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A Fair Process Model for the Union's Fair Representation Duty

Lea S. VanderVelde

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A Fair Process Model for the Union's Fair Representation Duty

Lea S. VanderVelde*

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INTRODUCTION

Conflicts of interest between the majority of employees and individuals are inevitable when a union engages in collective bargaining.¹ In negotiating and enforcing a contract, a union is entitled to require some individual sacrifices for the greater good of the majority.² The union’s discretion to com-

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¹. The union, as exclusive bargaining agent for the unit of employees it represents, negotiates and enforces contracts with the unit’s employer on behalf of the individual members. Because the exclusivity of the union’s representational status causes the problem of conflict of employee interests, one commentator has recommended scuttling the exclusivity principle. See Schatzki, Majority Rule, Exclusive Representation and the Interests of Individual Workers: Should Exclusivity Be Abolished?, 123 U. Pa. L. Rev. 897 (1975).

². Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975); Vaca v. Sipes, 386 U.S. 171, 182 (1967). Federal labor policy acknowledges that some individuals will be worse off under a system of collective bargaining and that their interests may be sacrificed for group gain. J.L. Case Co. v. NLRB, 321 U.S. 332, 339 (1944).
promise individual interests is not without limit, however. The individual employee has some recourse when he or she can prove that the union has breached its duty of fair representation. Thus, the standard of union conduct reflected in the union's duty of fair representation is a primary mechanism for balancing conflicting group and individual interests.

The conflict between majority and individual interests is particularly acute in the administration and processing of individual grievances by unions against employers. Under current law, the union controls the grievance process and occupies a pivotal position in deciding whether to enforce an employee's claim. Once an employee has submitted a grievance to the union, the union chooses whether to advance the grievance through the various steps of the process or to reject and abandon it. If the union abandons the grievance, arbitration is foreclosed to the employee. To enforce the contract claim, the employee must sue the employer in court, but the employee can obtain judicial review of the merits of the claim only if he or she proves that the union breached its duty of fair representation in responding to the grievance.

Selecting a reliable standard for determining when a union has breached its duty to employee-grievants is no easy task. Whatever union conduct is deemed to breach the duty will have repercussions, not only on the balance of power between individuals and majorities within the union, but also on the collective strength a union can muster in dealing with the employer. If the standard of conduct is set too low, rights of individuals and minority groups may be abused by the union acting under the influence of the majority. If the standard of conduct is set too high, special interest minorities may factionalize the union, dissipate its collective strength, and impair its ability to act collectively for the benefit of the majority. Since the duty of fair representation will be enforced by the courts,

4. A unionized employee may not bring suit against the employer until he or she has first exhausted existing grievance/arbitration procedures. Republic Steel v. Maddox, 379 U.S. 650, 652 (1965). Typically, the collective bargaining agreement specifies that the grievance/arbitration procedure is controlled by the union rather than the employee-grievant.
5. Those actions in which an employee attempts to sue his or her employer on an underlying grievance, but must first prove that the union breached its duty of fair representation, have been referred to as "hybrid § 301 breach-of-duty actions." See, e.g., United Parcel Serv. v. Mitchell, 451 U.S. 56, 60 n.2 (1981).
6. Vaca v. Sipes, 386 U.S. 171, 186 (1967). The employee may bring his suit in federal court under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1976). These suits are commonly referred to as "derivative" § 301 ac-
the standard must also take into account the appropriate degree of judicial deference to union decisionmaking.\textsuperscript{7}

Although it has been a focal point of considerable litigation\textsuperscript{8} and scholarship,\textsuperscript{9} there is still no consensus regarding the content of the union's duty of fair representation as a threshold issue in breach of contract suits brought by employees against their employers. The few major Supreme Court decisions on the subject speak in broad language that does not further the development of predictive tests.\textsuperscript{10} The many decisions

tions. These suits are termed “derivative” actions because the typical § 301 action to enforce the collective bargaining agreement is brought by either the union or the employer.

The National Labor Relations Board provides an alternative means of enforcing the duty of fair representation when the union's conduct constitutes an unfair labor practice under the NLRA, 29 U.S.C. § 159(2) (1976). For a full discussion of the Board's role regarding the duty of fair representation, see Fanning, The Duty of Fair Representation, 19 B.C.L Rev. 813 (1978). Because an NLRB determination which is adverse to the employee does not foreclose the employee from filing suit under § 301, there has been some divergence in the duty of fair representation concept between § 301 actions brought in court and complaints alleging union unfair labor practices brought before the NLRB. A recent opinion of the NLRB's general counsel indicates current Board preference to restrict the scope of the duty of fair representation in order to restrict the case load of the NLRB. See Memorandum 79-55 from John S. Irving, General Counsel for the NLRB to All Regional Directors, Officers-in-Charge, and Resident Officers.

This Article refers throughout to the problems confronting the individual employee who has a grievance. Many of the comments apply equally to the case of multiple employees who file a class grievance when the number or character of the group makes them a political minority within the union.

\textsuperscript{7} See infra text accompanying notes 40-42.

\textsuperscript{8} A LEXIS search of cases citing \textit{Vaca v. Sipes} turns up approximately 1225 listings. Of the numerous suits filed by employees against their employers, most involve grievances abandoned by unions prior to arbitration.

\textsuperscript{9} Many of the competing policy arguments involved in actions under the Labor Management Relations Act § 301, 29 U.S.C. § 185(a) (1976), were identified and discussed as early as the 1950's by Professors Cox, Summers, Blumrosen, and others in the context of a slightly different debate. See Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 Mich. L. Rev. 1435 (1963) [hereinafter cited as Blumrosen, The Worker]; Blumrosen, Legal Protection for Critical Job Interests: Union-Management Authority v. Employee Autonomy, 13 Rutgers L. Rev. 631 (1959); Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609 (1959); Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958); Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956); Summers, Individual Rights in Collective Agreements and Arbitration, 37 N.Y.U. L. Rev. 362 (1962). At that time, the debate focused on the question of whether the employee or the union controls the processing of a grievance. When the Supreme Court answered the question in \textit{Vaca v. Sipes}, in 1967, by holding that the union controlled the grievance procedure, but that a trial court could consider the merits of the employee's breach of contract claim when the union is found to have breached its duty of fair representation, the debate shifted to what union actions breach the duty of fair representation in grievance processing. See articles cited infra notes 61, 65.

\textsuperscript{10} For discussion of the Supreme Court's development of the duty of fair

11. The lengthy litigation history of Ruzicka v. General Motors, 336 F. Supp. 824 (E.D. Mich. 1972), 85 L.R.R.M. (BNA) 2419 (E.D. Mich. 1973), 86 L.R.R.M. (BNA) 2030 (E.D. Mich. 1973), rev'd, 523 F.2d 306 (6th Cir. 1975), reh'g denied, 528 F.2d 912 (6th Cir. 1975), 96 L.R.R.M. (BNA) 2822 (E.D. Mich. 1981), vacated, 649 F.2d 1207 (6th Cir. 1981), 519 F. Supp. 893 (E.D. Mich. 1981), illustrates the idiosyncratic nature of many fair representation cases. Ruzicka, a union activist employed by General Motors for nearly 11 years, was discharged by the company in March 1970 for being intoxicated on the job and using abusive language toward his supervisor. He filed a grievance claiming that the discharge was disproportionate to the offense. The union lost in the first two steps of the grievance procedure. In order to proceed with the grievance, the contract required that the company and the union exchange "statements of unjustified grievance." 86 L.R.R.M. (BNA) at 2032. The union neglected to file a timely statement, even though it received two extensions for the exchange date. Ruzicka claimed that the shop committeemen responsible for processing his grievance consciously failed to file the statement. After 27 months of unsuccessful efforts to pursue the matter within the union and a refusal from the NLRB to issue a complaint against the union for breach of the duty of fair representation, Ruzicka filed suit in federal district court against the company and the union. The district court dismissed the complaint. Although the court found that there was evidence of hostility between the committeemen and Ruzicka, the court held that mere hostility, without a showing that the "hostility tainted the official's conduct," was insufficient to establish a breach of the duty of fair representation. 86 L.R.R.M. (BNA) at 2032.

In Ruzicka I, the Sixth Circuit reversed, finding that the union "inexplicably neglected" to file the statement, and that "such negligent handling of the grievance, unrelated as it was to the merits of [the] case, amounts to unfair representation. It is a clear example of arbitrary and perfunctory handling of a grievance." 523 F.2d at 310. The Court of Appeals denied the defendants' petition for a rehearing en banc, stating that its "opinion is [sic] this action speaks to a narrow range of cases in which unexplained union inaction, amounting to arbitrary treatment, has barred an employee from access to an established union-management apparatus for resolving grievances." 528 F.2d at 913.

On remand, the district court ordered that the grievance proceed to arbitration on the merits, but retained jurisdiction until the matter was settled. On
the confusion, the duty of fair representation, which initially required only that unions refrain from certain types of bad faith conduct, has been expanded so that it now requires unions to engage in some kind of affirmative conduct. Exactly what affirmative conduct is required, however, has not been clearly defined. Thus, the courts have applied negative sanctions to union conduct which deviates from an, as yet, unspecified norm. As a result, unions wander through a minefield of confusing and sometimes inconsistent court holdings. If judicial sanctions are intended to improve union representation, court decisions cannot be deemed successful when they fail to provide consistent and comprehensible reasons for the sanctions imposed.

Nor has the scholarly debate to date provided a solution. Despite the extensive scholarship on the issue, there have been relatively few attempts by scholars to provide an affirmative formulation of what a union must do to discharge its duty to a grievant. Although scholars generally recognize the importance of balancing competing individual and collective inter-

November 11, 1976, the arbitrator decided the grievance in favor of Ruzicka and awarded him reinstatement with seniority and back pay. See 96 L.R.R.M. (BNA) at 2830. Thereafter Ruzicka moved for summary judgment against the defendants. The district court denied the motion, in order to allow the defendants to present evidence on the issue of the duty of fair representation. The district court then heard further testimony from the union. The union argued that even if the committeemen had failed to file the statement on time, it was the past practice of both the union and the company to relax filing deadlines. The district court rejected the union's argument, stating that evidence of the past practice was contained on the record before the Court of Appeals, and that court had "implicitly" rejected the defense when it found the union had breached its duty of fair representation. See Ruzicka I, 649 F.2d at 1210-11 (explaining history of case to that time).

In Ruzicka II, the Sixth Circuit again reversed the district court. 649 F.2d at 1211. The court stated that if the union had in fact relied on past practice when it failed to file a timely statement, its failure would no longer be considered "unexplained" and therefore, the union could not be deemed to have breached its duty of fair representation. Id. The court remanded to the district court to take further evidence on the shop practice with regard to grievance filing. Thirteen years after Ruzicka was discharged, and after two appeals to the circuit court and arbitration, litigation is still proceeding.

12. Compare Ruzicka v. General Motors Corp., 649 F.2d 1207 (6th Cir. 1981) with Hoffman v. Lonza, 658 F.2d 519 (7th Cir. 1981). For discussion of these cases, see infra notes 108-17 and accompanying text. Fear of suit and uncertainty of result may lead union officials to arbitrate some cases unnecessarily and to abandon some cases in the mistaken belief that they were authorized to abandon them.

ests, there has been little discussion of how a union should balance these interests in the wide variety of circumstances that regularly occur in grievance processing. No single formula has emerged capable of prescribing how a union should balance interests in such recurring situations as discharges, plant closings, or seniority disputes. To date, the predominant approach has been to view breach of the duty of fair representation as a tort. Although this conceptualization has continuing validity in certain circumstances, it is less appropriate when a grievant's basic claim is against the employer and the union has precluded the employee from enforcing that claim in arbitration. This Article suggests that, by reconceptualizing the duty of fair representation on the model of due process required of an administrative agency, the appropriate issues can be identified, a more definite code of union conduct can be prescribed, and the limits of judicial review can be defined with greater clarity.

The purpose of this Article is to construct a unified theory and propose a standard for determining when union conduct, in failing to advance an employee’s grievance, amounts to a breach of the union’s duty of fair representation and, consequently, when an employee is entitled to have the merits of the grievance heard by a court. Part I examines the complexity of the problem by identifying the interests of the various parties in the grievance/arbitration process, examining the purpose of the duty of fair representation, and reviewing existing proposals for standards governing the duty of fair representation. Part II proposes a “fair process model” of union behavior in prearbitration grievance processing. Part III explains the model in greater detail and examines its implications in specific situations. These situations are divided into three categories: 1) union fact finding; 2) union contract interpretation; and 3) nonadjudicatory reasons for terminating grievances. Part IV evaluates the fair process model in light of the objectives of federal labor policy.

14. One instance in which the conceptualization of the duty of fair representation as a tort has continuing usefulness is when a union is implicated along with the employer in causing the alleged breach of contract. In addition, when a union exhibits hostility or discriminatory intent in its representation of the grievant, the employee may have a cause of action against the union, irrespective of any underlying contract claim against the employer.

15. Readers familiar with the literature may choose to proceed directly to Part II.
I. THE NEED FOR A BETTER LEGAL STANDARD OF UNION CONDUCT IN PROCESSING GRIEVANCES

A. THE VARIOUS INTERESTS IN THE GRIEVANCE/ARBITRATION PROCESS

Whatever standard of conduct is chosen for the duty of fair representation in grievance processing, that standard must take into account the divergent interests of the respective parties in the grievance/arbitration process. The standard will primarily affect the union-employee relationship; since the employer is not a party to the duty of fair representation, the employer's interest in the standard is less direct than that of either the union or the employee. To the extent possible,

16. All three parties, the employer, the grievant, and the union, have an interest in the ongoing enterprise and hence, an interest in reaching a decision expeditiously and with a certain degree of finality. In particular cases, however, any one of the parties may be willing to jeopardize the expediency and finality of the process by holding out for a more favorable decision or greater settlement leverage over the others.

Professor Archibald Cox identified five categories of interests potentially affected by a grievance outcome:

1. the interests of the union as an organization in recognition, the union shop, the checkoff, consultation concerning changes in working conditions, and any form of discrimination against union stewards or members;
2. the unassorted interests of employees as a group, such as are involved in preserving the work "belonging to" the bargaining unit or some segment thereof;
3. the future interests affected by the law-making aspects of grievance adjustment;
4. the present interests of employees who may be in competition with the immediate grievant or who, through the force of comparison, may gain or lose from the adjustment of the grievance;
5. the interests of the individual who claims that he has not been paid correctly or that he has been damaged by the employer's failure to perform his contract obligations. Manifestly each worker has a strong and intensely personal interest in his compensation. He did the work. The money will be his, if recovered. His right is vested in the sense that the events giving rise to the employer's obligations are past and the claim is accrued.

Cox, Rights Under a Labor Agreement, 69 HARV. L. REV. 601, 615 (1956). Professor Cox was addressing what was, at that time, the unsettled issue of whether the union or the employee should control grievance processing. Now that the Supreme Court has determined that the union can control grievance processing, the issue has shifted to how the union should exercise that control. The new formulation of the issue requires consideration of a new category of interests, those of the respective parties in the fairness and integrity of the grievance procedure itself.

17. The duty of fair representation is primarily of interest to the union, which owes the obligation, and to the employees, to whom the obligation is owed. The employer's interest in any grievance is to protect the management decision which gave rise to the grievance. "Since grievances are almost always complaints against action taken or refused by the employer, a stalemate means that the employer's view prevails." Shulman, Reason, Contract, and Law in Labor Relations, 68 HARV. L. REV. 999, 1007 (1955). In seeking to have its policy
therefore, the standard chosen should be in keeping with the union's role in the collective bargaining relationship and should attempt to accommodate legitimate employee and union interests in specific grievances and in the arbitration process generally.

The employee-grievant has two separable interests in any grievance: an interest in the result and an interest in the fairness of the process that determines the result. In regard to the former, the employee-grievant seeks to gain whatever benefits flow from reversing the employer's unilateral decision. But prevail, the employer seeks to protect that interest. As the grievance claim progresses up the grievance ladder and is in turn appealed to higher and higher echelons of management, management's interest is reexamined to determine whether it is worth protecting. Feller, A General Theory of the Collective Bargaining Agreement, 61 CALIF. L. REV. 663, 766-68 (1973). This process gives the employer the opportunity to exercise a check on lower level managers and to cure erroneous policy decisions of lower level managers. Higher level managers may, for personnel reasons, affirm existing decisions in order to back up managers on the frontline of the decisionmaking process. Cf. Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 SYRACUSE L. REV. 635, 661 (1971) (discussing appellate courts' overruling of trial court decisions).

The employer also has an interest in the grievance process itself. As a substitute for strikes and work stoppages, the advantage of the grievance/arbitration process is obvious. In addition, the grievance process provides the employer with a mechanism for channelling complaints. See Feller, supra, at 768. Feller argues that even without the federal scheme of collective bargaining and the federal preference for the grievance/arbitration procedure, employers would find it in their own interest to institute such a procedure. Grievances are likely to arise in any complex organization, and employers may prefer in-house arbitration, a less costly, lower risk forum in which they are likely to exercise greater control over the result, to alternative channels such as court suits or strikes.

Finally, the employer has an interest in insulating itself from liability for breach of contract claims made by any of its employees. When the employer has breached the contract as alleged in the grievance, the employer's interest in finality need not be of a sufficient degree to be considered and protected in all cases. The duty of fair representation was not created for the benefit of the employer, and the union is not the employer's insurer. Even if the bar of finality is lifted on a grievance matter, the employer can defend its actions on the basis that it did not breach the contract. Cf. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570 (1976) (rejecting the argument that an employer can be protected from relitigation by a contract provision providing that arbitration decisions are final and binding). But see Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983) (in holding that a union could be held liable for back pay damages resulting from failure to arbitrate, the Supreme Court indicated that an employer may rely on the union's decision not to pursue an employee's grievance).

18. This goal requires the employer's involvement in any forum where the employee seeks to reverse the management decision. This was one of the major policies influencing the Supreme Court to decide that employees need not exhaust intra-union appeals before bringing suit under Labor Management Relations Act § 301, 29 U.S.C. § 185(a) (1976). Clayton v. International Union, United Automobile, Aerospace & Agricultural Implement Workers, 451 U.S. 679 (1981). See also Fox & Sonenthal, Section 301 and Exhaustion of Intra-Union Appeals: A Misbegotten Marriage, 128 U. PA. L. REV. 989 (1980).
even if the employee reasonably accepts that he or she cannot succeed on the merits of every grievance, the employee still has a distinct interest in the fairness of the grievance process itself, an interest which will be served if the process is capable of producing a fair decision on the merits. Since, under most collective bargaining agreements, the grievant is precluded from participating directly in the grievance/arbitration process, the grievant's attention focuses on the quality of the union's representation. Although an unfavorable disposition of the grievance may not leave the employee happy, the employee may be willing to accept the result if assured that the union objectively considered the grievance.19

The union's motives and interests in the grievance/arbitration process are more complex. On the one hand, the union's interests are the amalgam of all the separate interests of the employees it represents. On the other hand, the union is an institutional entity interested in its own perpetuation. For the most part, these interests correlate well.20 Since the union is established to advance employee interests, one would expect the union to want to secure any additional benefits it can for any employee as long as doing so does not interfere with the interests of other employees.21 As the exclusive


20. By assuring the welfare of the bargaining unit, the union insures its own stability. On occasion the interests of the union as an institution and the interests of the employees it represents can diverge, however. The union may be tempted to pursue a goal which benefits itself as an institution but does not further its ability to represent its bargaining unit. For example, the union may seek to develop a "sweetheart relationship" with the employer. See, e.g., Hughes v. International Bhd. of Teamsters, Local 683, 554 F.2d 365 (9th Cir. 1977). Whether the union should be able to advance institutional interests which are at odds with the interests of the members of its bargaining unit is a question which is beyond the scope of this Article. For a discussion of the view that the union should only be allowed to advance interests of its bargaining unit, see Note, The Duty of Fair Representation and Exclusive Representation in Grievance Administration: The Duty of Fair Representation, 27 SYRACUSE L. REV. 1199 (1976).

An alternative model of union behavior would view unions as public spirited, and as seeking the optimal plant policy. Although courts sometimes ascribe such lofty ideals to unions, see, e.g., United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), there is little evidence that union decisions made by local union officials in grievance processing conform to that model of foresight and long-range goals. For a discussion of an analogous dichotomy of models of local government behavior, see Michelman, Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy, 53 IND. L.J. 145 (1977-78). For the purposes of this Article, it is assumed that the dominant motive of the union is to maximize the interests of the employees in its bargaining unit.

bargaining agent for all the employees in the bargaining unit, however, the union must represent the interests of any other employees which might conflict with those of the grievant. Since other affected employees are not ordinarily permitted to intervene in a grievance, their interests must be taken into account by the union. Thus, the union is concerned with resolving conflicts arising among employees over grievance issues.22

As an institutional entity concerned with retaining its status as exclusive bargaining agent, the union has an interest in maintaining credibility both with its members and with the employer. In order to maintain its position, it must assure the majority of union members a minimum level of satisfaction. Since the union negotiated the contract under which the grievance arises, its interest in contract enforcement is a continuation of its interest in contract negotiation.23 The union must show its members that it can deliver what was promised. How the union resolves a grievance issue may also create a precedent that will affect future contract negotiations. As negotiator of future contracts, the union may want to leave an issue unsettled, either to preserve room for negotiation on the issue itself or to retain the issue as a bargaining chip to be traded for employer concessions in other areas of interest to its members.24 For the union to deal effectively with the employer and to maintain its credibility in future negotiations, it must be able to demonstrate discipline and unity by keeping the rank and file in line. A separate institutional interest of the union is a desire to avoid whatever liability can attach if the union is found to have breached its duty of fair representation.25

How the union perceives its multiple interests will determine whether the union pursues a particular grievance on be-

22. For a discussion of the union's proper role in balancing the competing interests of employees in the bargaining unit, see infra notes 130-45 and accompanying text.
24. Many grievance issues, such as discharges, have no effect on future negotiations. Promotion cases rarely change contract language, and most seniority cases have no effect on future negotiations. Establishing precedent can be important, but it is seldom involved in these types of cases. For a discussion of the rationales justifying union discretion in making judgments that affect negotiation, see infra notes 152-56 and accompanying text.
25. As this Article was going to press, the Supreme Court decided Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983), which may alter the union's incentives in favor of processing grievances to arbitration. In Bowen, the Court held that, in a wrongful discharge case, a union may be held liable for an entire back pay award from the time the grievance would have been arbitrated until the time of judgment. The magnitude of this new potential liability may induce unions to arbitrate all discharge cases.
half of the employee-grievant or chooses to dismiss the grievance and accept, at least tacitly, the employer's position, thus shielding the employer from further challenge by the employee-grievant.\textsuperscript{26} Ideally, the standard chosen for the duty of fair representation should attempt to balance the legitimate interests of the grievant against the legitimate interests of the union. In many situations, when the interest of the grievant in winning the grievance directly conflicts with interests of other employees, the individual's interest should give way to the greater interest of the majority of employees. Even when the individual grievant's interest in the result must yield, however, the majority has no legitimate interest in denying the grievant fair process. In fact, the majority shares the grievant's interest in the integrity of the grievance process. If the union's decisionmaking process is perceived as fair, greater employee satisfaction and, in turn, greater industrial peace will be promoted.

