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CAN NEGLIGENT REPRESENTATION BE FAIR REPRESENTATION? AN ALTERNATIVE APPROACH TO GROSS NEGLIGENCE ANALYSIS

Negligent processing of an employee's grievance by his or her union is a persistent analytical problem under the duty of fair representation owed by a union to its members. The General Counsel of the National Labor Relations Board suggested in a recent memorandum that a breach of that duty occurs in instances of gross (as opposed to mere) negligence, as well as in other defined circumstances. This Note discusses the development of the duty of fair representation, the guidelines in the General Counsel's memorandum, and problems attendant to a distinction between mere and gross negligence. The author suggests that a distinction based on discretionary and procedural functions be substituted for the analysis under differing degrees of negligence, arguing that imposing a greater duty of care upon unions in their procedural handling of grievances would yield a sounder, fairer, and more predictable operation of the duty of fair representation.

INTRODUCTION

SECTION 9(a) of the National Labor Relations Act (NLRA)¹ gives a properly designated union² the status of exclusive representative for purposes of collective bargaining.³ The section does not, however, provide for a similar degree of union control over grievance procedures.⁴ Nonetheless, most labor contracts do, in fact, provide for union exclusivity in processing employee grievances.⁵ Inherent in this dual exclusivity is increased union power

1. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1976).

2. Generally, a union is properly designated when a majority of employees in a bargaining unit have indicated that they want the union to represent them. *Id.* § 9(c)(i), 29 U.S.C. § 159(c)(1) (1976).

3. Section 9(a) provides in part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

Id. § 9(a), 29 U.S.C. § 159(a) (1976).

4. The applicable proviso of section 9(a) provides:

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

Id. § 9(a), 29 U.S.C. § 159(a) (1976).

5. Lehmann, *The Union's Duty of Fair Representation—Steele and Its Successors*, 30 FED. B.J. 280, 282 n.15 (1971).

and an increased potential for abuse.⁶ Thus, to protect employee interests from this potentiality, the judiciary developed the duty of fair representation.⁷ The scope of this duty has never been clear; consequently, the issue of fair representation has posed difficult problems for both the National Labor Relations Board (NLRB)⁸ and the courts.⁹

On July 9, 1979, John Irving, as General Counsel of the NLRB, attempted to clarify the scope of the obligation in a memorandum directed to all Regional Offices.¹⁰ Outlining substantive guidelines for the issuance of a complaint, Irving specified four general categories of union conduct which would constitute a breach of the duty of fair representation: improper motives or fraud, arbitrary conduct, gross negligence, and certain union conduct after it has begun to grieve on behalf of an employee.¹¹

Notably, Irving stated explicitly that a union's mere negligence has never, and would never, be a breach of the duty of fair representation.¹² He suggested, however, that "negligence [which] was so gross as to constitute a reckless disregard of the interests of the unit employee" *may* be a breach of the duty, but only under exceptional circumstances.¹³ To ensure that negligence would serve as a basis for a breach only in such unusual cases, Irving directed Regional Directors to submit possible cases of gross negligence to the Division of Advice for a determination of merit.¹⁴

Since this memorandum is a message to the courts as well as to

6. See Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 152 (1957).

7. One commentator has described the evolution of the duty of fair representation as "an attempt to protect the interests of individual employees without, at the same time, vitiating the effectiveness of collective bargaining." T. BOYCE, *FAIR REPRESENTATION, THE NLRB, AND THE COURTS* 4 (1978).

8. Fanning, *The Duty of Fair Representation*, 19 B.C.L. REV. 813, 837 (1978).

9. See Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 U. ILL. L.F. 35, 36-37.

10. Section 8(b)(1)(A) *Cases Involving a Union's Duty of Fair Representation*, 101 LAB. REL. REP. (BNA) 224 (Gen. Counsel Memo, 79-55, July 9, 1979) [hereinafter cited as *Union's Duty of Fair Representation*].

John Irving resigned on Oct. 20, 1979, and Norton Come was appointed acting General Counsel. Telephone interview with the Information Division of the NLRB (Feb. 23, 1980). William A. Lubbers was sworn in as General Counsel on January 2, 1980 and was confirmed by the Senate on April 23, 1980. Telephone interview with the Information Division of the NLRB (June 3, 1980).

11. *Union's Duty of Fair Representation*, *supra* note 10, at 226-27.

12. *Id.* at 227.

13. *Id.*

14. *Id.* Edward B. Miller, Former Chairman of the NLRB, described the attitude of regional personnel toward review by the Division of Advice as "ivory tower in nature, made by professionals too far removed from the people and real life situations faced daily

the Regional Offices,¹⁵ a distinction between gross and mere negligence without a defined difference may pose problems for discharged employees claiming union negligence as the basis for an unfair representation charge. It may cause such claimants to be turned away from the Regional Offices and force them to seek relief from the courts.¹⁶ If the distinction is maintained by the courts as well, it may prove fatal to arguably meritorious claims against employers, thus promoting unfairness to employees for the sake of an otherwise unnecessary rule of judicial convenience.¹⁷ On the other hand, if the distinction between gross and mere negligence is not maintained by the courts, there is a risk that conflicting rulings by the Regional Offices and the courts will encourage more claimants to emerge,¹⁸ further burdening the limited resources of each.¹⁹

This Note examines the scope of a union's duty of fair representation. First, it traces the development of the duty to show its continuous expansion in an effort to remain consistent with employee expectations while not unduly infringing upon union discretion.²⁰ Next, the Note discusses the standards for a breach of the duty developed by John Irving and describes the meaning of the four types of conduct specified in his memorandum.²¹

by the regional offices." E. MILLER, AN ADMINISTRATIVE APPRAISAL OF THE NLRB 37 (rev. ed. 1978).

15. Irving intended to furnish guidance to all "interested parties" through his memorandum. *Union's Duty of Fair Representation*, *supra* note 10, at 227.

16. Labor Management Relations Act (LMRA) § 301(a), 29 U.S.C. § 185(a) (1976), as interpreted by *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962), permits an individual employee to bring suit against his or her employer for breach of the collective bargaining agreement. *Id.* at 200. Since an employer may assert nonexhaustion of contractual remedies as a defense in such a case, the action will be dismissed unless the employee can prove either that the conduct of the employer amounts to a repudiation of the grievance procedure or that the union has breached its duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 185 (1967).

17. See notes 130-41 *infra* and accompanying text.

18. In a speech presented to the American Bar Association National Institute on April 27, 1979, Irving noted:

[T]he courts have articulated varying standards for what constitutes a denial of fair representation, and the Board uses other standards in determining whether an unfair labor practice has occurred. . . .

What results is uncertainty about the law, which is harmful to the national labor policy. Thus, we get more individually filed charges each year.

Speech by John Irving concerning the Duty of Fair Representation, 101 LAB. REL. REP. (BNA) 228, 228 (Gen. Counsel Memo. 79-56, July 9, 1979) [hereinafter cited as *Irving speech*].

