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BOWEN V. UNITED STATES POSTAL SERVICE: THE DUTY OF FAIR REPRESENTATION BECOMES A BURDEN

Paul Lansing *
Brian W. Peters**

INTRODUCTION

On January 11, 1983 a sharply divided Supreme Court\(^1\) significantly broadened labor unions' liability for the injuries of members improperly discharged by their employers. *Bowen v. United States Postal Service*\(^2\) stands for the proposition that a union that has violated its duty of fair representation is responsible for the increase in an employee's backpay award caused by the breach.\(^3\) Thus, a grievance arbitration clause in a collective bargaining contract limits the employer's liability for improper discharge to the backpay which would have accrued at a hypothetical arbitration date. Further, the Court, in effect, placed the union in a position akin to that of a guarantor by charging the union with all remaining backpay liability.\(^4\) In a typical case, the union's role as guarantor will leave it liable for greater damages than the employer.

The decision in *Bowen* clearly conflicts with the purposes of national labor policy and the role of unions in that policy. Further, it is a predictable, if not logical, result of the Supreme Court's confusion of union and management causes of action in earlier cases. This article will examine the purposes of the present national labor policy and the union's role therein,\(^5\) note the subsequent confusion of suits against unions and suits against

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1. Justice Powell wrote the majority opinion in which Chief Justice Burger and Justices Brennan, Stevens and O'Connor joined. Justice White, joined by Justices Marshall and Blackmun, and joined in part by Justice Rehnquist, concurred in part in the judgment and dissented in part, expressing the view that the employer should be primarily liable for the entire amount of the employee's backpay. Justice Rehnquist dissented as to the Court's assertion that Bowen should not have been deprived of the full amount of his compensatory damages because he failed to cross-appeal. *Bowen v. United States Postal Service*, __U.S.____, 103 S.Ct. 588 (1983).

2. 103 S.Ct. 588.

3. *Id.* at 595.

4. *See id.*

5. *See infra* notes 9–34 and accompanying text.
employers\textsuperscript{6} and analyze the Court's decision in \textit{Bowen} and its likely consequences.\textsuperscript{7} Finally, some suggestions for limiting union liability in future cases will be offered.\textsuperscript{8}

\textbf{NATIONAL LABOR POLICY AND THE UNION'S ROLE THEREIN}

A fundamental theme of federal labor law is the preservation of labor peace.\textsuperscript{9} Congress chose to effectuate this goal by encouraging and

\begin{itemize}
\item[6.] See \textit{infra} notes 35-45 and accompanying text.
\item[7.] See \textit{infra} notes 100-204 and accompanying text.
\item[8.] See \textit{infra} notes 205-31 and accompanying text.
\item[9.] See, e.g., the statements of congressional intent contained in the following federal statutes:
\end{itemize}

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is the purpose and policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.


Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the

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protecting the formation of labor unions.\(^\text{10}\) Unions were given the sole authority to negotiate wages, hours, and conditions of employment\(^\text{11}\) in the belief that mandated negotiation with a single representative would lead to more peaceful and efficient resolution of disputes.\(^\text{12}\)

Two points should be noted about the status of unions in federal labor policy. First, Congress determined that unions required significant federal protection in order to achieve a level of unionization which, Congress believed, would preserve labor peace. This protection assumed various forms, such as the exemption of unions from antitrust actions under

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10. Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.


11. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . .


12. As Getman and Blackburn note regarding the National Labor Relations Act:

The focus of the statute was on eliminating barriers to organization and collective bargaining. Unlike labor laws in other nations, the Wagner Act did not seek to regulate the relationship of the parties once recognition was achieved and good faith bargaining begun. This reflects the central role which attempts to combat union organization and refusal to recognize played in the major labor management conflicts of the preceding half century. It also reflects the relatively positive experience with collective bargaining once undertaken. Neither union nor management desired governmental involvement in setting wages and working conditions.

the Sherman Act, the corporate-like limited liability granted to unions, the representation of all workers in a bargaining unit upon approval by a majority of those workers, and the requirement that the employer bargain fairly with the union once the union is certified. Second, Congress assigned to unions the singular role of negotiating wages, hours, and conditions of employment. Unions derive their exclusive control of grievance procedures from the collective bargaining agreement, not from the operation of federal statutes.

Numerous union rights and duties have also been implied by the statutory language of the labor acts; among the most important of these is the union's duty to fairly represent all persons in the bargaining unit. The union's duty of fair representation was first imposed in Steele v. Louisville & Nashville Railroad under the Railway Labor Act. In Steele, the Brotherhood of Locomotive Firemen and Enginemen (the Brotherhood) negotiated a contract with the Railroad calculated to ultimately exclude all black firemen from employment with the railroad, in favor of white union members. Bester William Steele, a black fireman, was represented.

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13. 15 U.S.C. §1 et seq. (1976). This exemption was first attempted under §20 of the Clayton Act, see H.R. Doc. No. 669, 72d Cong., 1st Sess. 3 (1932), but §20 proved an ineffective exemption as construed and applied by the Supreme Court in Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) and Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927). Congress subsequently enacted the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§101-115 (1970), sections 5, 4 and 13 of which were held by the Supreme Court in Milk Wagon Drivers' Union v. Lake Valley Farm Prods., 311 U.S. 91 (1940) and United States v. Hutcheson, 312 U.S. 219 (1941) to exempt unions from antitrust actions under the Sherman Act.

14. “Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.” Labor Management Relations (Taft-Hartley Act) §301(b), 29 U.S.C. §185(b) (1976).

15. “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees . . . shall be the exclusive representatives of all the employees . . . .” National Labor Relations Act §9(a), 29 U.S.C. §159(a) (1976) (emphasis added).


18. Representatives designated . . . shall be the exclusive representatives of all the employees . . . Provided, that any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.


21. By established practice on the several railroads . . . only white firemen [could] be promoted to serve as engineers, and [the union] proposed that only "promotable," i.e.,
by the Brotherhood in contract negotiations, but was excluded from membership in the Brotherhood because of his race. As a result of the contract, Steele was demoted from work on passenger trains to less desirable and less remunerative work, first on freight trains and then on a switching train. In each instance Steele was replaced by a white Brotherhood member with less seniority and no greater qualifications for the job.

The Supreme Court noted that Congress had endowed the union with quasi-legislative power over Steele and observed that such power is subject to constitutional limitations on its use and abuse. Logically, then, Congress should have included such limitations in the Railway Labor Act and spared the Supreme Court a difficult constitutional decision. Since Congress had not done so, the Court probed a somewhat

white, men should be employed as firemen or assigned to new runs or jobs or permanent vacancies in established runs or jobs.

[The] railroads and the Brotherhood, as representative of the craft, entered into a new agreement which provided that no more than 50% of the firemen in each class of service in each seniority district of a carrier should be negroes; that until such percentage should be reached all new runs and all vacancies should be filled by white men; and that the agreement did not sanction the employment of Negroes in any seniority district in which they were not working.

22. Id. at 194-95
23. Id. at 196.
24. Id.
25. Steele reached the Supreme Court on appeal from a decision of the Supreme Court of Alabama. The action in state court followed an essentially identical action in the federal court system which both the District Court for the Western District of Tennessee and the Sixth Circuit Court of Appeals found to lack federal question jurisdiction. Specifically, the courts denied that there had been sufficient state action to support a Constitutional due process claim under the fifth amendment, and denied that the plaintiff had such rights under the RLA. Teague v. Brotherhood of Locomotive Firemen and Enginemen, 127 F.2d 53, 56 (1942).

In Alabama Circuit Court, the Railroad and the Brotherhood demurred to Steele's amended complaint and the Circuit Court sustained the demurrer. The Alabama Supreme Court, on appeal, affirmed. Steele v. Louisville & Nashville R.R., 245 Ala. 113, 114, 16 So.2d 416, 417 (1944). The Supreme Court of Alabama found that Steele had no fifth amendment claim in the absence of state action, and that the Railroad was not guilty of conspiracy in fulfilling its obligation under the RLA to bargain with the Brotherhood in good faith. 245 Ala. at 117-19, 16 So.2d at 418, 420. Further, the Court found that seniority rights were not vested, but were subject to the revision or elimination by the union:

When, by reason of changed economic circumstances, it became apparent that the earlier agreement should be modified in the general interest of all members of the Brotherhood it was within the power of the latter to do so, notwithstanding the result thereof to plaintiff. The Brotherhood had the power by agreement with the Railway to create the seniority rights of plaintiff, and it likewise by the same method had the power to modify or destroy these rights in the interest of all the members.


metaphysical congressional intent and discovered a quite substantial duty of fair representation.27

Similarly, Congress had been negligent in its protection of racial minorities in the National Labor Relations Act (NLRA)28 and, in Syres v. Oil Workers International Union,29 the Supreme Court was again able to discern a congressional intent to remedy this error.30 Although the Court was somewhat vague about the corporal situs of the union's duty under the NLRA,31 the National Labor Relations Board in Miranda Fuel Company32 concluded that the duty lies in section 8(b) of the Act.33 The

27. If, as the state court has held, the Act conferred this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty towards its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature, which is subject to constitutional limitation on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates, and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on petitioner and other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading.