B. THE SOURCE AND PURPOSE OF THE DUTY OF FAIR REPRESENTATION

1. \textit{In General}

The duty of fair representation is a judicially created concept that extends to all instances in which the union represents employees.\textsuperscript{27} Because the content given to the duty depends on what union behavior is considered desirable in the particular context and how the union's actions affect employees' interests, the union's duty of fair representation in contract negotiation differs from the union's duty of fair representation in enforcing the contract through grievance/arbitration procedures.\textsuperscript{28}

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} Basically, the union represents employees in two different, but related, contexts—contract negotiation and contract enforcement. The duty of fair representation also extends to areas in which the union would not be obligated to represent the employees, but has assumed the obligation. See, e.g., Nedd v. United Mine Workers, 556 F.2d 190 (3d Cir. 1977).

\textsuperscript{28} Contract formation and contract enforcement through grievance processing are linked in many ways. The union has an interest in seeing that the terms it negotiated are followed by the employer. Furthermore, issues of employee interest relevant to negotiation of future contracts may surface first in the grievance context. Despite this relation between negotiation and enforcement, the different procedures of union decisionmaking in grievance processing and negotiation require a different balance of majority and minority interests in the two types of activity. There has been general agreement among scholars that unions should be accorded greater latitude and held to a less stringent standard in contract negotiation than in contract enforcement. See Finkin, \textit{The Limits of Majority Rule in Collective Bargaining}, 64 MINN. L. REV. 183 (1980); Leffler, \textit{Piercing the Duty of Fair Representation: The Dichotomy Be-
The concept of the union’s duty of fair representation originated in a contract negotiation context in which the union had exhibited racial bias against black members of its bargaining unit. The Supreme Court held that, in exchange for relinquishing to the union the right to bargain individually with the employer, the members of the bargaining unit had the right to expect the union to represent them fairly and without discrimination. In other words, by obtaining the exclusive right to bargain on behalf of the members of its bargaining unit, the union assumed a corresponding duty to represent them fairly.

Because federal labor statutes subsume individuals and minority groups within a union and prevent them from bargaining separately with their employer, courts saw the need to impose on unions a duty of fair representation to protect minority groups, who, by virtue of either their numerical minority or their political disenfranchisement, are unable to protect their interests through the internal majoritarian processes of the union. It can be assumed from the union’s composition that the union will be responsive to majority interests in most instances. The primary purpose of the duty of fair representa-

29. 29 U.S.C. § 159 (1976) provides for the certification of a union as the exclusive bargaining agent for employees in most private industry. The Railway Labor Act § 2, 45 U.S.C. § 152 (1976) (RLA), covers certification of a union as the exclusive bargaining agent for railway employees. Although the concept of the duty of fair representation was first announced in a case under the RLA, the language of the Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-188 (1976 & Supp. IV 1980)) (NLRA), was patterned on the RLA and the courts’ use of the concept of the duty of fair representation in cases under these statutes has been virtually interchangeable. For a full discussion comparing the development of the duty of fair representation under the NLRA and the RLA, see Feller, supra note 17.

Although it is generally recognized that the duty derives from § 9(a) of the NLRA, 29 U.S.C. § 159 (1976), and the comparable provisions of § 2 of the RLA, the Supreme Court has often been unclear as to the exact source of the duty. Professor Feller notes that in Vaca v. Sipes, as well as in other cases, the Court has rested its jurisdiction in fair representation suits on § 301, 29 U.S.C. § 185(a) (1976), thereby treating the duty as derived from the collective bargaining agreement rather than from the statute. Feller, supra note 17, at 807-08. This confusion has also been noted by Professor Blumrosen in discussing Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961). Blumrosen argues that the court erroneously found that the duty of fair representation was grounded in the collective bargaining agreement rather than in the statute. See Blumrosen, The Worker, supra note 9, at 1492-93.


31. Id.

32. In certain circumstances, however, a union official may not be immediately responsive to the wishes of a numerical majority. See Cox, The Legal Nature of Collective Bargaining Agreements, 57 MIch. L. Rev. 1, 6 (1958). Even in
tion is to make the union accountable to minority interests as well. Since many union actions have the potential to affect individuals or minority groups adversely, the standard for the duty of fair representation must differentiate those areas in which the majority may appropriately overpower a minority from those in which it may not.

2. Breach of Duty as a Precondition to Suit Against The Employer

In Vaca v. Sipes, the Supreme Court employed the existing concept of duty of fair representation to narrow the grievant's access to a decision on the merits of his or her grievance. The Supreme Court had previously held that a grievant must exhaust available grievance/arbitration channels before resorting to the courts. The Court had also held that the duty of fair representation was applicable to the union's actions in processing grievances. In Vaca, the Supreme Court held that, absent explicit language in the contract, the employee has no right to have a grievance arbitrated, and that the employee can sue his or her employer on the breach of contract claim only if the employee first proves that the union breached its duty of fair representation in failing to take the case to arbitration. This two-part holding channels all attempts by employees to enforce claims against the employer through the union. As a

these circumstances, however, the majority may exercise a check on the union official by merely voting him out at the next union election or by the more severe means of decertifying the union as the bargaining agent for the unit.

33. Jones v. Trans World Airlines, Inc., 495 F.2d 790, 798 (2d Cir. 1974) ("The objective of the duty of fair representation is to provide substantive and procedural safeguards for minority members of the collective bargaining unit.").

34. Much of the early literature in the area addressed itself to whether the individual employee had an absolute right to benefits provided under the contract or whether the union could waive individual contract rights in the interest of the collective. See, e.g., articles cited supra note 9. This debate reflects many of the classic arguments of individual versus collective rights. For instance, although it is unfair to rob Peter to pay Paul, where the welfare or survival of the entire group hinges on some individual sacrifice, public policy suggests the group should prevail. In situations between the two poles, the best policy is less clear. See infra notes 130-56 and accompanying text.


36. See Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). This ruling raised the much debated question whether the union could control access to arbitration or the employee could compel arbitration. If the employee could not compel arbitration, the question arose whether the employee could sue the employer in court once all available grievance procedures had been exhausted. See supra note 9.


38. 386 U.S. at 185-86.
result, all suits by employees to resolve unarbitrated grievances must focus initially on whether the union has breached its duty of fair representation.

The Court's reasons for interposing this issue in employee suits were based on the Court's analysis of the dynamics of the grievance/arbitration system. The Court reasoned that granting individual employees the right to take claims to arbitration would overburden the grievance/arbitration system and possibly cause it to collapse. In addition, granting employees the right to arbitrate would reduce employers' incentives to negotiate with unions to settle claims prior to arbitration, thus undermining the authority of unions. Similarly, allowing an employee to sue an employer on a breach of contract claim, once grievance/arbitration procedures had been exhausted, could undermine the position and authority of both the union and the arbitrator and open a potential floodgate of litigation by employees disaffected with decisions made by the process. Therefore, the Court concluded that it was in the interest of federal labor policy and its preference for arbitration to allow unions to control the processing of grievances. By acquiring this power to control grievance processing, however, a union acquired a corresponding duty to represent a grievant fairly. Accordingly, when a union has breached its duty by failing to represent a grievant fairly, the congressionally sanctioned private method of grievance resolution has failed, and the grievant may seek a determination of his or her contract claim against the employer in court.

Thus, interposing the duty of fair representation as a threshold issue to employee suits accommodates two conflicting values: 1) the desire to protect the vitality and independence of industrial self-government from undue judicial interference, and 2) the desire to protect employees with meritorious grievances from abuses of power at the hands of the union by providing them with some recourse to an unbiased decisionmaker. Each of these values deserves closer examination.

On the one hand, it is desirable to protect industrial self-government from undue judicial interference for the reasons mentioned by the Court. If the dispute resolution system is to function effectively, only a limited number of grievances can be arbitrated. Otherwise, the quality of arbitration would diminish, and the cost of arbitration would cause employers and un-

39. Id. at 193.
ions to back away from this voluntary method of dispute resolution. In addition, the primacy of arbitration should not be undercut by employees rushing to another forum to resolve their disputes. Limiting court review to those instances in which a union has breached its duty of fair representation preserves the finality of the prearbitration resolution of the grievance.40

There are two general reasons for preserving this finality. First, a court trial may detrimentally affect the continuing relationship of the parties in an ongoing enterprise. Typically, an employee-grievant will continue to be a member of the employer’s work force and the union’s bargaining unit. Court trials tend to harden the respective sides, aligning the parties as adversaries. Although in specific instances it may be worthwhile for the parties to endure this cost if a more just result is reached, there is no assurance that a court will arrive at a better result, especially since courts generally lack expertise in dealing with issues of industrial policy. Second, collective bargaining, as envisioned by Congress, is a system of private ordering.41 In formulating federal labor policy, Congress rejected the notion that the government should establish contract terms for labor and management in favor of a scheme of greater labor and management autonomy.42 The choice of contract terms is left to the parties themselves. When a grievance is abandoned

40. The language of most collective bargaining agreements provides that grievances that are not advanced to the next higher step within a specified time period are considered finally barred. In an action under NLRA § 301, 29 U.S.C. § 185(a) (1976), a court will lift the “bar of finality” if the union has breached its duty of fair representation. See Hines v. Anchor Motor Freight, Inc., 424 U.S. 544 (1976) (holding that a breach of the union’s duty of fair representation would even set aside the presumably heavier “bar of finality” which attaches to an arbitrator’s decision).

41. The term “private ordering” is attributed to H. HART & A. SACKS, THE LEGAL PROCESS 292-93, 298-301 (10th ed. 1958). Professor Rosen sees this judicial reluctance to intervene in labor relations as “a continuation of the general judicial attitude against intervention in the sphere of private associational power and organization.” Rosen, supra note 28, at 401.

Professor Finkin observes:
A vexing problem results from the tension between the statutory system of private ordering by majority rule, a system that precludes government from setting the terms of the collective agreement, and the need to impose an external limit on the resulting bargain in order to protect individuals and minorities from abuses of majority power. Traditionally, the most important limit has been found in the judicially created duty of fair representation . . . .

Finkin, supra note 28, at 184.

42. In fashioning § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1976), legislators agreed that unions and employers should not be required to make a compact. In the words of Senator Walsh, “[A]ll the bill proposes to do is escort representatives to the bargaining door of their employer . . . . What happens
before arbitration, the union has tacitly agreed to leave the employer's action unchallenged. To preserve the autonomy of the contracting parties, a court must not substitute its judgment for the judgment of the union and employer.

On the other hand, a sound labor policy should protect individual employees from bad faith or arbitrary union actions. The collective bargaining structure should not enable a union to use its power as a device for abusing the interests it is empowered to protect. By allowing an employee to sue an employer when the employee has demonstrated that the union breached its duty of fair representation, the Supreme Court indicated that the union does not have complete power to waive the rights of individual employees and that an individual employee's contract rights are entitled to some degree of protection. In Vaca, the Court rhetorically questioned whether "Congress, in conferring upon the employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract." In the absence of a grievance/arbitration mechanism, employees are free to seek court enforcement of their breach of contract claims. Similarly, in those situations where a grievance/arbitration mechanism exists but the union does not control access to arbitration, employees are free to arbitrate their claims. Thus, the collective bargaining agreement creates in the employee substantive contract rights that would be en-

behind those doors is not inquired into, and the bill does not seek to inquire into it." 79 CONG. REC. 7660 (1935).

The scheme chosen by Congress to provide for more peaceful labor relations and to equalize the balance of power between employers and employees was to enable employees to unionize and to require employers to bargain with the unions. See id.

43. The recognition of this right is a necessary product of a system of collective rights operating within a larger legal, social and political context which rightfully respects individual expectations. Constant himself saw collective liberty threatened by its own peculiar danger, "that men might make individual rights too cheap." That the individual's rights may be subsumed to the collective may be necessary; that those rights, now held by the collective may be bartered away, is permitted; but that such collective rights, rights mirroring justifiable individual expectations of individual members, should be frivolously abandoned, is collective liberty degraded to a caricature of itself, to unprincipled majoritarianism or ochlocracy.


44. 386 U.S. at 186.

45. Id. at 183.

46. See, e.g., Schum v. South Buffalo Ry. Co., 496 F.2d 328, 331 (2d Cir. 1974) (contract gave either an employee or the union the right to invoke arbitration).
forceable but for contract provisions limiting enforcement to arbitration at the request of the union. Although these competing values are implicated in every lawsuit of this type, merely identifying these values does not provide a clear focus for lower courts attempting to decide whether the duty of fair representation has been breached in a specific situation.

C. THE SEARCH FOR A STANDARD FOR UNION “ARBITRARINESS”

Supreme Court decisions have provided little guidance to unions on how they should discharge their duty, or to the lower courts on how to determine whether a union has breached its duty.47 Supreme Court references to the standard have been characterized by catch phrases. The duty is violated by union actions which are “in bad faith,” “discriminatory,” “perfunctory,” or “arbitrary.”48 Conversely, union actions which are in “good faith and with honesty of purpose in the exercise of [the union’s] discretion” fulfill the duty.49

Moreover, the scope of this judicially developed standard has changed over time, influenced, in part, by the sequence in which cases were decided. The earliest Supreme Court cases involved employee allegations that the union breached its duty by exhibiting animus toward the plaintiffs such as racial discrimination or personal hostility.50 Gradually, this subjective standard was augmented by the addition of an objective component,51 which grew out of the Supreme Court's use of the term “arbitrariness” to describe conduct which would violate

47. See supra note 10.
48. 386 U.S. at 190-91.
51. Humphrey v. Moore, 375 U.S. 335 (1964), Vaca v. Sipes, 386 U.S. 171 (1967), and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) have been particularly significant in the development of the objective standard for the duty of fair representation. In Humphrey, the Court decided that the union was obligated “to make an honest effort to serve the interests of all those members . . . subject always to complete good faith and honesty of purpose in the exercise of its discretion.” 375 U.S. at 342 (quoting Ford Motor Co. v. Huffman, 345 U.S. at 337-38 (emphasis added)). Again quoting Ford Motor Co. v. Huffman, 345 U.S. at 338, the Humphrey Court stated that “[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.” 375 U.S. at 349. This language, which is frequently repeated in more recent Supreme Court opinions, indicates that the union’s discretion is circumscribed not only by the subjective limitations of good faith and honesty of purpose, but circumscribed as well by the standard of reasonableness—although the range of reasonableness is wide. In examining the union action under attack in Humphrey, the Court concluded that “the
the duty of fair representation. When cast in the disjunctive, in such phrases as "arbitrary, discriminatory or in bad faith," the inclusion of the term "arbitrary" implies that some union behavior could be found to breach the duty of fair representation without establishing the presence of animus toward the grievant. Although "bad faith" and "discriminatory" union actions continue to provide a basis for a claim that the union has breached its duty of fair representation, most Courts of Appeals now follow the rule that a union can be found to have breached its duty without any allegation of bad faith or wrongful subjective motivation.

Professor Finkin proposes eight rules of thumb for determining breach of a union's duty of fair representation in contract negotiation. There is some disagreement about whether the courts' review of unions' contract negotiations should be merely procedural, see, e.g., Leffler, supra note 28, at 46-47, or whether courts should review the substance of unions' bargaining positions as well, see, e.g., Finkin, supra note 28. Professor Finkin takes the view that "the fair representation question must be determined by weighing the firmness and significance of the minority's defeated expectations against the degree of interference with the system of collective bargaining occasioned by the substitution of an external judgment for that of the union." Id. at 210.

52. See Vaca v. Sipes, 386 U.S. at 190.

53. Certainly evidence of unreasonableness or arbitrariness can give rise to the inference that a union's action was motivated by bad faith. However, there is an increasing willingness on the part of the courts to overturn a union decision in those cases where bad faith is not alleged.

Discriminatory or bad faith conduct could also be considered "arbitrary." But there is no suggestion that the definition of arbitrary conduct is to be limited to those cases which are similar to discriminatory or bad faith conduct by the principle of ejusdem generis. The fact that the terms are stated in the disjunctive implies that arbitrariness alone is an allowable basis for finding a union breached its duty of fair representation.

54. See, e.g., Ryan v. New York Newspaper Printing Pressman's Union No. 2, 590 F.2d 451, 455 (2d Cir. 1979); Ness v. Safeway Stores, Inc., 598 F.2d 558, 560 (9th Cir. 1979); Foust v. International Bhd. of Elec. Workers, 572 F.2d 710, 715 (10th Cir. 1978), rev'd on other grounds, 442 U.S. 42 (1979); Archie v. Chicago Truck Drivers Union, 585 F.2d 210, 219 (7th Cir. 1978); Sanderson v. Ford Motor Co., 483 F.2d 102, 110 (5th Cir. 1973); Griffin v. United Auto, Aerospace & Agricultural Workers, 469 F.2d 101, 183 (4th Cir. 1972).

Some commentators have read Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), as a return to a subjective standard. In that case the Supreme Court reiterated the "discriminatory or bad faith" language of Vaca, see supra note 48, and stated "[t]here must be a substantial evidence of fraud, deceitful action or dishonest conduct" in order to find a breach of the duty of fair representation. 403 U.S. at 299 (quoting Humphrey v. Moore, 375 U.S. 335, 348 (1964)). However, Lockridge is distinguishable in one very important respect—it was not a hybrid § 301 breach of duty suit. The individual employee did not sue the union in order to prevail against the employer on an underlying breach of contract claim. The Court expressly noted that the employee's suit against the union was not bottomed on a collective bargaining agreement at all. 403 U.S. at 299. In Lockridge, the action was basically a tort action for interference with employment relations. Thus, to
What specific union conduct is deemed "arbitrary," however, varies widely and leads to the current confusion in the state of the law. Apparent inconsistencies exist between circuits and within the same circuit. Scholars attempting to define the term "arbitrariness" have developed different standards for the union's duty of fair representation in grievance processing. Interpretations of what constitutes "arbitrary" behavior generally follow either the negligence standard or the rational decisionmaking standard.

1. The Negligence Standard

Proponents of the negligence standard reason that the Supreme Court's use of the term "arbitrariness" prohibits certain types of union behavior beyond that which could be con-

the extent that the dicta in Lockridge can be said to require proof of wrongful motivation to establish that a union has breached its duty of fair representation, it seems reasonable to infer that the scope of the duty of fair representation is different when the duty of fair representation is embedded in an action on a contract claim than when it is not. See Baldini v. United Auto. Aerospace & Agricultural Implement Workers, 581 F.2d 145, 150 n.5 (7th Cir. 1978). But see Hoffman v. Lonza, Inc., 658 F.2d 519, 522 (7th Cir. 1981) (court required scienter, although duty of fair representation issue was embedded in an action for breach of the collective bargaining agreement).

55. Compare Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981) with Archie v. Chicago Truck Drivers, 585 F.2d 210 (7th Cir. 1978); Baldini v. UAW, 581 F.2d 145 (7th Cir. 1978); and Barton Brands, Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976). Compare also the differing opinions of the plurality, concurring, and dissent in Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir.), cert. denied, 449 U.S. 835 (1980).

56. Professor Finken has noted that a court's inquiry into union "arbitrariness" should be less intense in the contract negotiation context. See Finkin, supra note 28, at 197.

57. A third approach exists as well. Some commentators have approached the problem from the view that certain interests are so important to the grievant that the union should be required to arbitrate all such claims. See Blumrosen, Legal Protection for Critical Job Interest: Union-Management Authority Versus Employee Autonomy, 13 Rutgers L. Rev. 631, 656-57 (1959); Tobias, A Plea for the Wrongfully Discharged Employee Abandoned by His Union, 41 U. Cin. L. Rev. 55, 89 (1972). Under Tobias's view, the union should be required to arbitrate all discharge cases because discharge is the industrial equivalent of capital punishment. See id. at 57-58. At the other end of the spectrum, the union makes an evaluation of the importance of the grievance when it appropriately refuses to process a frivolous grievance. See, e.g., Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977) (grievant was suspended because he refused to wear a tie at work as required by dress code). Although there is some evidence to suggest that both courts and the National Labor Relations Board hold a union to a higher standard of duty in cases in which the employee's interest is more important, see Note, IBEW v. Foust: A Hint of Negligence in the Duty of Fair Representation, 32 Hastings L.J. 1041, 1063 (1981), this type of analysis has not been fruitful in yielding a uniform, predictable standard for the duty of fair representation in cases in which the grievant's interest is more than frivolous but less substantial than the loss of his or her job.
sidered intentionally tortious. These commentators argue that a union's careless execution of its representation function can be just as injurious to a grievant as conduct motivated by animus. Furthermore, negligent union behavior advances no collective interest. Thus, they conclude that a union should be held to have breached its duty of fair representation if it has acted negligently in processing a grievance.

In application, the negligence standard has been directed at union care in complying with grievance procedures, rather than at union care in making substantive, informed judgments. Consequently, the standard focuses on technicalities in grievance processing, such as a union's failure to meet a contractual time deadline for appeal, misnumbering a document, or losing a grievant's file. The inquiry turns on whether the specific omission alleged constitutes the requisite degree of fault.

Because the negligence standard focuses on the technical-


59. See generally authorities cited supra note 58. Support for this position is found in the Supreme Court's language: "[W]e accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion." Vaca v. Sipes, 386 U.S. 171, 191 (1967).


61. Several commentators have discussed the propriety of using ordinary negligence as the standard of assessing breach of the duty of fair representation. Some argue that an ordinary negligence standard would impose undue financial hardship on smaller unions and allow courts to interfere to an unacceptable degree in the grievance/arbitration system. See Adomeit, Hines v. Anchor Motor Freight: Another Step In the Seemingly Inexorable March Toward Converting Federal Judges (and Juries) Into Labor Arbitrators of Last Resort, 9 CONN. L. REV. 627, 634-35 (1977). Others argue that "there appears to be no valid reason to leave employees, damaged because of union negligence in the handling of their grievances, without redress." Flynn & Higgins, Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee, 8 SUFFOLK U.L. REV. 1096, 1147 (1974). See also Note, supra note 58, at 649-51 (concluding that the NLRB should adopt an ordinary negligence standard in order to prevent unions from shielding employers from liability, to protect employee interests in the essentially fiduciary
ties of compliance with grievance procedures, an employee has no recourse if the union has correctly followed procedure. Furthermore, since the standard does not require the union to make a substantive decision about the grievance, an employee has no recourse even if the union without reason failed to advance the grievance.\footnote{62} By imposing sanctions only for procedural mistakes, the negligence standard has the advantage of preventing a court from substituting its judgment for the union’s decision not to process a grievance,\footnote{63} but this can be at the expense of the individual grievant if the union acted unreasonably in terminating the grievance. Since the range of conduct this standard encompasses is limited, the standard fails to address the more difficult questions of how a union should balance conflicting individual and collective interests or choose between rival grievants. By avoiding these questions, the negligence standard fails to remedy possible abuses of the minority at the hands of the majority—one of the Court’s primary purposes in creating the duty of fair representation.\footnote{64}

2. The Rational Decisionmaking Standard

The second standard for breach of the union’s duty of fair representation in grievance processing is the rational decisionmaking standard.\footnote{65} Under this theory, “arbitrariness” is equated with the absence of rational decisionmaking, rather
than with negligent failure to comply with grievance procedures. This standard requires that a union have some rational justification for terminating a grievance. Since a failure to follow the appeals process correctly can terminate a grievance on a basis other than by a reasoned union decision to terminate, the rational decisionmaking standard encompasses those union actions proscribed by the negligence standard as well.