19. See *Union's Duty of Fair Representation*, *supra* note 10, at 225.

20. See notes 29-64 *infra* and accompanying text.

21. See notes 67-107 *infra* and accompanying text.

In particular, the Note focuses on whether a union's negligence may constitute a breach of its duty of fair representation.²² The Note analyzes the Irving approach—that only gross union negligence could constitute a breach—and finds that not only is this approach impracticable because of a lack of adequate doctrinal foundations,²³ but it is also unfair to an employee as it may result in precluding otherwise meritorious claims, contrary to employee expectations.²⁴ In addition, the Note argues that even if this new NLRB standard is rejected by the courts, the result will be an undesirable overloading of judicial resources as claimants, deprived of administrative redress, clamor for access to the courts.²⁵

Finally, this Note advances a solution to the problems presented by Irving's approach to union negligence as a breach of the duty of fair representation. Rather than maintaining an artificial distinction between gross negligence (for which a union would be liable) and mere negligence (for which a union would not be liable) for all union activities, this Note proposes that union activities be divided into "procedural" and "substantive" activities, with a greater duty of care imposed with regard to the former—consistent with employee expectations.²⁶ Such an approach, this Note argues, not only avoids the problems raised by the gross negligence—mere negligence distinction, but also finds considerable support in administrative law²⁷ and the general statutory framework in the area of labor relations.²⁸

I. ORIGIN AND DEVELOPMENT OF THE DUTY OF FAIR REPRESENTATION

The American labor movement emerged in response to employer domination of the work environment to give individual employees a collective voice in determining their conditions of employment.²⁹ Subsequently, the duty of fair representation was

22. See notes 91–151 *infra* and accompanying text.

23. See notes 115–25 *infra* and accompanying text.

24. See notes 126–41 *infra* and accompanying text.

25. See notes 142–51 *infra* and accompanying text.

26. See notes 152–65 *infra* and accompanying text.

27. See notes 181–91 *infra* and accompanying text.

28. See notes 167–80 *infra* and accompanying text.

29. T. BOYCE, *supra* note 7, at 3. See also Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1003 (1955).

The labor movement has also been described in more dramatic terms: "Broadly conceived the labor movement is the progress of the masses of the people up from slavery,

judicially developed to protect that coveted voice from possible abuse by powerful unions whose institutional interests often clashed with the interests of individual members.³⁰

An example of such a conflict occurred in *Steele v. Louisville & Nashville Railroad*,³¹ the seminal case in the development of the duty of fair representation. The union in *Steele* had negotiated a seniority agreement which gave preference to white firemen for promotion and layoff and which would have ultimately excluded black firemen from employment with the railroad.³² Invalidating the contract, the Supreme Court analogized a union to a legislature and found that the union was "subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and . . . under an affirmative constitutional duty equally to protect those rights."³³ Yet, the Court decided the case on a slightly narrower basis, holding that the representational exclusivity of the union, as conferred upon it by the Railway Labor Act,³⁴ demanded that the union fairly represent all interests of those affected "without hostile discrimination."³⁵

The applicability of the duty of fair representation to contract

their escape through serfdom into the wage system, and their ever continuing struggle to improve their economic and social condition." J. ANDREWS, *LABOR PROBLEMS AND LABOR LEGISLATION* 5 (4th ed. 1932).

30. T. BOYCE, *supra* note 7, at 4.

31. 323 U.S. 192 (1944).

32. *Id.* at 195.

33. *Id.* at 198. This analogy was rebutted in Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897, 901-02 (1975). Schatzki conceded that both a union and a legislature are selected by a majority and that both participate in the creation of laws which will affect many, including those who did not vote for the union or the legislator. However, he saw at least three significant differences between the two institutions. First, the union does not unilaterally decide the contents of the labor contract because it must bargain with the employer; the legislature is not under the same constraint. *Id.* at 901. Second, a union, unlike a legislature, often deals with issues of intense and direct interest to all of its members. *Id.* at 902. Third, unions commonly represent all employees in their individual grievances against one another and the employer, whereas the legislature does not represent individual concerns or grievances. *Id.*

34. 45 U.S.C. § 152 ¶ 4 (1976).

35. 323 U.S. at 202-03. A union is, in fact, presumed to act on behalf of a majority of the persons whom it represents. See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338-39 (1944). This presumption is supported by two theories—that the employees can pressure the union to act in their best interests because of their ability to remove its officers or to commence decertification proceedings, and that the union's goal is to satisfy the majority of the bargaining unit which it represents. Note, *The Duty of Fair Representation and Exclusive Representation in Grievance Administration: The Duty of Fair Representation*, 27 SYRACUSE L. REV. 1199, 1202 (1976).

negotiation was extended in *Ford Motor Co. v. Huffman*³⁶ to include cases and disputes arising under the NLRA.³⁷ The Court not only read *Steele* to require honest efforts to serve all union members without hostility, but also declared that a union must be accorded "a wide range of reasonableness . . . subject always to complete good faith and honesty of purpose in the exercise of its discretion."³⁸

The union's duty was extended further four years later when the duty was applied to cases involving the administration of a contract. In *Conley v. Gibson*,³⁹ the Supreme Court explicitly stated that the union's duty to represent its members fairly "does not come to an abrupt end . . . with the making of an agreement between union and employer."⁴⁰ Rather, the Court declared:

Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement.⁴¹

Notwithstanding this extension of the duty to cases of contract administration, the duty has generally been thought to be more flexible in the negotiation context.⁴² This variation is due to the amount of discretion which the union needs (and is afforded) in each situation to function effectively.⁴³ For example, in negotiat-

36. 345 U.S. 330 (1953).

37. *Id.* at 337-38. For a discussion of the similarities between fair representation suits under the Railway Labor Act and the NLRA, see Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 667-718 (1973).

38. 345 U.S. at 338.

39. 355 U.S. 41 (1957).

40. *Id.* at 46.

41. *Id.*

42. See, e.g., T. BOYCE, *supra* note 7, at 29 ("[A] union's discretion in contract administration [is] narrower, and its burden correspondingly greater, than the discretion accorded it in negotiating."); Leffler, *supra* note 9, at 37 ("[T]he Court unwittingly, but properly, developed different standards of fair representation corresponding with the different roles played by the union as exclusive representative of unit employees."); Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251, 254-58 (1977) ("The standards are not the same, because the statutory policy, the status of the union, and the practical needs of collective bargaining are quite different in contract administration."). *Contra*, Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1475-76 (1963) (where the author notes that the distinction between problems of negotiation and problems of administration are artificial).

43. T. BOYCE, *supra* note 7, at 29; Summers, *supra* note 42, at 254-58. The variation is also due, in part, to the congressional line-drawing in the statute, i.e., the distinction implic-

ing a contract, the union must compromise not only with the employer, but also with various interest groups within the union.⁴⁴ This precarious position necessitates wider union discretion,⁴⁵ which can be freely given without damaging any specific employee expectations.⁴⁶ Once an agreement is reached, however, employee expectations become firmly rooted in the contract, and correspondingly the discretion afforded the union in administering the contract is limited.⁴⁷

Consistent with the need to extend the duty to meet employee expectations, yet not to interfere with union discretionary activities, the Court has defined the duty in broad terms. In one of its most explicit statements on the duty of fair representation, the Supreme Court in *Vaca v. Sipes*⁴⁸ declared that a breach of the duty of fair representation occurs "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."⁴⁹ Despite this clear statement,

itly made in section 9 between negotiation and contract administration. See notes 1-5 *supra* and accompanying text.

44. Summers, *supra* note 42, at 257.

45. *Id.*

46. T. BOYCE, *supra* note 7, at 29.

47. *Id.*

48. 386 U.S. 171 (1967).

49. *Id.* at 190. Although the narrow issue in *Vaca* was the propriety of a union decision not to arbitrate the plaintiff-employee's grievance, *id.* at 173, the Court chose this occasion to clarify the duty of fair representation. The *Vaca* standard of "arbitrary, discriminatory, or in bad faith" only reformulated (although in a more concise way) pre-existing law. See, e.g., *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202-03 (1944) ("[T]he bargaining representative . . . [has a] duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) ("A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."); *Humphrey v. Moore*, 375 U.S. 335, 350 (1964) (The union is not liable if it "took its position honestly, in good faith and without hostility or arbitrary discrimination.").

