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The Duty of Fair Representation: What the Courts Do in Fact

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The Duty of Fair Representation: What the Courts Do In Fact

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INTRODUCTION

The duty of fair representation is defined by a body of judge-made law that has developed around the fiduciary-type duty a union owes the workers it serves as bargaining agent. The doctrine regulates union conduct in both negotiating and administering the collective bargaining agreement.¹ By far, the most common application of this body of law is in the context of union grievance handling, most frequently involving the handling of discharge grievances.²

In a line of cases culminating in *Vaca v. Sipes*³ and its progeny, the Supreme Court held that an employee allegedly discharged without good cause (or otherwise injured by an employer's breach of a collective bargaining agreement) is barred from bringing a breach of contract action against his or her employer where a potential remedy is available to the employee pursuant to a contractual grievance procedure. The employee must utilize the grievance procedure provided in the agreement. Moreover, the employee is bound by the results of that grievance procedure, even if a meritorious grievance was lost because of poor judgment on the part of the union officials who handled the grievance, or because the union simply decided not to take the grievance to arbitration because it thought the chances of winning were small.

The principal exception to this rule arises where an employee can prove that the grievance was lost because, in handling the grievance, the union breached its duty of fair representation through conduct which was arbitrary, discriminatory, perfunctory, or in bad faith.⁴ In such cases, the plaintiff employee typically sues

1. See *infra* text accompanying notes 25-54.
 2. See *infra* text accompanying notes 152-55, 167-68.
 3. 386 U.S. 171 (1967).
 4. *Id.* at 190-91.

both the union and the employer as codefendants in what has become known as a "hybrid § 301/fair representation claim."⁵ To prevail in such an action, the plaintiff must prove not only that the discharge was in violation of the collective bargaining agreement, but also that the plaintiff's failure to prevail in the grievance procedure was due to the union's breach of its duty of fair representation.⁶

This cause of action has proven to be one of the most controversial in all labor law. Plaintiffs, or at least those plaintiffs who are represented by knowledgeable counsel,⁷ are reluctant to use it because it pits the individual employee against the combined forces of the union and the employer.⁸ In addition, the courts have made it very difficult to prove a breach of the duty: even proof of gross negligence is often not enough.⁹ Unions, on the other hand, claim that they are the targets of so many of these suits that, even though they win most of them, defense costs are a severe drain on union treasuries. Moreover, fearing these suits, unions often take weak cases to arbitration, which both clogs the grievance system and further drains union resources.¹⁰ Finally, employers dislike the cause of action because they believe it un-

5. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 165 (1983). This cause of action is "hybrid" because it actually entails two separate claims—one against the union and one against the employer—rooted in different substantive and jurisdictional statutory provisions. See *infra* text accompanying notes 25-32, 42-53. While plaintiffs are not required to sue both the union and the employer in a single action, *Vaca*, 386 U.S. at 186, they do so most of the time. See *infra* text accompanying notes 129 & 130. Even where the plaintiff sues only the employer, however, he or she must still prove a breach of the duty on the part of the union.

6. *Vaca*, 386 U.S. at 193.

7. Unfortunately, economic factors and political considerations within the labor bar make it very difficult for potential plaintiffs to obtain the representation of experienced labor lawyers for duty of fair representation litigation. See *infra* note 198.

8. See, e.g., Tobias, *The Plaintiff's View*, in *THE CHANGING LAW OF FAIR REPRESENTATION* (J. McKelvey, ed. forthcoming 1985) [hereinafter cited as *THE CHANGING LAW*]; Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 U. CIN. L. REV. 55 (1972).

9. See, e.g., *Dober v. Roadway Express, Inc.*, 707 F.2d 292, 294 (7th Cir. 1983) ("negligence, even when gross, does not violate the duty of fair representation"); *but see* *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1274 (9th Cir. 1983) ("negligence may breach the duty of fair representation [where] . . . the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim").

10. See, e.g., Waldman, *A Union View*, in *THE CHANGING LAW*, *supra* note 8. See also Vladeck, *The Conflict Between the Duty of Fair Representation and the Limitations on Union Self-Government*, in *THE DUTY OF FAIR REPRESENTATION* (J. McKelvey ed. 1977).

dermines the finality of grievance procedures by giving discharged employees a second bite of the apple, and because it subjects employers to the costs of defending suits made necessary by the wrongful conduct of unions.¹¹

Although much has been written on the duty of fair representation,¹² most of it has been theoretical or policy oriented with very little empirical grounding regarding the actual dispositions of these cases in the courts.¹³ For example, Professor David Feller, a

11. See, e.g., Christianson, *A Management View*, in *THE CHANGING LAW*, *supra* note 8. Another basis of employer opposition to this cause of action—that it exposes employers to increased liability for breach of contract because of the delay in obtaining final resolution of such claims—was in large part eliminated by the Supreme Court's recent decision in *Bowen v. United States Postal Serv.*, 459 U.S. 212 (1983) (unions liable for all back pay accrued after the date on which the grievance would have been resolved absent the union's breach of the duty). See *infra* text accompanying notes 91-95.

12. For a sampling of this extensive literature, see generally T. BOYCE, *FAIR REPRESENTATION, THE NLRB, AND THE COURTS* (1978); *THE CHANGING LAW*, *supra* note 8; *THE DUTY OF FAIR REPRESENTATION*, *supra* note 10; Aaron, *The Union's Duty of Fair Representation Under the Railway Labor and National Labor Relations Acts*, 34 J. AIR L. & COM. 167 (1968); Cheit, *Competing Models of Fair Representation: The Perfunctory Processing Cases*, 24 B.C.L. REV. 1 (1982); Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973); Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183 (1980); Freed, Polsby & Spitzer, *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461 (1983); Harper & Lupu, *Fair Representation as Equal Protection*, 98 HARV. L. REV. 1212 (1985); Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 U. ILL. L.F. 35; Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251 (1977); VanderVelde, *A Fair Process Model for the Union's Fair Representation Duty*, 67 MINN. L. REV. 1079 (1983). Surprisingly few of the leading commentators have given substantial attention to the important procedural aspects of this cause of action. For some noteworthy exceptions, see T. BOYCE, *supra*; C. MORRIS, *THE DEVELOPING LABOR LAW 1285-1358* (2d ed. 1983); Fox & Sonenthal, *Section 301 and the Exhaustion of Intra-Union Appeals: A Misbegotten Marriage*, 128 U. PA. L. REV. 989 (1980); Tobias, *Individual Employee Suits for Breach of the Labor Agreement and the Union's Duty of Fair Representation*, 5 U. TOL. L. REV. 514 (1974).

13. Several commentators conducted surveys of reported decisions in the early 1970's, but the number of factors and variables examined was limited. See, e.g., Koretz & Rabin, *Arbitration and Individual Rights*, in AM. ARBITRATION ASS'N, *THE FUTURE OF LABOR ARBITRATION IN AMERICA* 113, 125 (1976); Tobias, *supra* note 12. More recently, several commentators have used *LEXIS* or *WESTLAW* to survey reported fair representation decisions, but none have attempted to quantify their findings in any systematic way. See, e.g., Freed, Polsby & Spitzer, *supra* note 12, at 463 n.2; Jones, *The Concept of the Duty of Fair Representation: The Time Has Come For a Mid-Course Correction*, in *THE CHANGING LAW*, *supra* note 8; Rabin, *The Duty of Fair Representation in Arbitration*, in *THE CHANGING LAW*, *supra* note 8; VanderVelde, *supra* note 12, at 1082 n.8. Although there has been some empirical study of the duty of fair representation as it is perceived by union officials, see Schwartz, *Different Views of the Duty of Fair Representation*, 34 LAB. L.J. 415 (1983), no study has been located which has examined unreported duty of fair representation cases, or which attempted to deter-

major architect of modern American labor law,¹⁴ recently suggested that plaintiffs in hybrid section 301 suits have greater success proving a breach of the duty on the part of the union than they do in proving the underlying breach of contract on the part of the employer.¹⁵ As an occasional lawyer in duty of fair representation cases, my impression was just the opposite. The point, of this example is that, without empirical data, neither of us has anything more to base our assertions on than anecdotal evidence or unsubstantiated hunches.¹⁶

In recent years, legal scholars have displayed an increasing interest in empirical research in labor law¹⁷ and in other areas of

mine the ultimate outcome of cases in which the reported decisions were not final judgments. For the results of a very interesting, though often overlooked, empirical study of New Jersey's brief experiment in permitting employees to arbitrate grievances their unions refused to press, see Blumrosen, *Workers' Rights Against Employers and Unions: Justice Francis—A Judge For Our Season*, 24 RUTGERS L. REV. 480, 488-89, 492-99 (1970).

14. Professor Feller argued on behalf of the unions in *Vaca v. Sipes*, 386 U.S. 171 (1967), and in the Steelworkers Trilogy: *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). For Professor Feller's views on the duty of fair representation, see Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973).

15. Feller, *Response: The Structure of Post-War Labor Relations*, 11 N.Y.U. REV. L. & SOC. CHANGE 136, 140 (1982).

16. Indeed, one study was recently criticized because it was based on an examination of "no relevant cases whatever." Hyde, *Can Judges Identify Fair Bargaining Procedures?: A Comment on Freed, Polsby & Spitzer, Unions, Fairness, and the Conundrums of Collective Choice*, 57 S. CAL. L. REV. 415, 417 (1984).