Although the rational decisionmaking standard attempts to go beyond the negligence standard to remedy some union abuses not accompanied by procedural error, the rational decisionmaking standard is at once too broad and too narrow. It is too broad because, as articulated to date, the rational decisionmaking standard offers few guidelines for determining what decisions are rational. Rational decisionmaking entails an open-ended balancing test, weighing multiple factors on a case-by-case basis. Without clearer guidelines there is a risk that a

supra note 28. Summers, supra note 13 can be considered in line with the rational decisionmaking theory in its interpretation of Supreme Court case law.

Commentator Fredric Leffler maintains that under Vaca, judicial inquiry into the union's duty of fair representation is two pronged: 1) a subjective analysis of the union's conduct, focusing on any evidence of discrimination, personal hostility, or bad faith, and 2) an objective evaluation of the union's conduct to detect arbitrary decisionmaking or perfunctory processing of a grievance. Leffler, supra note 28, at 43. The second prong of Leffler's test, which corresponds to the subject of this Article, follows the rational decisionmaking theory. Leffler, supra note 28, at 46.

Cases that follow the rational decisionmaking theory include Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978); Beriault v. Local 40, Super Cargoes & Checkers of Int'l Longshoremen's Union, 501 F.2d 258 (9th Cir. 1974).


67. Both theories find support in the same three cases. See Foust v. International Bhd. of Elec. Workers, 572 F.2d 710 (10th Cir. 1978), rev'd on other grounds, 442 U.S. 42 (1979); Minnis v. United Auto., Aerospace and Agricultural Implement Workers, 531 F.2d 850 (8th Cir. 1975); Ruzicka v. General Motors Corp., 528 F.2d 912 (6th Cir. 1975). For differing interpretations of these three cases, compare the views of the majority and the dissent in Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir. 1980). See also infra text accompanying notes 157-70.

68. Commentator Fredric Leffler observes that a union should be required to consider the merits of the grievance in deciding whether to arbitrate a claim. He maintains that "[t]he union may avoid liability successfully if it can establish that its institutional interests in settling the grievance substantially outweighted [sic] the claim's degree of merit." Leffler, supra note 28, at 54. However, Leffler fails to examine which "institutional interests" are legitimate and how the merits of grievance claims should be determined. He maintains that "when a court determines the nature and merits of a particular claim substantially outweigh the union's institutional interest, the cost of arbitration is justified, and the union should be held to have violated its duty if it settled the claim short of arbitration." Id. at 55. Except for wrongful discharge claims, which, he argues, should always be arbitrated, few guidelines are afforded for how the court should assign relative weights to the balance and how the
court may substitute its judgment for the judgment of a union. The rational decisionmaking standard is too narrow because it fails to ensure protection of vested minority interests. Under this standard, a union action that redistributed recognized contract benefits from a minority to a majority could be minimally rational, even though the action would not be fair.

Thus, neither the negligence standard nor the rational decisionmaking standard, as articulated to date, addresses the important questions of when collective interests appropriately outweigh an individual grievant's interest, and what sort of court review will best delimit court inquiry. In addition, neither standard provides an affirmative formulation of how a union should discharge its duty of fair representation to a grievant. The negligence standard provides no affirmative formulation at all, and the rational decisionmaking standard merely makes the broad charge that union decisions be rational.

II. THE FAIR PROCESS STANDARD: A MODEL FOR UNION CONDUCT

A. REQUIRING THE UNION TO CONSIDER THE MERITS OF THE GRIEVANCE

In its simplest form, this Article's proposal is that, in the context of grievance processing, fair representation means the union should be required to take the merits of the grievance into consideration, before acting in any way that forecloses arbitration of the grievance, whenever the union is vested with the exclusive authority to invoke the arbitrator's jurisdiction. Accordingly, the union should be expected to make a good faith assessment of the merits of a grievance and attempt to distinguish meritorious grievances from nonmeritorious grievances.

rebalancing comports with the underlying policy of judicial deference to the private ordering of the collective parties.

69. To avoid this problem in extreme circumstances, proponents of the rational decisionmaking standard have recognized that a court should ask whether a rational union could have decided to proceed as it did, rather than whether the union decision was the best decision which could have been made.

70. For treatment of this problem under the proposed standard, see infra notes 134-70 and accompanying text.

71. Some scholars have questioned whether it is possible to interpret the collective bargaining agreement definitively or whether the agreement is necessarily subject to multiple interpretations. See, e.g., Cox, supra note 9, at 23. Meritorious and nonmeritorious grievances are polar ends of a spectrum. Whether a grievance will be found meritorious is an issue in the realm of probability or likelihood. The issue, however, is not purely one of chance. For purposes of this Article, a "meritorious" grievance can be defined as one that
By considering the merits of the grievance the union can satisfy the grievant's legitimate interest in the fairness of the process, if not his or her interest in the subject of the claim. Thus, under the proposed standard the grievant would receive fair process—a decision on the merits. Although technically, a grievance is not deemed meritorious until an arbitrator determines that it is, the fiction is useful in developing a standard for union conduct. The union can best appraise whether an arbitrator would find a grievance meritorious by engaging in the same type of decisionmaking process one would expect the arbitrator to follow. Thus, union decisionmaking should be modeled on the arbitration process itself.

To establish a claim in arbitration, the grievant must prove that the employer breached a particular clause of the contract in a particular circumstance resulting in injury to the grievant. The grievant must 1) prove the truth of certain facts about the incident and 2) persuade the decisionmaker that the contract interpretation which will yield the result the grievant seeks is the "correct" interpretation—the interpretation intended by the parties when they agreed to the language. A further inquiry subsumed in contract interpretation is whether the contract language relied upon by the grievant applies to the situation at all. The situation may be governed by some other contract language or the contract may be silent on the matter. Sometimes the "law" on which a grievant bases his or her claim is an established pattern, practice, or custom that the grievant claims yields a significant benefit to the grievant and is based on a reasonable construction of clear contract language as applied to facts believed to be true.

72. For a discussion of the employee's interest in the fairness of the process, see supra notes 18-19 and accompanying text.

73. As a matter of jurisprudence, the law does not ascribe merit to any legal claim or cause of action until its merit has been determined by a court of law. In some situations, however, there may be legal recognition of the merits of a claim without a legal determination of its validity. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 74 (1979). In the industrial context, it is the arbitrator who determines whether the grievance is meritorious in claiming the contract has been breached. When the process of evaluating the merits of a claim has not reached culmination, there is the possibility that the contract has been violated but the grievant's injury left unremedied.

74. It is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even
Thus, under the proposed standard, the union's legal duty is to evaluate the merits of the grievance by determining both the facts and the applicable law. To render a factual finding, the union should gather the relevant evidence. Gathering evidence entails questioning witnesses and sometimes, when stories conflict, evaluating the credibility of witnesses. The union should further decide whether the grievance is meritorious under the applicable contract language, as supplemented by established practice. To make this judgment, the union must listen to the grievant's argument, read the language of the contract, and consider existing custom and practice. To apply this contract language to the situation, the union must determine the scope and purpose of the contract language.

Like the other standards, the standard developed here is derived from an attempt to reconcile the legitimate interests of the grievant with the legitimate interests of the union and the other employees it represents. Unlike the other standards, this

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50 pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words. Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1498-99 (1959) (quoted in United Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 579-80 (1960)). See also Sanderson v. Ford Motor Co., 483 F.2d 102, 111-12 (5th Cir. 1973) (written management policy not included in collective bargaining agreement but agreed to by union held to be part of the collective bargaining agreement).

75. For example, grievances based on discharge are more apt to be determined by the resolution of questions of fact. Did the employee-grievant assault the foreman? See, e.g., Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) (discharged employee-grievant allegedly falsified motel receipts). In some discharge cases, however, the employee-grievant may not challenge whether he or she in fact did the act which was the basis for the discharge, but instead may seek a determination whether, as a question of contract interpretation, it constitutes "just cause" under the terms of the collective bargaining agreement. See, e.g., Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975). The grievant in Ruzicka did not dispute the essential facts that he came to work intoxicated and used threatening and abusive language toward his supervisors. The thrust of the grievant's argument was that discharge was an "unduly harsh" penalty which was inconsistent with past arbitration decisions interpreting the collective bargaining agreement. For a particularly unusual grievance argument, see Lowe v. Pate Stevedoring Co., 558 F.2d 769, 772 (5th Cir. 1977). The grievant in Lowe admitted that without provocation he attacked his supervisor but argued that that was not a basis for discharge because knifings, shootings, and baseball bat beatings were not uncommon on the premises.

76. This necessarily entails considering the parties' intention in adopting the language. Where the contract language is ambiguous, the union has a special role to play. The union can give content to vague or ambiguous contract language by determining questions of industrial policy, ultimately deciding what policy is best for the plant and for the employees the union represents.
standard is fashioned on a due process model of union behavior.\textsuperscript{77} This standard, unlike the others, recognizes that individual grievants have an interest in the fairness of the process, an interest which is distinct from their interest in the result and which does not necessarily conflict with the group's interest. The essential function served by the fair representation duty in the grievance processing context is to recognize that certain minimal process is due the grievant.\textsuperscript{78} Since the issue of what minimal process the grievant is due is a question of what is fair, the proposed standard will be referred to herein as a fair process model.\textsuperscript{79} Like due process, the fair process model is basically procedural but also has some substantive elements.

A union's determination under the fair process model can be likened to the determinations of those administrative agencies which perform both investigative and adjudicative functions.\textsuperscript{80} Like such an agency, a union should be required to

\textsuperscript{77} It is recognized that modeling union behavior on due process considerations marks a departure from, and conflicts with, the historical behavior of unions in exercising leverage on the employer based on majority sentiment. This historical pattern of union behavior, though perhaps still suitable in contract negotiation, is inappropriate in contract enforcement. Although the due process model is inconsistent with the historical origins of the duty of fair representation, the model appears to be consistent with recent trends in court decisions. For a discussion of how the proposed standard compares to the historical view, see infra notes 205-08 and accompanying text. The proposed standard is conceptually very different than the analogies frequently made, modeling union behavior on the role of a fiduciary, see Finkin, supra note 28, or on the role of an advocate for the grievant. Modeling union behavior on the role of the arbitrator or an administrative agency is more appropriate because it recognizes that the union can take into account interests other than the grievant's in deciding whether to invoke arbitration. See infra text accompanying notes 78-79.

A disclaimer should be made at this point. In arguing that the union's duty of fair representation to the employee-grievant should be modeled on due process, no attempt is made to argue that this standard is constitutionally required. This Article merely takes the position that such a standard is desirable. One commentator, however, has taken the position that due process is constitutionally mandated. For an interesting discussion of a constitutional analysis of employee rights under the federally structured collective bargaining relationship, see Symposium: Individual Rights in Industrial Self-Government—A "State Action" Analysis, 63 Nw. U.L. Rev. 4 (1968).


\textsuperscript{79} The author wishes to thank Professor Richard Lempert for suggesting this term.

\textsuperscript{80} A union's role can be analogized to that of the Equal Employment Opportunity Commission (EEOC). The EEOC, created by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1976), investigates the facts of a claim, evaluates the claim, and issues a finding of reasonable cause or no reasonable cause before deciding whether to take the claim to court. 42 U.S.C. § 2000e-5 (1976). In the industrial context, it is even more important that the union engage in this type of deliberative investigation and evaluation of the claim than it is that the EEOC do so, because a complainant under the Equal Employment Opportunity Act may later pursue the claim in court, whereas a union's deter-
investigate the facts of the grievance and evaluate the arguments concerning whether the contract has been breached. Also like such an agency, a union can sometimes use its expertise to formulate additional policy rules in the context of the grievance determination. As an administrative tribunal is bound by the substantive provisions of its statute, the union's discretion in processing grievances should be bound by the substantive framework of the contract.81

The analogy between administrative procedure and union processing of employee grievances is not perfect. The union is a constituency whose existence depends entirely on the composite members of its bargaining unit. An administrative agency, on the other hand, is institutionally separate from those individuals whose claims it considers, and the agency is created externally by statute, not from the affected group itself. This distinction has tremendous importance for the institution's identification with the claimants and for the number of resources the institution can devote to investigating and pursuing claims. The analogy need not be complete in all respects, however, in order to enlighten and to inform the meaning of institutional fairness. The accumulated wisdom of what constitutes arbitrary conduct by administrative agencies can serve as an accessible analogy for courts unschooled in labor relations.

Although the debate over due process in administrative law has devolved into a question of constitutional requirements and the requirements of the Administrative Procedure Act,82 it is the prudential considerations of administrative law that are most enlightening to the debate over the union's duty of fair

81. It is this character of the grievance process which distinguishes it from contract negotiation. Contract negotiation is akin to legislation, while grievance handling is akin to administrative adjudication. A legislature has wide freedom in designing substantive rules and may leave them in general terms, but an administrative agency must limit its actions to the boundaries laid out by the legislation. A union must perform both functions, but these functions are exercised separately and should be subject to separate constraints. See articles cited supra note 28.

representation in grievance processing. Thus, the focus of the analogy is not on what administrative law is and how to reproduce it exactly in the grievance context, but instead on how principles of administrative jurisprudence can shed light on the special relationship between a union and the members of its bargaining unit and on the union's duty in administering a collective bargaining agreement.

The analogy succeeds to the extent that union discretion and agency discretion are based on similar principles. In both settings, judicial checks on institutional action involve deference to institutional expertise, consideration of minority and majority interests, regularization of the treatment of affected individuals, and a concern for the institutional costs of providing individuals fair treatment. The principles underlying deference create, first, an exhaustion doctrine and, second, a judicial unwillingness to set aside institutional decisions merely to substitute the court's judgment for the institution's expert judgment. In each case, a court will review the merits of the institution's decision only when the court has reason to believe either that the decision was tainted with wrongful subjective intent or that the decision was arbitrary.

In order to be practicable, the fair process model of the duty of fair representation, like any due process standard, must take into account the exigencies of the setting. The process due the employee-grievant need not be nearly as formal or rigorous as would be found in a judicial or quasi-judicial proceeding. Since a union may be required to deal with numerous grievances in the course of a year, the standard for decision-making should not have an unduly burdensome cumulative effect. The decision whether to arbitrate a grievance is typically made by a union official popularly elected by union members, an individual not likely to be trained in law. The proposed standard can meet the requirements of this setting since it is consistent with common sense and comports with fundamental, universally held notions of fairness.83

83. There is no reason to set the standard artificially low out of the patronizing belief that union stewards are incapable of providing better representation. But see Denver Stereotypers & Electrotypers Union Local 13 v. NLRB, 623 F.2d 134 (10th Cir. 1980). For contrasting views of union attorneys on the issue, compare Lipsitz, The Implications of Hines v. Anchor Motor Freight, in THE DUTY OF FAIR REPRESENTATION 55 (J. McKelvey ed. 1977), with 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). Unions can and do upgrade the quality of the grievance representation their officials provide. One means of improving the quality of representation is by offering training programs for union stewards.
B. THE FAIR PROCESS STANDARD FROM A COURT'S VIEWPOINT:
A SCHEME FOR CLASSIFYING CASES

By framing the issue in terms of whether the union fully considered the merits of the grievance, the wide variety of situations that unions, initially, and courts, in reviewing union conduct, are likely to encounter can be classified. A major advantage of this classification is that it allows an examination of the alignment of individual and collective rights in several, quite different contexts. The classification will also allow consideration of the second question: when is judicial sanction appropriate? That question will be addressed as each separate category is examined. In general, under the proposed standard, the court's role in reviewing a union's decision on the merits will parallel the court's role in reviewing a discretionary decision of an expert administrative agency.84

If the key question is whether a union accorded a grievant fair process by considering the merits of the grievance, a reviewing court may encounter several possible situations. First, the union may have failed to consider the merits at all. This may have occurred in one of two ways: the union may have made a careless mistake in processing the claim, resulting in its premature termination, or the union may have failed to investigate fully the underlying factual situation. In either case, the termination is not based on an appraisal of the claim's merits. This union conduct would be improper under the proposed standard and would allow a court to reach the merits of the grievance because, since the union failed to consider the merits, the grievant has not received fair process.85

Second, the union may have considered the claim's merits but found the claim to be nonmeritorious because it was unsupported either by the facts or by the contract language. This finding provides a justifiable reason for terminating the claim.

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84. Section 5(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706 (1976), provides, "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." The similarity between the union's duty of fair representation and the standard of judicial review of agency action is noted in Feller, supra note 17, at 811-12.

85. Once the court finds the grievant has not received fair process, the court could order arbitration of the contract claims. See Vaca v. Sipes, 386 U.S. at 196. This is analogous to a court's decision to remand an issue to the administrative agency for further deliberation. See, e.g., Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). A court may be cautious to order arbitration, however, where it has reason to believe that the union conduct giving rise to the breach would taint any subsequent proceeding.
The reviewing court should therefore allow the union action to stand; since the union has accorded the grievant fair process, there is no need to probe the decision further. 86

The situation is similar when the union determines that the grievance is frivolous. 87 Consistent with a due process theory, even where there is a technical breach of the contract, if the interest at stake is de minimus, the individual is not entitled to substantial due process because the individual's injury and the minimal interest in remedying it do not justify the costs of the process. Thus, the union should be able to weed out frivolous claims that present no claim of serious injury to the individual and serve only to burden the system.

Third, where the union has considered the merits of the claim and found it to be at least arguably meritorious, the inquiry will be more complex. In this case, the court must determine whether the grievance involves predominantly an issue of fact or of contract interpretation, because fact finding and contract interpretation are fundamentally different types of decisionmaking, involving different alignments of individual and collective interests and different reasons for union discretion. Generally, fact questions do not present issues of conflicting employee interests. The focus of the union inquiry should be on ascertaining the true facts. Therefore, the focus of court review should be on the reliability of union fact finding. When the grievance's merits depend on contract interpretation, there are more likely to be conflicts of employee interests over differing interpretations. The union may have decided not to press the claim because of the contrary interests of other members of the bargaining unit. This situation can be ascertained easily from the nature of the grievance itself. If other employees' interests are at stake, the issue is whether the majority has taken undue advantage of the minority.

If, however, the grievance does not implicate contrary interests of other employees, the inquiry is not at an end. The

86. The union's judgments in determining claims to be nonmeritorious are still constrained by the requirement that the union exercise good faith in its determination, however. See supra text accompanying notes 47-54.

87. A union need not process a frivolous claim to arbitration. See Vaca v. Sipes, 386 U.S. 171, 191 (1967); Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977). To guard against gross error in the union's cost-benefit evaluation of the claim, it may be wise to allow the willing employee-grievant to bear the cost of arbitration. The problem with using cost-benefit analysis to determine whether to arbitrate is that in many situations, the union may not find the claim to be sufficiently important to the group; however, the claim may be very important to the individual grievant. See generally infra text accompanying notes 192-200.
union may have been motivated to abandon the grievance for reasons unrelated to the grievance's merits. The union may have decided that the costs of arbitration to the union in terms of money, time, effort, or leverage were not worth the benefits of winning the grievance.

Thus, for the sake of analysis, three categories of cases can be isolated: cases involving grievances whose merits depend on 1) issues of fact; 2) contract interpretation when contrary interests of other employees are directly implicated in the grievance outcome; or 3) contract interpretation when the interests of other employees are not directly implicated. These categories are chosen because they present different alignments of individual and collective interests in either the grievance result or in the grievance/arbitration process. This classification scheme provides a basis for analyzing the underlying policies that determine the appropriate union response and the extent to which court attachment of liability is effective in producing that response. Although many cases involve combinations of these factors, by isolating these components and ordering them by degree of complexity, courts can analyze cases involving multiple issues more systematically.

III. SPECIFICATION OF THE FAIR PROCESS MODEL

A. UNION FACT DETERMINATION IN ASSESSING THE MERITS OF A GRIEVANCE

The merits of many grievances depend on issues of fact; this is particularly true of grievances appealing disciplinary penalties such as discharge. Vaca v. Sipes88 illustrates this situation and the role a union should play in making fact determinations. In Vaca, the employee, Owens, was discharged on the ground that he was unable to work because of poor health. The grievance presented primarily a question of fact: whether Owens was physically capable of performing his job. In response to Owens' grievance, the union sent Owens to several doctors to determine his physical fitness. Based on the doctors' determinations that Owens was not fit to perform his job,89 the union decided not to arbitrate the grievance. In the subsequent court action, the jury found for the plaintiff-employee, awarding him damages against the union. The Supreme Court held that the trial court could properly consider the issue of

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89. Id. at 175.
breach of duty of fair representation, but that, in this case, the union did not breach its duty.

As we have stated, Owens could not have established a breach of that duty merely by convincing the jury that he was in fact fit for work in 1960; he must also have proved arbitrary or bad faith conduct on the part of the Union in processing his grievance.

The Court concluded that the union, having made the determination based on medical evidence, had fulfilled its duty, notwithstanding that a jury later found Owens had been fit for work.

This conclusion is in keeping with two sound principles of jurisprudence. First, the stability of any decisionmaking system depends on restricting the ability of appellate tribunals to overturn factual determinations that are within the range of reason. Reasonable juries presented with the same evidence may not make identical fact findings. Unlike fact finding in scientific inquiry, fact finding in adjudication is not always reproducible. Thus, the ability to overturn those determinations made by the original fact finder is limited in order to preserve the stability of the system and to prevent appeals based on the hope that the facts may be found differently by a different decisionmaker. Appellate courts may overturn the findings of trial courts only when those findings are clearly erroneous. Similarly, trial courts or juries should overturn unions' fact determinations only when those determinations are not supported by the evidence the union collected after reasonable efforts.

The second principle recognizes that the union must decide whether to arbitrate within a relatively short time period and on the basis of the facts available at the time. The parties in the ongoing enterprise need the stability of definite answers within a reasonable period of time. At a later date when the union decision is challenged in court, more or different evidence may be available, and with the benefit of hindsight, a jury may find the facts differently. Thus, it is unrealistic and impractical to hold a union to a standard of prescience. Within the limits of the contractual time period for processing the

90. The Court considered and rejected the argument that the National Labor Relations Board had exclusive jurisdiction in these situations. Id. at 179.
91. Id. at 193.
92. Rosenberg, supra note 17, at 660.
93. The other circumstance that justifies overturning a union's fact determination is when a union's judgment has been tainted by bad faith or discrimination. Since this Article is concerned primarily with the union's objective duty of fair representation, no attempt is made to discuss the union's subjective duty to refrain from discrimination or bad faith.
94. See BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 32 (8th ed. 1975).
claim through the prearbitration stages, however, the union should be required to gather all evidence then available.