Justice White, writing for the majority, covered other major issues as well. First, he concluded that the preemption doctrine was inapplicable to controversies involving the duty of fair representation; thus, courts had concurrent jurisdiction with the NLRB. 386 U.S. at 183. Second, the Court expressly rejected the position that every employee has the right to have his or her grievance taken to arbitration. *Id.* at 191. Finally, the Court addressed the requirement that an employee must exhaust his or her contractual remedies before seeking judicial relief. Justice White found that a discharged employee would be relieved of this requirement if the employer's conduct "amounts to a repudiation of those contractual procedures" or if "the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if . . . the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance." *Id.* at 185 (emphasis in original). Thus, if an employee can prove unfair

courts have not uniformly applied this tripartite standard. Some jurisdictions have required a showing of union 'ill-will, hostility, or bad faith before finding a breach.⁵⁰ Moreover, the Supreme Court itself seemed to deviate from the *Vaca* standard in *Amalgamated Association of Street Electric Railway and Motor Coach Employees v. Lockridge*.⁵¹ In *Lockridge*, the Court announced that "a distinction . . . between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the other, needs strictly to be maintained"⁵² when judging a union's conduct. However, commentators have dismissed the importance of *Lockridge* by suggesting that the Court was attempting (although erroneously) only to describe pre-existing law,⁵³ that the Court's references to the duty were merely dicta,⁵⁴ or that it has been overshadowed by a subsequent Court statement on the matter.⁵⁵ Thus, notwithstanding *Lockridge*, *Vaca* remains the Court's definitive statement on the duty of fair representation.⁵⁶

Yet, even with a "clear" general definition of what the duty is or when it has been breached, critical issues of interpretation remain. Perhaps the most important issue arises when the *Vaca*

representation, the employer's defense of nonexhaustion of contractual remedies fails.

50. *E.g.*, *Dill v. Greyhound Corp.*, 435 F.2d 231, 238 (6th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971) (A "finding of hostility, malice, or bad faith" is required.); *Hiatt v. New York Cent. R.R.*, 444 F.2d 1397, 1398 (7th Cir. 1971) ("[A]ppellants are required to demonstrate that their exclusion was based in bad faith arbitrariness."); *Jackson v. TWA, Inc.*, 457 F.2d 202, 204 (2d Cir. 1972) (Hostile discrimination is necessary to establish a breach of the duty of fair representation.). *See also* Comment, *Post-Vaca Standards of the Union's Duty of Fair Representation: Consolidating Bargaining Units*, 19 VILL. L. REV. 885 (1974). *Contra* *Griffin v. UAW*, 469 F.2d 181, 183 (4th Cir. 1972) ("The repeated references in *Vaca* to 'arbitrary' union conduct reflected a calculated broadening of the fair representation standard [A] union may not arbitrarily ignore a meritorious grievance or handle it in a perfunctory manner."); *Retana v. Apartment Operators Local 14*, 453 F.2d 1018, 1023 (9th Cir. 1972) (A union must avoid arbitrary conduct.); *DeArroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 284 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970) ("[A]rbitrary and perfunctory handling by a union of an apparently meritorious grievance is not acceptable under the standard of fair representation.").

51. 403 U.S. 274 (1971).

52. *Id.* at 301.

53. Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119, 1125 (1973).

54. 10 SUFFOLK L. REV. 642, 646 (1976).

55. *See* T. BOYCE, *supra* note 7, at 38. In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568-69 (1976), the Court cited *Vaca* approvingly and never mentioned *Lockridge*. In a later case, *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 47 (1979), the Court again cited the *Vaca* standard of "arbitrary, discriminatory, or in bad faith" with approval.

56. *See* R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 698 (1976).

standard is applied to an alleged instance of union negligence. While some lower courts have found unfair representation where a union's conduct has been negligent, few of them have termed it such.⁵⁷ Most courts have followed the significant Sixth Circuit decision of *Ruzicka v. General Motors Corp.*⁵⁸ In *Ruzicka*, the court found that the union's failure to make a decision on the merits of the discharged employee's grievance and its negligence in allowing the deadline for filing a grievance to pass were arbitrary and perfunctory acts which constituted a breach of the duty of fair representation under *Vaca*.⁵⁹ Judge McCree, in a concurring opinion, preferred to find a breach solely on the basis of negligence, without trying to pigeonhole the union's unintentional conduct as either "arbitrary" or "perfunctory."⁶⁰

The NLRB initially exhibited a general reluctance to equate negligent grievance processing with unfair representation,⁶¹ but the *Ruzicka* decision has made inroads on that tendency.⁶² For example, in *United Steelworkers*,⁶³ the Board, citing *Ruzicka*, concluded that the union "breached [its] duty of fair representation by the perfunctory and negligent manner in which [it] processed the grievance [and] by allowing it to expire"⁶⁴

57. *E.g.*, *Foust v. International Bhd. of Elec. Workers*, 572 F.2d 710 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979) (The union's failure to file a grievance in a timely manner constituted "perfunctory conduct."); *Ruzicka v. General Motors Corp.*, 523 F.2d 306 (6th Cir.), *rehearing denied*, 528 F.2d 912 (6th Cir. 1975); *Pierce v. Fox Mfg. Co.*, 97 L.R.R.M. 2321 (N.D. Ga. 1977) (The untimely filing of an appeal to arbitration was a "breach of the duty of fair representation," and thus the arbitrator's denial of relief did not bar a section 301 suit against the employer.); *Ruggerello v. Ford Motor Co.*, 411 F. Supp. 758, 760 (E.D. Mich. 1976) ("If a union breaches its duty of fair representation in failing to process a grievance before determining its merit, it is certainly liable for failing to initiate a grievance after acknowledging its merit.").

58. 523 F.2d 306 (6th Cir.), *rehearing denied*, 528 F.2d 912 (6th Cir. 1975).

59. *Id.* at 310. The Court in *Vaca* had expressly declared that "a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion." *Vaca v. Sipes*, 386 U.S. at 191 (emphasis added).

60. *Id.* at 315-16 (McCree, J., concurring). *Cf.* *Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082 (9th Cir. 1973). In a concurring opinion, one member of the *Robesky* court noted that "The court attempts to define the term 'arbitrary' by using tort concepts of culpability Neither the law of torts nor precedents in the federal common law of labor relations provide adequate guidance to define the term 'arbitrary' in this manner." *Id.* at 1092 (Kennedy, J., concurring).

61. *See, e.g.*, *Great Western Uni-Freight*, 209 N.L.R.B. 446 (1974).

62. T. BOYCE, *supra* note 7, at 44-45.

63. 223 N.L.R.B. 1184 (1976).

64. *Id.* at 1190. The NLRB has found a breach of the duty of fair representation in the face of negligent union conduct in other cases as well, but it has been reluctant to attach the negligence label. *E.g.*, *P & L Cedar Prod. Co.*, 224 N.L.R.B. 244 (1976); *Western Extremator Co.*, 223 N.L.R.B. 1270 (1976).

Apparently, both the judiciary and the NLRB have taken steps (perhaps unknowingly) towards enlarging the scope of the duty of fair representation to include liability for union negligence. The Office of the General Counsel has been opposed to such a trend, as demonstrated by John Irving's recent memorandum to all Regional Offices.