But we think that Congress, in enacting the Railway Labor Act and authorizing a union, chosen by majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority.

Id. See also Jones, The Origins of the Concept of the Duty of Fair Representation in THE DUTY OF FAIR REPRESENTATION 25 (J. McKelvey ed. 1977).

30. Syres was a per curiam decision which read simply:

"The petition for writ of certiorari is granted. The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings. Steele v. Louisville & N.R. Co., 323 U.S. 192; Turnstall v. Brotherhood, 323 U.S. 210; Railroad Trainmen v. Howard, 343 U.S. 768."

Id.

31. Although no statute imposes a duty of fair representation upon unions, we have held . . . that 'the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.'


33. [W]e are of the opinion that Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory 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, 140 N.L.R.B. at 185, 51 L.R.R.M. at 1587 (footnote omitted).
Court has, of course, subsequently expanded the duty of fair representation to cover far more than racial discrimination.34

Suits Under Section 301 and the Rule of Apportionment of Damages

The union's duty of fair representation plays an important role in employee suits for breach of contract by an employer35 brought under Section 301 of the Labor Management Relations Act (LMRA).36 When the collective bargaining agreement contains grievance and arbitration provisions which are intended as the exclusive remedies for the employer's breach of contract,37 an employee is generally barred from bringing suit in federal court until those remedies have been exhausted.38 The employee, however, may proceed with the suit if the employer's conduct amounts to a repudiation of the grievance and arbitration provisions,39 or if her union has the sole power to invoke the higher stages of the grievance procedure and wrongfully refuses to process the grievance,40 thus violating its duty of fair representation.41

The use of "exhaustion of remedies" as a defense in Section 301 suits has produced considerable blurring of the distinction between actions for the employer's breach of contract and actions for the union's breach of the duty of fair representation. The employer's breach of the collective bargaining agreement is a special form of contract violation which Section 301 allows to be brought in the federal courts.42 The union's breach

40. Id. at 185-86.
41. See Bowen, at ___ at 600 (White, J., dissenting).
42. Section 301 provides, in part:
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 the citizenship of the parties.
of the duty of fair representation is not a violation of contract, but a violation of federal labor law as interpreted by Steele and its progeny. When the employer has breached a collective bargaining agreement containing an exclusive grievance procedure, the injured employee must effectively plead two causes of action: the employer’s breach of contract and the union’s breach of its duty of fair representation. Consistent with the dual nature of the action, damages should typically be apportioned between the employer and the union.

Prior to Bowen, the Supreme Court had not directly decided the issue of damage apportionment in Section 301 suits. The question had, however, been addressed in dicta in three cases: Vaca v. Sipes, Czosek v. O’Mara, and International Brotherhood of Electrical Workers v. Foust. In Vaca a Missouri jury awarded Benjamin Owens backpay and punitive damages for his union’s failure to bring his claim of an improper medical dismissal to arbitration. The Supreme Court reversed on two grounds: first, Owens failed to prove the union breached its duty of fair representation, and second, the union could not be held liable for damages caused by the employer’s breach of contract. Although each of

43. Although the duty of fair representation could, conceivably, be made a part of the collective bargaining agreement, that incorporation would be largely superfluous unless the duty was defined more stringently than under the national labor common law.
44. See Bowen, ___ U.S. at ___, 103 S.Ct. at 604 (White, J., dissenting) quoted supra note 31.
45. In fact, these causes of action might be brought as separate suits. See Tobias, supra note 36, at 515-16.
49. In Vaca, Benjamin Owens, Jr. was discharged by Swift and Company on the grounds that high blood pressure and a congenital heart murmur made him unfit for work. Owens protested his dismissal and the union processed his grievance through the first four stages of the five step grievance process. Prior to the fifth step of the grievance process, which involved binding arbitration, the union suggested that Owens have a complete physical examination by the doctor of his choice. Owens chose Dr. H.W. Day, who reported that Owens was, in his professional opinion, unable to work. The union thereafter refused to take Owens’ grievance to arbitration. Sipes v. Vaca, 397 S.W. 2d 658, 660-61. Owens sued the union in state court and received a jury verdict for $7,000 actual and $3,300 punitive damages. The trial court set aside the judgment on the grounds that jurisdiction over the subject matter was preempted by the federal government. Id. at 659. Owens appealed to the Kansas City Court of Appeals, but died while the appeal was pending, id., sustaining Dr. Day’s opinion of his health. Niles Sipes, as administrator of Owens’ estate, was substituted as appellant and received an affirmation of the trial court from the Court of Appeals. Following the dissent of one judge, however, the Court of Appeals, of its own motion, transferred the case to the Supreme Court of Missouri. Id. at 659-60. The Missouri Supreme Court reversed the judgment and remanded with instructions to reinstate the jury verdict. Id. at 665.
51. Vaca, 386 U.S. at 194-95.
52. Id. at 195.
these grounds was dispositive, the Court added its conception of a fair apportionment of damages in a proper case:

The governing principle... is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.53

Interestingly, however, the Vaca Court suggested that the union's proper share of Owens' damages would have been negligible.54

In Czosek v. O'Mara, furloughed employees of the Erie Lackawanna Railroad Company claimed that they had been wrongfully discharged by the Railroad and that their union had breached its duty of fair representation by its handling of the "wrongful discharge."55 Both the union and the Railroad contended that the employees were barred from suing because they failed to exhaust the administrative remedies available under the Railway Labor Act.56 In affirming the suit against the union,57 the Court

53. Id. at 197-98.
54. Id. at 198.
55. The facts of the case were as follows:

Prior to 1960 the plaintiffs were employed by the Delaware, Lackawanna & Western Railroad as stationary engineers in a power plant in Buffalo, New York. In that year the Delaware merged with the Erie Railroad, with the approval of the Interstate Commerce Commission, forming the present defendant Erie Lackawanna line. Plaintiffs were continued in their former positions by the merged line until 1962, when they were furloughed.

The complaint is very grudging in its recitation of the claims upon which federal jurisdiction is invoked. It is alleged that the 1962 furlough constituted a discharge of plaintiffs since they were never recalled and were in fact replaced by employees who had worked for the Erie Railroad before the merger. The complaint then claims that the discharges were the direct result of the 1960 merger, and violated 'the Interstate Act, 49 U.S.C.A. §5 et seq.' and the 'Implementing Agreement' between the Erie Lackawanna and its employees represented by defendant unions. A violation of the Railway Labor Act, 45 U.S.C.A. §151 et seq., is also alleged in that the Railroad failed to give the required 30 days written notice of an intended change in working conditions prior to the discharge of the plaintiffs.

Finally it is alleged that plaintiffs repeatedly requested the defendant unions and their officials to process their claims against the Railroad, but that these defendants 'have been guilty of gross nonfeasance and hostile discrimination in their arbitrary and capricious refusal to process said claims' and 'have breached their duty and have discriminated against the rights of the Plaintiffs, by violating the express and implied terms of the collective bargaining agreement in effect by not representing the Plaintiffs fairly and impartially in the Plaintiffs' loss of employment and the resulting loss of compensation therefrom.' The prayer is for judgment in the sum of $160,000 against any or all of the defendants.


57. The suit was originally dismissed as to both the union and the Railroad by John O. Henderson, Chief Judge of the United States District Court for the Western District of New York.
Hofstra Labor Law Journal noted that the union could not be found liable for damages wholly or partly attributable to the Railroad.58 The court opined:

Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer.59

In *International Brotherhood of Electrical Workers v. Foust,*60 the Supreme Court held that unions could not be assessed punitive damages for a breach of their duty of fair representation.61 That decision was partly based on fear that punitive damages might deplete union treasuries so severely that their effectiveness as bargaining agents would be jeopardized.62 In reaching its decision, the Court commented on the frequently *de minimus* nature of the *Vaca* court's apportionment rule: "[a]lthough acknowledging that this apportionment rule might in some instances effectively immunize unions from liability for a clear breach of duty, the Court found considerations of deterrence insufficient to risk endangering the financial stability of such institutions."63 The concurring justices also noted that "... the damages a union will be forced to pay in a typical unfair representation suit are minimal; under Vaca's apportionment formula, the bulk of the award will be paid by the employer, the perpetrator of the wrongful discharge, in a parallel §301 action."64 Against this background of primary employer liability for wrongful discharge, *Bowen v. United States Postal Service* seems anomalous.