17. One of the best known, and most controversial, empirical studies in labor law is J. GETMAN, S. GOLDBERG, & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976), which was heavily relied upon by a majority of the National Labor Relations Board in *Shopping Kart Food Markets, Inc.*, 228 N.L.R.B. 1311 (1977) (adopts laissez-faire approach to misrepresentation in union representation elections). See generally *Four Perspectives on Union Representation Elections: Law and Reality*, 28 STAN. L. REV. 1161 (1976). Another influential study with a distinctly empirical slant—and which inspired the title of this Article—is Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 70 YALE L.J. 175 (1960). For other examples of empirical research in the field of labor law, as well as discussions of the need for more such research, see D. McLAUGHLIN & A. SCHOOMAKER, *THE LANDRUM-GRIFFIN ACT AND UNION DEMOCRACY* (1979); Brett & Goldberg, *Grievance Mediation in the Coal Industry: A Field Experiment*, 37 INDUS. & LAB. REL. REV. 49 (1983); Chaney, *The Reinstatement Remedy Revisited*, 32 LAB. L.J. 357 (1981); Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's Gissel Decision* 79 NW. U.L. REV. 87 (1984); Dworkin & DeNisi, *Empirical Research in Labor Relations Law: A Review, Some Problems, and Some Directions for Future Research*, 28 LAB. L.J. 563 (1977); Henry, *Empirical Data and Statistical Analysis in Labor Law*, 1981 U. ILL. L. REV. 1; Roomkin, *A Quantitative Study of Unfair Labor Practice Cases*, 34 INDUS. & LAB. REL. REV. 245 (1981); Scott & Taylor, *An Analysis of Absenteeism Cases Taken to*

the law as well.¹⁸ Empirical study in the field of labor law is particularly important because of the Supreme Court's stated goal of rooting its labor law decisions in "the realities of labor relations and litigation."¹⁹ Indeed, the duty of fair representation doctrine itself is a prime candidate for empirical study, not only because it has been the subject of increasing scrutiny by the Supreme Court in recent years,²⁰ but also because the Labor and Employment Law Section of the American Bar Association has been drafting a proposed statute to be presented to members of Congress as a means of restructuring the entire doctrine.²¹

The purpose of this Article is to remedy this lack of concrete evidence of what actually happens to duty of fair representation cases in the courts,²² so that Congress or the courts can make more informed judgments about how this cause of action should be reformed, if at all. After tracing the development, and current

Arbitration: 1975-1981, 38 ARB. J., Sept. 1983, at 61.

18. See, e.g., P. DANZON & L. LILLARD, *THE RESOLUTION OF MEDICAL MALPRACTICE CLAIMS* (1982); *Dispute Processing and Civil Litigation*, 15 L. & SOC'Y REV. 385 (1980). Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RESEARCH J. 455; Givelber, Bowers, & Blitch, *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443; Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984); Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973); Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983); Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491 (1978); Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123 (1974). For an excellent discussion of the need for empirical research as an antidote to the dangers of what might be called "herd scholarship," see Galanter, *Reading the Landscapes of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 61-65 (1983).

19. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 167 (1983). This opinion later quotes Justice Goldberg's concurring opinion in *Humphrey v. Moore*, 375 U.S. 335, 358 (1964):

[I]n this Court's fashioning of a federal law of collective bargaining, it is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process. We should not assume that doctrines evolved in other contexts will be equally well adapted to the collective bargaining process.

DelCostello, 462 U.S. at 151.

20. See, e.g., *DelCostello*, 462 U.S. at 151; *Bowen v. United States Postal Serv.*, 459 U.S. 212 (1983); *Clayton v. UAW*, 451 U.S. 679 (1981); *United Parcel Serv. v. Mitchell*, 451 U.S. 56 (1981); *IBEW v. Foust*, 442 U.S. 42 (1979).

21. See A.B.A., *Recommendations and Report of the Section on Labor and Employment Law*, Drafts 3633c and 4619c (May 10, 1982).

22. This Article does not address the duty of fair representation as it has been developed and enforced by the National Labor Relations Board. See *infra* note 48.

status, of the doctrine in the courts, this Article reports the results of an extensive survey of all the duty of fair representation opinions published from 1977 through 1983, combined with a study of the courthouse files of all the duty of fair representation cases filed in three federal district courts between 1977 and 1982, supplemented by a mail and telephone survey of the lawyers involved in these cases.

Among the most striking of the study's findings is that plaintiffs win less than five percent of the duty of fair representation cases they file.²³ Moreover, the merits of the plaintiffs' claims are never reached in approximately forty-five percent of these cases because plaintiffs fail to overcome such procedural obstacles as a short limitations period or a requirement that they exhaust internal union remedies as a prerequisite to filing suit.²⁴ In light of these findings, this Article evaluates the charge, often made by plaintiffs' lawyers, that the duty of fair representation is little more than an empty promise which ultimately fails to provide workers with meaningful protection from arbitrary, discriminatory, or perfunctory union conduct.

I. THE EVOLUTION OF THE DUTY OF FAIR REPRESENTATION

A. *The Substantive Framework*

The duty of fair representation was created in 1944 by the Supreme Court in *Steele v. Louisville & Nashville Railroad*²⁵ Its original purpose was to remedy racial discrimination in union contract negotiations.²⁶ In *Steele*, a black locomotive fireman sought to enjoin the enforcement of the collective bargaining agreement that an all white union had negotiated. This contract would have ultimately eliminated black firemen from the railroad's employ, and have replaced them with whites. The Court upheld the plaintiff's claim, stating that when a union becomes the exclusive repre-

23. See *infra* text accompanying note 172-73.

24. See *infra* text accompanying note 189 (Table 17).

25. 323 U.S. 192 (1944).

26. See generally Herring, *The "Fair Representation" Doctrine: An Effective Weapon Against Union Racial Discrimination?*, 24 MD. L. REV. 113 (1964); Jones, *The Origins of the Concept of the Duty of Fair Representation*, in THE DUTY OF FAIR REPRESENTATION, *supra* note 10, at 25. For an insightful reexamination of *Steele* and its role in the development of both labor law and civil rights law, see Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157, 185-98 (1982).

sentative of the employees in a bargaining unit, it assumes "at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."²⁷ As a result, the union must represent in contract negotiations "non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith."²⁸ While unions are not barred from making distinctions among members of a craft on such relevant criteria as seniority or the type of work performed, "discriminations based on race alone are obviously irrelevant and invidious."²⁹

Although *Steele* arose under the Railway Labor Act,³⁰ the Court soon applied the duty of fair representation to cases arising under the National Labor Relations Act.³¹ Neither statute makes mention of the duty, but the Court inferred its presence from the statutory provisions granting a union selected by a majority of the members of a bargaining unit the status of exclusive bargaining agent for all of the employees in that unit.³²

27. *Steele*, 323 U.S. at 202. In addition to this equal protection basis for the duty of fair representation, the Court also rooted the doctrine in the fiduciary duty an agent owes its principal. As the Court stated:

It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.

Id. See *Jones*, *supra* note 26 at 27-28.

28. *Steele*, 323 U.S. at 204.

29. *Id.* at 203.

30. 45 U.S.C. §§ 151-188 (1982). See also *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944).

31. 29 U.S.C. §§ 151-169 (1982). See *Syres v. Oil Workers Int'l Union Local 23*, 350 U.S. 892, *rev'g per curiam* 223 F.2d 739 (5th Cir. 1955); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1952).

32. The Railway Labor Act (RLA) provides in pertinent part, "[e]mployees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this [Act]." 45 U.S.C. § 152, Fourth (1982). Similarly, section 9(a) of the National Labor Relations Act (NLRA) provides that

[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employ-

The Court next extended the doctrine by holding that it applies to cases not involving invidious racial discrimination. In *Ford Motor Co. v. Huffman*,³³ employees challenged the validity of seniority provisions in a collective bargaining agreement which gave preferential treatment to veterans of pre-employment military service. Although the Court found the seniority provisions to be within the "wide range of reasonableness" unions must be allowed in collective bargaining,³⁴ the Court nowhere hinted that its holding was based on the absence of allegations of racial discrimination.³⁵ Indeed, the passage of Title VII of the Civil Rights Act of 1964³⁶ has made the duty of fair representation much less important as a remedy for racial discrimination, and since that year, only one of the many duty of fair representation cases heard by the Supreme Court has involved allegations of such misconduct.³⁷

In *Conley v. Gibson*³⁸ the Court extended the duty's reach beyond contract negotiation to contract administration. As Justice Black wrote for a unanimous Court:

The bargaining representative's duty not to draw 'irrelevant and invidious'

ment, or other conditions of employment.

29 U.S.C. § 159(a) (1982).

Had the Court not inferred the existence of the duty of fair representation as a statutory limitation on a union's power over the workers that the union represents, it would have had to address constitutional questions concerning congressional delegation to unions of the power to engage in invidious discrimination. *Steele*, 323 U.S. at 198. Indeed, Justice Murphy would have based the Court's decision in *Steele* directly on constitutional grounds. *Id.* at 208 (Murphy, J., concurring).

Because the RLA and the NLRA are statutes regulating commerce, duty of fair representation claims in federal court are jurisdictionally based on 28 U.S.C. § 1337 (1982). Since the elimination of the amount in controversy requirement for general federal question jurisdiction, duty of fair representation claims can also be based on 28 U.S.C. § 1331 (1982). The suggestion found in some cases, such as *Amalgamated Ass'n of Motor Coach Employees v. Lockridge*, 403 U.S. 274, 298-99 (1971), that jurisdiction over duty of fair representation claims can be based on section 301(a) of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 185(a) (1982), is, in the words of Professor Feller, "clearly wrong." Feller, *supra* note 14, at 808.