II. THE MEMORANDUM OF THE GENERAL COUNSEL

The General Counsel of the NLRB has been referred to as "the keeper of the keys to the temple of justice."⁶⁵ Not only does the General Counsel possess the power to investigate charges, issue complaints, and prosecute, but also, his decisions with regard to these matters are not reviewable by either the courts or the Board.⁶⁶

Consistent with such powers, John Irving, as General Counsel, determined the bases for the issuance of a complaint whenever a charge of unfair representation is made.⁶⁷ His guidelines with regard to this particular charge are extremely important, as the issuance of an unfair representation complaint is often determinative of the matter.⁶⁸ Moreover, Irving's findings on this issue are binding on the Regional Offices because of his general supervisory control over all employees and officers therein.⁶⁹

In attempting to clarify the scope of the duty of fair representation, Irving's express goal was to minimize the serious consequences which flow from the "vagueness, imprecision, and sheer number of word-tests" used to define the fair representation obligation.⁷⁰ The consequences of the confusion are not unimpressive: a union processes clearly nonmeritorious grievances to avoid the appearance of breaching its duty, thus clogging arbitral

65. Statement of former Senator Sam Ervin, *quoted in* E. MILLER, *supra* note 14, at 36.

66. NLRA § 3(d), 29 U.S.C. § 153(d) (1976). For a detailed history of the establishment of the Office of the General Counsel, see *International Union of Elec. Workers v. NLRB*, 289 F.2d 757 (D.C. Cir. 1960).

Notably, the Regional Directors' decisions are subject to review by the Board, which has power to: 1) determine appropriate bargaining units; 2) investigate and provide for hearings; 3) determine whether a question of representation exists; and 4) to hold representation elections. NLRA § 3(b), 29 U.S.C. § 153(b) (1976).

67. See *Union's Duty of Fair Representation*, *supra* note 10, at 227.

68. *Irving speech*, *supra* note 18, at 230. Unions prefer to settle such claims—even when their chances of winning before the Board are good—to avoid the expense of defending the charge. *Id.*

69. NLRA § 3(d), 29 U.S.C. § 153(d) (1976).

70. *Union's Duty of Fair Representation*, *supra* note 10, at 225.

channels;⁷¹ the NLRB wastes its valuable and limited resources by investigating nonmeritorious charges;⁷² both the union and the employer are potentially liable for substantial monetary damages (*e.g.*, back pay) if a breach is proved;⁷³ and a union may be unable to recruit stewards and officers with the requisite competence if it must assure an error-free grievance procedure.⁷⁴

In his memorandum, Irving chose to categorize circumstances which would constitute a breach of the duty of fair representation, rather than to re-phrase the duty.⁷⁵ He divided prohibited union conduct into four categories: (1) improper motives or fraud, (2) arbitrary conduct, (3) certain union conduct after it has begun to grieve on an employee's behalf, and (4) gross negligence.⁷⁶ Using these categories as a guide, Irving's directives to the Regional Directors appear simple: if the union's conduct falls within one of the categories, the Regional Office should issue a complaint;⁷⁷ if the union's conduct does not fall within one of the categories, the Regional Office should dismiss the charge.⁷⁸

Still, despite the apparent simplicity, questions remain regarding the definition of each of the described categories. The first category describes union conduct attributable to improper motives.⁷⁹ In this regard, if the union action interferes with the "section 7 activities" of employees,⁸⁰ such action is a breach of the

71. *Id.* at 224-25.

72. *Id.* at 225. A breach of the duty of fair representation is an unfair labor practice, thus giving the Board jurisdiction over such charges. *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). *Cf. Vaca v. Sipes*, 386 U.S. at 179 (where the Court declared that the Board did not have exclusive jurisdiction over cases involving the alleged violation of the union's duty of fair representation).

73. *Union's Duty of Fair Representation*, *supra* note 10, at 225. See note 16 *supra* for an explanation of the mechanics of an employee suit against his or her employer and union.

74. *Union's Duty of Fair Representation*, *supra* note 10, at 225. See Vladeck, *The Conflict between the Duty of Fair Representation and the Limitations on Union Self-Government*, in *THE DUTY OF FAIR REPRESENTATION* 44 (J. McKelvey ed. 1977).

75. *Union's Duty of Fair Representation*, *supra* note 10, at 225.

76. *Id.* at 226-27.

77. *Id.* at 225.

78. *Id.*

79. *Id.* at 226. Fraud is within the ambit of the improper motives category. Proof of fraud requires "evidence that the union intentionally misled the employee as to a material fact concerning his/her [sic] employment, and that the employee reasonably relied thereon to his/her [sic] detriment." *Id.*

80. NLRA § 7, 29 U.S.C. § 157 (1976) describes permissible employee labor activities which are thus known as "section 7 activities." This section provides:

Employees shall have the right to self-organization, to form, to join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bar-

duty.⁸¹ Moreover, even if the section 7 rights of employees are not involved, conduct attributable to improper motives is a breach of the duty if based on "irrelevant or invidious considerations."⁸² Notably, this category addresses a union's intentional conduct.

Under the second category, union conduct which is arbitrary is also a breach of the duty of fair representation.⁸³ Specifically, if "there is no basis upon which the union's conduct can be explained," the action is arbitrary.⁸⁴ Refusal to process a grievance after only a perfunctory inquiry, or no inquiry at all, is unfair representation,⁸⁵ as is the union's refusal to support an employee without explanation if there is a "contract or an internal union policy which clearly and unambiguously supports the employee's position."⁸⁶

Another category of conduct which Irving considered is the union's conduct after it has chosen to pursue a grievance on behalf of an employee.⁸⁷ In such a case, the union is not statutorily precluded from settling the grievance or acquiescing in the employer's position, provided that the union is not improperly motivated or acting arbitrarily.⁸⁸ Also, when deciding whether to pursue a grievance to arbitration, the union may consider the monetary costs of such further processing.⁸⁹ In sum, the union is allowed a "wide range of reasonableness . . . in serving the unit it represents"⁹⁰

Finally, and more importantly, Irving included a category of behavior, which he termed "gross negligence," that would constitute a breach of the fair representation duty.⁹¹ In delineating this category, Irving explicitly stated that although a union's mere neg-

gaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Id.

81. *Union's Duty of Fair Representation*, *supra* note 10, at 226.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* "Inquiry" in this regard is defined in the negative: "[it] need not be the kind of exhaustive inquiry that one would expect from a skilled investigator." *Id.*

86. *Id.*

87. *Id.* at 227.

88. *Id.*

89. *Id.*

90. *Id.* (quoting *Ford Motor Co. v. Huffman*, 345 U.S. at 338).

91. *Id.*

ligence is not the equivalent of unfair representation,⁹² gross negligence may be a breach of the duty under exceptional circumstances.⁹³ Since the proper circumstances are to be determined essentially by the Division of Advice, the actual standard to be used to determine gross negligence remained virtually unstated.

There are, however, indications within the memorandum which could give substance to the unstated standard. Although noting that the General Counsel is not bound by judicial precedent, Irving cited *Ruzicka v. General Motors Corp.*⁹⁴ and *Robesky v. Qantas Empire Airways Ltd.*⁹⁵ to support his position on gross negligence.⁹⁶ Specifically, he read *Robesky* to define grossly negligent conduct as "acts of omission by union officials not intended to harm employees [but] so egregious, so far short of minimum standards of fairness to the employee, or so unrelated to legitimate union interests as to be unlawful."⁹⁷ By specifically noting *Robesky* and its requirement of an egregious omission for gross negligence, Irving seemingly adopted this as a necessary element of the gross negligence category of the fair representation standards.