Consistent with the union's conduct in the principal case, a union can fulfill its duty under the proposed standard by determining the relevant facts in order to decide whether the grievance is meritorious.\textsuperscript{95} If the union finds that the facts do not support the claim, the employee receives all he or she has a right to expect, a determination based on the merits of the grievance.

Furthermore, since the goal to be advanced is that of greater employee satisfaction with the fairness of the process, it is desirable that the union inform the grievant of the appraisal of the grievance's merits, particularly if it decides that the facts do not support the grievant's claims.\textsuperscript{96} Many cases allege union bad faith because the union failed to notify the employee of its decision to terminate a nonmeritorious claim.\textsuperscript{97} Some courts have gone so far as to hold that failing to tell employees that their claims have been abandoned, or allowing employees to continue to believe the union is still representing them in the grievance process, constitutes a breach of the union's duty of fair representation.\textsuperscript{98} Although union officials may be understandably hesitant to tell an employee that the evidence does not support his or her claim, especially if the employee's own

\textsuperscript{95} Several courts have held that a union fulfills its duty to the employee by determining that the relevant facts do not support the grievance claim. See Cox v. C.H. Masland & Sons, Inc., 607 F.2d 138 (5th Cir. 1979); Franklin v. Crosby Typesetting Co., 568 F.2d 1036 (5th Cir. 1978); Johnson v. General Drivers, Local Union No. 89, 488 F.2d 250 (6th Cir. 1973); Bazarte v. United Transp. Union, 429 F.2d 868 (3d Cir. 1970).

\textsuperscript{96} Encouraging the union to disclose to the grievant its appraisal of the merits of the employee's claim is desirable when the union determines that the contract language does not support the grievant's claim as well as when the union determines that the facts do not support the claim.

\textsuperscript{97} See, e.g., Buchholtz v. Swift & Co., 609 F.2d 317 (8th Cir. 1979), cert. denied, 444 U.S. 1018 (1980); Robesky v. Quantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978) (although union obtained settlement of employee's grievance, union failed to inform employee that she no longer had a chance to take her grievance to arbitration to attempt to obtain a better settlement); Baldini v. Local Union No. 1095, 581 F.2d 145 (7th Cir. 1978); Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335 (6th Cir. 1975), cert. denied, 425 U.S. 981 (1976); Minnis v. International United Auto., Aerospace and Agricultural Implement Workers, 531 F.2d 850 (8th Cir. 1975); Bazarte v. United Transp. Union, 429 F.2d 868 (3d Cir. 1970); Perry v. Chrysler Corp., 84 Lab. Cas. (CCH) ¶ 10,685 (E.D. Mich. 1978) (allegation of bad faith when plaintiff not notified of withdrawal of grievance for four months).

FAIR REPRESENTATION DUTY

credibility is at stake, the union runs no risk of liability by doing so, and any subsequent suit filed by a disgruntled employee against the union can be dismissed without a trial.

1. The Duty to Investigate

In order to make an informed decision about the facts, a union must fully investigate a claim. A complete investigation entails gathering all the available evidence that would be necessary to present the case to an arbitrator. The union should collect whatever documentary evidence exists, question witnesses to the event, and, where relevant, seek expert opinion. Since the primary objective is fact finding, when additional evidence is relevant, a union should not be satisfied by merely talking to the employer and employee to seek adjustment of the grievance. This requirement of full investigation need not excessively burden the union. Since in many situations the grievant has access to the relevant evidence, the


100. See Anderson v. Grocers Supply Co., 483 F. Supp. 73, 79 (S.D. Tex. 1979) (substantial issue of unfair representation raised when union refused to call certain witnesses and to question other witnesses during grievance procedure). Cf. Jozaitis v. F.W. Woolworth, Inc., No. 78C3319 (N.D. Ill. Mar. 13, 1980) (failure to question witness held harmless error when testimony would not have added to the facts). But see Barhitte v. Kroger Co., 85 Lab. Cas. (CCH) ¶ 11,081 (W.D. Mich. 1978) (failure to investigate the existence of witness must reach the level of gross negligence before a breach will be found); Warb v. General Motors Corp., 95 L.R.R.M. (BNA) 3238, 3238-39 (E.D. Mich. 1977) (no breach when union made good faith attempt to question witness but failed because of company insufficiency). Professor Rabin suggests that failure to interview witnesses or to pursue obvious lines of inquiry are omissions egregious enough even to set aside the bar of finality which accompanies an arbitration proceeding. See Rabin, The Duty of Fair Representation in Arbitration, in THE DUTY OF FAIR REPRESENTATION 84, 92 (J. McKelvey ed. 1977).

101. See, e.g., Vaca v. Sipes, 386 U.S. 171, 175 (1967) (union sent grievant to a doctor for physical examination); Bures v. Houston Symphony, 503 F.2d 842, 843 (5th Cir. 1974) (players committee requested that discharged musician audition).

102. See, e.g., Barhitte v. Kroger Co., 85 Lab. Cas. (CCH) ¶ 11,081 (W.D. Mich. 1978), in which grievant had been discharged for stealing meat. The grievant claimed he told the suppliers to bill him and his employer separately for separate purchases he made, yet all of the meat was charged to his employer's account. The union official did not question any of the employees at the supplier's packing house concerning the incident or investigate the truth of the matter beyond talking to the grievant and to the employer's representatives.
union should be able to delegate some of the responsibility for gathering evidence to the grievant.

Another Supreme Court case bears on the issue of adequacy of fact investigation. In *Hines v. Anchor Motor Freight*, the grievance at issue was a claim of wrongful discharge, which depended primarily on a fact question: whether the grievants had falsely reported motel receipts. Though the union took the claim to arbitration, it was unsuccessful in getting the employees reinstated. The employees then sued both the union and the employer on the ground that the union failed to investigate the claim properly, and that if it had, it would have discovered exculpatory evidence which was never presented to the arbitrator. The Court found the allegations sufficient to state a claim that the union had breached its duty of fair representation, with the result that the arbitration decision could be set aside.

In *Vaca*, the Supreme Court had said that the union could not process a grievance perfunctorily; in *Hines*, the Court expanded the definition of perfunctory processing to include the failure to investigate facts necessary to the grievant's case. The Court's opinion, which appears to require the union to gather the facts on which the grievance is based, implies that there is some obligation on the part of the union to consider and evaluate the evidence that its investigation yields. Otherwise, requiring the union to investigate would be an unnecessary and futile gesture.

2. The Duty to Comply with the Grievance Procedure

In order to ensure that a grievance is not abandoned until after it has been investigated and its merits fully considered, a union should be required to comply with all procedural steps preliminary to arbitration. If a grievance is extinguished because the union fails to comply with a procedural requirement, such as timely filing, the employee's opportunity to obtain a meaningful determination on the merits is lost. This union behavior would seem to constitute a violation of the Supreme Court's proscription against processing a grievance perfunctorily and against arbitrarily ignoring meritorious grievances.

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104. Id. at 571.
105. 386 U.S. at 194.
The decisions of the circuits are in conflict on this point.108 Although deciding the cases on other grounds, the Supreme Court implicitly approved the sanctioning of union negligence in failing to comply with the grievance procedure in two recent cases dealing with the scope of damages in § 301—breach of duty suits. Bowen v. United States Postal Service, 103 S. Ct. 588 (1983); International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979). The First, Second, Sixth, Ninth, and Tenth Circuits have held that failure to investigate or failure to appeal a grievance in a timely manner constitutes a breach of the duty. See, e.g., Foust v. International Bhd. of Elec. Workers, 572 F.2d 710 (10th Cir. 1978) (union failure to file plaintiff's grievance timely raised a jury question whether union breached the duty of fair representation), affd, 442 U.S. 42 (1979); Schum v. South Buffalo Ry. Co., 496 F.2d 328, 330-32 (2nd Cir. 1974) (union representative's unintentional failure to file a timely second step complaint constituted breach of the duty of fair representation). For an exhaustive analysis of Schum, see Feller, supra note 17, at 666-718. See also De Arroyo v. Sindicato De Trabajadores Packinghouse, 425 F.2d 281, 284 (1st Cir.). (jury's finding of unfair representation sustained when union failed to investigate or make any judgment concerning the merits of plaintiff's grievance), cert. denied, 400 U.S. 877 (1970).

In Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975) (Ruzicka I), the union failed to file grievance forms after being granted two extensions. The Sixth Circuit rejected a requirement of bad faith or intentional conduct and instead found the union's inaction to constitute perfunctory handling in breach of its duty. The court focused on the fact that the union's failure to act was unexplained and that the union failed to examine the merits of the grievance. Id. at 310. The court applied the Ruzicka I standard in two subsequent cases, Williams v. Teamster Local Union No. 984, 625 F.2d 138 (6th Cir. 1980), and Milstead v. International Bhd. of Teamsters, 580 F.2d 232 (6th Cir. 1978), cert. denied, 454 U.S. 896 (1981). In Williams, the union inexplicably failed to process a grievance which was supported by clear contract language and was uncontested by the company. 625 F.2d at 139. In Milstead, the union breached its duty by failing to scrutinize the appropriate terms of the contract relating to the plaintiff's grievance. 580 F.2d at 235-36. In both cases, the union's inaction was unexplained and not based on a determination of the merits.

Recently, the scope of the Ruzicka I standard has been narrowed in a second opinion. Ruzicka v. General Motors Corp., 649 F.2d 1207 (6th Cir. 1981) (Ruzicka II). Under Ruzicka II, a union may defend a perfunctory conduct charge by offering evidence justifying the way in which the grievance was handled. In Ruzicka II, the court recognized evidence of the union's reliance on the employer's past practice of freely granting extensions. Prior to the second opinion, the court had suggested that only a decision on the merits would defeat a charge of perfunctory conduct. See Ruzicka I, 523 F.2d at 310. Under Ruzicka II, a failure to proceed is not perfunctory conduct when the union's failure to act is "based on a wholly relevant consideration, is not intended to harm its member, and is not the type of arbitrariness which reflects reckless disregard for the rights of the individual employee." 649 F.2d at 1212.

In Robesky v. Quantas Empire Airway Ltd., 573 F.2d 1082, 1089-91 (9th Cir. 1978), the union representative failed to inform the grievant of the circumstances surrounding a settlement offer made by the company. As a direct result of the union's failure, the grievant rejected the company's reinstatement offer. Relying on Ruzicka I, Griffin v. United Auto., Aerospace and Agricultural Implement Workers, 469 F.2d 181 (4th Cir. 1972), and De Arroyo, the Ninth Circuit held that the union's unintentional failure to inform was so egregious that a trier of fact could find it amounted to arbitrary and perfunctory behavior. 573 F.2d at 1091. When a failure to inform had no substantial impact on the grievant's claim, however, the court declined to find perfunctory conduct amounting to breach. See Singer v. Flying Tiger Line, Inc., 652 F.2d 1349 (9th Cir. 1981). In Singer, the union failed to inform the grievant of the grievance hearing and, as
However, recently, cases from the United States Courts of Ap-

a result, he did not attend. The court found no perfunctory conduct and no breach of the duty because the only issues involved contract interpretation, and thus, the failure to inform was not prejudicial. *Id.* at 1354. The court distinguished *Singer* from *Robesky* by noting that in *Robesky* the plaintiff was clearly prejudiced by the union’s failure to inform him. *Id.* See also *Stephens v. Postmaster General*, 623 F.2d 594, 596 (9th Cir. 1980). The court has also indicated that a failure to investigate may constitute perfunctory conduct in breach of the duty of fair representation. See *Hughes v. International Bhd. of Teamsters Local 683*, 554 F.2d 365 (9th Cir. 1977). In *Hughes*, the union decided not to arbitrate a wrongful discharge claim on the basis of a “sham” interview with the plaintiff. The court found a breach of duty on the basis of evidence of both bad faith and perfunctory handling. *Id.* at 368.

On the other hand, the Fifth and Seventh Circuits have held that a failure to comply with the grievance procedure did not constitute breach of the duty of fair representation in itself, and that scienter is required. See, e.g., *Coe v. United Rubber Workers*, 571 F.2d 1349 (5th Cir. 1978) (union representative unintentionally misnumbered the plaintiff’s grievance, and, as a result, the claim was unsuccessful. The Fifth Circuit treated the mistake as an issue of negligence and relied on *Amalgamated Ass’n of St., Elec. Ry. and Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), and *Bazarte v. United Transp. Union*, 429 F.2d 866 (3d Cir. 1970) for the proposition that negligent conduct does not amount to a breach.).

The Seventh Circuit’s opinions are conflicting. In *Miller v. Gateway Transportation*, 616 F.2d 272 (7th Cir. 1980), an employee was discharged for refusing to carry out a work assignment which he claimed violated trucking industry regulations. The union’s representation during the grievance process consisted solely of a reading of the employee’s written grievances. *Id.* at 274. The court held that this minimal representation together with a failure to investigate the claim raised a substantial issue of fact concerning perfunctory handling of the grievance in breach of the union’s duty. *Id.* at 277. See also *Baldini v. Local Union No. 1095*, 581 F.2d 145, 150-151 (7th Cir. 1978). However, in *Hoffman v. Lonza*, 658 F.2d 519 (7th Cir. 1981), a different panel of the Seventh Circuit held that a union official’s failure to appeal because he forgot to appeal was not a breach of the duty of fair representation. *Id.* at 522.

Consistent with the majority of courts is the decision of the Third Circuit that an employee must demonstrate that the union’s conduct was prejudicial. See *Findley v. Jones Motor Freight*, 639 F.2d 953 (3d Cir. 1981). In *Findley*, the company informed an employee that his telephoned refusal to accept a work assignment constituted a voluntary quit. The employee claimed that he had been unable to understand the company dispatcher over the phone because of a bad connection and that, in any event, he called back to accept the assignment shortly thereafter. *Id.* at 956. The grievant complained that the union’s failure to secure a statement from the company dispatcher regarding the call constituted perfunctory conduct. The court rejected the claim stating that since the plaintiff failed to inform the court of what the witness would have said, there is no indication that the failure to obtain the statement was in any way prejudicial. *Id.* at 956-60.

The position of other Circuits on this issue is uncertain. See, e.g., *Wyatt v. Interstate & Ocean Treas. Co.*, 623 F.2d 888 (4th Cir. 1980). In *Wyatt*, the company discharged the plaintiff because of a physical disability. Instead of fully investigating all of the plaintiff’s medical records, the union representative relied solely on the company’s statements to determine whether the claim was meritorious. *Id.* at 890-91. Citing *Griffin*, the Fourth Circuit stated that indifference or grossly deficient conduct could constitute a breach. The court, however, did not reach the merits of the case, and, as a result, the meaning of the opinion is unclear. Nevertheless, the Fourth Circuit’s reading of *Griffin*, as well
peals for the Sixth and Seventh Circuits have come out differently on virtually identical facts. In each case, the union official forgot to file an appeal within the time limit allowed by the contract, thus terminating the grievant's claim of wrongful discharge. In *Ruzicka v. General Motors Corp.*, the Sixth Circuit held that failing to appeal a claim without reason was a breach of the duty of fair representation. In *Hoffman v. Lonza*, on the other hand, the Seventh Circuit held that such union conduct was not actionable.

To reach its conclusion, the Seventh Circuit held that some degree of scienter was required to breach the duty of fair representation. This decision is a marked departure from the decisions of other courts of appeals and from the Seventh Circuit's earlier decisions. The *Lonza* court based its decision in part on Supreme Court dicta of dubious precedential value and in part on a misreading of the policies underlying its reliance on such cases as *Ruzicka I* and *DeArroyo*, suggests that a failure to investigate may amount to unfair representation. See 623 F.2d at 891.

The Eighth Circuit has indicated that a union's failure to investigate or to file a grievance timely may constitute perfunctory treatment. In *Minnis v. United Auto., Aerospace and Agricultural Implements Workers*, 531 F.2d 850 (8th Cir. 1975), an employee was discharged for having falsified a medical form relating to sick leave pay. The union reluctantly accepted the grievance, then failed to process it in a timely manner and refused to investigate. The union finally dropped the grievance without notifying the grievant. Id. at 853. The court held that the evidence would support inferences of bad faith and arbitrary and capricious conduct. *Id.* A recent Eighth Circuit decision modifies the *Minnis* standard. See *Ethier v. United States Postal Serv.*, 590 F.2d 733 (8th Cir.), cert. denied, 444 U.S. 826 (1979). A union's failure to file timely was found not to be perfunctory treatment when the failure was a result of a mistake in construing the contract language and the union had otherwise pursued the claim competently. *Id.* at 736. Even when an employee is prejudiced by union conduct as in *Ethier*, a breach will be found only where the union's mistakes or failures are inexplicable.

110. 649 F.2d 1207 (6th Cir. 1981).
111. 658 F.2d 519 (7th Cir. 1981).
112. See supra note 108.
113. See *Archie v. Chicago Truck Drivers*, 585 F.2d 210 (7th Cir. 1978); *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793 (7th Cir. 1976).
114. The basis for the court's decision was dicta revived from the Supreme Court decision in *Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1970). Although *Lockridge* characterized union actions which breach the duty of fair representation as requiring bad faith in the form of "substantial evidence of fraud, deceitful action or dishonest conduct," *id.* at 299 (quoting *Humphrey v. Moore*, 375 U.S. 335, 348 (1964)), the issue was tangential to the case, having been regarded as irrelevant in the decision below. *Id.* at 279-30, 300.

Furthermore, five years after *Lockridge*, in *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), the Supreme Court reiterated the language of *Vaca v. Sipes*, which suggests that arbitrary union conduct, absent bad faith, can constitute a breach of the duty of fair representation. See *id.* at 569. *Hines* omitted refer-
the duty of fair representation as a threshold issue in employee-employer cases.\textsuperscript{115} It appears that the \textit{Lonza} decision, in which only two judges of the court participated, will not be the last word in that circuit on this issue.

Conversely, in \textit{Ruzicka I}, the Sixth Circuit found that a union’s failure to appeal a grievance in a timely manner, if done without reason, violates the duty of fair representation.\textsuperscript{116} Subsequently, in \textit{Ruzicka II}, the union argued that it had a reason for failing to appeal the claim in a timely manner. The union claimed it had relied on the employer’s previous practice of granting time extensions for filing appeals. The Sixth Circuit held that this claim, if proved, would constitute a defense, and stated that a union does not breach its duty of fair representation as long as it can articulate some legitimate reason for its inaction. In reaching this conclusion, the court analogized the

eference to \textit{Lockridge}. The basic difference between the nature of the actions in \textit{Hines} and in \textit{Lockridge} may explain the subtle difference in the Court’s characterization. While \textit{Hines} was bottomed on a breach of contract claim against the employer, \textit{Lockridge} was not. \textit{Lockridge} was a suit against the union alone for allegedly tortious action for breach of the duty of fair representation based on the union’s construction of a union security clause. A distinction requiring scienter in one case but not in the other may be based on the different functions of the duty of fair representation in the respective lawsuits. When the lawsuit is for a union’s tortious action alone, it may be reasonable to limit employee suits against the union to those cases involving bad faith or discrimination, since a wide range of union actions may potentially cause some harm to the member of its bargaining unit. When the action is a hybrid § 301 breach of duty action, however, the union is in a special position to cause injury to the employee through nonfeasance rather than malfeasance, so it is appropriate to hold the union to a higher duty of care.

\textsuperscript{115} The court’s second reason for deciding that the union’s conduct did not violate the duty of fair representation was that such a finding would expose the employer to suit and upset the employer’s interest in the finality of the grievance termination. 658 F.2d at 522. This rationale reflects a misconception about the purpose of the duty of fair representation and its relation to the employer’s interest in finality. The Supreme Court’s articulated purpose for using the duty of fair representation as a threshold issue was to insulate the grievance/arbitration system from being undermined by employee suits and to protect from challenge the union’s ability to settle grievances and to make decisions for the collective good. The Supreme Court’s purpose was not to insulate the employer from having to defend against charges of contract breach. In fact, this rationale is at odds with the Supreme Court’s subsequent decision in \textit{Hines v. Anchor Motor Freight, Inc.}, 424 U.S. 554 (1976). In \textit{Hines}, the Supreme Court expressly decided that, although generally the employer can rely on the finality of the decision, there is an exception to the rule when the contractual process has been seriously flawed by the union’s breach of its duty. In that circumstance, the union’s breach removes the contractual bar of finality. \textit{Id.} at 570-71. \textit{But see} Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983).

\textsuperscript{116} \textit{Ruzicka v. General Motors Corp.}, 649 F.2d 1207 (6th Cir. 1981). This decision, however, shows the limitations of using the negligence standard. Although the court stated that simple negligence would not violate the duty, the court determined that failing to file an appeal was more egregious than simple negligence. \textit{Id.} at 1212.
union's justification to cases in which the union determined that the grievance was not meritorious. There is, however, a vital distinction between these two situations. In the latter, the grievant receives a decision on the merits; in the case at bar, where the union expected a deadline extension, the grievant received no such decision. Thus, when the union miscalculates the employer's willingness to extend filing deadlines, the grievant is likely to be less satisfied with the fairness of the process. 117

There may be a reason, different from the one the Sixth Circuit articulated, which justifies judicial deference when a union miscalculates an employer's willingness to extend a filing deadline. A union that fails to appeal a grievance in reliance on prior practice cannot be expected to foresee that the employer has decided to change the practice. At the time, the union may believe it is complying with the grievance procedure. For a court to second-guess the union when it has made a mistake, in good faith reliance on prior practice, rather than through carelessness, would be to hold the union to an unrealistic standard of prescience. Sanctioning the union's conduct in hindsight will not improve future union representation. In contrast, a union that fails to appeal without reason can be expected to know that its failure will terminate the grievance. Imposing sanctions for this conduct will encourage the union to act deliberatively. Thus, although sanctions against a union that acted carelessly have some justification, less justification exists for penalizing a union that mistakenly chose the wrong strategy in its good faith efforts at representation.

3. The Problem of Advocacy Strategy

A union frequently must make choices about how best to represent an employee in advocating his or her claim. 118 The bar of finality should protect these union judgments 119 in the

118. Professor Rabin notes that "courts, except in the egregious cases . . . , seldom disturb arbitration awards in the name of fair representation." This may be, he suggests, because "second-guessing a union's decision not to take a case to arbitration is hard enough; assessing its tactics and trial techniques may well be impossible, let alone inappropriate." Rabin, supra note 100, at 90-91. For a discussion of the constraints and pressures on union decisionmaking, see supra text accompanying note 94.
same manner that the bar of finality protects union fact finding which is based on facts available at the time. Reconsideration of these union judgments by a court cannot improve union representation. Thus, if a union, in the good faith belief that a discharge grievance is not winnable on the facts, argues for the employer's forgiveness or an arbitrator's mercy, that tactical decision should be protected from second-guessing by a judge or jury. The bar of finality should be lifted only when the consequences of the union's inaction were clearly foreseeable.