**APPORTIONMENT IN THE CIRCUIT COURTS**

Two views concerning apportionment of damages in section 301 cases are supposed to have existed in the courts of appeals. The first, which may best be labeled the *Vaca* approach,65 does not hold the union

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The United States Court of Appeals for the Second Circuit affirmed as to the dismissal of the suit against the Railroad, but reversed and remanded as to the suit against the union, O'Mara v. Erie Lackawanna R.R., 407 F.2d at 674, 679. The Supreme Court affirmed the decision of the Court of Appeals, Czosek, 397 U.S. at 50. 58. Czosek, 397 U.S. at 29. 59. Id. at 50. 60. 442 U.S. 42 (1979). 61. Id. at 52. 62. Id. at 50–51. 63. Id. at 50, citing *Vaca,* 386 U.S. at 198. 64. *Foust,* 442 U.S. at 57 (Blackmun, J., with whom Burger, C.J., and Rehnquist and Stevens, J.J., joined), citing *Vaca,* 386 U.S. at 197-98. 65. The name is in reference to Justice White's majority opinion in *Vaca v. Sipes.* There is some justification for referring to the Supreme Court's decision in *Czosek v. O'Mara* as a separate

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liable for lost earnings resulting from a wrongful discharge unless the union participates in the discharge. The second, best labeled the Stewart approach after Justice Stewart's concurring opinion in *Hines v. Anchor Motor Freight*, holds the union liable for lost earnings which accrued after the point when a grievance would theoretically have been settled absent the union's breach of its duty of fair representation.

### The Vaca Approach

The *Vaca* approach was first articulated in *De Arroyo v. Sindicato de Trabajadores Packing*. There, the court overturned a jury verdict that the seven plaintiffs had been improperly discharged, and found instead that the Telephone Company had improperly discharged six of the seven. In affirming the jury's verdict that the union had violated its duty of fair representation with respect to six of the seven, the court analyzed the proper apportionment of damages:

We look again to *Vica* [sic] v. Sipes, this time for guidance on the allocation of lost earnings where the Company improperly discharges and the Union unfairly represents. *Vaca* establishes that only the Company is liable for damages attributable solely to its breach of contract, while the "increases if any in those damages caused by the

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66. 424 U.S. 554, 572-73 (1976). Justice Stewart's brief concurrence read as follows:

> I agree with the Court that proof of breach of the Union's duty of fair representation will remove the bar of finality from the arbitral decision that Anchor did not wrongfully discharge the petitioners. See *Vaca v. Sipes*, 386 U.S. 171, 194; Humphrey v. Moore, 375 U.S. 355 342-51. But this is not to say that proof of breach of the Union's representation duty would render Anchor potentially liable for backpay accruing between the time of the 'tainted' decision by the arbitration committee and a subsequent 'untainted' determination that the discharges were, after all, wrongful.

If an employer relies in good faith on a favorable arbitral decision, then his failure to reinstate discharged employees cannot be anything but rightful, until there is a contrary determination. Liability for the intervening wage loss must fall not on the employer but on the Union. Such an appointment of damages is mandated by Vaca's holding that 'damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.' 386 U.S., at 197-98. To hold an employer liable for back wages for the period during which he rightfully refuses to rehire discharged employees would be to charge him with a contractual violation on the basis of conduct precisely in accord with the dictates of the collective agreement.

Id.


68. *Id.* at 289.

69. *Id.* at 285.
union's refusal to process the grievance should not be charged to the employer." Vaca v. Sipes, supra 386 U.S. at 197-198, 87 S.Ct. at 921; see also Czosek v. O'Mara, supra, 397 U.S. at 29, 90 S.Ct. 770. In a case such as ours, where there has been no suggestion that the Union participated in the Company's improper discharge and where there was no evidence that but for the Union's conduct the plaintiffs would have been reinstated or reimbursed at an earlier date, we conclude that the Union's conduct cannot be said to have increased or contributed to the damages attributable to the Company's improper discharge. Thus, the entire amount of lost earnings of each plaintiff... is properly charged to the Company.

In Richardson v. Communication Workers of America,71 citing De Arroyo, the Eighth Circuit also adopted the Vaca approach: where the union's breach of duty involves only a failure to process an employee's grievance, its apportioned damage arising from the unrelated wrongful discharge is usually de minimus. Under such circumstances, the employer is solely responsible for the damages flowing from the breach of contract. However, under the above principles, where the union wrongfully induces the discharge, it follows that its liability for damages may be apportioned to the extent that it is responsible for the whole of such damage.72

In Milstead v. IBT73 and Scott v. Anchor Motor Freight74 the Sixth Circuit found that unions could not be held liable for lost wages,75 that employers could be held liable only for "lost wages and related items."76 The Vaca approach is similarly followed in Soto Segarra v. Sea-Land Service, Inc.77 and Wyatt v. Interstate & Ocean Transport Co.78

70. Id. at 289-90.
71. 443 F.2d 974 (8th Cir.), cert. denied, 414 U.S. 818 (1971).
72. Id. at 981-82.
73. 580 F.2d 232 (6th Cir. 1978).
75. It is also possible that the award rendered here included some damages for lost wages. If so, the award is clearly contrary to law since judgment against the union under the facts of this case can be had only for those damages that flowed from its own conduct... and which compensate Milstead 'from the Union's pocket for those expenses he incurred because of the union's failure to process his grievance properly.' Milstead, 580 F.2d at 236-37 (quoting Ruzicka v. General Motors Corp., 523 F.2d 306, 312 (6th Cir. 1975)).
76. Scott, 496 F.2d at 281-82.
77. 581 F.2d 291 (1st Cir. 1978). The court noted: Consistent with Vaca, this court [has] held that where there is no allegation that the union participated in the improper discharge or evidence that, but for the union's conduct, the employee would have been reinstated earlier, no part of the backpay award is chargeable to the union... In the instant case, the district court did not charge the union for any of the backpay due appellee but instead awarded $5,750 in attorney's fees proximately caused by the union's failure to process his grievance.
78. 623 F.2d 888 (4th Cir. 1980). The court concluded: Under any view of the evidence, Wyatt's loss of wages was caused by his discharge. If it
The strongest statements of the Vaca approach, however, are found in Milstead v. IBT II and Seymour v. Olin Corporation. In Milstead II the Sixth Circuit noted:

Milstead contends that his damages were caused by the failure of the Union properly to process his grievance, and not by his wrongful discharge by his employer. He argues that the Union was responsible for all his damages, including lost wages, stemming from his discharge. This contention is flatly contrary to the law of this case . . . and is not in accord with the law of this Circuit.

The Fifth Circuit, in Seymour, also opined:

We see no reason why [the employer] should be relieved of the natural consequences flowing from its wrongful discharge of [the employee], merely because the Union defaulted in its separate duty to [the employee] promptly to rectify [the employer's] wrong. The weakness of [the employer's] position is revealed when it is expressed somewhat more starkly: [The employer], the wrongdoer, protests to the Union: you should be liable for all damages flowing from my wrong and after a certain time, because you should have caught and rectified my wrong by that time.

The Stewart Approach

The Stewart approach is more easily found in law review commentary than in Courts of Appeals decisions. Of the four "apportionment" cases cited by the majority in Bowen, three are dicta in Sixth Circuit cases that are of dubious precedential value after Milstead and Milstead II and one is dicta in a Seventh Circuit opinion in which even the Stewart approach would have apportioned all backpay to the employer. The first Sixth Circuit case, Smart v. Ellis Trucking Co., remanded in light of Hines v. Anchor Motor Freight an employee's appeal to the

was wrongful, he has an action against the employer and it is unfortunate if he has foreclosed that by his dismissal of the employer at trial. Damages attributable to the employer can be recovered only against it unless the union, by its actions, has contributed to the wrongful discharge or exacerbated Wyatt's loss or diminution of wages, beyond that for which the employer could be charged.

Id. at 892-93.

80. 666 F.2d 202 (5th Cir. 1982).
81. Milstead II, 649 F.2d at 396.
82. Seymour, 666 F.2d at 214-15.
84. Bowen, ___ U.S. at ___, 103 S.Ct. at 593 n.8.
85. See supra note 73.
86. See supra note 79.
87. 580 F.2d 215 (6th Cir. 1978).
finality of an arbitration award. After reversing and remanding the portion of the district court decision overturned by *Hines*, the Court added by footnote:

If on remand, the trial court determines that plaintiff is entitled to reinstatement, it will be faced with the further question of the extent to which the employer's liability for any backpay may be limited, should it appear that the employer justifiably relied upon the finality of the arbitration decision upholding the discharge and had no part in undermining the process of arbitration.\(^9\)

In *Ruzicka v. General Motors Corporation*\(^9\) the Sixth Circuit, in the process of remanding the case to the district court with instructions to order arbitration,\(^9\) rejected the assertion that the employer and the union jointly and severally liable for the employee's injury.