33. 345 U.S. 330 (1953).

34. *Id.* at 338, 342.

35. A few lower federal courts assumed that duty of fair representation remedies were available only in cases of race discrimination, but that trend was shortlived. *See, e.g., Alabaugh v. Baltimore & O.R.R.*, 222 F.2d 861 (4th Cir.), *cert. denied*, 350 U.S. 839 (1955), *overruled by Thompson v. Brotherhood of Sleeping Car Porters*, 316 F.2d 191 (4th Cir. 1963).

36. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

37. *See Glover v. St. Louis & S.F. R.R.*, 393 U.S. 324 (1969).

38. 355 U.S. 41 (1957).

distinctions among those it represents does not come to an abrupt end . . . with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective bargaining agreement. A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit.³⁹

Although *Conley* clearly provided employees with a remedy for a union's wrongful refusal to process a grievance,⁴⁰ the Court was not asked to determine what right such employees might have to seek relief against their employers directly.⁴¹ Nor was the Court required to determine the rights of employees against their employers or unions if their grievances were only partially processed, or processed to unsuccessful conclusions.

The first of these questions was answered in 1962 by *Smith v. Evening News Association*,⁴² in which the Court held that individual

39. *Id.* at 46 (footnotes omitted). In *Conley*, an employer had discharged or demoted 45 black workers in violation of their collective bargaining agreement and replaced them with whites. When the discharged workers complained to their union, it refused to process their grievances or otherwise assist them. The Court held that such conduct violated the union's duty of fair representation.

In contract administration, the duty of fair representation is not as directly rooted in the union's status as exclusive bargaining agent as it is in contract negotiation, because the provisos in section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) (1982), and section 3 First (j) of the Railway Labor Act, 45 U.S.C. § 153 First (j) (1982), expressly reserve for individual employees a role in presenting grievances to their employers. Nevertheless, most unions assert through the collective bargaining agreements they negotiate the exclusive authority to process and settle grievances, and it is this contractually created power that provides a further basis for the duty of fair representation. *See Summers, supra* note 12, at 254-56.

40. 355 U.S. at 46.

41. The plaintiffs in *Conley* sought no relief from their employer, in all likelihood because they knew that section 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i) (1982), conferred exclusive jurisdiction over such disputes upon the National Railroad Adjustment Board. The Adjustment Board has no jurisdiction, however, over disputes between railway unions and the workers they represent. *Conley*, 355 U.S. at 44-45. For a discussion of some of the unique jurisdictional problems that arise in duty of fair representation cases under the Railway Labor Act, see Comment, *Jurisdiction Over Intertwined Contract Violation and Fair Representation Claims Under the Railway Labor Act*: Richins v. Southern Pacific Co., 66 MINN. L. REV. 209 (1981). *See also Feller, supra* note 15, at 676-86, 692-700, 707-10.

42. 371 U.S. 195 (1962).

employees could sue their employers under section 301(a) of the Labor Management Relations Act⁴³ in order to vindicate "personal" claims created by collective bargaining agreements, such as those for wages owed or for wrongful discharge. This right to sue was soon qualified, however, by *Republic Steel Corp. v. Maddox*,⁴⁴ in which the Court held that where a collective bargaining agreement contained a grievance procedure designated by the parties as the exclusive means of resolving grievances under the agreement, individual employees must attempt to exhaust that procedure before bringing suit under section 301.⁴⁵

Several years later in *Vaca v. Sipes*,⁴⁶ the Court dealt with the second pivotal question that it had left open in *Maddox*:⁴⁷ What if the employee is prevented from exhausting the grievance procedure because the union refuses to process the grievance, or fails to process it to a successful conclusion? The Court's answer was that the employee could proceed with a section 301 suit against the

43. 29 U.S.C. § 185(a) (1982). This section provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

44. 379 U.S. 650 (1965).

45. Over a strong dissent from Justice Black, Justice Harlan's majority opinion reasoned that exhaustion of contractual grievance procedures was required by federal labor policy which expressly declared "[f]inal adjustment by a method agreed upon by the parties . . . to be the desirable method for settlement of grievance disputes arising" under collective bargaining agreements. 29 U.S.C. § 173(d) (1982). The exhaustion requirement was seen as furthering the union's status as exclusive bargaining representative and enhancing its prestige with the employees it represents, while at the same time furthering the employer's interest by limiting the remedies available to its employees. *Maddox*, 379 U.S. at 653. Justice Black objected to this view, however, as manifesting a preference "for accommodating the wishes of employers and unions in all things over the desires of individual workers." *Id.* at 663 (Black, J., dissenting).

Exhaustion of contractual remedies is not required where the contractual remedies were not designed either to reach disputes of the type in question, or to be the exclusive means of resolving grievances under the contract. Any doubts about the grievance procedure's coverage, however, must be resolved in favor of coverage. *Id.* at 657-59 (citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)). Individual employees may also forego contractual grievance procedures where "the conduct of the employer amounts to a repudiation of those contractual procedures." *Vaca v. Sipes*, 386 U.S. 171, 185 (1967).

46. 386 U.S. 171 (1967).

47. *Maddox*, 379 U.S. at 652.

employer only if it could be proven that the union's failure to properly handle the grievance amounted to a breach of the union's duty of fair representation.⁴⁸ Moreover, the Court held that such a breach "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."⁴⁹ Thus, while the Court stated that a union "may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion," it also asserted that no "employee has an

48. *Vaca*, 386 U.S. at 185-87. *Vaca* actually involved only duty of fair representation claims brought against a union for refusing to take a discharge grievance to arbitration; the related breach of contract claim was asserted against the employer in a separate action. *Id.* at 176 n.4. The original plaintiff, Benjamin Owens, had been on a medical leave from his job at a meat packing plant because of high blood pressure. He attempted to return to work after his own doctors certified him as fit, but the company doctor concluded that Owens' blood pressure was still too high, and Owens was permanently discharged on the grounds of poor health. Owens' union processed his grievance through several steps of the contractually established grievance procedure, but when another doctor examined Owens at union expense, and agreed with the company doctor that Owens was not fit for work, the union decided not to take the grievance to arbitration. *Id.* at 174-75.

The plaintiff had prevailed before a jury in state court, but because the National Labor Relations Board (NLRB) had recently held that a union's breach of the duty of fair representation was an unfair labor practice, *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963), the defendant union argued that such claims were within the exclusive jurisdiction of the Board and could not be heard by the courts. *Vaca*, 386 U.S. at 176. It was in rejecting this preemption argument that Justice White's majority opinion discussed the relationship between section 301 suits against employers for breach of contract, and suits against unions for breach of the duty of fair representation. *Id.* at 183-88.

It is now well settled that the NLRB and the courts have concurrent jurisdiction over allegations that a union has breached its duty of fair representation. Both forums have advantages and disadvantages for aggrieved workers. NLRB proceedings are usually faster, and the charging party need not hire a lawyer or incur the out-of-pocket costs entailed in litigation. On the other hand, charging parties have less control over NLRB proceedings, and some important remedies, such as reinstatement, may not be available because employers are generally not named as respondents. See T. BOYCE, *supra* note 12, at 83-85. Moreover, as an administrative agency influenced by the shifting winds of the political process, the NLRB occasionally has periods during which it is not particularly solicitous of the interests of individual employees. See, e.g., Levy, *The Unidimensional Perspective of the Reagan Labor Board*, 16 RUTGERS L. J. (forthcoming 1985). For further discussion of the duty of fair representation doctrine before the NLRB, see NLRB, OFFICE OF THE GENERAL COUNSEL, SECTION 8(b)(1)(A) CASES INVOLVING A UNION'S DUTY OF FAIR REPRESENTATION (Memorandum 79-55, July 9, 1979) reprinted in BUREAU OF NAT'L AFFAIRS, LAB. REL. Y.B.—1979 (1980) [hereinafter cited as NLRB MEMO]; T. BOYCE, *supra* note 12; C. MORRIS, *supra* note 12, at 1285-1347; Fanning, *The Duty of Fair Representation*, 19 B.C.L. REV. 813 (1978); Schwartz, *The National Labor Relations Board and the Duty of Fair Representation*, 34 LAB. L.J. 781 (1983); Note, *The NLRB and the Duty of Fair Representation: The Case of the Reluctant Guardian*, 29 U. FLA. L. REV. 437 (1977).

49. *Vaca*, 386 U.S. at 190.

absolute right to have his grievance taken to arbitration."⁵⁰

Finally, in 1976, the Court made its last substantive expansion of the doctrine in *Hines v. Anchor Motor Freight, Inc.*⁵¹ In this case, the Court held that even where a union has taken an employee's grievance all the way through arbitration or a similar final and otherwise binding step in the contractual grievance procedure, the employer may still be sued for breach of contract under section 301 if the union's handling of the grievance breached the duty of fair representation in a way that "seriously undermine[d] the integrity of the arbitral process."⁵² As Justice White wrote for the majority, "we cannot believe that Congress intended to foreclose the employee from his § 301 remedy . . . if the contractual processes have been seriously flawed by the union's breach of its

50. *Id.* at 191. As he had done in *Maddox*, Justice Black again wrote a strong dissent, arguing that the majority's decision enhances the interests of unions and employers at the expense of individual employees:

Either the employee should be able to sue his employer for breach of contract after having attempted to exhaust his contractual remedies, or the union should have an absolute duty to exhaust contractual remedies on his behalf. The merits of an employee's grievance would thus be determined by either a jury or an arbitrator. Under today's decision it will never be determined by either.