A second indication of the range of this category may be evidenced by Irving's statement that "the mere fact that the union is inept, negligent, unwise, insensitive, or ineffectual, will not, standing alone, establish a breach of the duty."⁹⁸ This statement not only reinforces the omission requirement, but it also refines the description of what constitutes gross negligence, indicating that a wide range of union activities, which would otherwise be harmful to the employees, will not be considered a breach of the duty.

Finally, a speech given by Irving to the American Bar Association National Institute provides another guide for defining the unstated standard.⁹⁹ In his explanation of the category of gross

92. *Id.* at 227.

93. *Id.*

94. 523 F.2d 306 (6th Cir.), *rehearing denied*, 528 F.2d 912 (6th Cir. 1975). See notes 58-64 *supra* and accompanying text.

95. 573 F.2d 1082 (9th Cir. 1978). See note 60 *supra*.

96. *Union's Duty of Fair Representation*, *supra* note 10, at 227.

97. *Id.* Cf. *Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d at 1090 ("Acts of omission by union officials not intended to harm members may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be *arbitrary*.") (emphasis added).

98. *Union's Duty of Fair Representation*, *supra* note 10, at 225 (footnotes omitted).

99. *Irving speech*, *supra* note 18.

negligence Irving stated, "I think we should go slow here and wait for a really egregious case before going to complaint on [union negligence]." ¹⁰⁰ This statement indicates that findings of gross negligence by the Division of Advice could indeed be rare.

That the categories of conduct constituting a breach of the duty of fair representation—especially gross negligence—have been narrowly defined by the General Counsel is not surprising. Prior to Irving's memorandum, a record number of charges had been filed against unions with the NLRB. ¹⁰¹ Each of the charges, even if facially without merit, had to be investigated and analyzed by a field attorney. ¹⁰² The impact on the NLRB's resources is obvious. ¹⁰³ Consequently, the desire to reduce the number of non-meritorious claims ¹⁰⁴ was undoubtedly a prominent motivation behind the new standards. ¹⁰⁵

In addition, in so defining his standards, Irving rejected a stricter approach to union negligence in favor of a traditional, moderate, and more practical standard. ¹⁰⁶ By keeping the standard at a "moderate level," it remains acceptable to both labor and management. A union need not worry about filing an untimely grievance or any other errors in detailed contract administration, as long as the union was not improperly motivated, acting arbitrarily or acting in such an egregiously erroneous fashion as to constitute gross negligence. Employers benefit because they will not be liable for the back pay of a discharged employee who cannot prove more than mere negligence. ¹⁰⁷ However, any bene-

100. *Id.* at 230.

101. Most of these charges have been filed under NLRA § 8(b)(1), 29 U.S.C. § 158(b)(1) (1976), which provides in part: "It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 [Section 7 of the NLRA, *see* note 80 *supra*] of this title."

Since 1968, the number of charges filed with the Board alleging violations under § 8(b)(1) has increased by 170%. *Union's Duty of Fair Representation*, *supra* note 10, at 225. Irving estimated that over 800 unfair labor practice charges would be filed per week in 1980. *Id.*

102. *Union's Duty of Fair Representation*, *supra* note 10, at 225.

103. *Id.*

104. *Irving speech*, *supra* note 18, at 231.

105. *See* E. Miller, *supra* note 14, at 34-35 (where the former chairman of the NLRB notes that efficiency is necessary to the effective functioning of the office of the General Counsel).

106. *Irving speech*, *supra* note 18, at 229.

107. *See, e.g., Dente v. International Organization of Masters, Local 90*, 492 F.2d 10 (9th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974). For a discussion of this case, *see* notes 137-41 *infra* and accompanying text.

fits gained by this approach to fair representation may be outweighed by the problems it presents.

III. PROBLEMS PRESENTED BY THE GROSS NEGLIGENCE STANDARD

Irving's memorandum stands as the official statement from the Office of the General Counsel on union negligence. It exists for the use of the Regional Offices in the exercise of their duties, but it was written also to furnish guidance to "interested parties" and the public at large.¹⁰⁸ Unofficially, it is a message to unions, employers, employees, and the courts.

The courts share jurisdiction with the Board over unfair representation cases but are not bound by Board precedents or General Counsel pronouncements in this area.¹⁰⁹ If a court chooses to follow the guidelines on negligence set forth in the memorandum, it will be faced with the problem of making a fine distinction between "gross" and "mere" negligence—words with no generally accepted meaning.¹¹⁰ Further, it may be faced with a plaintiff who was discharged for a wrongful reason, and be unable to afford him or her relief because the union was merely negligent in processing the grievance.¹¹¹ On the other hand, if the memorandum's guidelines are not followed, the emergence of conflicting rules from the NLRB and the courts may cause more claimants to file charges and complaints.¹¹² There is an additional risk that more complaints may be filed with the courts than with the NLRB if claimants perceive a forum more hospitable to their negligence theory.¹¹³ In either case, more claimants will strain the resources of the NLRB and the courts.¹¹⁴

A. *Adherence to the Guidelines*

The initial problem posed by Irving's negligence formulation is the continued use of the distinction between gross and mere negligence without workable definitions. The prevailing view in tort law as to degrees of negligence is that there are no degrees of

108. *Union's Duty of Fair Representation*, *supra* note 10, at 227.

109. *See Vaca v. Sipes*, 386 U.S. at 180-83.

110. *See* notes 115-25 *infra* and accompanying text.

111. *See* notes 126-41 *infra* and accompanying text.

112. *See* notes 142-47 *infra* and accompanying text.

113. *See* notes 149-50 *infra* and accompanying text.

114. *See* notes 145 & 150 *infra* and accompanying text.

care as a matter of law but only as a matter of fact.¹¹⁵ In other words, gross negligence is ordinary negligence "with the addition of a vituperative epithet."¹¹⁶ Dean Prosser has suggested that the words gross negligence "signif[y] more than ordinary inadvertence or inattention, but less than conscious indifference to consequences"¹¹⁷ Prosser's observation parallels Irving's view of the standard for gross negligence articulated in *Robesky v. Qantas Empire Airways Ltd.*¹¹⁸ "acts of omission by union officials not intended to harm employees [but] so egregious, so far short of minimum standards of fairness to the employee, or so unrelated to legitimate union interests as to be unlawful."¹¹⁹

Yet, any similarity between Irving's capsulization of *Robesky* and Prosser's description of gross negligence does not simplify the use of the gross negligence—mere negligence distinction. For example, some commentators have observed that the use of a negligence theory in an unfair representation case reduces the issue to semantics.¹²⁰ Viewing the same set of facts, one court may term the conduct "negligent" and deny relief, while another may deem the actions to be "arbitrary" and permit the claimant to pursue the suit.¹²¹ This is not unexpected in light of the fact that the negligence—gross negligence distinction is not self-explanatory¹²² and that there is no sound analytical or precedential framework in which to place the concept of union negligence.¹²³ Other commentators have derided the use of negligence analysis in this context as a "kiss of death" for plaintiffs' claims,¹²⁴ since any discussion of negligence without the unusual circumstance of egregious action will preclude the claimant from any relief. This result is also not surprising, especially in light of such compelling policy considerations as the desirability of preserving the private

115. W. PROSSER, *THE LAW OF TORTS* 182 (4th ed. 1971). For an outline of the historical development of gross negligence, see Note, *An Analysis of Gross Negligence*, 37 MARQ. L. REV. 334, 335-38 (1953-54).