When a breach of the duty of fair representation is shown, however, the Union is liable for that portion of appellant's injury representing "increases if any in those damages [chargeable to the employer] caused by the union's refusal to process the grievance." *Vaca* 386 U.S. at 197-98, 87 S.Ct. at 921. Thus, upon a finding of unfair representation, "the court must fashion an appropriate remedy," 386 U.S. at 187, 87 S.Ct. at 915, compensating Appellant from the Union's pocket for those expenses he incurred because of the Union's failure to process his grievance properly.\(^9\)

The Sixth Circuit noted in *St. Clair v. Local 515*\(^9\) that "the union is certainly liable for nothing more, and perhaps for less [than damages measured by backpay]."\(^9\) The court, however, went on to observe that "the Supreme Court has strongly implied that in cases like this, involving a discharge and an alleged failure by the union to take all available steps to remedy the employee's complaint, the increment of damages caused by the union's breach of duty is virtually *de minimus.*"\(^9\)

In *Harrison v. Chrysler Corporation*\(^9\) the Seventh Circuit remanded for trial an employee suit asking backpay for the period between an improper dismissal and reinstatement through the grievance procedure.\(^9\)

\(^89\). Id. at 219 n.6, citing *Hines*, 424 U.S. at 572-73 and *Ruzicka*, 523 F.2d at 312.

\(^90\). 523 F.2d 306 (6th Cir. 1975), reh'g denied, 528 F.2d 912 (1975).

\(^91\). Id. at 315.

\(^92\). Id. at 312. Although the district court did apportion backpay to the union, 96 L.R.R.M. 2822, 2837 (E.D. Mich. 1977), this result does not seem to have been intended by the court. See *Milstead*, 580 F.2d at 236-37, quoted supra note 74, where the court finds that damages for lost wages cannot be apportioned to the union.

\(^93\). 422 F.2d 128 (6th Cir. 1969).

\(^94\). Id. at 132 (footnote omitted).

\(^95\). Id. (emphasis in original).

\(^96\). 558 F.2d 1273 (7th Cir. 1977).

\(^97\). Id. at 1280.
The court noted in its discussion of Chrysler's liability, "It is true that a union which breaches its duty of fair representation may be sued by an employee for lost pay attributable to the breach."98 In Harrison the union would, however, not be liable for backpay even under the Stewart approach, since the backpay was for a period preceding the date of the arbitration decision.99

Given the paucity of support for the Stewart approach, the split between the circuits may not be a true one.

**Bowen in Brief**

On February 21, 1976 Charles V. Bowen was suspended without pay by the United States Postal Service for his part in an altercation with a fellow employee on postal service property.100 Bowen was formally terminated on March 30, 1976, and he appealed his dismissal through the grievance procedure established in the collective bargaining agreement in force between the Postal Service and his union, the American Postal Workers Union, AFL-CIO.101 Bowen continued his appeal through the steps of the grievance process until the union national office declined to take his claim to arbitration.102 He then filed suit in the United States District Court for the Western District of Virginia, charging that the Postal Service dismissed him without just cause, in violation of the collective bargaining agreement,103 and that the union handled his grievance perfunctorily, in violation of its duty of fair representation.104

98. *Id.* at 1279, citing *Vaca*, *supra* note 46.
101. *Bowen*, ___U.S. at ___, 103 Ct. at 590.
102. *Id.*
103. The action is allowed under the Postal Reorganization Act §1208(b) and (d):
Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Contrary to the Fourth Circuit decision in Bowen, the Federal Tort Claims Procedure, 28 U.S.C. §§2671–2680 (1976), is not applicable to the Postal Service here since the Service's action is a violation of a contract rather than a tort. *See Bowen*, 642 F.2d at 80 n.2.
104. The duty of fair representation arises under the National Labor Relations Act, subchapter II of chapter 7 of title 29 of the United States Code. The duty is applicable to postal unions by reason of §1209(a) of the Postal Reorganization Act: "Employee-management relations shall, to the extent not inconsistent with provisions of this title, be subject to the provisions of subchapter II of chapter 7 of title 29." 39 U.S.C. §1209 (1976).
Chief Judge James C. Turk instructed the jury that, if they found Bowen’s claims meritorious, they should determine the proper compensatory damages and apportion these damages between the Service and the union. Judge Turk indicated that the apportionment was left primarily to the jury’s discretion, but suggested that they might base their apportionment on the date at which Bowen would have returned to work if the union had fulfilled its duty. Counsel for the union objected to apportionment of any backpay to the union, but failed to object to the manner of apportionment suggested by Judge Turk.

The jury found for Bowen and awarded him $52,954 for lost wages and benefits. The union was liable for $30,000; the remainder was to be paid by the Postal Service. Punitive damages of $40,000 were also awarded; $10,000 from the union and $30,000 from the Service. Judge Bowen, ___ U.S. at ___, 103 S.Ct. at 591. Although no authority for this theory of apportionment is found in the district court decision, see Bowen, 470 F. Supp. 1127, the apportionment clearly follows the Stewart approach, discussed supra notes 83-99 and accompanying text. Counsel for the Union stated, “Your Honor, in respect to this special verdict form, the [Union] would object to any verdict or any question here which would allow the jury to return a judgment against the [Union] for any form of wages. Traditionally, the Union does not pay wages. And these damages are wholly assessable to the [Service], if at all.” Record 611-612. In a Motion for Judgment Notwithstanding the Verdict, counsel for the Union reasserted that the “amount of back wages awarded [Bowen] by the jury against the [Union] is a matter of law wholly assessable against the employer.” Record, Vol. 1, Item 37, ¶ 2.

_105._ Bowen, ___ U.S. at ___, 103 S.Ct. at 591. See particularly note 3:

_106._ Bowen, ___ U.S. at ___, 103 S.Ct. at 591. See supra notes 83-99 and accompanying text.

_107._ The completed special verdict form read:

SPECIAL VERDICT

1. Do you find from a preponderance of the evidence in this case that the defendant American Postal Workers Union as bargaining agent for Lynchburg postal employees breached its duty of fair representation to plaintiff Bowen in the handling of his grievance?

   Yes

   Answer Yes or No

2. If your answer to Question 1 is yes, do you find from a preponderance of the evidence that plaintiff Bowen was discharged by defendant United States Postal Service without just cause?

   Yes

   Answer Yes or No

3. If your answer to Question 1 and/or 2 is yes, state from a preponderance of the evidence or with reasonable certainty the amount of compensatory damages to which plaintiff is entitled.

   $47,000.00

4. If your answer to Question 1 is yes, do you find from a preponderance of the evidence that defendant American Postal Workers Union acted maliciously or recklessly, or in callous disregard of the rights of plaintiff Charles V. Bowen in not taking Mr. Bowen’s grievance to arbitration?

   Yes

   Answer Yes or No
Turk affirmed the verdict as to the union and adopted it as to the Service. He disallowed all punitive damages.

The Court of Appeals for the Fourth Circuit summarily reversed the damage award against the union, holding as a matter of law that Bowen’s backpay was wholly chargeable to his employer. The court, however, refused to increase the $22,954 award against the Service to reflect damages originally allocated to the union. That refusal obliterated over half of Bowen’s award, even though the amount itself was undisputed.

5. If your answer to Question 4 is yes, what amount, if any, do you assess in favor of plaintiff Bowen against the defendant American Postal Workers Union as punitive damages?
   - $10,000.00

6. If your answer to Question 2 is yes, do you find from a preponderance of the evidence that defendant U.S. Postal Service acted maliciously or recklessly, or in callous disregard of the rights of plaintiff Charles V. Bowen in terminating his employment?
   - Yes

7. If your answer to Question 6 is yes, what amount, if any, do you assess in favor of plaintiff Bowen against the defendant, U.S. Postal Service as punitive damages?
   - $30,000.00

8. If compensatory damages are awarded by your answer to Question 3, state the amount, if any, that should be attributable to the defendant Postal Service.
   - $30,000.00

   - $17,000.00

   - Defendant Union
   - Defendant Postal Service

Date: December 20, 1978

/\s/ Charlotte B. Ives
Foreman

Bowen, Petition for Certiorari, Appendix D at A21-A22.


109. The jury sat as an advisory panel on the claims against the Service under the authority of 28 U.S.C. §2402 (1976). Strangely, §2402 applies to suits brought under 28 U.S.C. §1346 (1976), while this suit was (or should have been) brought under the authority of 39 U.S.C. §1208(b), the text of which is reproduced supra note 102. Bowen, ___U.S. at___, 103 S.Ct. at 600 n.2 (White, J., concurring). Thus, a nonadvisory jury might have been proper. Cf. Baran v. Hoszwa, 62 F.R.D. 444 (N.D. Ohio 1974).