Id. at 208 (Black, J., dissenting). *Vaca* thus resolved a major policy debate in the 1950's and 1960's concerning the competing interests of the union and the individual employee in controlling grievances under collective bargaining agreements. See VanderVelde, *supra* note 12, at 1082 n.9. Some of the principal arguments in that debate were set forth in Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435 (1963); Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956); and Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1962), all of which were cited by the Court in *Vaca*, 386 U.S. at 190-91.

51. 424 U.S. 554 (1976).

52. *Id.* at 567. In *Hines*, several truck drivers were discharged for allegedly falsifying motel receipts in order to obtain reimbursement from their employer in amounts greater than they actually spent. In fact, the truck drivers were innocent of any wrongdoing; it was the motel clerk who had falsified motel records in order to steal from his employer. However, this fact was not discovered until after the discharges were upheld by a joint labor-management grievance committee because the union had specifically refused the employees' request to investigate the motel. *Id.* at 556-58. The drivers sued both the union and the employer in a hybrid 301/fair representation action. The district court granted summary judgment for the defendants, but the court of appeals reversed as to the union. It held that evidence of political antagonism toward the plaintiffs within the union was sufficient evidence of bad faith or arbitrary conduct on the part of the union to warrant a trial. The judgment in favor of the employer was affirmed, however, on the ground that the employer had not participated in the union's breach and therefore should be able to rely on the finality of the contractual grievance procedure. *Id.* at 559-61. The plaintiffs obtained Supreme Court review of the circuit court's ruling in favor of their employer, but the union did not seek such review of the ruling against it. *Id.* at 561 n.7.

duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct.”⁵³ The opinion did stress, however, that “grievance processes cannot be expected to be error-free,” and that “mere errors in judgment” on a union’s part will not constitute a breach of the duty.⁵⁴

B. *The Search for a Standard: “Still Crazy After All These Years”*⁵⁵

The Supreme Court has not defined with precision the standard for proving a breach of the duty of fair representation. As noted in the preceding section, the early cases focused primarily on race discrimination in contract negotiations, and held that a union has a “duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts;” this meant that unions could not engage in “hostile,” “irrelevant,” or “invidious” discrimination.⁵⁶ In other words, unions must “represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.”⁵⁷ Later cases clearly stated that, at least in contract negotiations, unions must be permitted “a wide range of reasonableness,” and that the “complete satisfaction of all who are represented is hardly to be expected,” so long as differences in treatment are based on relevant criteria such as seniority.⁵⁸

With the extension of the duty of fair representation into the area of contract administration, however, the standards became more complex. In *Vaca v. Sipes*,⁵⁹ for example, the Court not only reiterated the prohibition against hostile, discriminatory, or bad faith conduct, but added two new prohibitions as well, against “arbitrary” and “perfunctory” conduct.⁶⁰ The Court’s use of these

53. *Id.* at 570.

54. *Id.* at 571.

55. P. Simon, *Still Crazy After All These Years*, recorded on STILL CRAZY AFTER ALL THESE YEARS. Courtesy and copyright 1975 Paul Simon. Published in the U.S.A. by Columbia Records. All rights reserved.

56. *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 203 (1944).

57. *Id.* at 204.

58. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). For an excellent discussion of the duty of fair representation in contract negotiations, see Finkin, *supra* note 12, at 193-236.

59. 386 U.S. 171 (1967).

60. *Id.* at 177, 182, 190-94. The Court had first used the term “arbitrary” in an earlier contract administration case, *Humphrey v. Moore*, 375 U.S. 335, 350 (1964); Justice Black’s dissent in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 669 (1965), contained the

terms indicated that a breach of the duty of fair representation could be established by proving *either* that a union's conduct was hostile, discriminatory, or in bad faith on the one hand, *or* that the conduct was arbitrary or perfunctory on the other.⁶¹

Thus, the Supreme Court has defined the duty of fair representation in terms that have been described at best as "very general,"⁶² and more typically as "vague and imprecise" and a "vast and confusing array of word-tests."⁶³ The greatest difficulty for lower courts using this standard has come in their efforts to give meaning to the terms "arbitrary" and "perfunctory."⁶⁴ For example, most of the circuit courts claim adherence to the notion that conduct which is merely negligent does not violate the duty of fair representation,⁶⁵ but in a number of cases, courts have simply labeled what is essentially negligent conduct as arbitrary or perfunctory.⁶⁶ A refreshing exception is *Dutrisac v. Caterpillar Tractor*

first reference to "perfunctory" grievance handling.

61. See, e.g., *Vaca*, 386 U.S. at 190 ("[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, *or* in bad faith" (emphasis added)); *id.* at 193 ("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" (emphasis added)).

62. C. MORRIS, *supra* note 12, at 1322.

63. NLRB MEMO, *supra* note 48.

64. Because two recent law review articles have collected these cases and made impressive strides toward classifying them and proposing more sophisticated standards for evaluating union conduct in grievance handling, no attempt to duplicate their efforts will be made here. See Cheit, *supra* note 12; VanderVelde, *supra* note 12. Many recent cases are also collected in C. MORRIS, *supra* note 12, at 1328-37. A less complicated approach, and for that reason perhaps one ultimately more useful to the courts, was taken by Professor Summers, who discussed seven paradigmatic hypothetical cases, and used them to develop six "emerging principles of fair representation." Summers, *supra* note 12, at 278-80.

65. See, e.g., *Dober v. Roadway Express, Inc.* 707 F.2d 292, 294 (7th Cir. 1983); *Poole v. Budd Co.*, 706 F.2d 181, 183 (6th Cir. 1983); *Curtis v. United Transp. Union*, 700 F.2d 457, 458 (8th Cir. 1983); *Condon v. Local 2944, United Steelworkers*, 683 F.2d 590, 594 (1st Cir. 1982); *Harris v. Schwerman Trucking Co.*, 668 F.2d 1204, 1206-07 (11th Cir. 1982); *Findley v. Jones Motor Freight*, 639 F.2d 953, 960 (3d Cir. 1981); *Coe v. United Rubber Workers*, 571 F.2d 1349, 1350-51 (5th Cir. 1978). *But see Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983).

66. See, e.g., *Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082, 1089-91 (9th Cir. 1978); *Foust v. IBEW*, 572 F.2d 710, 716 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979); *Schum v. South Buffalo Ry. Co.*, 496 F.2d 328, 331-32 (2d Cir. 1974); *Griffin v. UAW*, 469 F.2d 181, 184 (4th Cir. 1972); *De Arroyo v. Sindicato De Trabajadores Packinghouse*, 425 F.2d 281, 284-85 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970).

Indeed, in *IBEW v. Foust*, 442 U.S. 42 (1979), which held that punitive damages were

Co.,⁶⁷ in which the court acknowledged that the union's conduct was simply negligent, but asserted that it was "more instructive to compare the types of unintentional errors in union grievance processing that usually are held to breach the duty" than to worry about mere "labels."⁶⁸

Efforts to clarify the appropriate standard in duty of fair representation cases have been further thwarted by dictum in a 1971 Supreme Court decision, *Amalgamated Association of Motor Coach Employees v. Lockridge*,⁶⁹ which has been totally disregarded in subsequent Supreme Court opinions, but which continues to influence some lower courts.⁷⁰ In this case, the Court stated that proof of a breach of the duty of fair representation requires "substantial

not available in duty of fair representation cases, the four concurring justices noted (but did not appear to be troubled by) the fact that the union's conduct in that case "betrayed nothing more than negligence." *Id.* at 53 (Blackmun, J., concurring). See generally Note, *IBEW v. Foust: A Hint of Negligence in the Duty of Fair Representation*, 32 HASTINGS L.J. 1041 (1981) [hereinafter cited as Note, *A Hint of Negligence*]. Many commentators, of course, have argued that negligent conduct should be explicitly recognized as constituting a breach of the duty of fair representation. See, e.g., Dinges, *Ruzicka v. General Motors: An Unlikely Hero of the Trade Union Movement—The Individual Employee in a Section 301 Case Who Has Been a Victim of Union Negligence*, 24 WAYNE L. REV. 1773 (1978); 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, 1143-51 (1974); Note, *Determining Standards for a Union's Duty of Fair Representation: The Case for Ordinary Negligence*, 65 CORNELL L. REV. 634 (1980) [hereinafter cited as Note, *The Case for Ordinary Negligence*]. But see, e.g., 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 (1977); Vladeck, *supra* note 10, at 45-54.

67. 749 F.2d 1270 (9th Cir. 1983).

68. *Id.* at 1272-73. The plaintiff in *Dutrisac* was discharged for excessive absenteeism, and he filed a grievance with his union claiming that his discharge was racially motivated in violation of the collective bargaining agreement. A union official processed the grievance through several steps of the grievance procedure. Then after the company refused to settle, the union decided to take the grievance to arbitration. Unfortunately, through an inadvertent omission and with no ill will toward the plaintiff, the union made its request for arbitration two weeks late, and the arbitrator ruled that the grievance was untimely and therefore not arbitrable. In affirming the district court's summary judgment for the plaintiff, the court explained:

Most of the decisions finding 'simple negligence' insufficient to establish a breach of the duty involve alleged errors in the union's evaluation of the merits of a grievance When the challenged conduct is not an erroneous decision by the union but its failure to perform a ministerial act required to carry out the decision, courts have been more willing to impose liability for merely negligent conduct.