Ironically, some courts have found that a union may have violated its duty of fair representation by negligent processing even when the underlying grievance was not meritorious.120 Since arbitrating a nonmeritorious claim will not yield a benefit to the employee,121 one might wonder whether the union's negligence prejudiced the employee. If not, it is difficult to imagine why such conduct should amount to a breach of duty. In evaluating the position that courts should take on this issue, it is useful to identify the purposes that a finding of breach of the duty could serve. First, if a court imposes sanctions on a union for negligent grievance processing, irrespective of whether the claim is meritorious, the union may be deterred from processing future grievances negligently. Second, a sanction imposed for union negligence restores integrity to the grievance/arbitration process. Since employees have a legitimate interest not only in the outcome of the grievance, but also in the process itself, some type of sanction may be appropriate to satisfy the employee's interest and confidence in the private dispute resolution system. But these purposes—restoration of employee confidence and deterrence of future negligence—must be balanced against the cost of court interference with the result the parties have reached through the private dispute resolution system. When there is no injured employee to protect, court interference in the process is less justifiable.

4. The Problem of Erroneous Fact Finding

An additional question concerning union fact finding remains unanswered: may a court reverse a grievance outcome when it finds the union has materially erred in fact finding?

120. Kaiser v. Local No. 83, 577 F.2d 642, 645 (9th Cir. 1978). But see Findley v. Jones Motor Freight, 639 F.2d 953, 958-60 (3d Cir. 1981); Singer v. Flying Tiger Line, Inc., 652 F.2d 1349, 1354-55 (9th Cir. 1981). In both these cases, the courts required the employee to prove that the union's failure to comply with the procedure was prejudicial to the grievant.

Certainly, a court cannot hold that a union breached its duty of fair representation merely because the court would have found a different version of the facts. That would be substituting the court's interpretation of the evidence for the union's and would not justify jeopardizing the benefits that flow from judicial deference to union decisionmaking. But must a court uphold a union's decision if it finds both that no reasonable union could have made that factual determination and that the employee-grievant has been injured? A court is quite likely to sidestep this question and recast the claim to fit under one of the other areas of breach of the duty of fair representation. For example, a court may find that a union's erroneous fact finding is due to an incomplete investigation. Alternatively, a court may decide that a union's erroneous fact finding gives rise to an inference that the union acted in bad faith by ignoring evidence that would have led a reasonable union to conclude that the grievance was meritorious. Once a court has determined that a union has breached some aspect of its fair representation duty, the court can proceed to correct the erroneous fact finding in the process of considering the merits of the claim for breach of contract. In each case, the appropriate court response may have to depend upon balancing the institutional cost of upsetting the finality of even an erroneously made grievance determination against the cost to the employee-grievant of an unremedied breach of the collective bargaining agreement.

In *Hines*, the Supreme Court indicated in dicta that it would balance these countervailing values in favor of finality. In acting on the case before it, however, the Court did not separate the elements of inadequate union investigation and possible union dishonesty. The Court stated:

> The grievance processes cannot be expected to be error-free. The finality provision has sufficient force to surmount occasional instances of mistake. But it is quite another matter to suggest that erroneous arbitration decisions must stand even though the employee's representation by the union has been dishonest, in bad faith, or discriminatory; for in that event, error and injustice of the grossest sort would multiply. The contractual system would then cease to qualify as an adequate mechanism to secure individual redress for damaging failure of the employer to abide by the contract.123

It must be noted that *Hines* can be distinguished because the

policy favoring finality of process when the grievance has been arbitrated is weightier than the policy favoring finality when the grievance has been resolved short of arbitration. Since the union is responsible for both gathering information and making the decision whether to arbitrate the grievance based on that information, there is greater potential for an erroneous result in the pre-arbitration setting, as well as less cost in setting the result aside, when the grievance process has not culminated in arbitration.

In summary, when the merits of a grievance turn on facts, the union should be required to act much as an adjudicative administrative agency does—investigate the claim, gather evidence, decide whether the evidence supports the claim and, if the evidence does support the claim, vigorously demand arbitration. In this type of grievance, the conflicting policies at stake are preserving finality and protecting the individual employee whose grievance will go unremedied if the court does not examine the merits of the grievance. Conspicuously absent in this situation are conflicting interests of other employees of the bargaining unit. Employees who are not involved in the

124. Professor Rabin comments that with regard to those cases taken to arbitration, the arbitrator can and should insure that all aspects of the case are adequately explored, particularly where the arbitrator suspects that the union is not doing an adequate job . . . . The arbitrator is the last neutral body in a position to properly assess whether the individual has had his day in court, and he ought to make sure the individual’s case is adequately developed. Rabin, The Impact of the Duty of Fair Representation Upon Labor Arbitration, 29 Syracuse L. Rev. 851, 872-73 (1978).

125. Neither the union nor the employer has as great an institutional stake in unarbitrated grievances, as they have in grievances which have been arbitrated.


An exception to this statement may be a situation in which, for example, finding one employee did not falsify claim checks leads to the implication that another employee did. In addition, other employees may have a valid protectible interest in the union’s determination of the truth of whether an employee-grievant is capable of performing the job, since that employee’s performance affects their safety or the quality of the product collectively produced. In these situations, the union may be justified in acting in the group interest, if not in the grievant’s interest, by requiring the grievant to take additional measures to demonstrate his work qualifications or capability. See, e.g., Coleman v. General Motors Corp., 27 Fair Empl. Prac. Cas. (BNA) 1009 (8th Cir. 1981); Wells v. Southern Airways, Inc., 616 F.2d 107, 109-10 (5th Cir. 1980) (individual member of the airline pilot’s association declined to accept assignment with grievant except under written protest which resulted in a routine test of grievant’s ability), cert. denied, 449 U.S. 862 (1980); Florey v. Air Line Pilots Ass’n, 575 F.2d 673, 675-76 (8th Cir. 1978) (airline pilot’s association’s refusal to attest to the grievant’s sobriety as required by the FAA resulted in his loss of certification); Bures v. Houston Symphony Soc’y, 503 F.2d 842, 843 (5th Cir. 1974).
grievance have no protectible interest in differing versions of the facts. Their only interest is an interest shared by the grievant—that the union act fairly and find the facts accurately, so the contract can be fully enforced and the integrity of the system maintained. Since no conflicting collective interests are at stake, the focus of the inquiry is on the reliability of the fact finding, and the union should be encouraged to represent the individual employee to the fullest extent possible by making determinations based on the facts before deciding to abandon a grievance.

B. UNION INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT IN ASSESSING THE MERITS OF A GRIEVANCE

Under the fair process model of grievance processing, in order to consider the merits of a grievance fully, a union must evaluate not only the facts, but the applicable "law" as well. The applicable law includes, of course, the contract language, established plant customs and practices, and prior arbitration decisions interpreting the contract language and plant practices.\textsuperscript{127} The fair process model requires that a union ascertain whether any contract language or unwritten plant practice provides a basis for a claim of breach of contract. The easy case is one in which the contract language is clear and runs counter to the grievant's claim. In this case, the union may unquestionably abandon a grievance.\textsuperscript{128} In the absence of allegations of bad faith or discrimination, a court may also summarily dispose of a lawsuit based on this defense.\textsuperscript{129} If the grievance poses at least an arguable question of contract interpretation, however, both the union, in the first instance, and the court, in any subsequent action, must engage in a more complicated deliberation.

\textsuperscript{127} See supra note 74 and accompanying text.


1. Contract Interpretation When the Interests of Other Employees are Implicated in the Grievance Outcome

a. Modeling Contract Interpretation on Administrative Law

A union's role in resolving grievances which present an arguable interpretation of a contract is likely to be more complex because the interpretation pressed by the grievant may conflict with the interests of other members of the bargaining unit. Conflicts of interest between employees within the bargaining unit are recurrent and inevitable in both the original contract negotiation phase and the subsequent contract enforcement phase. Conflicts occur because individual employees who have different interests and assign different priorities to those interests are forced to bargain collectively through the union. Different interpretations of the same contract language may benefit different groups of employees. By pressing for one interpretation, the union may favor the grievants, but disfavor another group of employees within its bargaining unit to whom it also owes a duty of representation. This problem is most apparent when employees are competing for the same limited benefit, such as promotion, work unit assignment, or seniority. Each affected group may pressure the union to interpret

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130. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees." Ford Motor Co. v. Hoffman, 345 U.S. 330, 338 (1953). Although conflicts will surface routinely during contract negotiation, some conflicts will succeed the adoption of the contract and are likely to cause further problems in the course of grievance processing.

131. For example, older employees may assign a high priority to securing adequate pension plans, while younger employees are concerned about higher pay or more vacation time. Employees with families may be interested in more holidays or better insurance plans. See D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 114 (1970); Rosen, Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining, 15 HASTINGS L.J. 391, 401 (1964). Systems analysts would refer to this situation as a case of differing "utility functions." See R. KEENEX & H. RAFFA, DECISIONS WITH MULTIPLE OBJECTIVES (1977).

132. Failure to consider the effect on other employees would expose the union to suit for breach of the duty of fair representation by those employees who were not a party to the original grievance, but were affected by its resolution. See, e.g., Humphrey v. Moore, 375 U.S. 335, 349 (1964); Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 202 (1944).

133. The position a union takes on a seniority grievance will affect all other employees who will be above the grievant on the seniority list if his case fails, but below him if his case succeeds. See, e.g., Denver Stereotypers & Electrotypers Union, Local 13 v. NLRB, 625 F.2d 134, 135 (10th Cir. 1980); Mitchell v. Amalgamated Council of Greyhound Drivers, No. 78-3452 (6th Cir. Aug. 13, 1980) (available on LEXIS, Genfed library, Cir file); King v. Space Carriers, Inc., 608 F.2d 283, 285-86 (8th Cir. 1979); Ryan v. New York Newspapers Printing Press-
the contract in that group's favor.\textsuperscript{134} For institutional reasons, the union may choose to support the more powerful group, usually the group which constitutes the majority, without considering the merits of the claim. This practice will regularly jeopardize the interests of minorities or individuals.

When a grievant's interest in pursuing his or her claim conflicts with the interests of other employees in the bargaining unit, commentators have subscribed to two different schools of thought. The two schools reflect opposing views of how much discretion a union should have in balancing individual and group interests and the extent to which the contract should limit union discretion. One theory assumes that contract language creates entitlements in the employees;\textsuperscript{135} the other assumes that employees have only those rights that the union is

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\textsuperscript{134} To the extent that fair representation includes the notion of \textit{equal representation}, once a union has taken a position on the meaning of a contract term, it should be bound to interpret the term consistently. Thus, prior practices are relevant to the issue of a union's freedom to choose different interpretations of a contract term.

\textsuperscript{135} A primary proponent of this view is Professor Clyde Summers. Professor Summers has identified six categories of cases in which the union would be deemed to have breached its duty of fair representation to the employee-grievant. Four of them pertain to the entitlement theory:

1. The individual employee has a right to have clear and unquestioned terms of the collective agreement that have been made for his benefit, followed and enforced until the agreement is properly amended. For the union to refuse to follow and enforce the rules and standards it has established on behalf of those it represents is arbitrary and constitutes a violation of its fiduciary obligation.

2. The individual employee has no right to insist on any particular interpretation of an ambiguous provision in a collective agreement, for the union must be free to settle a grievance in accordance with any reasonable interpretation of the ambiguous provision. However, the individual has a right that ambiguous provisions be applied consistently and that the provision mean the same when applied to him as when applied to other employees. Settlement of similar grievances on different terms is discriminatory and violates the union's duty to represent all employees equally.

3. The union has no duty to carry every grievance to arbitration; the union can sift out grievances that are trivial or lacking in merit. However, the individual's right to equal treatment includes equal access to the grievance procedure and arbitration for similar grievances of equal merit.

4. The individual employee has a right to have his grievance decided on its own merits. The union violates its duty to represent fairly when it trades an individual's meritorious grievance for the benefit of another individual or of the group. Majority vote does not necessarily validate grievance settlements, but may instead, make the settlement suspect as based on political power and not the merits of the grievance.

Summers, \textit{supra} note 13, at 279.
willing to enforce. While the former theory creates a fixed system of rights, the latter creates a system of floating rights.

Under the first theory, the contract creates vested entitlements in the employee that cannot be waived without his or her consent, unless the contract is amended. Presumably, amendments can only operate prospectively, so that accrued contract rights cannot be changed even by contract amendment. Since under this theory only clear contract language creates entitlements, a union is still free to decide between employee groups when the contract language is ambiguous. According to the theory's adherents, courts should intervene whenever combined union and employer actions threaten to deprive an employee of an entitlement.

Under the contrasting theory, a contract entitles employees to only those rights that the union is willing to enforce. This theory views contract negotiation and enforcement as a continuum. Since the union negotiates the contract, the union can also waive the contract's terms. Second, this theory challenges the notion that any contract term can be expressed in clear language. Contract terms deal with general situations, so that each specific application of a term inevitably requires an interpretation of the term's intended scope. Thus, according to the theory's adherents, there is no reliable basis for distinguishing contract language that creates an entitlement from contract language that does not. Third, because federal policy generally disfavors court intervention in private employment relations, the theory concludes that the union and the employer should be able to agree to waive contract language through continued bargaining. Under this theory, courts should intervene only if an employee can prove that the union acted out of discriminatory, hostile, or otherwise wrongful subjective feelings toward the grievant. At the extreme, adherence to this theory could result in ad hoc, item-by-item contract revision, regardless of the individual grievants' expectations.

Because the two theories proceed from different assumptions of how conflicting individual and group interests should be balanced, arguing the merits of the different theories leads ultimately to the basic issue which lies at the center of the unresolved means-ends debate of Kantian versus Utilitarian juris-

136. A primary proponent of this view is Professor David Feller. See Feller, supra note 17, at 774.

137. Support for this premise can be found in the oft-quoted words of the Supreme Court: "The grievance procedure is... a part of the continuous collective bargaining process." United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).
prudence. It is from this jurisprudential dilemma that some practical considerations drawn from administrative jurisprudence can attempt to save us. Focusing on the notion of fairness of process may lead to some tentative conclusions regarding how this means-ends debate should be resolved in the grievance processing context.

In the last section, the administrative agency analogy established a model of the union as a neutral fact finder; here, the analogy provides a model of the union as a neutral mediator of employee interests. Because of the contract's existence, however, the union may not be able to mediate employee interests as freely as it mediates interests in contract negotiation. The contract language has created certain employee expectations, and frustrating these expectations will lead to employee dissatisfaction. The situation is similar to that in which an administrative agency involved in mediating interests has taken a position by promulgating a rule. The existence of the rule operates as a greater restraint to change than if the agency had promulgated no rule at all.

Statutory policy, as expressed in the Administrative Procedure Act (APA), generally requires that an agency provide affected parties with an opportunity to participate, before the

138. This issue is beyond the scope of this Article. Although to this author the entitlement theory seems preferable to the floating rights theory, it is difficult to say that there may not be some exigent circumstances where the greater good of the majority justifies depriving the individual of his or her entitlement. See, e.g., I. Kant, Foundations of the Metaphysics of Morals (L. Beck trans. 1859) (within Kant's jurisprudence, a person must be treated "always as an end and never as a means only" if that treatment is to be ethical). See also I. Kant, The Philosophy of Law (W. Hastie trans. 1887), and J. Bentham, An Introduction to the Principles of Morals and Legislation (1789) (Bentham determines whether group action is right by focusing on the sum of the interests of the individual members. Under Bentham's utilitarian principle, group action is right if the action promotes the greatest interest of the greatest number. Thus, contrary interests of individual members will be subordinated to the group's interest.). For current scholarship where the debate continues, see, e.g., B. Ackerman, Private Property and the Constitution (1977); R. Nozick, Anarchy, State, and Utopia (1974); J. Rawls, A Theory of Justice (1971).

139. The classic example of this situation is the life raft where one individual owns the only means of survival. In an era of economic upheaval, a similar example may be plant closings. See infra notes 172-90 and accompanying text.

140. Professor David Feller, a proponent of what is here referred to as the floating rights theory, argues that the collective agreement is not a contract creating rights but instead is a rulemaking process creating rules. See Feller, supra note 17, at 774. Unfortunately, Professor Feller does not press this analysis further to realize that an employee has an expectation in the continued enforcement of rules which operate in his or her favor.

agency may change its rules.\textsuperscript{142} This opportunity for affected parties to participate is accorded regardless of whether their interest under the rule rises to the level of an "entitlement."\textsuperscript{143} Underlying the APA position is the belief that participation allows the individual to bring to the decisionmaker information about the value of the expectation to the individual. Participation may also enable a compromise to be made between conflicting interests, and can have a cathartic effect on the individual's acceptance of the ultimate decision. In the grievance context, if it is necessary for a union to subordinate a grievant's expectations to the greater good of the majority, an opportunity to participate in the union's decision can promote similar values. The extent of the opportunity to participate may not be subject to exact prescription because it may depend on the particular structure of the grievance process and on the union's internal structure, and thus it is best left the subject of union experimentation. At the very least, however, it would seem that the union official or panel, which decides whether to pursue a grievance, should be obligated to listen to the employee's side of the matter.\textsuperscript{144}

\textsuperscript{142} Agency rules can be promulgated through a notice and comment procedure or an adjudicative procedure. See 5 U.S.C. §§ 553, 554, 556, 557 (1976). Rules adopted after a notice and comment process have only prospective application, whereas rules adopted in adjudication are frequently applied to the case being adjudicated. See, e.g., Securities and Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 202 (1947). Both processes, however, accord affected parties an opportunity to participate.

\textsuperscript{143} Another administrative law analogue is possible, that of entitlement theory, rather than administrative rulemaking. With regard to entitlement analysis, constitutional due process has been preoccupied with the same concerns afflicting entitlement analysis in the grievance context discussed earlier. Compare Mashaw, Administrative Due Process: The Quest for a Dignitary Theory, 61 B.U.L. REV. 893, 898-906 (1981) with Shulman, Reason, Contract and Law in Labor Relations, 68 HARV. L. REV. 999 (1955). The basic issue is whether an entitlement exists, since the consequence of finding an entitlement determines whether due process attaches at all. If due process attaches, it will likely require an opportunity to participate in decisionmaking in some way, possibly by a trial type hearing. When the entitlement rises to the level of a fifth amendment property interest, due process requires just compensation when overriding group interests require that an individual's entitlement be taken.

\textsuperscript{144} This view is consistent with Humphrey v. Moore, 375 U.S. 335 (1964), the major Supreme Court case raising the issue of conflicting employee interests in the grievance context. This case is most often cited for upholding the union's decision to side with one group of employees over another in a seniority dispute stemming from a merger of two operations. Id. at 349-50. The case is also important for acknowledging some right to employee participation in the decisionmaking. After holding that the union was entitled to take the position it did, the Court recognized that a question remained whether the adversely affected employees were deprived of a fair hearing. The Court resolved this factual question by stating: "Dealers employees had notice of the hearing; they were obviously aware that they were locked in a struggle for jobs and seniority
Devising a model for union behavior based on the affected individual's legitimate expectations comes close to the entitlement theory mentioned earlier. After all, legitimate expectations, like entitlements, are based on clear contract language. Unlike the entitlement theory, however, which would require that a union never waive an entitlement by declining to process a meritorious grievance, the administrative law analogy treats expectations created by clear contract language merely as a point of departure for inquiry into what decisionmaking procedure is appropriate and what type of employee participation should be accorded. Grievances based on such expectations should not be lightly dismissed, but, if a grievance must be dismissed because of some overriding group interest, fairness of process would seem to require according the grievant an opportunity to participate in that decision.

Thus, a fair process approach arrives at an accommodation of the best attributes of both the opposing schools of thought. The fair process standard secures employee expectations in benefits provided by contract, but avoids the all or nothing problem of the entitlement theory, in which the entire question of fair representation turns on whether the contract language creates an entitlement. Yet, the fair process approach allows a union, when necessary, to maintain the importance of collective interests over individual ones, provided the union accords the individual some opportunity to participate in the decision.

Further inquiry into fairness of process should include an examination not only of the contract enforcement process, but also of the negotiation process which typically brings contract clauses into existence. A particular contract clause may represent the culmination of discussion among the rank and file during the negotiation of the contract from which employee expectations were originally formed. Thus, in order to formu-

with the E & L drivers, and three stewards representing them went to the hearing at union expense and were given every opportunity to state their position.” Id. at 350 (emphasis added).


But while the vested-rights approach establishes a rigid rule, the duty of fair representation restraints only when it would be unfair not to. One may well say, as Professor Cox intimates, that in most instances it will be an easily demonstrable breach of the duty not to pursue an accrued wage claim on behalf of an individual employee. But in those several instances in which the collective reasonably and fairly decides that it is in the best interests of all employees not fully to pursue the expectations of a single individual, the duty of fair representation allows the adjustment to be made....

Id. at 32.
late a policy based on protecting employees’ expectations, it is necessary to view them against the backdrop of the typical negotiation process.

b. Group Dynamic Analysis: Interemployee Trading and the Relational Balance Between Groups of Employees

In contract negotiation, individuals with similar preferences can be expected to form special interest groups to support particular contract terms. Because a collective bargaining agreement will contain multiple terms and conditions, and because an individual’s preferences reflect multiple interests, employees will form and re-form groups over the spectrum of terms and conditions.\textsuperscript{146}

Although employees of the same bargaining unit often have different preferences, that fact, by itself, need not cause their interests to conflict.\textsuperscript{147} Conflicts of interest are inevitably caused because resources available for employee benefits are limited. As a practical matter, a union cannot press for every conceivable benefit in negotiating a contract. While the employer may find it in its own interest to devote as few resources as possible to employee benefits and while the union attempts to obtain as many benefits as possible, there is an upper limit, determined by the financial viability of the enterprise, above which the employer cannot go. This limit affects the union’s negotiating strategy because the union must select which demands to press at the bargaining table. Allocating a larger portion of the total available benefits to one group of employees will necessarily reduce the number of benefits available for others, unless the union can find some way to increase the total amount of benefits it can obtain from the employer.\textsuperscript{148} As a practical matter, the maxim for resolving conflicts of interest over limited resources is likely to be majority rule.

Following majority rule need not result in all contract

\textsuperscript{146} See D. Bok & J. Dunlop, \textit{supra} note 131, at 113.

\textsuperscript{147} For example, while the more senior group may not benefit from a policy favoring better probationary terms for new employees, the senior employees will not be harmed by it.

\textsuperscript{148} The Supreme Court has reflected some recognition of the fact that the principle of limited resources lies behind employee conflict of interests: An employer confronted with bargaining demands from each of several minority groups would not necessarily, or even probably, be able to agree to remedial steps satisfactory to all at once. Competing claims on the employer’s ability to accommodate each group’s demands, \textit{e.g.}, for reassignments and promotions to a limited number of positions, could only set one group against the other . . . .

terms favoring a majority. A minority's hope is that it can obtain a favorable contract term by combining forces with other minority factions or by trading votes. Because a collective bargaining agreement covers multiple issues, there is room for employees to trade support on various parts of the final package. Thus, unless a discrete majority of employees votes as a bloc on every issue, one can expect minority coalitions to form effective majorities on some issues. Bargaining for some minority positions is also sound institutional strategy for the union because it promotes more widespread satisfaction within the group. Multiple issue voting and vote trading provide alternative means of gaining group approval by allowing the losers on one issue to be compensated by gains on another. As the result of vote trading, the contract may well contain terms different from those that would have been reached had each item been voted on separately. Thus, the final contract package represents not only an agreement between union and management on contract terms, but it also represents agreements, reached in a deliberative trading process, on how scarce resources are to be allocated among employees within the bargaining unit.