110. Judge Turk reasoned:

   Plaintiff is, under the normal principles applicable to this type of case, entitled to recover punitive damages against the defendant USPS. That defendant has, however, raised a plea of sovereign immunity to this aspect of the case, and the Court finds sovereign immunity is a bar to recovery of punitive damages against the USPS. The Court, accordingly, sets aside the jury verdict to the extent that it awarded punitive damages to the plaintiff against the United States Postal Service. Additionally, the Court finds that the actions of the defendant APWU, while supporting the jury verdict and findings of compensatory damages, were less reprehensible than the actions of the USPS. Therefore, as punitive damages cannot be assessed against the USPS, the Court does not deem it fair to impose punitive damages against the APWU. Accordingly, the jury verdict, to the extent that it awards plaintiff punitive damages against the defendant APWU, is set aside.

Bowen, 470 F.Supp. at 1131. The award of any punitive damages is now suspect under Foust, 442 U.S. at 52, which was decided eighteen days after the district court decision in Bowen.

111. Bowen, 642 F.2d at 82.

112. The court noted this refusal in a footnote added later which read: "We make no revision in the judgement of $22,954.12 against the Postal Service. In this connection we note that no appeal
The Supreme Court reversed the Fourth Circuit and affirmed the decision of the district court. The majority adopted the issue as petitioned Bowen did, framing it as "whether a union may be held primarily liable for that part of a wrongfully discharged employee's damages caused by his union's breach of its duty of fair representation." First, the majority examined the union's contention that it could, at most, be liable only for Bowen's litigation expenses resulting from its breach of duty. The majority found this argument flawed in that it treated the employer/employee relationship created by the collective bargaining agreement as though it were a simple contract of hire. Instead, the agreement was to be examined under "the federal common law of labor policy."

The first element of that common law examined by the majority was Vaca v. Sipes. They found that the Vaca principle for apportioning damages was designed to make the employee whole. Just as the union's breach of its duty prevented the grievance procedure from functioning and justified allowing the employee's suit for damages, so the union's breach of its duty "required the union to bear some responsibility for increases in the employee's damages resulting from its breach." The majority found the issue in Hines v. Anchor Motor Freight, Inc. analogous in which proof of a breach of the duty of fair representation was held to allow suit after an otherwise final arbitral decision. Since it would be unjust to bar an employee's recovery even when the union has conspired against her, "it would be equally unjust to require the employer to bear the increase in the damages caused by the union's wrongful conduct."

113. Bowen, ___ U.S. at ___, 103 S. Ct. at 592 n.7.
115. Bowen, ___ U.S. at ___, 103 S. Ct. at 590.
116. Id. at ___, 103 S. Ct. at 593-94.
117. Id. at ___, 103 S. Ct. at 594.
118. See discussion supra notes 49-54 and accompanying text.
119. Bowen, ___ U.S. at ___, 103 S. Ct. at 595.
120. Id.
121. In Hines, employee wrongful discharge claims were submitted to arbitration, and were denied by the arbitrator, after almost no investigation by the union. The District Court sustained motions for summary judgment by both the union and the employer, for failure to show a breach of the duty of fair representation and for finality of the arbitral decision, respectively. Hines, 72 Lab. Cas. (CCH):13, 987 (N.D. Ohio 1973). The Sixth Circuit affirmed as to the employer, but found a sufficient showing of union breach to warrant remanding the complaint against the union for trial. Hines, 506 F.2d 1153, 1156 (6th Cir. 1974). The Supreme Court overturned the summary judgment granted to the employer, despite the employer's apparent blamelessness in the grievance proceedings, holding that the finality of an arbitration proceeding was not a bar where the union had breached its duty of fair representation. Hines, 424 U.S. at 572.
122. Bowen, ___ U.S. at ___, 103 S. Ct. at 595 (footnote omitted).
The majority also grounded the union's backpay liability in national labor policy. Noting that the grievance procedure is fundamental to federal labor policy, the majority reasoned that the union's breach would sabotage the procedure and unfairly injure the employer.123 "Just as a nonorganized employer may accept an employee's waiver of any challenge to his discharge as a final resolution of the matter, so should an organized employer be able to rely on a comparable waiver by the employee's exclusive representative."124 Further, the Court reasoned, imposing liability "will provide an additional incentive for the union to process its members' claims where wanted."125

The majority distinguished Czosek v. O'Mara,126 noting that it was decided under the Railway Labor Act.127 Although Czosek suggested the union's liability for its breach should be limited to the employee's costs of bringing suit in federal court,128 the majority noted that the RLA provided employees with an alternate administrative remedy not open to Bowen.129 Thus, the union's breach of duty was less damaging under the RLA and a lesser standard of liability was appropriate.130

The dissent took the position "that the employer should be primarily liable for all backpay."131 Tracing the Supreme Court decisions preceding Bowen, the dissent noted that an employee's right to bring a section 301 suit against her employer was first recognized in Smith v. Evening News Ass'n.132 So long as the collective bargaining agreement contains no arbitration provision, "the employee's right to bring suit is unqualified, and . . . the employer unquestionably is liable for any and all backpay that is
due." If the agreement, however, contains an arbitration provision, Republic Steel Corp. v. Maddox requires that an employee exhaust the grievance and arbitration provisions before commencing a Section 301 suit. In Vaca v. Sipes, the Court excused exhaustion in cases where the union alone could invoke the higher stages of the grievance procedure and the union had prevented the employee from exhaustion of remedies by wrongfully refusing to process the grievance. The dissent noted:

Vaca made clear that, with respect to an employer, the only consequence of a union's breach of a fair-representation duty to an employee is that it provides the employee with the means of defeating the employer's "defense based upon the failure to exhaust contractual remedies," . . . in a Section 301 suit. The Court explicitly stated that the union's violation of its statutory duty in no way "exempt[ed] the employer from contractual damages which he would otherwise have had to pay," . . . and that the employer could not "hide behind the union's wrongful failure to act."

The dissent's view of primary employer liability was further supported by Hines v. Anchor Motor Freight, Inc. In Hines, the union's breach of its duty of fair representation was held to lift the bar to an employee's Section 301 suit, even though his grievance had been fully arbitrated. The Court rejected the employer's protest that its blameless conduct should allow it to rely on the arbitral award. "As in Vaca, with respect to the employer, the only consequence of the union's breach was that it 'remove[d] the bar' to the employee's right to bring a Section 301 action."

The dissent opined that holding the employer primarily responsible for backpay awards did not absolve the union of liability for its breach. Instead, "[t]he damages that an employee may recover upon proof that his union has breached its duty to represent him fairly are simply of a different nature than those recoverable from the employer." Although the dissent recognized that the union's liability would sometimes be de minimis, they concluded that the Court had recognized and approved of

133. Bowen, ___U.S. at ____ , 103 S.Ct. at 600 (White, J., dissenting).
135. Bowen, ___U.S. at ____ , 103 S.Ct. at 600 (White, J., dissenting).
136. 386 U.S. 171, discussed supra notes 48-53 and accompanying text.
137. Bowen, ___U.S. at ____ , 103 S.Ct. at 600 (White, J., dissenting).
138. Id. at 600-01 (White, J., dissenting).
139. 424 U.S. 554 (1976), discussed supra note 121.
140. Id. at 567.
141. Id. at 569.
142. Bowen, ___U.S. at ____ , 103 S.Ct. at 601 (White, J., dissenting) (footnote omitted).
143. Id. at 602 (White, J., dissenting).
this fact in *Electrical Workers v. Foust*. In that case, the Court shielded unions from punitive damages in actions for breach of the duty of fair representation. "As in *Vaca*, considerations of deterrence were deemed insufficient to risk endangering union 'financial stability.'"

The dissent further argued that contrary to *Vaca*, the majority position left the union liable for the bulk of the employee's backpay award. Without the employer's wrongful discharge and refusal to reinstate, the plaintiff would have no right to reimbursement from anyone. The dissent thus reasoned that "there is no reason why the matter should not be governed by the traditional rule of contract law that a breaching defendant must pay damages equivalent to the total harm suffered, 'even though there were contributory factors other than his own conduct.'" The dissent also disagreed with the notion that the union owed a duty to the employer under the arbitration clause in the collective bargaining agreement:

The agreement gives the union the right to raise grievances, but it does not obligate it to do so. And, most assuredly, the agreement in no way expressly or impliedly grants the employer any rights against the union if the union fails to bring a meritorious grievance to its attention. (emphasis in original).

It is only the union's duty of fair representation which obliges it to pursue employee grievances. This common law duty, the dissent asserted, is owed exclusively to the employee.