Id. at 1273 (citations omitted).

69. 403 U.S. 274 (1971).

70. See *infra* note 77.

evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives."⁷¹

Lockridge, however, was a preemption case involving what was essentially an action for tortious interference with an employment relationship; it was not a hybrid section 301/fair representation action,⁷² and the opinion contained no indication of any conscious intent on the part of the Court to change the standards it had announced earlier for establishing a breach of the duty.⁷³ Indeed, no subsequent Supreme Court decision has repeated the *Lockridge* formulation of the standard; the Court has instead consistently re-

71. 403 U.S. at 301. The Court also quoted from *Humphrey v. Moore*, 375 U.S. 335, 348 (1964), a pre-*Vaca* case, that there must be "substantial evidence of fraud, deceitful action or dishonest conduct." 403 U.S. at 299. It should be noted, however, that the *Humphrey* Court

did not limit its DFR analysis to a search for fraud, deceit, and dishonesty. Having concluded that the union had displayed none of these three symptoms, it proceeded to demonstrate that the union had acted 'in good faith and without hostility or arbitrary discrimination,' and that it had made a rational decision not based on 'capricious or arbitrary factors.'

Clark, *supra* note 12, at 1125 (citing *Humphrey*, 375 U.S. at 350). Moreover, the *Lockridge* Court also referred to the "arbitrary or bad-faith conduct" standard of *Vaca*, 403 U.S. at 301 (emphasis added).

72. The union in *Lockridge* had procured the plaintiff's discharge pursuant to a valid collectively bargained union security clause, because the union mistakenly believed that the union constitution required the plaintiff's suspension from union membership for his failure to tender his union dues in a timely fashion. 403 U.S. at 277-80. The plaintiff sued the union in state court, alleging that the union's conduct had wantonly and wilfully deprived him of employment, and had violated the union's own constitution, which served as a contract between the union and its members. *Id.* at 281-82. The Court held that the plaintiff's action was preempted pursuant to *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), because the union's alleged conduct was arguably prohibited by the National Labor Relations Act. In doing so, however, the Court rejected arguments made for the first time in plaintiff's Supreme Court brief that the union had violated its duty of fair representation, explaining that the court below had treated the case as a simple contract action and had not entertained any evidence concerning possible causes for the union's alleged breach of contract. It was in this context that the Court inaccurately described the standards for establishing a union's breach of the duty. *Id.* at 298-301. The Court's undue emphasis on hostility and intentional discrimination in describing the standard can probably be explained by the fact that the plaintiff had argued that the union was hostile toward him because he had obtained his release from the dues checkoff, and that the union had departed from its own past practice by seeking his discharge for late payment of dues. *Id.* at 280.

73. In the dissenting opinions, for example, "Justice Douglas quoted *Vaca's* tripartite standard, and Justice White, the author of *Vaca*, cited its holding on preemption. But neither of them suggested that the majority had modified *Vaca's* substantive theory in any way." Clark, *supra* note 12, at 1126 (citing *Lockridge*, 403 U.S. at 307 (Douglas, J., dissenting), 329-30 (White, J., dissenting)).

turned to language from *Vaca v. Sipes*.⁷⁴ While most lower courts and commentators agree that *Lockridge* did not modify the standards for evaluating union conduct,⁷⁵ a number of courts have mistakenly relied on *Lockridge* (perhaps in a backlash to the flirtation of other courts with a negligence standard)⁷⁶ in holding that only intentional or bad faith misconduct can constitute a breach of the duty.⁷⁷ Until Congress or the Supreme Court provides otherwise, however, lower courts should follow the Supreme Court's lead in recent cases and apply the *Vaca* standard, not the *Lockridge* dictum.

C. *The Procedural Framework*

In the nine years since *Hines v. Anchor Motor Freight, Inc.*,⁷⁸ all five duty of fair representation cases to reach the Supreme Court have involved procedural issues: the nature and allocation of available monetary remedies,⁷⁹ the appropriate statute of limitations,⁸⁰ and the exhaustion of internal union remedies.⁸¹ While these cases are perhaps less fundamental to the doctrine's substantive framework than the earlier cases, they have nevertheless had a substantial impact on the outcome of duty of fair representation

74. See *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164 (1983) (duty is breached when the union acts in "a discriminatory, dishonest, arbitrary, or perfunctory fashion" (emphasis added)); *Clayton v. UAW*, 451 U.S. 679, 693 n.24 (1981); *IBEW v. Foust*, 442 U.S. 42, 47 (1979); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568-69 (1976).

75. See, e.g., *Ryan v. New York Newspaper Printing Pressman's Union No. 2*, 590 F.2d 451, 456 (2d Cir. 1979); *Foust v. IBEW*, 572 F.2d 710 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979); *Beriault v. Local 40, ILWU*, 501 F.2d 258 (9th Cir. 1974); *Griffin v. UAW*, 469 F.2d 181 (4th Cir. 1972); T. BOYCE, *supra* note 12, at 37-39; Cheit, *supra* note 12, at 12 n.60; Clark, *supra* note 12, at 1124-26; Leffler, *supra* note 12, at 44-45; VanderVelde, *supra* note 12, at 1097-98 n.54, 1117-18 n.114.

76. See, e.g., *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983); *Ruzicka v. General Motors*, 523 F.2d 306 (6th Cir. 1975) [hereinafter cited as *Ruzicka I*].

77. See, e.g., *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1983); *Anderson v. Airline Pilots*, 650 F.2d 133 (8th Cir.), *cert. denied*, 454 U.S. 1063 (1981); *but see, e.g., Schultz v. Owens-Illinois Inc.*, 696 F.2d 505 (7th Cir. 1982); *Sanders v. Youthcraft Coats and Suits*, 700 F.2d 1226 (8th Cir. 1983).

78. 424 U.S. 554 (1976).

79. *Bowen v. United States Postal Serv.*, 459 U.S. 212 (1983); *IBEW v. Foust*, 442 U.S. 42 (1979).

80. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983); *United Parcel Serv. v. Mitchell*, 451 U.S. 56 (1981).

81. *Clayton v. UAW*, 451 U.S. 679 (1981).

litigation.⁸²

Hybrid section 301/fair representation cases can be brought in either state or federal court,⁸³ although actions filed in state court may be removed by defendants to federal court.⁸⁴ Lower courts are divided on the availability of jury trials in these cases, but the current trend seems to favor them.⁸⁵ Available remedies have also been specified for the most part by the lower courts, and include reinstatement or other injunctive relief, back pay and other compensatory damages, and attorneys' fees.⁸⁶

In *International Brotherhood of Electrical Workers v. Foust*,⁸⁷ however, the Supreme Court held that prevailing plaintiffs in duty of fair representation cases cannot recover punitive damages from

82. See *infra* text accompanying notes 188 & 189.

83. Cf. *Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) (section 301(a) of the Labor Management Relations Act does not deprive state courts of jurisdiction).

84. 28 U.S.C. § 1441 (1982).

85. See, e.g., *Smith v. Hussman Refrigerator Co.*, 619 F.2d 1229, 1244 (8th Cir. 1980) (*en banc*), *cert. denied*, 449 U.S. 839 (1981); *Cox v. C.H. Masland & Sons, Inc.*, 607 F.2d 138, 143 (5th Cir. 1979); *Minnis v. UAW*, 531 F.2d 850 (8th Cir. 1975); *Kinzel v. Allied Supermarkets, Inc.*, 88 F.R.D. 360 (E.D. Mich. 1980); *Lucas v. Philco-Ford Corp.*, 380 F. Supp. 139 (E.D. Pa. 1974). *But see*, e.g., *James v. Universal Mfg. Corp.*, 109 L.R.R.M. (BNA) 2858 (S.D. Miss. 1981); *Davidson v. International Bhd. of Teamsters*, 96 L.R.R.M. (BNA) 2808 (S.D. Ind. 1977).

86. See C. MORRIS, *supra* note 12, at 1347-54. Some commentators have argued that where a union has wrongfully refused to process a grievance or take the grievance to arbitration, the court should not rule on the underlying breach of contract claim, but should simply order the union to process the grievance or take it to arbitration. See, e.g., Edwards, *A View From the Bench*, in *THE CHANGING LAW*, *supra* note 8; Feller, *supra* note 14, at 813-17. The Court in *Vaca* rejected this limitation on available remedies, however, for two reasons. First, arbitrators usually have no authority to award relief against the union, whose breach of the duty has probably increased the employee's losses. *Vaca*, 386 U.S. at 196. Second, in many cases, "the arbitrable issues may be substantially resolved in the course of trying the fair representation controversy," and it would be unnecessarily expensive and time consuming to require the plaintiff to prove his contract claim a second time in arbitration. *Id.* Moreover, unions forced by court order to arbitrate grievances may do so less than vigorously, both because of potential hostility toward the grievants who brought suit against them, and because a victory in arbitration may expose them to increased back pay liability due to the Supreme Court's decision in *Bowen v. United States Postal Serv.*, 459 U.S. 212, (1983). In any event, remanding to arbitration should never entail remanding to joint labor-management grievance committees because of their vulnerability to abuse. See *infra* note 149. As one commentator has argued, "a court-ordered arbitration will not afford effective protection to the plaintiff unless the court supervises the arbitration, appoints the arbitrator, establishes ground rules that are equitable to all three parties, insures that plaintiff's counsel will be paid for his representation, and retains continuing jurisdiction over the case." Tobias, *supra* note 12, at 553.