The foregoing analysis of negotiation has important implications for grievance processing. Unlike the agenda in contract negotiation, grievances arise over issues governed by particular contract language separately, rather than over all the issues contained in the contract at once. If the union selectively exercises its power to compel arbitration, the resulting allocation of employee benefits may be different from the allocation of benefits contemplated in the contract. Assuming that the union will be responsive to majority opinion, the union can be expected to arbitrate any grievance issue that affects a majority of employees. Most grievances, however, benefit only an individual or a

149. See D. Bok & J. Dunlop, supra note 131, at 113. It is not enough that a particular contract term would benefit a majority. In order for a term which favors the majority to be part of the union's demand, the term must be dominant in the amalgam of the combined priorities of the majority. As Bok and Dunlop have said, "Most negotiations do not consist of clear-cut choices between majority and minority interests. Rather, the union works with many demands that are pressed with varying degrees of intensity by different groups." Id. See also R. Walton & R. McKersie, A Behavioral Theory of Labor Negotiation (1965).


minority of employees of the bargaining unit, making it difficult to garner majority support for arbitrating the grievance, especially if the majority perceives some benefit from not arbitrating the grievance.\textsuperscript{152}

If contract language favorable to the minority is the result of a trade, the minority may not be able to mobilize the same support in contract enforcement that it received in contract negotiation. The same broad coalition that favored adoption of the contract term may not support enforcement of the term when not all the coalition members are affected. Thus, an agreement negotiated on a multiple issue basis will regularly be altered to the detriment of minorities if it is enforced by majority rule on an issue-by-issue basis.

This result hardly would seem fair to the minority group that succeeded in obtaining a negotiated contract promise but is unable to secure the enforcement of the promised benefit. Consequently, federal labor policy should be structured to allow minorities subsumed in exclusive bargaining units to secure the gains they achieve in negotiation.\textsuperscript{153} Otherwise, minority groups would lose the incentive to participate fully in the collective bargaining process, contrary to congressional policy.\textsuperscript{154} If minority groups' bargaining efforts are not protected, the union will be increasingly controlled by whatever homogeneous group of employees can defeat through grievance processing any benefits minority subgroups obtained through negotiation. More internal union strife, more unstable labor relations, and threats to labor peace by disenfranchised minority groups could result. A rule requiring union adherence to specific contract language, however, provides minorities with an incentive to participate in the collective bargaining process because they can rely on the enforcement of contract gains they obtain through participating in the process.

Because vote trading in contract negotiation is likely to be obscure and the final package will reflect the employer's prefer-

\textsuperscript{152} The benefit may be in terms of union expenses saved, see infra text accompanying notes 192-200, or in terms of additional majority benefits gained by sacrificing the grievant's interest, see infra text accompanying notes 202-17.


\textsuperscript{154} The Landrum-Griffin Act §§ 101-105, 29 U.S.C. §§ 411-415 (1976) ensures that minority voices can be heard in union affairs. Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 64 (1975). The Act ensures union members the right to speak, vote, and participate in the affairs of the union, subject to such reasonable rules as the union may adopt. The purpose of this act commonly referred to as the "employee's Bill of Rights" is to enable and encourage maximum participation of employees in union activities.
ences as well as those of union members, courts will normally be unable to determine which contract clauses were the result of trading. The specificity of contract language provides a much better guide for the protection of minority interests. If the contract language is vague, majority rule is an appropriate basis on which to proceed because the minority has no right to expect or insist on any specific benefit absent clear contract language. As in negotiation, the interest of the individual or the minority must yield to majority group interest. When contract language favors the minority group, however, there is greater reason for requiring the union to recognize the legitimate expectations of the minority. Thus, adhering to specific contract language eliminates the need for courts to investigate whether the language was actually the result of a trade.

The fairness of using contract language as a limitation on

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155. See Finkin, supra note 28, at 187.
156. Traditional contract analysis would lead to the same result. See Restatement (Second) of Contracts § 19 (1973). Under traditional contract analysis, when contract language is ambiguous, a court is faced with several problems not present when contract language is clear and specific. The court must divine the intent of the employer and the union as parties to the contract. Divining the intent of an ambiguous collective bargaining provision is a difficult exercise, even for arbitrators skilled in interpreting the law of the shop. The intent must be viewed "with some imagination of the purposes which lie behind" the language. Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1, 27 (1958). "The difficulty arises from the fact that management and labor often have conflicting aims and objectives, and the interpretation put upon the contract may depend upon which objective is chosen as the major premise." Id. In an employee's suit alleging breach of ambiguous contract language, a court is hard pressed to find a fundamental purpose governing the contract language counter to the interpretation urged by both the employer and the union.

Furthermore, the fact that the contract language is ambiguous may imply one of two situations—either the parties did not agree upon a specific policy because the issue was never considered, or the issue was considered but the parties could not agree upon a specific policy and they intended to leave the issue open to further negotiation when it arose. See Summers, supra note 9, at 390. If the former is true, it would be an abuse of the court's authority to impose on the parties contract terms to which they never agreed. If the latter is true, it would be an abuse of the court's authority to interpret the contract contrary to the intention that the issue be left open for further negotiation. Hence, the entire exercise of divining a fixed intent from ambiguous contract language contrary to an interpretation the collective parties have subsequently chosen is ill advised.

These problems are not present, however, when the contract language is clear. If a court has clear, specific language to guide it, the court cannot be accused of reordering the scheme agreed upon by the private parties; it merely enforces the terms the parties initially set. Thus, the rule that judicial involvement should depend on the specificity of the contract language maintains the appropriate relational balance between courts and parties to collective bargaining agreements. As Professor Summers has observed, under this rule, the collective parties, rather than individuals, retain the dominant role in completing the terms of the agreement. Id. at 390, 396.
union discretion can be illustrated by an example of clear and unambiguous terms which grant a benefit to a minority group. In an industry subject to periodic layoffs, the collective bargaining agreement would conceivably contain a clause providing for partial layoff of all employees in case of a plant slowdown. High seniority employees may have been persuaded to accept this clause in exchange for a contract clause providing a steeply sloped wage scale. Under this quid pro quo, high seniority employees receive a sufficiently high wage that they are willing to accept an occasional partial layoff. Correspondingly, low seniority employees may be willing to accept a low wage scale in exchange for greater job security, since they would be guaranteed partial employment in the case of a plant slowdown.

Assume further that the employer failed to follow the contract language and placed one third of its most junior employees on total layoff. These employees would be required first to seek remedies in the grievance/arbitration process. The majority of the employees would favor the changed layoff policy. The union, therefore, may be tempted to derail the grievance at the urging of the majority. According the union the discretion to change the terms of the contract by allowing it to terminate the grievance would result in giving the majority an unfair advantage at the expense of the minority. The majority, consisting of more senior employees, would receive the double benefit of higher wages and job security at a double cost to the minority, in contravention of the express terms of the collective bargaining agreement and the bargain struck between the employee groups. Not only would this result in an unfair distribution of tangible benefits, but it would greatly undermine the confidence of the minority in collective bargaining and grievance/arbitration as means of obtaining fair working conditions.

c. An Application of the Fair Process Model to Contract Interpretation

Among the conflicting cases dealing with employee conflict of interest in grievance processing, Smith v. Hussmann Refrigeration Co.157 appears to follow the fair process model. In

157. 619 F.2d 1229 (8th Cir. 1980). The Rhode Island Supreme Court reached a similar decision in Belanger v. Matteson, 115 R.I. 332, 346 A.2d 124 (1975), cert. denied, 424 U.S. 968 (1976). The union in Belanger arbitrated the case of a teacher with more seniority who was passed over for promotion in favor of a teacher with less seniority under a modified seniority clause, similar to the clause in Hussmann. The union convinced the arbitrator that the two teachers had equal qualifications and that under the contract, the senior teacher was en-
Hussmann, the contract language structured the employer's promotion decisions.\textsuperscript{158} The applicable contract language provided that the company should consider the factors of seniority, skill, and ability in making promotions, but "[w]here skill and ability to perform are substantially equal, seniority shall govern."\textsuperscript{159} The company promoted four employees based on their superior skill and ability. Grievances were filed by other employees, who were passed over for promotion but who were senior to those employees whom the company had promoted. The union chose to support the grievants' claims solely because of their seniority and pressed the grievances to arbitration. In choosing to support these grievants, the union never evaluated the skill of the employees who had been promoted, even though the grievances' merits depended upon the potential candidates being substantially equal in skill and ability to those employees promoted by the employer. When the arbitration award eventually resulted in two of the more senior employees receiving the jobs of two of those who had been promoted initially, the latter two brought suit against the employer and the union.

The United States Court of Appeals for the Eighth Circuit issued two different opinions on the matter. The first opinion,\textsuperscript{160} decided by a panel of three judges, addressed the question squarely under the analysis of this Article. It held that the union had erred in failing to take into account the merits of the grievance under the contract language. In the second opinion,
issued after the court agreed to rehear the issue en banc,\textsuperscript{161} the court reiterated its original reasoning that the jury could properly find that the union breached its duty of fair representation by failing to follow the contract language requiring skill and ability to be taken into account. This time, however, the court broadened its ruling by suggesting alternative grounds on which the jury could reasonably have found against the union: that the union failed to take the plaintiffs' interests into account and did not allow them to participate in the decisionmaking, a line of reasoning which is also consistent with the fair process model.\textsuperscript{162} Despite the alternative holdings, the initial ground clearly received the most attention from the court.\textsuperscript{163} The court stated, "In a [seniority dispute] the union must fairly represent both groups of employees and may take a position in favor of one group only on the basis of an informed, reasoned judgment regarding the merits of the claims in terms of the language of the collective bargaining agreement."\textsuperscript{164} The court recognized the difficulty thrust upon the union when it prefers one group of employees over another. Since employees are not all similarly situated, a union must be able to make legitimate differentiations. Liability should not be imposed on a union because of mere differences of opinion in line drawing. Nevertheless, when the employees' interests directly conflict, the union's decision must not be made arbitrarily, which, as the court indicated, would seem to require an informed, reasoned judgment of the merits of the claims.\textsuperscript{165}

In analyzing the language of the contract, the court stated:
Under the collective bargaining agreement, after the company chose to select on the basis of merit, three separate considerations were relevant in determining the right of any employee to be promoted. These were (1) his selection by the company, (2) on the basis of skill and

\textsuperscript{161} Smith v. Hussmann Refrigeration Co., 619 F.2d 1229 (8th Cir. 1980).
\textsuperscript{162} The court held that 1) the jury could properly have found that the union's failure to notify plaintiffs of the arbitration hearing or to invite them to attend the hearing was a breach of the duty of fair representation, \textit{id.} at 1241; 2) the jury could have found that the union's resubmission of the issue to the arbitrator, after he had initially determined seniority, violated the collective bargaining agreement's provision of arbitration finality, \textit{id.} at 1242; and 3) the jury could have found that the union's failure to accept plaintiffs' counter grievances after the first grievance decision was finalized was a breach of the duty of fair representation, \textit{id.} at 1243.
\textsuperscript{163} Only three of the eight judges sitting agreed to this position. Judge Lay seemed to follow a bad faith standard and concurred with the majority on another ground, and Judges Bright and Ross also concurred on other alternative grounds. Judges Heaney and Stephenson dissented. \textit{id.} at 1246-54.
\textsuperscript{164} \textit{Id.} at 1237 (emphasis added).
\textsuperscript{165} The court indicated, however, that it did not mean to require a union to hold internal hearings on the merits of every grievance. \textit{Id.} at 1240.
ability, (3) superior to the skill and ability of any senior employee who
had bid for the position. Disregard for the qualification of superior skill
and ability could manifest an arbitrary and perfunctory approach to
promotion interests . . . . 168

Presumably, had the contract failed to specify the factors on
which the promotion was to be based, 167 the union would have
been free to base its decision on any single rational factor or
combination of factors including seniority alone. In that case,
the union's decision to follow the principle of seniority in chal-
lenging the employer's action would have been reasonable and
within its discretion.

The court also expressed concern that failing to follow the
contract language, by adhering to a policy of processing griev-
ances solely on the basis of seniority, "would effectively set
aside a provision of the collective bargaining agreement. 'Such
cavalier treatment of the contract is scarcely consistent with
the contemplation of the parties and seems contrary to the
union members' understanding and expectations when they
ratified the contract.' "168

The other ground which the court found sufficient for a
finding of breach of the duty of fair representation was the
union's exclusion of the plaintiffs from the decisionmaking pro-
cess. 169 The court found two separate instances of this exclu-
sion. The union failed to notify the plaintiffs of the time or
place of the arbitration hearing, and after the adverse arbitra-
tion decision, the union refused to accept new grievances filed
by the plaintiffs. The court held that either instance could be a
proper basis for finding a breach. The court seemed to suggest

166. Id. at 1239.
167. See, e.g., Humphrey v. Moore, 375 U.S. 335 (1964), in which the contract
failed to specify on what basis seniority disputes should be resolved.
168. 619 F.2d at 1240-41 (quoting Summers, supra note 13, at 264).
169. The Eighth Circuit has not been alone in drawing the line of union arbitrar-
iness based on the union's adherence to specific contract language. In Werner
denied, 454 U.S. 834 (1981), cert. denied, 454 U.S. 834 (1981), the Ninth Circuit indicated approval of the Huss-
mann doctrine. The court stated that Hussmann teaches that the union should
support those employees whose position is substantiated by the terms of the
collective bargaining agreement. In Werner, the union's actions of favoring one
group over another in a seniority dispute were upheld because the plain mean-
ing of the contract supported the position advanced by the union. See also
Heider Jeep Corp., 96 L.R.R.M. (BNA) 2956 (N.D. Ohio 1977) (refusal to process
a seniority grievance did not constitute a breach when the contract and a modi-
fication of the contract supported the union's action); Gratien v. Bethlehem
Steel Corp., 68 Lab. Cas. (CCH) ¶12,628 (W.D.N.Y. 1972) (withdrawal of senior-
ity grievance just prior to arbitration did not constitute a breach when the con-
tract language and a previous arbitration decision favored the union's
decision).
169. 619 F.2d at 1241, 1243.
that the purpose of giving the affected employees the opportunity to attend the arbitration hearing was to ensure their views would be presented to the arbitrator, since the union had not considered those views. Certainly, as the court states, a fair arbitration hearing would have cured earlier defects of union representation. It is unlikely, however, that the court would require all affected parties to have the opportunity to attend the arbitration hearing if the union takes into account their views at an earlier stage.

Although it is difficult to articulate a uniform rule outlining the requisite extent of the opportunity to participate, the facts of this case indicate that the union systematically excluded the interests of the junior employees who had been promoted to the contested position. The union failed to interview them in order to make a deliberation on the merits, failed to notify them of the arbitration on a decision which would affect their job interests, refused to accept their grievance filed after the arbitration decision had affected their interests, and finally, refused their request to address the membership on the issue. Thus, the court appears to have been motivated by the same notions of policy that underlie the fair process model: the union should in most cases follow clear contract language, but if it must depart from the language it must not shut affected employees out of the process of union decisionmaking.

2. A Special Case: Plant Closings

The foregoing section argued that the clear, unambiguous language of collective bargaining agreements should, for the most part, establish the boundaries of union discretion in grievance processing, even when the interests of employees conflict. This conclusion is based on the view that contract language may reflect interemployee agreements on how to allocate scarce resources. In the case of unforeseen circumstances, such as a plant closing caused by an unanticipated change of market forces, however, wider union discretion may be justified and necessary. The interests of all workers are served by granting the union the power to reopen the contract to scale down employee benefits, since each employee stands to benefit from the continuation of the enterprise. This is precisely the type of exigent circumstance in which individual entitlements may need to yield to greater collective interests. Even if union concessions cannot preserve the enterprise, this ex-

170. Id. at 1241 n.13.
171. See supra note 138.
traordinary change in circumstances can justify setting aside interemployee agreements on the allocation of benefits. Of course, if a plant closing has been anticipated and provided for by clear contract language, the provision for the contingency militates against the need for wider union discretion and in favor of protecting employee expectations created by that language.

In the plant closing setting, the union should have the power to set aside interemployee deals reflected in the original contract because employees presumably would have negotiated a different benefit package had they known the plant closing was pending. A contract negotiated on the assumption that the enterprise will continue indefinitely will usually include a mixed package of immediate and future benefits. To obtain some future benefit, such as vacation time or pension benefits, the union presumably had to relinquish some immediate benefit, such as higher wages. The receipt of that future benefit, however, is dependent upon the plant's continued operation until the time the benefits become due. Thus, if the union anticipated the plant closing at the time it negotiated the contract, it would no doubt choose to forgo future benefits for a larger package of immediately available benefits. Holding the union

172. See supra text accompanying notes 146-56. See also RESTATEMENT (SECOND) OF CONTRACTS § 265 (1979): “Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.”


174. For example, employees approaching retirement may trade lower present wages for higher pension benefits, which can only be realized upon retirement. If these employees had known that they would not be able to retire as expected because of the plant closing, they probably would have pressed for and obtained a package consisting of higher present wages or partial retirement benefits.

If wage increases for higher seniority employees received support from lower seniority employees expecting eventually to move into the higher seniority classification, the low seniority employees probably would have withdrawn their support for the contract term had they known that the plant would close before they would receive the benefit of the term. Thus, it is reasonable to assume that since the majorities that formed over particular contract benefits would differ, the majority that formed over the contract package would differ as well.
to clear contract terms in this circumstance may result in a fortuitous allocation of available benefits, since those employees with still pending benefits will be unable to receive them.

Because employer actions pursuant to partial or complete closings are likely to trigger grievance claims, the scaling down of benefits frequently occurs in the context of grievance processing. In negotiating new arrangements, there is again the risk that a majority-influenced union may take undue advantage of a minority. As long as the union waives only those contract terms that affect all employees equally, or that af-

175. See, e.g., Buchholtz v. Swift & Co., 609 F.2d 317 (8th Cir. 1979), cert. denied, 444 U.S. 1018 (1980). The employer's willingness to renegotiate with the union may depend on whether the employer anticipates a partial or temporary closing or a complete closing. If the employer anticipates only a partial closing, it may seek the union's continued cooperation, and it may be willing to amend the contract and thus allow greater participation by minority groups in negotiating the outcome.

If the employer decides to close the plant permanently, there is little incentive for the employer to negotiate a contract amendment with the union. Thus, in certain circumstances the union may choose to use existing contract claims enforced through the grievance/arbitration procedure as tactical leverage for negotiating a better settlement, since threatening to take a grievance to arbitration has a nuisance value similar to threatening to bring suit. See, e.g., Buchholtz v. Swift & Co., 609 F.2d 317 (8th Cir. 1979), cert. denied, 444 U.S. 1018 (1980). In these circumstances it would be folly to hold the union to the literal terms of an existing contract which is predicated on the assumption of a continuing enterprise.

Although the employer is required to bargain in good faith about the effects of closing under the National Labor Relations Act, the question of whether the employer must bargain about the decision to terminate part of its operation and the effects of that decision upon the bargaining unit has created a split between the courts and the National Labor Relations Board. The NLRB has taken the position that an employer must bargain about both the decision and its effects. See Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966). Appellate courts, however, have repeatedly declined to adopt the Ozark Trailers principle. Recently, the Supreme Court held that in economically motivated partial closure situations the employer need only bargain about the effects of the closure. See First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). The decision to partially terminate the business, the Court concluded, is a managerial prerogative which overrides any benefits to the bargaining unit derived from a requirement of bargaining. Id. at 686. For a detailed discussion of First National Maintenance, see Fenton, Partial Closings After First National Maintenance: Legal Refusals to Bargain Collectively, 1981 Ariz. St. L.J. 865.

176. Essentially, the same situation occurs when the union negotiates some term of a contract which disadvantages the entire bargaining unit. Professor Finkin suggests a "rule of thumb" for the union's duty of fair representation in negotiating:

A question of a departure from the duty of fair representation is not presented unless there is a disadvantagement of a minority within the bargaining unit or of an individual where the characteristic of the individual's disadvantagement is not shared with the majority. Because the gravamen of the duty is a limitation on the majority's power over the minority, the duty does not restrain the power of the majority over itself. If, for example, a union agrees to an across-the-board reduction in benefits, or fails to secure severance pay in the event of the plant
fect employees proportionally on some recognized basis such as seniority, no issue of fair representation arises, since an equal or proportional reduction in benefits should reflect the benefit allocation that existed under the original contract. In these cases, the costs of the concessions are equitably distributed among bargaining unit members. In fact, holding a union to strict enforcement of clear contract language might result in greater inequity, especially if that language was adopted on the employees' assumption of continued operation.

If, instead of waiving benefits on some recognized basis, a union waives only those contract terms that affect individuals or minority groups, an issue of fair representation is raised because the majority may be improving its position by appropriating additional benefits at the expense of the minority. Fair process does not require shifting the balance in favor of a minority, but it does establish a minimum procedural requirement that affected parties be permitted to protect their interests by participating in any settlement or liquidation of contract benefits. Since the justification for reopening the contract is that, if the employees had negotiated with knowledge of the pending plant closing, they would have sought different contract terms, any contract readjustment should be accompanied by whatever procedural protections would normally accompany contract negotiation. This mechanism is superior to selective grievance enforcement because it enables employees to arrive at their true preferences by interemployee trading and is more likely to arrive at an allocation of limited resources that reflects the employees' true bargaining strength.

Ryan v. New York Newspaper Printing Pressmen's Union

177. See, e.g., Kennan v. Pan American World Airways, Inc., 81 Lab. Cas. (CCH) ¶ 13,079 (N.D. Cal. 1976). More senior employees can be expected to have a greater stake in the enterprise. They typically receive more benefits under existing contracts so it is reasonable for them to receive more benefits in an adjustment.


179. The amendment process could present the same problem of shutting minorities out of the decisionmaking process if the union, with the employer's consent, is able selectively to reopen negotiation on certain provisions. In the partial layoff hypothetical, see supra text accompanying notes 156-57, reopening negotiations on the wage scale could create a benefit for the majority at the expense of the minority—the very danger sought to be avoided by restricting the union's ability to waive contract terms through selective contract enforcement.
No. 2\textsuperscript{180} and \textit{Battle v. Clark Equipment Co.}\textsuperscript{181} present two examples in which literal adherence to the terms of the collective bargaining agreements led to unintended and incongruous results in cases of unexpected plant closings. In both cases, adjustments designed for temporary layoffs were applied in situations where the layoff became a permanent closing. Since these plants followed a LIFO (last in, first out) seniority order, those with the least seniority were the first laid off, and, therefore, were able to avail themselves of supplemental unemployment benefits in \textit{Battle} and of new employment opportunities in \textit{Ryan} to the disadvantage of high seniority employees who were inevitably laid off at a later date.