The dissent did recognize that the union and the employer should be jointly and severally liable where the union has participated in the employer's breach, and suggested that the union should, in any case, be secondarily liable. Neither conspiracy nor the need for secondary liability, however, were implied by the facts in *Bowen*. Finally, the dissent, with the exception of Justice Rehnquist, would have reversed the Fourth
Circuit opinion insofar as it protected the Postal Service from backpay liability originally allocated to the union.\(^{153}\)

**Bowen in Review**

The errors of *Bowen* are of three types. The first is a fundamental confusion of contractual and statutory duties as they apply in the context of collective bargaining.\(^{154}\) The second is a related misunderstanding of the union's role in national labor policy vis-à-vis the employer.\(^{155}\) The third is a failure to appreciate the effects of the decision on the national labor scene.\(^{156}\)

**Confusion of Statutory and Contractual Duties**

Statutory and contractual duties are easily confused in a Section 301 suit\(^{157}\) where the employee has alleged a breach of the duty of fair representation by her union.\(^{158}\) Consider, for example, the fictitious case of Marcy Fairweather (Fairweather), an employee of the Brown Cable Company (Cable). Fairweather was a member\(^{159}\) of the United Wire...
Twister's Union (UWTU), which represents the employees of Cable. One bright July morning Elder Brown, the senile president of Cable, mistook her name for that of Harvey Weathered—whom two shop supervisors urged fired for excessive absenteeism—and ordered her dismissed. Fairweather's dismissal without just cause was in violation of the collective bargaining agreement between Cable and UWTU, and her grievance was processed through the first four steps of the grievance procedure without satisfactory resolution. The fifth step of the grievance procedure, which involved binding arbitration, could be invoked only with the approval of the national UWTU vice-president Sally Venge. Venge, who still bore a childhood grudge against Fairweather, refused to have the meritorious grievance taken to arbitration. Fairweather then filed suit in federal district court, alleging that Cable fired her in violation of the collective bargaining agreement, and that UWTU breached its duty of fair representation by failing to take her meritorious grievance to arbitration.

Clearly, Fairweather's suit would be impossible without the wrongful actions of both Cable and UWTU, but the nature of their wrongful
tation is owed to all members of the bargaining unit, not just to union members. See Vaca, 386 U.S. at 177.

160. UWTU was certified many years earlier by the National Labor Relations Board as the exclusive bargaining representative for all nonprofessional and nonmanagerial employees of Cable.

161. Excessive absenteeism, defined as three working weeks absence without excuse within one year, was a valid ground for dismissal under the collective bargaining agreement in force between UWTU and Cable.

162. The dismissal did not violate any state or federal statute, either by reason of Cable's purposes or by reason of its procedure in dismissing Fairweather.

163. The collective bargaining agreement provided:

Any dismissal of an employee by error, without reason, or for a reason not expressly provided by this agreement shall be without just cause and a breach of this agreement.

164. The collective bargaining agreement provided:

The grievance procedure detailed in this agreement shall be the exclusive method of resolving disputes under this agreement, except as otherwise provided by law.

165. The resolution was not satisfactory to Fairweather. Since the resolution affirmed the status quo, Cable was, of course, quite satisfied.

166. All prior steps involved only local or regional union officials. The decision to arbitrate was made on the national level because the costs of arbitration were borne by the national treasury.

167. It is this action by Venge that constitutes a breach of the UWTU's duty of fair representation. See Vaca, 386 U.S. at 185.

168. A suit under LMRA §301 is interpreted by Smith v. Evening News Ass'n, 371 U.S. at 200-01. See supra note 185.

169. Since the collective bargaining agreement sued upon has grievance and arbitration provisions intended as the exclusive remedy for Cable's breach, see supra note 164, the allegation of UWTU's breach is a necessary component of Fairweather's §301 suit against Cable, see supra notes 35-41 and accompanying text.

170. It is an article of faith in §301 suits that, absent the union's breach in processing the employee's grievance, the arbitrator would have reached the same decision on the merits of the employee's claim as the court. See e.g., Bowen, --- U.S. at ---, 103 S.Ct. at 588 (1983), where the inevitability of the arbitrator's decision is implicit in both the majority (T)he union [must] bear
actions is quite different. Cable violated the terms of the collective bargain-
gaining agreement between it and UWTU.171 Thus it committed a con-
tractual wrong which has injured Fairweather. By its nature, Cable's
breach is a continuing wrong; it can only be remedied by reinstating
Fairweather to her old job.172 Cable's wrong is not, however, a violation
of national labor law: Section 301 simply allows the action to be brought
in a federal, rather than a state, court.173 In contrast, UWTU's breach of its
duty of fair representation is a violation of the national labor policy.174
UWTU has violated a duty owed to its member, Fairweather,175 and
UWTU's wrong is, by its nature, a single occurrence which the union
cannot later remedy.176 It is not, however, a breach of the contract with
Cable, unless Cable has bargained for and received the right to rely on the
union's conduct.177

some responsibility for increases in the employee's damages resulting from its breach. To hold
otherwise would make the employer alone liable for the consequences of the union's breach of duty."
(emphasis added) Id. at____, 103 S. Ct. at 595) and dissent (commenting on Vaca, 386 U.S. at
173-76, "Had the union opted in favor of arbitration, an award almost certainly would have been
forthcoming long before the judicial suit had even proceeded to trial." Bowen, ___U.S. at____, 103
S.Ct. at 601 (White, J., dissenting) (emphasis added, footnote omitted). In light of the preceding
judicial article of faith, Fairweather's suit is "clearly" the result of actions by both UWTU and Cable.
Of course, Fairweather's suit would also be impossible without both breaches, see supra notes 35-41
and accompanying text.

171. See supra note 163.
172. Actually, Cable can mitigate only its continuing damages, but those continuing damages
cannot be mitigated by the union.
173. See the text of §301, reproduced supra note 42.
174. See supra notes 19-34 and accompanying text.
175. "It is now well established that, as the exclusive bargaining representative of the
employees in [the] bargaining unit, the Union had a statutory duty to represent all of those employees
. . . ." Vaca, 386 U.S. at 177 (emphasis added). The duty of fair representation applies only to
relations between unions and members of the bargaining unit. This is in accord with the congressional
labor policy of protecting the establishment and operations of unions. See supra notes 14-17 and
accompanying text. This policy conflicts with the rights of individuals, and the courts have modified
the policy accordingly by recognizing the duty of fair representation. See Steele, 323 U.S. at 198-99;
see also supra note 27. No such fundamental right requires a further judicial intrusion into congres-
sional policy of protecting unions, since it is precisely from employers that unions were protected.

176. The majority opinion in Bowen suggests, somewhat vaguely, that the union could miti-
gate to some extent: "The union would have the option, if it realized it had committed an arguable
breach of duty, to bring its default to the employer's attention. Our holding today would not prevent
a jury from taking such action into account." Bowen, ___U.S. at____, 103 S.Ct. at 597 n.15. Even
taken at face value, this tenuous right is in no way comparable to the employer's ability to mitigate.
See supra note 172 and accompanying text.

177. One commentator has suggested:

[The only meaningful defense appears to lie in the bargaining process itself: the employer
should bargain for a broad indemnity clause, allowing the shifting of the cost of defending
seniority-only or union security aspects of a collective bargaining agreement to the party
ultimately responsible—the union. Such an approach relieves the court of the apportion-
ment burden created by Vaca, and should serve as an effective check on the union's
ignoring the rights of its members.

Edwards, Employer Liability for Union Unfair Representation: Fiduciary Duty or Bargaining Real-
There is considerable authority analogizing the union's duty of fair representation to the fiduciary duty of a trustee.\textsuperscript{178} Shorn of its labor law context, Fairweather's suit is a relatively simple problem in the law of trusts. UWTU serves as trustee for Fairweather, holding in trust Fairweather's valuable right to bargain with her employer for her services.\textsuperscript{179} In its trustee position, UWTU negotiates with Cable a contract providing for Fairweather's services to be exchanged for compensation and certain contract rights. Among these rights is a nonjudicial remedy for breach of contract which must be invoked by the trustee.\textsuperscript{180} Upon breach of the contract by Cable,\textsuperscript{181} UWTU as trustee violated its fiduciary duty by not pursuing the contractual remedy.\textsuperscript{182} In an action against UWTU as trustee, Fairweather would be entitled to only the increases in damages caused by UWTU's breach of its fiduciary duty.\textsuperscript{183} Where, as here, the party breaching the contract is available for suit on the contract and fully able to pay damages, the trustee's share of damages would, at most, be equal to the cost of bringing the suit.\textsuperscript{184}