116. W. PROSSER, *supra* note 115, at 182 (quoting Baron Rolfe in *Wilson v. Brett*, 152 Eng. Rep. 737 (1843)).

117. *Id.* at 184.

118. 573 F.2d 1082 (9th Cir. 1978). See notes 95-97 *supra* and accompanying text.

119. *Union's Duty of Fair Representation*, *supra* note 10, at 227. The court in *Robesky* labeled this conduct arbitrary, not unlawful. See note 97 *supra*.

120. T. BOYCE, *supra* note 7, at 45.

121. See note 57 *supra* and accompanying text.

122. See note 115 *supra* and accompanying text.

123. See notes 115-17 *supra* and accompanying text.

124. Note, *Duty of Fair Representation—Imposing Liability for Arbitrary Union Negligence*, 7 MEM. ST. L. REV. 168, 175 (1976).

settlement process between the union and the employer and the need to give the union discretion in both bargaining and grievance activities.¹²⁵

The second problem posed by Irving's moderate approach to fair representation is that discharged employees with meritorious claims against their employers may be left remediless if their union has been merely negligent. This problem becomes especially significant when employment is viewed as more than merely "having a job":

Every man's employment is of utmost importance to him. It occupies his time, his talents, and his thoughts. It controls his economic destiny. It is the means by which he feeds his family and provides for their security. It bears upon his personal well-being, his mental and physical health.

In days gone by, a man's occupation literally gave him his name. Even today, continuous and secure employment contributes to a sense of identity for most people.

It is no solace to a man fired from his job that his union acted without spite, animosity, ill will, and hostility toward him. If he has been wrongfully discharged by his employer, in violation of his contract of employment, a collective bargaining agreement made for his benefit and protection, it is unthinkable that he should be denied relief—denied justice—by the courts.¹²⁶

The need to recognize the significant personal importance of employment is especially acute in a union shop for two reasons. First, employees have specific expectations with regard to contract administration because such expectations are rooted in the collective bargaining agreement.¹²⁷ For example, the employees know that the union and employer have agreed to a four-step grievance procedure and they expect that it will be correctly followed if a discharge occurs. Second, by negotiating for exclusive control over the grievance procedure, the union effectively preempts the employee from personally presenting his grievance to the employer.¹²⁸ As one observer concluded, "Having commandeered control over the employee's rights under the contract, the union should owe at least the duty to use reasonable care in enforcing

125. Compare T. BOYCE, *supra* note 7, at 42 with notes 42–47 *supra* and accompanying text.

126. *Lowe v. Hotel & Rest. Emp. Union Local 705*, 389 Mich. 123, 148, 205 N.W.2d 167, 178–79 (1973).

127. See notes 42–47 *supra* and accompanying text.

128. *Summers*, *supra* note 42, at 278.

those rights.”¹²⁹

Employees, then, legitimately expect the exercise of reasonable care in the handling of grievances, but they are occasionally disappointed. They are often further disappointed by courts which deny them a cause of action against their union or employer because of a rule of judicial convenience. For example, in *Coe v. United Rubber Workers*,¹³⁰ the union notified the employer of its desire to go to arbitration on behalf of a discharged employee.¹³¹ The notification was in writing, as required by the contract, but it referred to the employee's grievance by an incorrect number.¹³² After the time limit for filing a written grievance had passed, the union filed its demand for arbitration, this time with the proper number.¹³³ The employer denied the claim as untimely, and thus non-arbitrable.¹³⁴ Consequently, the employee sued his employer and union in federal court. Finding that the union's conduct could be classified as only “careless” and therefore not within the *Vaca* standard of “arbitrary, discriminatory, or in bad faith,”¹³⁵ the court granted the union's motion for summary judgment.¹³⁶ Thus, the employee's claim against his employer failed before it could be proved.

Another case, *Dente v. International Organization of Masters, Local 90*,¹³⁷ also involved a discharged employee as plaintiff, but one whose grievance had been arbitrated.¹³⁸ The arbitration resulted in reinstatement but without back pay for the ten-month lag between the filing of his grievance and its arbitration.¹³⁹ The union was held not to have breached its duty of fair representation by its delay because “[t]he worst that can be said of [its] conduct is that it was negligent, and this of course is not enough.”¹⁴⁰ Notably, even if the court decided that as a matter of law mere negligence could constitute a breach, the facts in *Dente* might have indicated that the union's conduct was reasonable since it was ne-

129. *Id.*

130. 571 F.2d 1349 (5th Cir. 1978).

131. *Id.* at 1350.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 1350-51.

136. *Id.* at 1350.

137. 492 F.2d 10 (9th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974).

138. *Id.* at 11.

139. *Id.*

140. *Id.* at 12.

gotiating a contract during that time period,¹⁴¹ and might not have had sufficient resources to arbitrate in a more timely fashion. Notwithstanding this circumstance, by not articulating its views of the facts and the propriety of the standard of liability, the court found an unwarranted easy answer to an otherwise complicated question of significant importance to the plaintiff-employee.

B. *Non-Adherence to the Guidelines*

Because there is minimal need to avoid conflicting rules of substantive law in fair representation cases, the NLRB and the courts have traditionally shared jurisdiction in this area of labor relations.¹⁴² Conflicting rules, however, have caused an increase in the number of charges filed with the Board against unions,¹⁴³ including charges "based on little more than the fact that the employee feels he/she [*sic*] has been treated 'unfairly'."¹⁴⁴ Since each charge must be investigated and analyzed by a field attorney of the Regional Office, the resulting strain on the financial resources of the NLRB has been considerable.¹⁴⁵

To reduce this growing burden, Irving hoped to persuade all "interested parties," including the courts, that his guidelines should be adopted because they represented the best possible solution in light of various policy considerations.¹⁴⁶ If certainty in the law could be established, Irving reasoned, potential claimants would be adequately warned that neither the Board nor the courts would entertain a claim of unfair representation on the theory of union negligence.¹⁴⁷

Because of the absence of workable definitions for the terms gross and mere negligence and a sound analytical framework in which to place them, courts may not adopt Irving's guidelines.¹⁴⁸ Instead, courts may continue to apply varying conceptions of a union's duty of fair representation which may be inconsistent with

141. *Id.* at 11.

142. *Vaca v. Sipes*, 386 U.S. at 180-81. The need to avoid conflicting rules of substantive law is minimal compared with the need for an alternate forum to protect the individual employee's interests from potential abuse. See notes 1-7 *supra* and accompanying text.

143. A direct consequence of confusion in the law is an increase in the number of unfair representation charges filed with the Regional Offices. *Irving speech, supra* note 18, at 228.

144. *Union's Duty of Fair Representation, supra* note 10, at 225.

145. *Id.*

146. See *id.* at 227-28; *Irving speech, supra* note 18, at 230.

147. *Irving speech, supra* note 18, at 231.

148. See notes 115-25 *supra* and accompanying text.

the General Counsel's position.¹⁴⁹ Consequently, potential claimants who see no chance of having a complaint issued by the Regional Office may turn to the courts for relief. While this would decrease the case load of the Board, it would swell the courts' dockets, and thus the "system" would suffer from the impact of conflicting rules of law.

"Gross negligence" and "mere negligence" are labels applied to union behavior without analysis.¹⁵⁰ Discharged employees with legitimate claims against their employers may be denied their day in court because their union has been merely negligent.¹⁵¹ Although the memorandum's guidelines do not facilitate a better understanding of the terms, an alternative view exists which provides a sound, equitable, and analytical framework within which to judge union negligence.