87. 442 U.S. 42 (1979).

defendant unions. The Court reasoned that the basic scheme of federal labor policy has a compensatory and remedial, not punitive, orientation.⁸⁸ In addition, the Court was concerned that the award of punitive damages “could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents.”⁸⁹ It was also feared that the threat of punitive damages could undermine collectively bargained grievance procedures because unions “might feel compelled to process frivolous claims or resist fair settlements.”⁹⁰

Unfortunately, in *Bowen v. United States Postal Service*,⁹¹ the Court gave much less weight to these last two factors when it decided how liability for damages should be apportioned between unions and employers. The Court held that unions alone, as opposed to either employers alone or unions and employers jointly, should be primarily liable for the portion of a discharged employee’s back pay which accrues between the time a union breaches the duty and the plaintiff’s final recovery. Although the dissent in *Bowen* is better reasoned,⁹² the Court’s decision is less

88. *Id.* at 49, 52. Punitive damages are not available from the NLRB as a remedy for unfair labor practices, *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940), and most courts have held that they are not available as a remedy for employment discrimination under Title VII of the Civil Rights Act of 1964. *E.g.*, *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975). On the other hand, courts have held that punitive damages are available in employment discrimination actions brought under the Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 144 (current version at 42 U.S.C. § 1981 (1982)). *E.g.*, *Claiborne v. Illinois Cent. R.R.*, 583 F.2d 143 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979). Punitive damages are also available as a remedy for violations of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). *See, e.g.*, *Quinn v. Digiulian*, 739 F.2d 637 (D.C. Cir. 1984); *International Bhd. of Boilermakers v. Braswell*, 388 F.2d 193 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968). The Court in *Foust* expressly reserved judgment on the availability of punitive damages under the LMRDA. *Foust*, 442 U.S. at 47 n.9.

89. *Foust*, 442 U.S. at 50-51.

90. *Id.* at 51-52.

91. 459 U.S. at 212.

92. The majority opinion was a dramatic departure from the well established practice, previously sanctioned by the Court, of holding employers liable for ‘all back pay,’ while the union would be liable only for the plaintiff’s attorney’s fees and other litigation costs. *Id.* at 231 n.1, 232 (White, J., concurring in part and dissenting in part). The dissent correctly noted that a union’s breach of the duty in handling a discharge grievance “does not make the discharge and the refusal to reinstate any less wrongful” on the part of the employer. *Id.* at 238. As the dissent concluded, the *Bowen* decision “in effect reads an indemnification provision into the collective bargaining agreement, even though the employer can and more properly should be required to bargain for such a provision, if desired.” *Id.* at 240-41. For an outstanding discussion of *Bowen* and the apportionment issue, see VanderVelde, *Making Good on Vaca’s Promise: Apportioning Back Pay to Achieve Remedial Goals*, 32 UCLA L.

devastating to unions than it first appears, because plaintiffs prevail in so few duty of fair representation cases to begin with.⁹³ Moreover, unions can reduce their exposure by negotiating grievance procedures that permit employees to arbitrate some of their own grievances at their own expense,⁹⁴ or that provide for the union's indemnification by the employer for damages awarded as a result of the union's breach.⁹⁵

The Supreme Court has twice in recent years addressed statute of limitations issues in section 301/duty of fair representation cases.⁹⁶ *DelCostello v. International Brotherhood of Teamsters*⁹⁷ was the second of the two cases, made necessary in part to clear up the confusion created by the first.⁹⁸ In *DelCostello*, the Court held that

REV. 302 (1984). See also Kirschner & Walfoort, *The Duty of Fair Representation: Implications of Bowen*, 1 LAB. LAW. 19 (1985); Weingarten, *Bowen v. United States Postal Service: The Decision and its Effect on the Union's Duty of Fair Representation*, 35 LAB. L.J. 608 (1984).

93. See *infra* text accompanying note 172 (Table 15).

94. See *Bowen*, 459 U.S. at 225; Murray, *Apportionment of Damages in Section 301 Duty of Fair Representation Actions: The Impact of Bowen v. United States Postal Service*, 32 DE PAUL L. REV. 743, 780-83 (1983); *Apportioning Damages in DFR/§301 Actions: Union Responses to Bowen v. United States Postal Service*, in AFL-CIO LAW. COORDINATING COMM., THE LABOR LAW EXCHANGE 15-16 (No. 1, 1983) [hereinafter cited as AFL-CIO LAW.]. This is not a drastic step. The Railway Labor Act, for example, permits employees whose union fails to process their grievances to press it themselves. 45 U.S.C. § 153 First (i), (j) (1982). In this respect, *Bowen* may lead to a reopening of the policy debate, seemingly resolved by *Vaca*, over union versus individual employee control over the presentation of grievances. See *supra* note 50.

95. See AFL-CIO LAW., *supra* note 94, at 16-18. Another alternative is for unions to adopt a system of internal union review of alleged fair representation violations, coupled with contractual provisions extending the time limits for invoking arbitration if the union on reconsideration determines to do so. *Id.* at 15. Indeed, this proposal would also make available to defendant unions in many duty of fair representation cases the defense of failure to exhaust internal union remedies. See *infra* text accompanying notes 101-103.

96. Section 301 contains no limitations period, but the Supreme Court had held in *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), that "the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." *Id.* at 704-05.

Lower federal courts were split, however, on whether to adopt in hybrid fair representation cases the state limitations periods for tort actions, for contract actions, or for some other state cause of action. See, e.g., *Howard v. Aluminum Workers*, 589 F.2d 771 (4th Cir. 1978) (tort); *Butler v. Teamsters Local 823*, 514 F.2d 442 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975) (contract); *Kaylor v. Crown Zellerbach, Inc.*, 643 F.2d 1362 (9th Cir. 1981) (statutorily created claims).

97. 462 U.S. 151 (1983).

98. In *United Parcel Serv. v. Mitchell*, 451 U.S. 56 (1981), the Court held that a § 301/fair representation suit challenging the decision of a Teamster joint grievance committee should be governed by the state limitations period for actions to vacate arbitration awards, which in the case before the Court was 90 days. Unfortunately, *Mitchell* created

the limitations period for filing both fair representation claims against unions, and related breach of contract claims against employers, should be six months.⁹⁹ The Court "borrowed" that limitations period from section 10(b) of the National Labor Relations Act, which requires unfair labor practice charges to be filed with the National Labor Relation Board within six months.¹⁰⁰

The last procedural issue to be resolved by the Supreme Court in recent years was whether plaintiffs must exhaust internal union remedies before initiating duty of fair representation suits against their unions or breach of contract actions against their employers. In *Clayton v. United Automobile Workers*,¹⁰¹ the Court held that "where an internal union appeals procedure cannot result in reactivation of the employee's grievance or an award of the complete relief sought in his § 301 suit, exhaustion will not be required with respect to either the suit against the employer or the suit against the union."¹⁰² Even where these conditions are

more uncertainty than it resolved. For example, it was unclear whether the designated limitations period applied only to the action against the employer, or whether it applied to the action against the union as well. It was also unclear whether it applied when the grievance underlying the suit had not been taken through the final steps in the contractual grievance procedure. Moreover, the decision was severely criticized for adopting too short a limitations period. See, e.g., Klare, *United Parcel Service v. Mitchell: Of Docket-Clearing and Employee Rights*, MASS. B.A. LAB. L. SEC. NEWS, November, 1981, at 1.

99. 462 U.S. at 155.

100. 29 U.S.C. § 160(b) (1982). The Court noted that it was not abandoning its general practice of borrowing from analogous state statutes of limitations when federal statutes contained no limitations periods, and was not overruling *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). *DelCostello*, 462 U.S. at 171. See *supra* note 96. The Court explained that hybrid § 301/duty of fair representation cases were a unique creation of federal labor law, and that no state statutes of limitations were as closely analogous to, or effectuated federal labor policy as well as, section 10(b) of the NLRA. *DelCostello*, 462 U.S. at 171. Thus, without acknowledging that it was doing so, the Court in effect overruled *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56 (1981). *DelCostello* is silent regarding its application to duty of fair representation suits under the Railway Labor Act, but lower courts have held that it is applicable to such suits. See, e.g., *Lindner v. Berg*, 116 L.R.R.M. (BNA) 3389 (1st Cir. 1984); *Welyecko v. U.S. Air, Inc.*, 733 F.2d 239 (2d Cir.), *cert. denied*, 105 S. Ct. 512 (1984); *Barnett v. United Air Lines*, 738 F.2d 358 (10th Cir.), *cert. denied*, 105 S. Ct. 594 (1984).

101. 451 U.S. 679 (1981).

102. *Id.* at 685. The plaintiff in *Clayton* alleged that he had been discharged without cause by his employer, ITT Gilfillan. He filed a grievance, and his union processed it through several steps of the collectively bargained grievance procedure. The union decided, however, not to take the grievance to arbitration, and Clayton was notified of the union's decision after the time for requesting arbitration under the contract had expired. Clayton filed his lawsuit without first pursuing the internal union appeals procedures established under the United Auto Workers' constitution. *Id.* at 682-83. Justice Brennan's opin-

met, exhaustion will not be required if there is evidence of union hostility toward the grievant which would make a fair hearing unlikely, or if exhaustion would "unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim."¹⁰³

II. THE METHODOLOGY OF THE EMPIRICAL STUDY

In order to determine the characteristics and the outcomes of duty of fair representation litigation in the courts, data for this study were collected in three ways. First, my research assistants and I surveyed and catalogued information from all the duty of fair representation cases which generated published federal court opinions between 1977 and 1983. Second, we read and catalogued information from the courthouse files of all the duty of fair representation cases filed in three federal district courts during most of that same time period. Finally, we conducted a mail and telephone survey of the attorneys involved in the cases identified through the courthouse files.

ion for a five member majority held that Clayton's failure to exhaust his internal union remedies did not bar his suit, because the union appeals procedures could "neither reinstate Clayton in his job, . . . nor reactivate his grievance." *Id.* at 691, 696. The Court "decline[d] to impose a universal exhaustion requirement lest employees with meritorious § 301 claims be forced to exhaust themselves and their resources by submitting their claims to potentially lengthy internal union procedures that may not be adequate to redress their underlying grievances." *Id.* at 689.