The simple trust scenario is altered in national labor common law to serve the policies which underlie national labor law. Thus, unlike an ordinary trustor, Fairweather cannot bring suit on the contract until she has exhausted the contract's grievance procedures, where these procedures are intended as the exclusive remedy for Cable's breach of contract.\textsuperscript{185} The restriction on Fairweather's right to bring suit is intended to encourage the efficient and peaceful resolution of disputes close to the workplace, rather than in the costly and vexatious manner of a court fight.\textsuperscript{186} When the grievance procedures are unworkable, however, the suit is not prohibited.\textsuperscript{187} One such situation is where, as here, UWTU has the exclusive right to invoke higher steps of the grievance procedure and wrongfully refuses to do so.\textsuperscript{188} The focus is upon the employee's right to

\begin{itemize}
\item \textsuperscript{179} See 29 U.S.C. §159(a) (1976), quoted supra note 15.
\item \textsuperscript{180} See supra notes 164-65 and accompanying text.
\item \textsuperscript{181} See supra note 163 and accompanying text.
\item \textsuperscript{182} See supra note 167 and accompanying text.
\item \textsuperscript{183} See generally \textit{RESTATEMENT (SECOND) OF TRUSTS} §§205(a), 282(2) (1959); G. BOGERT & G. BOGERT, \textit{THE LAW OF TRUSTS AND TRUSTEES} §§869 (2d ed. 1982); 4 A. Scott, \textit{THE LAW OF TRUSTS} §282.1 (3d ed. 1967).
\item \textsuperscript{184} The situations are not totally analogous, in that the cost of bringing suit is, typically, born by the beneficiary regardless of who brings the suit, while the employee would not typically pay for the grievance procedure. Thus the additional costs of bringing suit may be nil for the beneficiary of a trust, but substantial for a grieving employee.
\item \textsuperscript{185} See supra notes 35-41, 163.
\item \textsuperscript{186} \textit{Bowen, ___U.S. at___}, 103 S.Ct. at 596.
\item \textsuperscript{187} Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).
\item \textsuperscript{188} \textit{Bowen, ___U.S. at___}, 103 S.Ct. at 594.
\end{itemize}
recovery. Restrictions are placed upon that right in order to further dispute resolution at the plant level, but they are waived where they would nullify the employee's right.

The Supreme Court has also altered the trust scenario by determining the correct statute of limitations for Section 301 suits. In DelCostello v. International Brotherhood of Teamsters, the Court held that the six-month limitation on bringing unfair labor practice charges before the National Labor Relations Board should also apply to the commencement of hybrid Section 301/duty of fair representation suits by employees. The DelCostello decision arose from the consolidation of two lower court cases: DelCostello v. International Brotherhood of Teamsters in which the Fourth Circuit affirmed the application of the thirty-day statute of limitations for actions to vacate arbitration awards, and Flowers v. Local 2602, United Steelworkers of America, where the Second Circuit had applied the three-year statute of limitations for malpractice cases.

The Supreme Court in DelCostello noted that the hybrid Section 301/duty of fair representation suit "has no close analogy in ordinary state law." Although the Court had previously found state statutes of limitation to vacate arbitration awards should apply to suits against employers, the Court found that the more appropriate state statute of limitations was the period for legal malpractice. The Court, however, rejected the use of state statutes of limitations altogether, finding that the employee's right to recovery was dependent upon both employer and union being parties to the litigation.

189. Id. at ___, 103 S.Ct. at 595.
191. N.L.R.A. §10(b), which reads in pertinent part: "Provided ... no 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 ...." National Labor Relations Act, 29 U.S.C. §160(b) (1976).
192. DelCostello, ___U.S. at ___, 103 S.Ct. at 2293-94.
194. 671 F.2d 87 (2d Cir. 1982).
195. DelCostello, ___U.S. at ___, 103 S.Ct. at 2291.
197. Justice Stevens suggested an alternative solution for the claim against the union: Borrowing the state limitations period for legal malpractice.... The analogy here is to a lawyer who mishandles a commercial arbitration. Although the short limitations period for vacating the arbitral award would protect the interest in finality of the opposing party to the arbitration, the misrepresented party would retain his right to sue his lawyer for malpractice under a longer limitations period. This solution is admittedly the closest state law analogy for the claim against the union. Nevertheless, we think it too suffers from objections peculiar to the realities of labor relations and litigation. DelCostello, 103 S.Ct at 2292 (citation omitted, emphasis added).
198. The most serious objection is that it does not solve the problem caused by the too-short time in which an employee could sue his employer under borrowed state law. In a
Instead, the Court chose to borrow the six-month statute of limitations for bringing unfair labor practice charges,\(^\text{199}\) reasoning that a Section 301/duty of fair representation suit very closely resembled an unfair labor practice charge.\(^\text{200}\) Thus, the Court reversed the judgment in *Flow- ers*, since ten months had elapsed before the suit was filed, and reversed and remanded *DelCostello* for further proceedings.\(^\text{201}\)

Beyond the restriction upon bringing suit, there is no labor policy reason for altering the ordinary trust law scenario. The paramount policy is that the employee be made whole; this is in no way frustrated by making the employer primarily responsible for the employee's backpay, particularly since the employer is typically the "deep pocket" party.\(^\text{202}\) Nor is national labor policy furthered by allowing the employer to rely on the union's breach.\(^\text{203}\) While the opportunity to reduce liability might make an exclusive contract grievance procedure slightly more attractive to an employer, the increased liability upon the union will make such a procedure less attractive to union negotiators.\(^\text{204}\)

Thus, the character of Cable and UWTU's wrongs must carry through to the apportionment of damages. Cable's primary, contractual, continuing breach must result in primary liability for Fairweather's backpay. UWTU's unrelated statutory breach must result in secondary liability for Fairweather's backpay,\(^\text{205}\) as well as liability for Fairweather's additional damages. Typically, these additional damages will be the cost of bringing suit in federal court.\(^\text{206}\)

\[^{199}\] See supra note 191.

\[^{200}\] Even if not all breaches of the duty [of fair representation] are unfair labor practices, however, the family resemblance is undeniable, and indeed there is substantial overlap. Many fair representation claims (the one in *DelCostello*, for example) include allegations of discrimination based on membership status or dissident views, which would be unfair labor practices under §8(a)(1) or (2). Aside from these clear cases, duty-of-fair-representation claims are allegations of unfair, arbitrary, or discriminatory treatment of workers by unions—as are virtually all unfair labor practice charges made by workers against unions. . . . Similarly, it may be the case that alleged violations by an employer of a collective bargaining agreement will also amount to unfair labor practices.

\[^{201}\] Id. at 103 S.Ct. at 2294–95.

\[^{202}\] The employer need not be the "deep pocket" party, however, since the union will continue to have secondary liability for the employer's breach. See supra note 151 and accompanying text.

\[^{203}\] See supra note 175.

\[^{204}\] Essentially, the union will be serving as a guarantor of the employer's good faith in performance of the collective bargaining agreement. Thus, whether or not it actually purchases insurance to cover the risk, the union will absorb considerable additional costs.

\[^{205}\] Bowen, ___ U.S. at ___, 103 S.Ct. at 605-06 (White, J., dissenting).

\[^{206}\] See, e.g., Soto Segarra v. Sea-Land Service, Inc., 581 F.2d 291, 298 (1st Cir. 1978); see also supra note 77.
The Union as Surety

The decision in Bowen has the additional fault of settling up the union as a surety for the employer's wrongful act. Suppose, for example, the fictitious Amalgamated Electrical Parts Supply, Inc. (Parts) discharged Harvey Smith, an employee, without just cause. Smith's dismissal constitutes a breach of the collective bargaining agreement between Parts and the United Part Sorters and Circuit Breakers Union (Union). If the collective bargaining agreement does not contain a grievance and arbitration procedure which is intended as the exclusive remedy for Parts' breach, Parts is liable for all of Smith's backpay. If, however, the contract does contain such an exclusive grievance and arbitration procedure, Bowen stands for the proposition that Parts may properly rely on United to vigorously and completely pursue the Parts breach to a proper remedy. Should Union fail to act to remedy the Parts breach, Union is responsible for all backpay past the date when an arbitrator's decision would have been rendered. In a typical case, United will bear the burden of the majority of Parts' backpay.

Bowen's surety aspect removes from the bargaining process any decision as to the duties of the union toward the employer under the collective bargaining agreement. Rather than leaving these valuable contract rights to be freely negotiated, Bowen forces a standard interpretation upon all such contract clauses. Yet this deviation from the norm of freely bargained agreements is without foundation in labor policy. If anything, the clear congressional policy of according protection to unions should tip the balance in a close question in favor of the union.

Nor is the union's duty of fair representation a consideration in determining the union's duty to the employer under an exclusive grievance and arbitration procedure. The union's duty of fair representation is owed exclusively to persons in the bargaining unit it represents. The federal labor common law duty may incidentally benefit employers in some instances, but its primary application, from Steele and Syres to the present, has been to protect employees in the bargaining unit. Here, however, the employee receives no benefit at all since the dispute merely concerns who will pay her, rather than whether she will be paid.