IV. AN ALTERNATIVE APPROACH

A more reasoned approach to the issue of negligent union activity as a breach of its duty of fair representation would be to eschew the gross negligence-mere negligence distinction which appears to be the source of most of the problems. A better course would be to divide union functions relating to the grievance process into procedural and substantive tasks.¹⁵² Procedural functions, for example, would include filing, numbering grievances, and notifying employees of any action taken if such notification is specifically required by the grievance procedure.¹⁵³ Under this alternative approach, if a union were negligent in performing any of these "procedural" tasks, it would be held to have breached its

149. Cf. notes 48-50 *supra* and accompanying text. Since lower courts did not uniformly adopt the arbitrary element of the *Vaca* standard, an element which was clearly expressed, they arguably will not follow guidelines which are relatively unclear.

150. See notes 115-25 *supra* and accompanying text.

151. See notes 126-41 *supra* and accompanying text.

152. This Note advocates and develops an alternative view which has been merely suggested by other commentators. See T. BOYCE, *supra* note 7, at 47-48; Note, *supra* note 122, at 178; 44 FORDHAM L. REV. 1062, 1067 (1976).

Other solutions have been proposed as well. One observer has advanced a test of intrinsic fairness for settling fair representation claims which would emphasize the processing of all meritorious grievances. Note, *supra* note 35, at 1225. Similarly, another observer has suggested a revitalization of the duty by the replacement of the bad faith standard with an objective review by the courts of any unsatisfied claims. Note, *Individual Actions for Breach of a Collective Bargaining Agreement: Judicial Alternatives to the Grievance Procedure*, 1978 WASH. U.L.Q. 765, 791.

153. T. BOYCE, *supra* note 7, at 48; Note, *supra* note 124, at 178; 44 FORDHAM L. REV. 1062, 1067 (1976).

duty of fair representation.¹⁵⁴ Notably, since these procedural tasks do not involve any discretionary decisionmaking, the union's effectiveness would be undisturbed.¹⁵⁵

On the other hand, discretionary or "substantive" decisions—such as whether to grieve on behalf of an employee or whether to pursue a grievance to arbitration—would not be subject to a due care requirement and accordingly the issue of union negligence would be irrelevant.¹⁵⁶ Instead, the *Vaca* standard of "arbitrary, discriminatory, or in bad faith" would be applied to determine if the union had breached its duty of fair representation.¹⁵⁷ This approach would preserve the union's effectiveness, insulating its discretionary decisions by resort to a more deferential standard of review.¹⁵⁸

The due care standard, as applied to a union's procedural non-discretionary functions, would not require specific or uniform conduct by a union representative in the performance of any particular function.¹⁵⁹ Grievance procedures vary,¹⁶⁰ personalities differ, and labor conditions fluctuate. From the flux, however, a reasonable person standard emerges as the solution: a union representative must act as a reasonable person would under the circumstances.¹⁶¹ Significantly, the reasonable person standard should not be construed as a reasonable expert standard, even though a steward *might* gain a considerable amount of experience.¹⁶² The steward is not usually an expert claims adjuster with special skill; rather, he or she is ordinarily elected by co-workers

154. T. BOYCE, *supra* note 7, at 48; Note, *supra* note 124, at 178; 44 FORDHAM L. REV. 1062, 1067 (1976).

155. T. BOYCE, *supra* note 7, at 48; 44 FORDHAM L. REV. 1062, 1067 (1976). See notes 42-47 *supra* and accompanying text.

156. See T. BOYCE, *supra* note 7, at 47; 44 FORDHAM L. REV. 1062, 1067 (1976).

157. T. BOYCE, *supra* note 7, at 47.

158. *Id.*

159. As Prosser noted: "The utmost that can be done is to devise something in the nature of a formula, the application of which in each particular case must be left to the jury, or to the court." W. PROSSER, *supra* note 115, at 150.

160. Some 99% of all sample contracts in a recent survey included grievance procedures. BASIC PATTERNS IN UNION CONTRACTS (BNA) 11 (9th ed. 1979). While the number of steps in a grievance procedure varies between one and six, the three-step procedure is most common. [1978] 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) 51:61. As a first step, most grievance procedures call for a discussion between the employee or employees concerned and the immediate supervisor; any subsequent steps are designed to provide for appeal to higher levels of management. *Id.*

161. See W. PROSSER, *supra* note 115, at 151.

162. This is a policy decision rather than a decision based on substantive tort law. See text accompanying notes 163-65 *infra*. See generally, W. PROSSER, *supra* note 115, at 161-66.

because of popularity, not because of skill in contract administration.¹⁶³ Furthermore, leaving the reasonable person standard intact would partially shield union coffers from continual claims against them¹⁶⁴ and would allow the union to recruit stewards more easily, *i.e.*, without requiring extensive administrative skill or training.¹⁶⁵

The wisdom of safeguarding the grievance procedure *per se* by applying a due care standard to a union's procedural functions is supported by two separate concepts—the general nature of the collective bargaining process and an area of administrative law undergoing a similar development, the nondelegation doctrine.¹⁶⁶ Both emphasize careful safeguarding of “procedure” to ensure a sound substantive result.

The National Labor Relations Act¹⁶⁷ provides the “bare legal framework” for collective bargaining between employers and unions.¹⁶⁸ The framework consists primarily of two duties—the duty of an employer not to interfere with his or her employees' choice of self-organization¹⁶⁹ and the duty to recognize and bargain with a representative selected by the majority of employees.¹⁷⁰ Compliance with these duties allows the parties to exercise their autonomy¹⁷¹ in the negotiation of “rates of pay, wages, hours of employment, or other conditions of employment”¹⁷² without governmental supervision.¹⁷³ Autonomy in the bargaining process is not only desirable, it is necessary:

The whole matter of bargaining and administering a collective agreement is hard to cover in advance by rules of law. In our system the parties themselves set the pace. The legislatures, ad-

163. Vladeck, *supra* note 74, at 45.

164. A “reasonable expert standard” would probably be difficult to apply since not all experienced or inexperienced stewards possess the special skill required of an expert. *Id.* at 45. One commentator observed, “The level of literacy of the shop steward is often not adequate for making a sharply defined claim.” *Id.* Under these circumstances, more claims against the union would probably be settled in the employees' favor. Imposing a reasonable standard of care would avoid this potential problem.

165. *Union's Duty of Fair Representation*, *supra* note 10, at 225.

166. The doctrine dictates that a legislature cannot delegate its lawmaking power to another body. *See* notes 181–86 *infra* and accompanying text.

167. 29 U.S.C. §§ 151–169 (1976).

168. Shulman, *supra* note 29, at 1000.

169. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976).

170. *Id.* § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976).

171. Shulman, *supra* note 29, at 1000.

172. NLRA § 9(a), 29 U.S.C. § 159(a) (1976).

173. S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935), *reprinted in* STATUTORY HISTORY OF THE UNITED STATES LABOR ORGANIZATION 280, 293 (R. Koretz ed. 1970).

ministrative boards and the courts follow the lead, interfering to set the rules only after the parties have become obstreperous. This is essentially a *laissez faire* philosophy, where the parties are expected to create the pattern for themselves.¹⁷⁴

Thus, the foundation of our national labor policy requires minimal procedural compliance, founded on the belief that the parties will consequently produce a contract.