In \textit{Battle}, the collective bargaining agreement provided for regular weekly benefits payable to any qualified employee who had been laid off. If the contract had been strictly followed, the supplemental unemployment benefits (SUB) fund would have been exhausted before the workers with the greatest seniority were laid off, leaving those who made the greatest contributions to the fund without any benefits. The union acted by amending the contract to freeze distribution of benefits under the old plan and to provide for their distribution on a seniority basis. Under the union constitution, this amendment was ratified by 90\% of those with SUB plan credits and 100\% of those on layoff. The United States Court of Appeals for the Seventh Circuit ordered dismissal of the challenger's claim that the union had acted arbitrarily in proposing the amendment because the court found that the amendment responded to an inequity in a reasonable manner.\textsuperscript{182}

The Seventh Circuit's decision is consistent with the fair process theory. Faced with a declining labor market, a union should be able to negotiate a reduction of benefits for all employees and to allocate remaining benefits based on seniority. One would expect this redistribution to parallel the former ordering of employee rights. Typically, more senior employees receive greater benefits than less senior employees. On the new diminished scale, more senior employees would continue to receive more benefits than less senior employees. Furthermore, the original purpose for including SUB benefits in the contract was probably based on the premise of a temporary layoff. In a continuing enterprise, the fund would later be replenished, perhaps by those same laid-off employees who received

\textsuperscript{180} 590 F.2d 451 (2d Cir. 1979).
\textsuperscript{181} 579 F.2d 1338 (7th Cir. 1978).
\textsuperscript{182} \textit{Id.} at 1347-48.
benefits, when the plant returned to full employment. Here, however, when the layoff became a permanent plant closing, it was not an unfair invasion of vested minority expectations to liquidate the fund's assets on the basis of seniority. Furthermore, since the ratification procedure gave full consideration to the affected minority, they were able to participate fully in the adjustment decision.

In Ryan, the problem was more complex and the responses of the union and the court less satisfactory. The Alco plant laid off employees in four stages. When the first group was laid off, it was not apparent to the union that the entire plant would close down. The union responded to the first layoff by issuing a "freeze order" prohibiting other members from seeking new jobs and from obtaining seniority at other plants under the union's jurisdiction until all laid-off employees had found employment and established seniority. When a second group of employees was laid off, the union issued a similar freeze order. When the third group of employees was laid off, it became apparent to the union that a permanent closing was being effected. The union issued a different order permitting all remaining employees to establish priority at another plant as of the date of the order, regardless of whether they were actually laid off or changed jobs at that time. Although all employees eventually found new employment, the effect of this sequence of union orders was to disadvantage the third group of employees laid off. This group was now at the bottom of the priority list, although they had been second from the top at Alco. Those employees laid off first now had top seniority although they had been lowest at Alco. Those with top seniority at Alco were now in the middle of the list at their new jobs.

The United States Court of Appeals for the Second Circuit found no breach of the union's duty of fair representation, based on the premise that a union has broad discretion to adjust the demands of competing factions if it does not act arbitrarily or irrationally. The court found that the union's actions were rational because the union could not foresee the

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183. See Kennan v. Pan American World Airways, Inc., 81 Lab. Cas. (CCH) ¶ 13,079 (N.D. Cal. 1976) (as a result of widespread layoffs, company and union restricted base trading rights for stewardesses on a rigid seniority basis).

184. The priorities at Alco had been: The new priorities were:

<table>
<thead>
<tr>
<th>Original Priority</th>
<th>New Priority</th>
</tr>
</thead>
<tbody>
<tr>
<td>56</td>
<td>most senior</td>
</tr>
<tr>
<td>35</td>
<td></td>
</tr>
<tr>
<td>20</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>least senior</td>
</tr>
<tr>
<td>35</td>
<td></td>
</tr>
</tbody>
</table>

plant closing during the early layoff stages. At each stage the union had acted to protect those employees who appeared to be the only ones needing reemployment. At the time of the third layoff, when the union could foresee a complete closing of the plant, it acted responsibly to preserve the superior position of the most senior group of employees.

This ruling may have been supported by the premise that it is unfair to hold a union to a level of prescience only available on hindsight. In this case, however, the court's deference to union decisionmaking seems unsupported by the policies which underlie the deference rule. Readjustment of the seniority list to reflect the original seniorities at Alco does not appear to be the sort of court intrusion against which the doctrine was designed to protect. Short of reordering the priority list itself, the court could have required the union to provide greater procedural protections by holding an election on the issue of reordering seniority, since majority rule would probably have returned the priority order to what it had been at Alco.

Thus, this case illustrates the value of according employees an opportunity to express their preferences regarding the redistribution of benefits obtained through the fortuitous timing of events of a plant closing.

In summary, many grievances involve issues of conflicting interests between employees. This problem is especially likely to arise in grievances which require the union to interpret contract language. In these situations the concern is that the benefits that respective groups of employees receive through contract enforcement reflect their true bargaining strength within the context of negotiating a contract package. Minorities or individuals have no right to insist that ambiguous language be interpreted in their favor. But when the minority has managed, through negotiation and vote trading, to obtain favorable contract terms in clear and specific language, there should be some restrictions on the union's power to abandon those

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186. *Id.* at 455-56.
187. *See supra* text accompanying note 94.
188. *See supra* text accompanying notes 40-42.
189. Indeed, it is ironic that the majority pressures within the union did not return the priority list to right without a lawsuit. Given the numbers, one could have expected the group of 56 plus 35 to return to the head of the list, displacing the group of 12 and 20 who had formerly had the least seniority at Alco. Although this may attribute to the court greater wisdom than it articulated, the court may have refused to reorder the priorities on the belief that court intervention is justified only when a majority takes advantage of a minority. In instances in which a minority takes advantage of a majority, the majority usually can protect itself.
This proposal can be effected by creating a presumption favoring the union's obligation to enforce clear contract language, a presumption that can be rebutted if the union presents evidence of exigent circumstances and evidence that the affected employees have had an opportunity to participate in any redistribution of benefits.

C. NONADJUDICATIVE REASONS FOR FAILING TO ARBITRATE A GRIEVANCE: CONTRACT INTERPRETATION WHEN THE INTERESTS OF OTHER EMPLOYEES ARE NOT DIRECTLY IMPLICATED

The administrative agency analogy for union decisionmaking described in the preceding sections cast the union in an adjudicative role, determining the facts and the law of the contract. The inquiry does not end there, however. A question remains whether there are any reasons other than a determination on the grievance's merits which should allow a union to terminate the grievance. In other words, are there valid nonadjudicative reasons which justify a union's terminating a grievance? One such reason may be a union's limited financial resources. Another reason may be limited union strength in terms of bargaining leverage in dealing with the employer.

1. Limited Financial Resources: Due Process Is Not Cost Free

A union's limited financial resources may be a legitimate basis for the union's failure to take a grievance to arbitration. Even after weeding out frivolous and nonmeritorious grievances, a union may find that it has more meritorious grievances than it can afford to arbitrate. Because the arbitration process is costly, both in terms of paying the arbitrator and paying for legal representation, the union's financial resources may not

190. A similar result should follow when an employer has violated clear and specific contract language to the injury of an individual employee even though the individual may not have had sufficient bargaining strength to have sought and obtained the favorable contract term alone.

191. For one answer to this question, see Tedford v. Peabody Coal Co., 533 F.2d 952, 957 (5th Cir. 1976), in which the Fifth Circuit held that an action by a union is not arbitrary if the action is "(1) based upon relevant, permissible union factors which excludes (sic) the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) a rational result of consideration of those factors; and (3) inclusive of a fair and impartial consideration of the interests of all employees." See also Seymour v. Olin Corp., 666 F.2d 202, 208 (5th Cir. 1982) (holding, under Tedford, that a union's refusal to represent a discharged employee because he had hired an attorney was wrongful because the refusal was based on an irrelevant, impermissible factor).

192. Costs include "the time and expense of the participants, and the inves-
allow it to arbitrate every meritorious grievance filed. To a limited extent, the union has some control over its financial ability to arbitrate grievances. The union can increase its financial resource base by passing the costs on to union members in the form of increased dues. The union can also attempt to negotiate contract terms that pass a greater portion of arbitration costs on to the employer.

Nonetheless, limited financial resources may force a union to choose between grievances. For the sake of illustration, assume that a union has two meritorious grievances to process. If the arbitration is successful, grievance A will benefit one employee, whereas grievance B will benefit several employees. If the union can afford to arbitrate only one of the grievances, the union may choose to pursue the grievance which is of greater interest to the members of its bargaining unit. The union may decide which grievance is of greater interest on several different bases. If the union decides that greater interest is determined by the number of employees affected, it may prefer grievance B. If, however, the benefit to be obtained by arbitrating grievance B is less significant than that of grievance A, the union may prefer grievance A. By deciding not to arbitrate one of the grievances, the union may be inviting a suit by the grievants whose claims are terminated. Certainly, the union cannot be faulted for attempting to allocate its scarce financial resources to obtain the contract enforcement which is of maximum interest to the members of its bargaining unit. But neither can the employee be faulted for attempting to enforce a meritorious grievance that has been abandoned solely because of lack of union finances.

A possible solution to the problem would be to allow the employee to pay the union's costs of arbitration. Certainly,
an employee who is willing to face the litigation costs involved in pursuing the matter would be willing to bear the financial cost the union would incur in arbitrating the claim. Under this solution, neither the union nor the grievant would be worse off. The union would be better off because it would not find itself cast as a possible defendant in a section 301 suit, but instead it would be aligned with the employee in presenting the grievance. Moreover, since arbitration is preferable to litigation,\(^9\) the integrity of the system would be protected from undue court interference. The only party who might complain is the employer, but it is not certain that the employer would be disadvantaged. Although the employer would be better off if the grievance was terminated and it did not need to defend itself in arbitration, if the employee would sue the employer anyway, the employer may be better off in arbitration than defending in court. More important, the employer, as the party that allegedly breached the contract, has no legitimate interest in avoiding arbitration based on the union's finances.\(^9\) This proposal could be effected by allowing grievants to arbitrate if they pay the costs whenever the union's sole reason for not arbitrating a grievance is financial cost.\(^2\)

2. Limited Strategic Resources: The Analogy to Strike Decisions

Aside from financial cost, a union may have another reason for not processing a grievance and quite another thing for a union to bar the individual from processing it on his own behalf. The union's exclusive control over grievances is not one imposed on the union by the statute, but is one voluntarily assumed by the union under the contract. Summers, supra note 13, at 273-74. Professor Summers argued in favor of allowing individual grievants to bear the costs of arbitrating grievances which the union had rejected. He reasoned that placing the financial burden on individuals would serve to discourage the union's pursuit of favorable claims or those claims whose net gain was less than the cost of arbitration. He also dispelled the fear that the employer would be harassed by litigious employees by observing that the financial burden on the individual is relatively greater than that on the employer and that few employees will challenge the combined forces of union and management. Regardless of whether Professor Summers is correct on this point, the suggestion proposed here affects a smaller number of grievances: those in which the union's only reason for rejecting the grievances is the financial cost of arbitration. See also Summers, supra note 9, at 403-04.


199. For a general discussion of the employer's interest in the grievance/arbitration process, see supra notes 17, 156.

200. Cf. Encina v. Tony Lama Boot Co., 448 F.2d 1264 (5th Cir. 1971), aff'd sub nom. 316 F. Supp. 229 (W.D. Tex. 1970) (union's offer to request arbitration of a grievance if the employee would pay expenses was not a breach of the duty of fair representation when the chance of success was highly speculative).
unrelated to the grievance's merits for blocking the employee's access to arbitration. If the grievance is arguably meritorious and does not directly jeopardize interests of other employees, the grievant may argue that the union must arbitrate the grievance because it has nothing at risk and there is a chance that the arbitrator will rule in the grievant's favor. At first glance, it might appear that the union should be obligated to do so, since the individual's interest is not offset by a countervailing collective interest. The union's decision not to arbitrate a claim, however, may be based on its desire to conserve another limited resource for the collective interest: bargaining leverage.

All grievances have a nuisance value which the union can either impose on or remove from the employer. Thus, the decision whether to arbitrate a claim may be influenced by the union's desire to exert leverage on the employer. Leverage behavior is most apparent in the union's use of the collective strike. Although the nuisance to the employer of arbitrating a claim is not nearly as great as the nuisance of a strike, the analysis of union strategy is similar.

When strikes were the major means of contract enforcement, a union could not call a strike, or even threaten to strike, each time an individual employee or minority group claimed that the employer had breached the contract. The costs of a strike to the union and its members were far too high to warrant more than occasional use of this ultimate leverage device. Furthermore, the effective use of the strike depended on careful timing and selective use. The strike was the union's ultimate weapon, but to maintain credibility with the employer the union could threaten to strike only sparingly.

As a means of contract enforcement, strikes depend on leverage in much the same way that contract negotiation depends upon leverage. What a union can negotiate, as well as what it

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201. See Summers, supra note 13, at 274.
202. Maximizing leverage implies that the union can selectively choose which grievances to arbitrate. Use of the grievance process as a leverage tactic and a tool for negotiation is discussed in Feller, supra note 17, at 743-44.
203. Some arbitrators have observed that prior to the period for negotiation of a new contract, the number of grievances filed rises, only to be settled once the new contract is signed.
204. The union can hardly afford an all out strike every time it feels that a grievance has been unjustly denied. The consequence is either that unadjusted grievances are accumulated until there is an explosion, or that groups of workers, less than the entirety, resort to job action, small stoppages, slow downs, or careless workmanship to force adjustment of their grievances.

Shulman, supra note 143, 1007.
can enforce, depends upon the group's collective power backed by group action through selective striking. In the strike model of contract enforcement, it is inconceivable that a court would interfere to tell a union to use its muscle to enforce contract terms favoring a minority.\textsuperscript{205}

The shift away from strikes toward arbitration as the predominant means of contract enforcement, however, effected a change in the model for union behavior as well as in the scope of the duty of fair representation. Compelling arbitration, although not cost free, does not impose as great a cost on either the employer or the union and the members of its bargaining unit as does calling a strike. Although arbitration originally was conceived of as a substitute for strikes,\textsuperscript{206} the trend of court decisions and worker expectations has been to view arbitration as a substitute for judicial determination.\textsuperscript{207} Strikes and judicial determinations, as different analogues for arbitration, have had different influences on the evolution of the standard for union behavior in grievance processing. The question then is what remaining role leverage should play in a union's decision not to enforce a grievance. More particularly, the concern is whether the two reasoning processes produce different outcomes in terms of whether grievances should be arbitrated.

Although the Supreme Court has recognized that a union can compel arbitration solely for the purpose of exerting bar-

\begin{itemize}
  \item \textsuperscript{205} Since the duty of fair representation developed in this context, it is not surprising that originally the scope of the duty was limited to proscribing subjective discrimination. The only conduct courts sanctioned was a union's withholding its collective voice and power from minority groups in its bargaining unit based on discrimination or bad faith.
  \item \textsuperscript{206} In collective bargaining agreements, the no strike clause promised by unions was considered the quid pro quo for the employer's promise to submit unsettled grievances to binding arbitration. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).
  \item \textsuperscript{207} The degree to which the arbitration process involves many of the attributes of judicial procedure is noted in Feller, \textit{supra} note 17, at 743. Evidence of the shift can be found in the increasing concern for due process in arbitration proceedings. See Fleming, \textit{Some Problems of Due Process and Fair Procedure in Labor Arbitration}, 13 Stan. L. Rev. 235 (1961); Rabin, \textit{supra} note 92, at 84; Symposium, \textit{Individual Rights in Industrial Self-Government—A "State Action" Analysis}, 63 Nw. U. L. Rev. 4 (1968); Comment, \textit{Industrial Due Processes and Just Cause for Discipline: A Comparative Analysis of the Arbitral and Judicial Decisional Processes}, 6 U.C.L.A. L. Rev. 603 (1959). This change may have come about due to the courts' recasting of arbitration as a means of dispute resolution in their own image. See, e.g., Rothlein v. Armour & Co., 391 F.2d 574, 580 n.28 (5d Cir. 1968) (court suggested that a key factor in deciding whether the employee had received fair treatment in the grievance procedure prior to arbitration was the grievance machinery's operational resemblance to judicial adjudication). See also Local Lodge 1426, Machinists Union v. Wilson Trailers, 289 N.W.2d 608, 611 (Iowa 1980) (court stated that union had right to sue as well as right to strike because of absence of arbitration provision).
\end{itemize}
gaining leverage on the employer, a union's desire to refrain from exerting leverage may not be a sufficient justification for deciding to abandon a grievance. The case law on this point is not well developed. The use or conservation of leverage also presents the troublesome problem of the practice of trading grievances. Although a union may justifiably forgo a "nonmeritorious grievance" in exchange for an employer concession on another issue without disadvantaging the grievant, trading away grievances that are "arguably meritorious" may disadvantage employee-grievants because of the possibility that, if arbitrated, their grievances would have yielded benefits.

There are some definite advantages in allowing a union to conserve leverage by trading grievances, however. A leverage decision is essentially one of resource allocation, and the union has a limited amount of leverage with which to influence the employer. Moreover, the union may wisely anticipate that, as a


210. Although the employee has no right to insist on arbitration of a nonmeritorious grievance, the union can use the nuisance value of a worthless grievance to obtain additional benefits for other employees. In keeping with the idea that trading meritorious grievances is "arbitrary" behavior, Professor Summer has said:

The Union's violation of its duty in these cases is that its decision to surrender the individual's grievance was not based on a judgment of the merits of the grievance. If a union, after full investigation and fair consideration, decides that a grievance is not worth carrying to arbitration, then in such a case there would be no unfairness to the individual employee in its trading surrender of his grievance for whatever favorable settlements of other grievances it might persuade the employer to give.

Summers, supra note 13, at 271. See Miller v. Greyhound Lines, Inc., 95 L.R.R.M. (BNA) 2871 (E.D. Pa. 1977) (grievance trading agreement upheld when the claim was clearly nonmeritorious and the decision was made in good faith); Heider v. Jeep Corp., 96 L.R.R.M. (BNA) 2871 (E.D. Pa. 1977) (grievance trading agreement upheld when the claim was clearly nonmeritorious and the decision was made in good faith); Heider v. Jeep Corp., 96 L.R.R.M. (BNA) 2956 (N.D. Ohio 1977) (grievance trading agreement not a breach when it was part of the department-wide settlement of a seniority dispute to which the grievant agreed).

One would expect courts to be hesitant about approving a union's action to trade one employee's grievance for another because it is abhorrent to the litigation concept of representation. One would expect a court in order to sidestep the issue to be quick to characterize the traded grievance as nonmeritorious. See, e.g., Local 13, Int'l Longshoremen's & Warehousemen's Union v. Pacific Maritime Ass'n, 441 F.2d 1061 (9th Cir.), cert. denied, 404 U.S. 1016 (1971); Simberlund v. Long Island R.R. Co., 421 F.2d 1219 (2d Cir. 1970) (union withdrew employee's claim on determination that it would lose at Railroad Adjustment Board level in exchange for wage increase for all employees).
practical matter, it will not be able to persuade the arbitrator to accept a pro-employee interpretation of the contract in every grievance. If the same arbitrator is chosen to arbitrate all grievances, and for reasons of consistency in contract interpretation this is likely to be the case, the arbitrator may attempt to even out the win-loss record of the employer and union in close cases. The arbitrator may not even be conscious of this practice, but by evening out the record in close cases, the arbitrator may promote better industrial relations and ensure his or her own credibility as a fair decisionmaker in the eyes of the parties. Obviously, not all close cases are of equal importance to either the employer or the union. The uncertainty of winning any particular grievance and the knowledge that, in close cases, each party has roughly a fifty-fifty chance of prevailing may induce the parties to negotiate, to ensure that each party wins those grievances most important to it. The negotiation will result in offers to trade away those grievances in which each party has a lesser interest for those in which each has a greater interest. Trading grievances not only conserves leverage, it may also build a basis of agreement, cooperation, and goodwill between the employer and the union. Thus, the union has much to gain from being able to trade grievances.

But despite these advantages, is the practice of trading grievances fair to the employees whose grievances are traded away? Even as the union is making a decision about how to allocate its leverage, it is important that the union consider the grievance's likelihood of success, which makes it essential that the union consider the grievance's merits. Clearly, a union should be able to trade nonmeritorious grievances because the grievant is not injured by such a trade. By definition, even if arbitrated, these grievances yield no benefits to employees. Unions should not, however, be able to trade grievances they perceive as meritorious because that would effect a redistribution of benefits, most likely from an individual or minority to the dominant group. The real issue then is whether grievances whose merits fall in the grey area between clearly meritorious and nonmeritorious should be treated more like one or the other for purposes of union discretion to trade.

Several policies favor treating these arguably meritorious grievances as within the union's discretion to trade, provided that affected grievants have the opportunity to make their case to the union. Absent clear language, a grievant has no right to

211. It could be noted that by balancing the union and employer successes the arbitrator may also ensure his or her continued employment as arbitrator.
expect union enforcement. Since this type of grievance by definition cannot be deemed to yield a benefit to the grievant with any degree of certainty, factors other than merit, such as the importance of the grievance to the grievant or the precedential value to the group should be taken into account. Since the particular industrial policy is not set in clear and unambiguous terms, the union and the employer should be entitled to fill in gaps in the contract. Even though the grievance is only arguably meritorious, however, the employee should be accorded the opportunity to present his or her case to the union because the grievant may be able to persuade the union of the grievance's importance and that factors other than the grievance's merits favor arbitration. Therefore, since this rationale underscores the importance of a union initially determining the merits of a grievance, union adjudication and union leverage are not necessarily inconsistent methods of decisionmaking.

What case law there is on the issue of grievance trading appears to follow this analysis. Several courts have maintained the distinction between "clearly meritorious" grievances and grievances that are only "arguably meritorious." Sometimes courts have evaluated this union conduct by discussing whether the trade of a clearly meritorious grievance constitutes bad faith. Whether the courts sanction the trading of griev-

212. See supra note 156 and accompanying text.
213. See, e.g., Cronin v. Sears Roebuck & Co., 588 F.2d 616, 619 (8th Cir. 1978).
214. Another factor that may be related to whether an "arguably meritorious" grievance is traded is whether the grievance is a fact dispute or a question of contract interpretation of general applicability. Trading issues of general applicability does not pose the same problem of inflicting a disproportionate cost on an individual as trading discharge cases does. For a discussion of the importance to the grievant as a basis for determining which grievances should be arbitrated, see supra note 57.
215. In a pre-Vaca article, Professor Rosen warned about substituting public for private ordering if the courts exercise too much substantive supervision over the merits of collective bargaining decisions. He also argued that there can be a very broad range of judicial opinion as to whether a particular aggrieved individual's right is sufficiently clear under the existing collective agreement to warrant enforcement. Rosen, supra note 28, at 424. However, Professor Rosen's alternative suggestion—that individuals with nonfrivolous grievances, irrespective of whether the claim asserted is under clear or under ambiguous provisions of the contract, be permitted to appear and participate in grievance and arbitral processes—was clearly rejected by the Supreme Court in Vaca. See also Rosen, The Individual Workers in Grievance Arbitration: Still Another Look at The Problem, 24 MD. L. REV. 233, 241-44 (1964).
216. Generally, courts have considered whether this conduct breaches the union's duty of fair representation by discussing whether a union's failure to consider the merits constitutes bad faith. In Local 13, Int'l Longshoremen's and Warehousemen's Union v. Pacific Maritime Ass'n, 441 F.2d 1061 (9th Cir.), cert.
ances under the heading of "bad faith" or of "arbitrariness" is not as significant as the fact that courts appear to be using an "objective" standard to define "bad faith," by distinguishing between trading meritorious grievances and trading grievances, which are only arguably meritorious, finding the former but not the latter to fall into the category of bad faith and to be evidence of breach of the duty.