103. *Id.* The Court was silent on the issue of which party has the burden of demonstrating the propriety (or impropriety) of requiring exhaustion in a given case, but it would seem that the burden should be borne by the defendants—"the parties who not only profit from [the exhaustion defense] but also possess virtually all the relevant information." Fox & Sonenthal, *supra* note 12, at 1028. See also Note, *Exhaustion of Intraunion Remedies Doctrine: The Lower Federal Courts' Application of Clayton v. UAW*, 8 J. CORP. L. 389, 403 (1983).

Another issue left open by the Court in *Clayton* is the length of time the grievant must spend exhausting internal remedies, where exhaustion is appropriate. The Court's concern that exhaustion not "unreasonably delay" a plaintiff's day in court, 451 U.S. at 689, would suggest that grievants not be required to spend endless months, or even years, exhausting internal union remedies. The final remedy under some union constitutions is appeal to the union's national convention, which may be held at intervals as long as five years apart. See Fox & Sonenthal, *supra* note 12, at 997. Indeed, even the dissenters in *Clayton*, who would have imposed exhaustion requirements even where union remedies could not award complete relief, would have adopted the four month limit on exhaustion contained in section 101(a)(4) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(4) (1982). *Clayton*, 451 U.S. at 702-03 (Rehnquist, J., dissenting).

A. *The Published Opinions*

1977 was chosen as the starting point for this study because that was the first full year following the Supreme Court's decision in *Hines v. Anchor Motor Freight*.¹⁰⁴ *Hines* is an important milestone in duty of fair representation litigation because it answered in the affirmative a question the Court had left open nine years earlier in *Vaca v. Sipes*:¹⁰⁵ whether employees could utilize the cause of action to challenge the resolution of grievances that had been taken all the way through the arbitration process.¹⁰⁶

The cases to be surveyed were identified by means of a list generated on *LEXIS*.¹⁰⁷ Although we began with a list of 1283 citations,¹⁰⁸ almost forty percent of those opinions were eliminated by the conclusion of the study, leaving 809 cases in the survey. The opinions eliminated fell into four categories: (1) opinions containing the words "fair representation" but which were not in fact duty of fair representation cases; (2) opinions in cases originating before the National Labor Relations Board;¹⁰⁹ (3) cases involving public sector labor relations governed by state law;¹¹⁰ and (4) additional opinions in cases already included in the survey.¹¹¹ As each case was read, a survey form was completed¹¹² and the data gathered were subsequently coded and entered into a computer for

104. 424 U.S. 554 (1976).

105. 386 U.S. 171 (1967).

106. See *supra* text accompanying notes 51-54.

107. The search request was "fair representation," Labor library, Courts file.

108. The great majority of these opinions were published by the West Publishing Company or one of the two principal labor law looseleaf services (BNA or CCH), but 144 of the citations were to apparently unpublished slip opinions. We included these slip opinions in the survey if otherwise within the scope of the study.

109. Cases involving the NLRB were excluded from this study because the procedural aspects of those cases, the parties involved, the remedies available, and indeed the body of law applied are so different from those in duty of fair representation suits initiated in the courts by private litigants that to include them would be mixing apples with oranges. See *supra* text accompanying note 48.

110. Public sector cases governed by federal law were included in the survey.

111. Many cases generated more than one published opinion during the period covered by this study. In such cases, we used only the most recent published opinion in order to avoid the problem of overcounting the factors we were examining. For example, in the well-known *Ruzicka* litigation, see, e.g., *VanderVelde*, *supra* note 12, at 1083-84 n.11, which generated four published opinions during the period covered by this study and ten overall, we used *Ruzicka v. General Motors Corp.*, 707 F.2d 259 (6th Cir.), *cert. denied*, 464 U.S. 982 (1983).

112. The survey form used is reproduced in the appendix to this Article.

analysis.

B. *The Courthouse Cases*

A survey based solely on published opinions, of course, can yield a picture of only the tip of the litigation iceberg, and as with real icebergs, it is difficult to know how closely that tip resembles the shape of things lying beneath the surface.¹¹³ Published opinions, for example, often involve interlocutory issues and may provide no clue as to which party ultimately prevailed in the litigation and on what grounds. Moreover, in most types of litigation, over fifty percent of the cases settle out of court.¹¹⁴ Published opinions can obviously reveal little about the patterns of such settlements. For these reasons, our examination of duty of fair representation litigation included the files of federal courthouses.

The duty of fair representation cases in three federal district courts were chosen for examination: The Eastern District of Pennsylvania, the Southern District of New York, and the District of Maryland.¹¹⁵ In part, these districts were chosen because of their geographic accessibility, but they were chosen for other reasons as well. Each district is in a different federal circuit, so the law governing the cases studied is somewhat more representative than if all the districts were in the same circuit.¹¹⁶ Moreover, all three districts are among the top twelve in volume of duty of fair representation litigation, as measured by the number of cases generating published opinions.¹¹⁷

The names and docket numbers of the case files to be examined were compiled from lists of all the cases classified as Labor Management Relations Act or Railway Labor Act cases and filed in each district from 1977 through 1982.¹¹⁸ Many of the cases on

113. For a discussion of the problems in relying on published opinions as a basis for empirical studies of the law, see Cartwright, *Disputes and Reported Cases*, 9 LAW & SOC'Y REV. 369 (1975).

114. Trubek, *supra* note 18, at 89.

115. Limited resources precluded a more extensive survey.

116. *Compare, e.g.*, *Medlin v. Boeing Vertol Co.*, 620 F.2d 957, 961 (3d Cir. 1980) (requiring bad faith to establish a breach of the duty) *with* *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888, 891 (4th Cir. 1980) (grossly deficient conduct can constitute a breach of the duty).

117. *See infra* text accompanying note 128 (Table 5).

118. These lists were based on information supplied on the "civil cover sheets" which are filed with the court whenever a new action is initiated in federal district court. The

these lists, of course, did not involve duty of fair representation claims, and were eliminated from the survey. Those that did comprised nearly all of the duty of fair representation actions filed in these three districts during the period covered. Given the imprecision with which federal courts classify their cases, however, the survey probably missed a number of cases in which the principal claims were based on Title VII of the Civil Rights Act of 1964¹¹⁹ or on the Landrum-Griffin Act,¹²⁰ but which also contained secondary duty of fair representation claims. There is no way of identifying such cases short of examining the pleadings in every Title VII or Landrum-Griffin Act case, which was not done. It is safe to say, however, that we examined nearly every case in which the litigants considered the duty of fair representation claims to be primary.¹²¹

A total of 188 duty of fair representation case files were examined: 101 in the Eastern District of Pennsylvania; forty-five in the Southern District of New York; and forty-two in the District of Maryland. As with the published opinions, a survey form was completed as each case file was examined, and the data collected were coded and entered into a computer for analysis.¹²²

C. *The Attorney Survey*

The final means of gathering data for this study was a mail and telephone survey of the attorneys involved in the duty of fair representation cases identified through the courthouse research described in the preceding subsection. Our primary purpose in

Clerk's office for the Eastern District of Pennsylvania had this material available on microfiche for all the years covered by the study, and the Clerk's office for the Southern District of New York had the material available for some of the years covered. The remaining lists of cases for the Southern District of New York, and all the lists for the District of Maryland, were obtained from the Administrative Office of the United States Courts.

119. 42 U.S.C. §§ 2000e to 2000e-17 (1982) (prohibiting employment discrimination based on race, sex, religion, or national origin).

120. 29 U.S.C. §§ 401-531 (1982) (regulating the internal affairs of unions and requiring unions to meet minimal standards of union democracy).

121. The attorney survey revealed that defense attorneys in duty of fair representation cases almost always remove such cases to federal court when filed initially in state court. *See infra* text accompanying note 133. Thus, most fair representation cases filed even in the state courts within these federal districts were probably included in the study. There were a handful of cases, however, in which the court records were misfiled or otherwise unavailable.

122. The survey form that was used is reproduced in the appendix to this Article.

conducting the attorney survey was to obtain information about the ultimate outcome of cases that settled out of court. The last docket entry for 35.6% of the cases in courthouse files was "stipulated dismissal," or something to that effect,¹²³ yet the court records rarely described the terms of the settlements agreed to by the parties. The attorney survey also sought information about each attorney's experience with duty of fair representation litigation in general.

Attorneys' names and addresses were obtained from the courthouse files, and where necessary, addresses were updated through telephone and bar directories. Questionnaires were mailed to all the attorneys for whom addresses could be obtained, and follow-up telephone interviews were conducted with many attorneys who failed to respond to the mail survey. Responses were ultimately obtained from at least one attorney involved in each of 116, or 61.7%, of the courthouse cases. These responses provided information about the settlements reached in 73.1% of the cases resolved through out-of-court settlements.