Amendments to the NLRA have built upon its foundation but have not changed its basic framework. For example, section 8(d)¹⁷⁵ requires good faith bargaining with respect to certain mandatory bargaining subjects—"wages, hours, and other terms and conditions of employment."¹⁷⁶ Nonetheless, the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession."¹⁷⁷ In *NLRB v. Insurance Agents' International Union*,¹⁷⁸ the Supreme Court agreed: "But apart from [the duty to bargain in good faith], Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."¹⁷⁹

Thus, the general nature of collective bargaining allows both the union and the employer substantive leeway in producing a collective bargaining agreement, provided that the parties have complied with the procedural duty to bargain in good faith about mandatory matters. Similarly, the alternative approach to union negligence as a breach of the duty of fair representation would allow the union leeway in certain substantive discretionary matters¹⁸⁰ if procedural functions related to grievance processing have been reasonably performed.

The doctrine of nondelegation, as modified by Professor Davis, also provides analogous support to this alternative approach. Originally, the nondelegation doctrine was based on the belief that a legislature could not delegate its lawmaking power to an

174. Gregory, *The Collective Bargaining Agreement: Its Nature and Scope*, 1949 WASH. U.L.Q. 3, 22.

175. NLRA § 8(d), 29 U.S.C. § 158(d) (1976).

176. *Id.* "Wages", for example, includes pensions, fringe benefits, and stock purchases at less than market price. A. COX, D. BOK & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 477 (8th ed. 1977). "Conditions of employment" may include subcontracting, shift schedules, and technological change. *Id.* Other mandatory subjects include work rules and matters of union status. *Id.*

177. NLRA § 8(d), 29 U.S.C. § 158(d) (1976).

178. 361 U.S. 477 (1960).

179. *Id.* at 488.

180. See text accompanying note 156 *supra*.

administrative agency.¹⁸¹ Alternatively, the doctrine was said to permit delegation only if meaningful statutory standards existed to guide the exercise of the delegated power.¹⁸² However, since the Supreme Court has upheld delegation without meaningful statutory standards,¹⁸³ the doctrine, in Davis' opinion, has failed to provide adequate standards by which legislative delegation should be reviewed.¹⁸⁴ Professor Davis maintains that the doctrine's failure is easily explained: "The kind of government we have compels delegation. The problems of policy, even of major policy, are so extensive that the 535 people in Congress could not conceivably decide them or even write meaningful standards to guide their determination."¹⁸⁵

Nonetheless, the basic purpose behind the doctrine remains compelling—administrative agencies should be prevented from exercising "unguided and uncontrolled discretion to govern as they see fit."¹⁸⁶ Accordingly, Professor Davis has suggested a new nondelegation doctrine which would emphasize procedural safeguards to "protect private parties against injustice on account of unnecessary and uncontrolled discretionary power."¹⁸⁷ To this end, courts should examine both statutory standards and procedural safeguards to determine if there is adequate protection against the exercise of arbitrary power.¹⁸⁸ For example, if an administrator, in exercising discretionary power without hearings, uses a system of "open findings, open reasons, and open precedents," the risk of an arbitrary result is low.¹⁸⁹ A decision made

181. 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 150 (2d ed. 1978). See, e.g., *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932) ("That the legislative power of Congress cannot be delegated is, of course, clear.").

182. 1 K. DAVIS, *supra* note 181, at 151.

183. The Court has approved legislation with remarkably vague standards for agency action. Among these standards, the Court has affirmed legislation which allowed agency action based on: its "own judgment," *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96 (1953); "public convenience, interest, or necessity," *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933); "just and reasonable" actions, *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 435 n.3 (1930); "public interest," *Avent v. United States*, 266 U.S. 127, 130 (1924).

184. 1 K. DAVIS, *supra* note 181, at 151.

185. *Id.* at 150, 152.

186. *Id.* at 206.

187. *Id.* at 208. Another observer supports Davis' conclusion: "The contemporary approach is one of not invalidating even the broadest statutory delegations of power, but of assuring that they are accompanied by adequate controls on subsequent administrative behavior." Leventhal, *Principled Fairness and Regulatory Urgency*, 25 CASE W. RES. L. REV. 66, 70 (1974).

188. 1 K. DAVIS, *supra* note 181, at 209.

189. *Id.*

under this procedure should not receive the intense judicial scrutiny which would be necessary if the administrator had not stated reasons or used precedents.¹⁹⁰

Because the new nondelegation doctrine recognizes that procedural safeguards contribute to the prevention of arbitrary administrative action, it corroborates the emphasis of the alternative approach on the grievance procedure in order to prevent arbitrary and negligent union conduct. While Davis' approach requires "open findings, open reasons, and open precedents," the alternative view requires a union to perform its procedural grievance-related functions with reasonable care. In both instances, the result of the process merits relatively deferential judicial review because uncontrolled discretion has been prevented. Furthermore, discretion has been controlled without undermining the union's effectiveness as exclusive representative. In fact, if a union's procedural functions have been reasonably performed, it will be allowed to exercise its discretion more freely in substantive matters.¹⁹¹

The alternative approach to union negligence also avoids the problems which the Irving guidelines perpetuate.¹⁹² By substituting a clear and workable definition of union negligence for "gross negligence" and "mere negligence," the courts can avoid semantic issues which often unfairly redound to the union's favor.¹⁹³ Consequently, the significant personal interest in employment is recognized and safeguarded if a union acts negligently while performing one of its procedural functions. Concomitantly, the union's ability to make discretionary decisions in matters of contract administration is protected and its position as exclusive representative is secured.¹⁹⁴

If adopted by both the NLRB and the courts, the alternative approach to union negligence may also lead to a reduction in the number of unfair representation charges and complaints filed with the Regional Offices and the courts respectively. Because it would add certainty to the law, potential claimants and their attorneys would be on notice that a union is liable only for its negligence while performing ministerial tasks. Furthermore, discharged employees would not be forced to bypass the NLRB procedures to

190. *Id.* at 210.

191. See text accompanying notes 154-56 *supra*.

192. See text accompanying notes 108-51 *supra*.

193. See text accompanying notes 120-25 *supra*.

194. See notes 156-58 *supra* and accompanying text.

find a more favorable and expensive forum for the adjudication of their claims.¹⁹⁵ The limited resources of the Board would be well spent once its procedures were engaged, since claimants would likely bring meritorious charges in view of predictable and reliable standards.

V. CONCLUSION

The alternative approach to union negligence is an optimum means of accommodating both the union's interest in exercising maximum discretion in its contract administration activities and the employee's interest in being treated fairly in accord with his or her expectations arising from the bargaining agreement. On the one hand—where a substantive function has been negligently performed—the union will be favored, and on the other hand—in the case of the union's procedural negligence—the balance will tip in favor of the employee.

This is more than a Solomonic split of the burden of risk between employee and union. Labor relations and administrative law doctrine have given credence to the notion that by preserving procedural integrity, substantive rights are also preserved. Thus, under the alternative approach the employee gains more protection without significant loss of union effectiveness. Moreover, the alternative approach appears to avoid the semantic analysis and unfair results produced by the Irving approach. Consequently, because the alternative approach seems to enhance all interests relevant to the duty of fair representation by presenting a clear, reliable framework, both the NLRB and the courts should consider adopting it as the rule of decision.

RITA A. BARTNIK

195. An employee claiming unfair representation may file a charge with the Regional Office within six months after the occurrence of the alleged unfair labor practice. NLRA § 10(b), 29 U.S.C. § 160(b) (1976). If the employee files a charge within this time, the Regional Office will investigate and prosecute if necessary, thus saving the individual claimant considerable expense.

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