D. AN APPLICATION OF THEORY IN A COMPLEX CASE

_Buchholtz v. Swift & Co._217 illustrates many of the problems discussed in the preceding sections. On November 29, 1969, the employer closed its packing plant and announced that no vacation benefits would be given for service in 1969, since the contract provided that in order to receive vacation benefits, employees must be on the active payroll as of December 29, 1969. The United States Court of Appeals for the Ninth Circuit said, "We agree ... that a breach of the duty of fair representation would not be established merely by proof that the International union 'swapped' a concession [on one grievance for another]. In this practical world such issues, susceptible of no absolutely 'right' solution, are often resolved by accommodation." _Id._ at 1067. The court justified such an accommodation by the existence of a conflict of interests between employees. Noting that the union's trading of interests must be constrained by good faith, the court stated that the "swap" would support two inferences: either 1) that "it was a good-faith choice between interpretations of two provisions of the contract," or 2) that the union, "actuated in part by hostility toward [the grievant], elected to sacrifice him for a favorable outcome on the [other issue]." _Id._ at 1067-68, n.10. Although there was some evidence of union hostility toward the grievant, the court allowed that the trade would itself be sufficient to constitute a breach even without other evidence of bad faith. "If the International agreed to an interpretation patently lacking in merit, this in itself might be evidence that its representation was unfair." _Id._ at 1067-68, n.10. "What we hold is that a union may not agree with an employer, either expressly or tacitly, to exchange a meritorious grievance of an individual employee for some other supposed benefit." _Id._ at 1068 n.11 (emphasis added).

Similarly, in Harrison v. United Transportation Union, 530 F.2d 558 (4th Cir. 1975), _cert. denied_, 425 U.S. 958 (1976), the United States Court of Appeals for the Fourth Circuit stated,

"[W]e think that the evidence indicates that Harrison's grievance may have had merit. This does not establish that the union's failure to press the grievance was a failure to represent him fairly, but proof of a grievance's merit is circumstantial evidence that the failure to process the claim constituted bad faith."

_Id._ at 561. The court indicated that the jury could have found the union's conduct to be arbitrary based on a memorandum indicating that the grievant's claim was relinquished in exchange for another grievance.

This analysis is consistent with the theory that the "good faith" performance limitation in contract law prevents the party charged with good faith from attempting to recapture foregone opportunities because such conduct harms the expectation interest of the dependent party. See Burton, _Breach of Contract and the Common Law Duty to Perform in Good Faith_, 94 HARV. L. REV. 369 (1980).

217. 609 F.2d 317 (8th Cir. 1979), _cert. denied_, 444 U.S. 1018 (1980).
ber 28 of the calendar year for which vacation benefits are claimed. The employees filed a grievance alleging that the December 28 date was chosen solely for administrative purposes and that, since they had worked eleven of the twelve months, they were entitled to some vacation benefits. Moreover, the employees alleged that the employer had timed the closing specifically to avoid paying vacation benefits. The question was one of contract interpretation. The union processed the claim and requested arbitration of the matter. Before arbitration took place, however, the employer announced it was closing a second plant. In prearbitration meetings, the union agreed to drop the vacation pay grievance of the employees of the first plant in exchange for additional pension benefits for employees of the second plant. The employees of the first plant sued the union and the employer for their vacation benefits.

Because of the unanticipated nature of the closing of both plants, the union could have argued that greater flexibility was needed to readjust the benefits provided under the contracts. This situation differs from the closing cases discussed earlier, however, because, here, the union did not attempt to scale down employee benefits across the board. Nor did the union follow procedures to allow employees to participate in adjusting the benefits. In this particular case, the employees of the first plant were not even notified in advance of the proposed trade, not to mention being denied a chance to participate in the decision. The effect of the union's settlement was to benefit the employees of the second plant at the expense of the employees of the first plant.

In light of the unanticipated closing, the union should not have been held to strict enforcement of the contract, but if the union were to readjust benefits, it should have followed a decisionmaking process that would have assured full participation of both plants' employees. The procedural protection accorded by ensuring participation is valuable because of the chance that it may lead to a more satisfactory substantive result and because of the assurance it gives affected parties that their interests are being taken into account. Much of the concern about the union's conduct in Buchholtz arose because the group advantaged by the trade was completely isolated from the group disadvantaged. Had some sort of ratification procedure been followed, one might have expected majority rule to produce an accommodation between the two groups, such as

218. See supra notes 171-90 and accompanying text.
trading off vacation pay for pension benefits that could be operative at both plants or compromising both claims in order to obtain partial vacation pay and partial pension benefits.\textsuperscript{219} Allowing vote trading to take place on both issues would have gained more approval because the losers on one issue could have been partially compensated by gains on the other. The majority would determine its highest priority, but if no discrete majority emerged, one might observe minorities capturing some benefit in exchange for their support of the trade. Although a voting procedure might have arrived at the same result,\textsuperscript{220} following an employee voting procedure would have proven that this result was the maximum benefit for the largest number of employees and would have assured each group that their interests were being taken into account.

In a split decision by the United States Court of Appeals for the Eighth Circuit, all three positions taken reflect differing appraisals of the merits of the underlying grievance. The majority and concurring opinions took the position that the vacation pay grievance either was not meritorious at all, or was at best only arguably meritorious.\textsuperscript{221} The majority opinion endorsed the validity of the trade by highlighting the benefits the union had obtained for the employees of the second plant.\textsuperscript{222} In contrast, the dissent considered the vacation pay grievance meritorious.\textsuperscript{223} While the dissent acknowledged that unions have discretion to trade claims in good faith, the dissent found that this particular trade was not in good faith because the union believed the plaintiffs' claim to be meritorious and traded it for benefits for other workers without notifying the plaintiffs.\textsuperscript{224}

Under the leverage trading analysis, if one accepts the assumption that the grievance was at best only arguably meritorious, then the union should be entitled to trade it away to ensure the success of the more important grievance. Even

\textsuperscript{219} The union may have perceived some tactical advantage in selective contract enforcement over contract amendment. Even if the grievance machinery is used for tactical advantage, however, the determination of which grievances to pursue should be open to employee participation, which could lead to an equitable distribution of the burden of the closing and the available benefits.

\textsuperscript{220} If the employees who work at the second plant constituted the majority and had voted as a bloc, this would have been the result.

\textsuperscript{221} 609 F.2d at 326-28.

\textsuperscript{222} Id. at 327.

\textsuperscript{223} Id. at 330.

\textsuperscript{224} Id. at 335. For a discussion of the relationship between good faith and attempts to redistribute benefits foregone in contract negotiation, see Burton, supra note 216.
trades of arguably meritorious grievances, however, should be accompanied by notice to and participation of the affected parties.

The split decision illustrates the difficulty of having courts determine whether a grievance is meritorious. Each side cited arbitration cases in which similar grievances had been upheld or denied.\textsuperscript{225} In this case, however, the court's job was considerably easier because the union itself had already determined that the grievance was meritorious before relinquishing it.\textsuperscript{226} Thus, the union admitted trading away benefits that the contract gave one group to obtain benefits for another employee group, effecting a benefit redistribution in contravention of the contract terms. Under the fair process model, rather than debate the underlying contract interpretation itself, the court should have noted the union's own judgment and held that the union could not abandon the grievance without consulting the affected employees. The court could have found a breach in the union's failure to notify the grievants of the proposed trade-off, which prevented them from participating in the decision. When, as in \textit{Buchholtz}, a union fails to provide fair process by failing to allow participation before a trade, the court could pursue another desirable avenue: order arbitration, thereby channeling the decision of contract interpretation to the most appropriate decisionmaker, the arbitrator.

IV. CONCLUSION: AN EVALUATION OF THE FAIR PROCESS MODEL

The proposal advanced by this Article can be summarized as follows:

A union should be required to take whatever steps are necessary to determine the merits of a grievance before abandoning it. In fact-based grievances, the union's duty is to determine whether the facts support the grievance. Because resolution of fact questions usually involves no conflict with interests of other employees, the union's appropriate role is as an investigator and fact finder. In grievances based on contract interpretation, in which conflicting employee interests are present, unions should be accorded greater discretion. A union should be required to listen to the grievant's case in order to determine its merit. If the union

\textsuperscript{225} \textit{Id.} at 325-26, 330.
\textsuperscript{226} \textit{Id.} at 319.
finds, based on the plain language of the contract, that the grievance is "clearly meritorious," the union should advance the grievance despite any majority pressures, because not to advance the grievance would unjustifiably redistribute benefits under the contract in the specific case and undermine employee confidence in contracts generally. If the union finds the grievance is nonmeritorious, it may abandon the grievance or trade it for some other benefit. If the union finds the grievance is only "arguably meritorious" and the union has accorded the grievant the opportunity to make his or her case, the union may decide not to press the grievance.

The reviewing court's role is one level removed from determining the merits of the grievance. In all except extreme cases, the court should allow the union's determinations of merit to stand, even if the court would have found the merits differently. The reviewing court's primary role is to ascertain whether the union took the necessary steps to determine the grievance's merits. One necessary step is to allow the employee to make his or her case to the union. A union's failure to take the necessary steps to determine merit is "arbitrary" conduct because it denies the grievant fair process. One complete defense to the charge of arbitrary conduct is that, after considering the grievant's case, the union found that the grievance was not "clearly meritorious." Any doubts about the union's evaluation of the merits should be resolved in the union's favor. A second defense to the charge of breach is that, although the union found the grievance was "clearly meritorious," exigent circumstances allow the union to redistribute benefits and the redistribution decision was made with the affected parties' participation. The court's inquiry here is limited to ascertaining the facts of exigency and participation, and does not extend to evaluating the resulting distribution of benefits. A court should find a breach only in the relatively rare circumstance when, after resolving all doubts in the union's favor, the court determines that, under the plain language of the contract, the grievance benefit was clearly due and the union provides no compelling reason for setting aside contract terms arrived at by the normal procedure. The specificity of language pro-
vides the reviewing court's guide; the court need not and should not look behind clear contract language to inquire whether a trading process actually led to the adoption of the language.

Court review under the fair process standard is basically procedural, yet federal labor policy should structure procedural requirements to promote fairer substantive results. This goal of promoting fairer substantive results raises the question whether the standard goes too far or not far enough in involving the courts in union decisions.

Because the proposal limits a court to examining whether the union has gone through the steps necessary to make a determination on the merits, there is a possibility that a union may go through the motions perfunctorily, without ever really considering the merits at all. Of course, a union is still subject to the "good faith" requirement of Vaca, but the "good faith" inquiry generally is limited to examining whether there is any evidence of union animus. Since it is very difficult to monitor a union's zealou{}ness, at some point one must assume a union's good faith in advancing employee interests, or the entire justification for unions as exclusive bargaining agents fails.

The fair process standard does to as far as possible to promote fair substantive results. First, the fair process standard creates appropriate incentives for individuals and minorities to participate in collective bargaining because it gives minorities the ability to create enforceable contract rights through the use of clear contract language. Second, by affording affected parties the opportunity to present their case to the union, the standard provides the best practical assurance that the union will take their interests into account, and holds out the chance that the union will choose to advance the "arguably meritorious" grievance to arbitration. Even if the union chooses not to advance the grievance, giving the grievant the opportunity to present his or her claim to the union may promote several more satisfactory ways of resolving the dispute. The opportunity to present the claim to the union may allow the union to secure the employee's consent to abandon the grievance, may result in a better settlement or compromise with the employer or implicated interests of other employees, or may simply have the cathartic effect of allowing the grievant to vent frustration at some work-related incident. Third, to extend judicial protection to griev-

227. See 386 U.S. at 190.
228. See supra notes 50-53 and accompanying text.
ances that are only "arguably meritorious" would mean that virtually every union determination of a grievance's merit could be substantively reviewable by a court with the inherent risk that a court could substitute its own slate of distributional preferences for the distributional preferences of the union representing the group. Fourth, to the extent that a breach of the duty of fair representation gives a court jurisdiction to examine the merits, the duty of fair representation envisions some degree of court involvement in union affairs. Yet the fair process standard does not involve courts too deeply in union affairs because a court need not reach the merits when the union has done so. Under this arrangement, the union maintains the role of primary policy maker in deciding how to distribute benefits in "arguably meritorious" cases. In addition, resolving all doubts in the union's favor protects the union's judgment from court second-guessing with hindsight.229

The fair process standard proposes how the aperture of court jurisdiction should be adjusted based on the different reasons for limiting and allowing court review. The reason for limiting court review is to preserve unions' exclusive control of access to arbitration; a union must be able to control access in order to ensure that conflicting employee claims do not weaken either collective employee strength or the arbitration machinery necessary for enforcing legitimate claims.230 The reason for allowing court review is to prevent unions from exercising control in such a manner as to benefit dominant groups at the expense of individual grievants without regard to the legitimacy of their claims.

Since this adjustment allows more cases to be heard than would a purely subjective standard or a negligence standard, the fair process standard is subject to the criticisms that it requires too great a commitment of judicial resources, that it will induce arbitration of too many claims, and that it is too burdensome to unions. As to the first criticism, whether this standard requires too great a commitment of judicial resources depends on one's point of reference. In the absence of a voluntarily agreed upon arbitration system, courts would be required to hear all suits for breach of contract.231 This standard saves courts from making determinations on the merits in all cases where either arbitrators or unions have done so. Of those cases brought, the focus on process assures that a court's inquiry will

229. See supra text accompanying notes 92-94.
230. See supra text accompanying note 39.
be manageable, since courts are not required to engage in an open-ended balancing of interests. Moreover, the standard provides an affirmative formulation for union conduct in a wide variety of grievances, resolving some of the uncertainty in current law. This clearer definition of a union's legal duty should reduce the amount of litigation as unions adapt to a consistent standard. Furthermore, if the standard is successful in promoting greater employee satisfaction, the standard should reduce the number of suits brought by employees disgruntled with the grievance/arbitration process. The hope is that the sanction will improve union representation and result in fewer cases being brought.

Adoption of the standard may result in some additional arbitration, as unions, mindful of their charge to consider the merits of grievances, may decide to arbitrate some marginal cases. This result is preferable, however, to increased court litigation of the same doubtful cases. Difficult cases are best channelled to arbitration, rather than to courts, since the precedent set by arbitration will be more limited. It is uncertain whether the marginal increase in arbitration will constitute any significant burden on the system, and the effect can only be determined by empirical research. The standard is fully responsive to the Supreme Court's concern with overburdening arbitration, however, since unions can continue to determine which grievances are nonmeritorious and eliminate them from the system.

As with all standards of due process, the fair process standard may impose some additional cost on unions in terms of time and effort in processing grievances. Any incremental cost to a union, however, must be balanced against the value of the grievant's expectation of fairness. By terminating a grievance prior to arbitration, the union precludes the employee from the arbitration tribunal, the industrial counterpart to one's day in court. Listening to the employee's arguments and evaluating their merits is a relatively small burden on the union, when compared to the benefit to the employee of having such an opportunity to be heard. Moreover, requiring the union to evaluate the merits of the grievance need not be burdensome, since the union can minimize institutional costs in several ways. Some of the cost of time and effort can be shifted to the grievant by requiring the grievant to furnish the material facts when the grievance is filed. Some evidence gathering can be delegated to the grievant as well. If the grievant fails to pursue the grievance, the grievant cannot later accuse the union of breach-
ing its duty of fair representation. Evaluation of grievances based on contract interpretation may require a greater commitment of union time to read the applicable contract language and listen to the grievant's argument. This task can be done informally; there is no need to furnish the grievant with a plenary hearing.

More important, unions should not view this additional burden as contrary to their institutional interests. Much of the benefit of increased employee satisfaction from better union representation will flow back to the union. The expenditure of time to listen to grievants' claims or to allow employee participation in redistribution decisions will make the union more visible to its constituency and should instill greater confidence in its effectiveness. Whether imposing sanctions on unions under this standard will result in improved union representation will be affected by whatever remedies the Supreme Court eventually determines to be appropriate.\(^\text{232}\) A finding that a union breached its duty of fair representation should lift the bar of finality to allow the grievant to litigate or arbitrate the case, but a finding of breach need not and should not result in an unnecessarily heavy sanction and should not in any case result in liability disproportionate to the nature of union error.\(^\text{233}\)

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\(^{232}\) The appropriate remedy for breach of the union's duty of fair representation in a hybrid § 301 action is still undetermined. The union may not be held liable for punitive damages. International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979). However, the union may be held primarily liable for that part of a wrongfully discharged employee's damages caused by his union's wrongful failure to arbitrate. Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983). In Bowen, the Court affirmed an apportionment of back pay between the employer and the union based on a division of the time periods. The employer was held liable for the period from the date the employee was wrongfully discharged until the date the grievance would have been arbitrated. The union was held liable from the date the grievance would have been arbitrated until the action was reduced to judgment. The legal impact of the Bowen decision is unclear because the Court failed to delineate the consequences of being primarily rather than secondarily liable, see id. at 595 n. 12, and because the union failed to object to the trial court's jury instruction apportioning liability on the basis of time periods. The Court specifically reserved decision on the issue of whether the trial court's jury instruction was proper.

\(^{233}\) The Supreme Court's decision in Bowen can be criticized on these grounds. The Court allowed an apportionment of backpay to stand under a rule that will result in unions bearing the majority of the backpay damages in most wrongful discharge cases. In Bowen, the award was left to stand despite the fact that a special jury verdict on punitive damages, which was set aside following the Foust decision, indicated that the jury believed the employer's actions were more egregious than the union's. Although the Supreme Court cited improvement of the quality of the union's representation efforts as one of the reasons for its approval of the apportionment, the Supreme Court appeared to be unaware of the potential consequences of this apportionment rule on a union's willingness to agree to grievance/arbitration or its willingness to preserve the arbitration machinery by weeding out doubtful cases. A further con-
Otherwise, the ability of unions to advance the interests of employees would be crippled by a limitation designed to improve the quality of their representational efforts.

Other advantages of the proposed standard are evident when one evaluates it against the criteria by which the appropriateness of all dispute resolution mechanisms should be judged—the system's capability to render accurate decisions and the satisfaction of the parties whose interests are affected by the process. Employee satisfaction is particularly important to smooth labor relations. Dean Shulman has noted that a system that is perceived as unfair or ineffective in correcting meritorious grievances will not promote industrial peace.234

Under the proposal, greater accuracy of decisionmaking can be achieved without undermining the union's collective strength. Because the union is expected to search for meritorious grievances under the standard, more meritorious grievances should be arbitrated and remedied, resulting in greater enforcement of employees' legitimate expectations in contract terms. Since the best solution to a dispute allocates to each party those contract benefits in which the party has a reasonable expectation or vested right,235 the grievance/arbitration process should result in remedies for meritorious grievances. Terminating a clearly meritorious grievance prior to arbitration results in allocating a benefit or detriment "incorrectly." A standard that requires the union to sift for clearly meritorious grievances should increase the likelihood that meritorious grievances will be arbitrated and remedied without resort to suit. This benefit is achieved under the fair process standard without jeopardizing the union's ability to act in the group's in-

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234. See Shulman, supra note 143, 1016-17. Speaking in the context of the role of arbitration, Dean Shulman emphasized the need for striving for employee acceptance and satisfaction with the system. He used words which are equally applicable to a grievance which is terminated by the union short of arbitration:

The important question is not whether the parties agree with the [decision] but rather whether they accept it, not resentfully, but cordially and willingly. Again, it is not to be expected that each decision will be accepted with the same degree of cordiality. But general acceptance and satisfaction is an attainable ideal.

Id. at 1019.

In arguing that the arbitrator should provide a reasoned opinion along with the arbitration award, Dean Shulman observed, "it is the rank and file that must be convinced. For the temptation to resort to job action is ever present and is easily erupted." Id. at 1021.

235. See A. CORBIN, CORBIN ON CONTRACTS § 1 (1952).
terests, since the union retains a wide range of discretion where it is most needed, in the interpretation of the collective bargaining agreement and the settlement of disputes between conflicting employee groups.

Second, and perhaps more important than greater accuracy of decisionmaking, the standard should promote greater employee satisfaction with the fairness of the grievance process. The standard coincides with an employee's expectations that the grievance outcome will be based on honest appraisals of his or her claim rather than on favoritism, on the grievant's personal political clout within the union, or on procedural technicalities. Given the union's structure and the inherent problem of conflicts of interests among employees, the union will not be able to please all employees all the time; yet providing a basically fair process to individual or minority group grievants is a step the union can take that does not conflict with other employees' interests.

One could take the purportedly pragmatic position that the cost of frustrating the expectations of an individual or even a minority of employees in fair process is not so damaging to the social fabric of industrial relations as to justify holding the union to any fair representation duty at all. As long as the majority is satisfied with the union's actions in processing grievances, the union will maintain its position as exclusive bargaining agent, and if the majority is not satisfied, the union will be decertified. In most unions, however, there is no identifiable majority and minority when interests in the terms of the contract are involved. Rather, there are a multitude of overlapping minorities. Whenever one minority group is deprived of an expectation, uneasiness may be created in all minority groups, and as current scholarship suggests, it is very difficult to predict when the cumulative dissatisfaction over even unrelated grievances poses a threat to industrial peace. This dissatisfaction and distrust of the union can take many forms, from wildcat strikes to small scale sabotage to apathy, any of which is likely to impair employee morale and productivity and to undermine union vitality. If a grievance is meritorious and the grievant's expectations of fair treatment are disappointed, the employee-grievant will be justifiably frustrated by being ex-


cluded from the process of deciding whether to arbitrate his or her grievance, and even one dissatisfied employee can damage morale and diminish productivity by engaging in those antisocial actions which the grievance mechanism was developed to avoid.

The fair process standard, more than any other standard consistent with the notion of a duty of fair representation, will raise the level of employee satisfaction, because in each case the employee is assured fair process: a decision on the merits by the arbitrator, the union, or the court and participation in any effort to redistribute benefits. The goal of federal labor policy is to promote labor peace, and issues of labor peace lead inevitably to issues of labor justice. Adoption of the fair process standard should lead to greater labor justice.

238. See supra text accompanying note 18-19.