207. The contract language was substantially identical to that quoted supra note 163.
208. Smith was a member of the bargaining unit represented by United.
209. Bowen, ___U.S. at___, 103 S.Ct. at 600 (White, J., dissenting).
210. Id. at___, 103 S.Ct. at 599 (White, J., dissenting).
211. Id. at___, 103 S.Ct. at 601 n.4, 603 (White, J., dissenting).
212. See supra note 175.
213. Id.
Bowen and “Labor Peace”

Bowen will also produce considerable and unfortunate negative effects upon the national labor policy goal of labor peace. The first of these effects is a severe reduction of the employer’s incentives to settle a Section 301 suit prior to trial. Consider, for example, the fictitious Harvey’s Hammer Company (Hammer) which discharged Julie Forge in violation of the collective bargaining agreement in force between Hammer and the United Sisterhood of Tool Crafters (Crafters). Upon Crafters breach of its duty of fair representation, Forge brought suit in federal district court. Forge, an experienced and highly trained employee, received twenty-five dollars an hour before her dismissal. Prior to Bowen, Hammer would have had a two hundred dollar per day incentive to correct its breach by reinstating Forge with backpay. After Bowen, however, Hammer’s liability is borne by Crafters after the hypothetical arbitration date, and Hammer’s incentive to settle short of trial is considerably reduced. Crafters, of course, has considerably greater incentive to settle early, but they are unable to provide the remedy of reinstatement which is the crux of Forge’s suit. By decreasing the likelihood of an early settlement, Bowen increases both the expense and the contentiousness of dispute settlement. That increase, of course, negatively effects the goal of labor peace.

Bowen also increases the likelihood that a prudent union will take nonmeritorious claims to arbitration to avoid the significant backpay liability which an error in judgment could generate. One can make a convincing argument that the union will balance the probability and cost of an unfavorable decision against the true costs of arbitration and determine through a magical ten factor formula the correct and optimal approach (to three decimal places). The union official, however, who confronts a situation with no firm idea of the probabilities and no magical formula is likely to understand the true message of Bowen: when in doubt, fight it out. That incentive to arbitrate nonmeritorious claims will tremendously increase the cost of employee appeals from dismissals, both to the union and to the employer, and will reduce the likelihood of the sort of quick, clear decision that best promotes labor peace.

The likelihood that unions will be forced to arbitrate unmeritorious claims is increased by the present confusion over what amounts to a breach of the duty of fair representation. The decision whether or not to proceed with the final stages of the grievance procedure is a matter gener-

215. Id. at ___, 103 S.Ct. at 599 n.1 (White, J., dissenting).
216. See supra notes 210 and 211.
217. Bowen, ___U.S. at ___, 103 S.Ct. at 605 (White, J., dissenting).
ally left to the discretion of the Union. The problem arises when the dismissed employee alleges that the union has refused "in an arbitrary or perfunctory manner" to pursue the matter further. Though there was no challenge before the Supreme Court of Charles V. Bowen's allegation that his union had violated its statutory duty, there is no consistent standard to determine when a union has done so. One commentator has said that a conclusion of arbitrariness should be made by following either a negligence or a rational decisionmaking standard. A negligence standard would hold a union liable for carelessness in complying with the technicalities of the grievance procedure. The negligence standard would not hold a union liable where the union had consciously though wrongly decided not to pursue a grievance. The rational decisionmaking standard is meant to address this type of failing. The problem with this standard is that it may amount to second-guessing the union's decision. It will be extremely difficult for a court to make a better decision than a union regarding the merits of the grievance when it must also consider the interests of other union members, the allocation of scarce union resources, and the effect that a decision to proceed will have on future collective bargaining negotiations. It should be noted that the Court in Vaca felt that an employee should not be able to compel arbitration of his grievance regardless of its merits lest the settlement machinery become overburdened and undermined. Perhaps this concern for the grievance process and the standard for defining "arbitrariness" in Vaca will temper

222. Id. at 1098.
224. See, e.g., Robesky v. Quantas Empire Airways, 573 F.2d 1082 (9th Cir. 1978) (there was no rational basis for union's failure to tell employee that her grievance would not be taken to arbitration; employee was harmed by rejecting settlement offer she otherwise would have taken).
225. Circuit Judge Murnaghan expressed his concern with the admission of evidence that amounted to second-guessing the national union's assessment of the merits by someone without experience at that level. Bowen v. U.S. Postal Service, 642 F.2d 79, 84 (4th Cir. 1981) (Murnaghan, J., dissenting).
226. See generally VanderVelde, supra note 4.
228. Id. at 193-94. The union diligently supervised the grievance into the last step before arbitration. When it appeared that arbitration would be fruitless, the union advised the grievant to settle. It was not arbitrary for the union to decline further action.
the harshness of *Bowen* by making it more difficult to prove a breach.

* Bowen may even discourage unions from bargaining for arbitration clauses in collective bargaining agreements because of the considerable risk of liability such clauses entail.\(^{229}\) Yet *Bowen* provides, in return for this considerable sabotage of national labor policy goals, no benefit at all to the aggrieved employee. The injured party, after all, is concerned about the amount of the award, not the pockets from which it is satisfied.

**FOILING THE *Bowen* TRAP**

The best, and perhaps only possible, union defense against *Bowen*-type liability is to carefully document the reasons for not proceeding to arbitration with a particular grievance. The documentation need not be a massive, multi-paged treatise on the law as it concerns a particular discharge, but should reasonably set out the basis on which the claim was denied. Consider, for example, the fictitious United Plastic Implement Makers Union (Makers). Makers member Bob Baccus was dismissed by his employer, Kitchen Tools, Inc. (Kitchen) for excessive drunkenness on the job. Kitchen justified its dismissal of Baccus on a somewhat vague provision of the collective bargaining agreement which provided for discharge under circumstances of “excessive self-induced-incapacitation” on the job.\(^{230}\) Baccus appealed his dismissal within the contractual grievance procedure through all steps prior to arbitration without obtaining a satisfactory resolution. On review of Baccus’ request for arbitration Joseph Jones, the Makers officer in charge of arbitration decisions, decided that Baccus’ grievance was unlikely to produce a favorable arbitral ruling. Jones’s decision was based on three grounds: (1) in three prior arbitration decisions, Kitchen’s interpretation of the “excessive self-incapacitation” clause as applying to drunkenness had been upheld; (2) Baccus’ frequent drunkenness was undisputed; (3) Baccus’ drunkenness on the morning of his dismissal was witnessed by at least three knowledgeable persons willing to testify in Kitchen’s behalf. A model form to document this decision might read as follows:

United Plastic Implement Makers Union Arbitration Evaluation

Member name: Bob Baccus.
Disputed action: Dismissed for cause.
Reason for action: Kitchen claims that Bob showed up for work intoxicated and that he had done so on six prior occasions.

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\(^{229}\) The argument may be made that the grievant would prefer that the money come from the employer, rather than the union of which he is a member. The degree to which this will apply to a person who feels mistreated by both parties is difficult to determine.

\(^{230}\) The contract provided: “An employee may be dismissed for excessive self-induced incapacitation where an employee’s non-coerced actions on or off the job severely limit the employee’s job performance.”
during the year. Dismissal was for "excessive self-incapacitation" under the collective bargaining agreement.

Member's reason for grieving: Bob claims he wasn't drunk and that Kitchen is "out to get" him.

Officer responsible for decision: Joseph Jones.

Date of Decision: January 20, 1984.

Decision: Arbitration not recommended.

Reasons: (1) Kitchen has been upheld in three similar arbitrations, those of Jim Sort, Sally Thomkins, and Doug Johnson.
(2) Bob's earlier drunkenness is undisputed on the record and Kitchen has witnesses.
(3) Bob's drunkenness on the morning of the dismissal was witnessed by Mark George, William Mark, and Sharon Fine, all of whom are willing to testify.

Such a form should be at least on file with the union, and should be sent to the grieving member at the time the decision not to arbitrate is made. The form's purpose is to serve as evidence that the union's decision was not arbitrary, malicious, or perfunctory. On the other hand, it is intended to take very little time and effort to complete so that it does not burden the official in charge excessively. Whether this or another form is used, it is important that records showing clearly the union's efforts to fulfill its duty of fair representation be kept. No such system can avoid all liability, but care and accuracy in drafting such documents should significantly improve the union's chances in court.

CONCLUSION

Bowen v. United States Postal Service marks a significant change in the Supreme Court's view of apportionment of damages in employee suits under section 301 of the LMRA. The majority's decision will hold the union liable, in a typical case, for more than half of the backpay caused by the employer's wrongful dismissal. The decision represents, in part, a confusion of the employer's contractual and the union's common law duties to the employee and produces the bizarre result of holding the union responsible for damages caused by the employer, such liability being grounded on the union's duty to the employee. The union's new surety position relative to the employer is likely to have unfavorable effects upon the national labor policy goal of labor peace in that it will reduce the employer's incentive to settle in a Section 301 suit, increase the

231. The possible rights of the employee with regard to such a form are beyond the scope of this article. It appears that the union should inform the grievant of its decision so that he or she will not lose an opportunity to settle short of arbitration. See supra note 224. Informing the grievant also avoids the appearance of acting in an arbitrary or perfunctory manner.
likelihood that unmeritorious claims will be brought to arbitration, and reduce the likelihood of union approval of grievance and arbitration procedures in collective bargaining agreements. In the end, the union's only defensive weapon appears to be the careful keeping of records where a decision not to arbitrate has been made.