III. THE FINDINGS OF THE STUDY

A. *The Volume and Location of DFR Litigation*

If commentators agree on anything concerning duty of fair representation litigation, it is that the number of such cases has been increasing rapidly in recent years.¹²⁴ Table 1 presents the number of duty of fair representation opinions published per year between 1977 and 1983. The figures indicate an increase in the number of such opinions of 150% over that span.

123. See *infra* text accompanying note 172 (Table 15).

124. For example, almost every speaker at a recent conference on the duty of fair representation noted the higher volume of litigation of this type. See *THE CHANGING LAW*, *supra* note 8.

TABLE 1
DFR OPINIONS PUBLISHED PER YEAR¹²⁵

Year	Number
1977	71
1978	86
1979	66
1980	122
1981	135
1982	152
1983	<u>177</u>
Total	809

These figures certainly indicate a dramatic increase, but it must be noted that this increase in the number of opinions published does not necessarily imply that the number of cases filed has increased at the same rate. It might instead reflect the high state of flux and uncertainty in the controlling law, to which judges respond by writing and publishing more opinions. For example, one of the most unstable areas of the law controlling duty of fair representation litigation during the period covered by this study involved the determination of the appropriate statute of limitations;¹²⁶ fully 26.2% of all the opinions surveyed addressed this issue, ranging from 8.5% of the opinions published in 1977 to an amazing 46.7% of the opinions published in 1983.

In this regard, the figures in Table 2 are quite interesting, because they show that the number of duty of fair representation cases actually filed in the three district courts covered by the courthouse survey remained fairly constant, in fact dropping slightly, between 1977 and 1982. It must be noted, however, as a comparison of the figures in Table 1 and Table 3 indicates, that the number of published opinions issued by these three district courts increased at a slower rate than that for all district courts. Nevertheless, the evidence does suggest that duty of fair representation litigation may not be increasing at quite the alarming rate that the number of published opinions alone might indicate. In-

125. The figures in this Table were compiled using only one published opinion—the most recent—for cases generating more than one. *See supra* note 111.

126. *See supra* text accompanying notes 96-100.

deed, a comparison of the figures in Tables 2 and 4 suggests that duty of fair representation litigation may be growing at a much slower rate than other civil litigation in the federal courts.

TABLE 2

DFR CASES FILED PER YEAR
IN THREE DISTRICT COURTS

Year	E.D.Pa.	S.D.N.Y.	D.Md.	Totals
1977	22	8	7	37
1978	16	8	5	29
1979	16	5	4	25
1980	16	7	9	32
1981	14	11	8	33
1982	<u>17</u>	<u>6</u>	<u>9</u>	<u>32</u>
Total	101	45	42	188

TABLE 3

DFR OPINIONS PUBLISHED
PER YEAR IN THREE DISTRICT COURTS

Year	E.D.Pa.	S.D.N.Y.	D.Md.	Totals
1977	5	2	3	10
1978	5	4	2	11
1979	5	2	0	7
1980	8	2	3	13
1981	3	7	1	11
1982	5	4	4	13

TABLE 4

CIVIL CASES OF ALL TYPES FILED PER YEAR IN THREE DISTRICT COURTS¹²⁷

Year	E.D.Pa.	S.D.N.Y.	D.Md.	Totals
1977	4315	6350	2081	12,746
1978	4543	6328	2360	13,231
1979	4793	6896	2688	14,377
1980	5102	7545	2930	15,577
1981	5308	8004	3421	16,733
1982	5787	8666	3601	18,054

The geographic distribution of duty of fair representation litigation may be seen in Table 5, which provides the number of published opinions per federal district court. As one might expect, these cases seem to be concentrated in the highly unionized north-east and upper midwest, and appear with less frequency in the less unionized south and west.

127. This table was compiled from statistics collected by the Director of the Administrative Office of the United States Courts. See Report of the Proceedings of the Judicial Conference of the United States for 1982 at 94; for 1981 at 201; for 1980 at 218-19; for 1979 at 214-15; and for 1977 at 192. Yearly figures are for the twelve month period ending June 30 for each year shown.

TABLE 5
DFR OPINIONS PER DISTRICT¹²⁸

District	Number	Percent
N.D. Ill.	74	9.2
E.D. Mich.	38	4.7
E.D. Pa.	34	4.2
S.D.N.Y.	29	3.6
N.D. Ohio	29	3.6
S.D. Ohio	28	3.5
N.D. Cal.	26	3.2
D. Mass.	24	3.0
E.D.N.Y.	19	2.4
W.D. Pa.	14	1.7
N.D. Ga.	13	1.6
D. Md.	13	1.6
W.D. Mich.	13	1.6
C.D. Cal.	12	1.5
E.D. Wis.	12	1.5
N.D. Ala.	11	1.4
D. Minn.	11	1.4
E.D. Mo.	11	1.4
D.D.C.	9	1.1
S.D. Tex.	9	1.1
50 Districts	1-8	less than 1 each
24 Districts	0	---

B. *The Parties Involved*

It is now well settled that in most situations, plaintiffs in duty of fair representation litigation are free to sue both the employer and the union together in one suit, or to sue each separately in two lawsuits, or to sue only one or the other in a single action.¹²⁹

128. The Northern District of Illinois is probably somewhat overrepresented in this table because an unusually high number of otherwise unpublished slip opinions from this district found their way into the *Lexis* database. For example, 27 of the 40 slip opinions contained on the *Lexis* list of citations for 1983, or 67.5%, were from the Northern District of Illinois.

129. *Vaca v. Sipes*, 386 U.S. 171, 184-88 (1967); *Kaiser v. Teamsters Local 83*, 577 F.2d 642, 644 (9th Cir. 1978). Often, plaintiffs choose for political reasons not to sue their unions. See, e.g., Gibbs, *DFR Actions Must Be Carefully Evaluated*, LABOR UPDATE, May 1981,

The figures in Table 6 indicate, however, that in the overwhelming majority of cases, both the union and employer are named as defendants in a single action, sometimes along with other defendants.¹³⁰

TABLE 6
PARTIES NAMED AS DEFENDANTS

Party	Published Opinions		Courthouse Cases	
	Number	Percent	Number	Percent
Employer only	41	5.1	15	8.0
Union only	61	7.5	17	9.0
Both	606	74.9	120	63.8
Employer & other	2	0.3	2	1.1
Union & other	26	3.2	4	2.1
Both & other	73	9.0	30	16.0

at 8; Levy, *The DFR Is a Valuable Arrow for the Rank and File Quiver*, LABOR UPDATE, May 1981, at 9 (*Labor Update* is the newsletter of the labor law committee of the National Lawyers Guild). Unfortunately, the Supreme Court's recent decision in *Bowen v. United States Postal Serv.*, 459 U.S. 212 (1983), may make that an expensive option for some plaintiffs, who will have to choose between suing their unions or foregoing some of their back pay. See *supra* text accompanying notes 91-95.

Some types of duty of fair representation claims, it should be noted, do not involve any alleged contract violations on the part of the employer at all, and in such cases, obviously, the employer would not be named as a defendant. This is often the case in suits alleging some form of discrimination or favoritism in the administration of union-run hiring halls. See, e.g., *Emmanuel v. Omaha Carpenters Dist. Council*, 535 F.2d 420 (8th Cir. 1976).

130. The other defendants most often sued include individual union officers and individual supervisors or other agents of the employer. The union entity most frequently sued is the local, which usually has primary responsibility for grievance handling. Plaintiffs will sometimes sue their international union or other subdivisions of their union as well. For purposes of Table 6, these additional union defendants were classified as "union," not "other" defendants. Union defendants other than locals, however, are frequently dismissed from the proceedings on the grounds that they were not directly involved in the alleged breach of the duty on the part of the local and cannot be held vicariously liable. See, e.g., *Baker v. Newspaper & Graphic Communications Local 6*, 628 F.2d 156 (D.C. Cir. 1980); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir. 1980); *Teamsters Local 30 v. Helms Express, Inc.*, 591 F.2d 211 (3d Cir.), *cert. denied*, 444 U.S. 837 (1979); *but cf.* *Kirkland v. Arkansas-Best Freight Sys., Inc.*, 629 F.2d 538 (8th Cir. 1980), (although an international union does not owe a personal duty of fair representation to a member of a local union, the member at least has the right to insist that procedural safeguards imposed by the international union be observed), *cert. denied*, 450 U.S. 980 (1981); *Warner v. McLean Trucking Co.*, 574 F. Supp. 291 (S.D. Ohio 1983) (inclusion of other defendants upheld because this was "not wholly a dispute between a union and its members").

Duty of fair representation suits are sometimes brought as class actions,¹³¹ and the courthouse survey revealed that fifteen of the 188 cases in the three districts studied, or eight percent, were brought as class actions, although classes were actually certified in only two of those cases.¹³² No effort was made to determine how many of the published opinions involved class actions, because opinions addressing issues other than class certification may have had no reason to mention that the case was in fact brought as a class action, and the danger of undercounting such cases was believed to be too great.

The courthouse survey also revealed that about one-third of the duty of fair representation cases in the three federal districts studied were originally filed in state court but were removed to federal court by defendants.¹³³

Table 7 indicates the number of cases per international or national union in which that union, or one of its locals, was charged with a breach of the duty of fair representation. An immediately striking statistic from this table is that nearly one-third of all the cases involved a single union, the International Brotherhood of Teamsters. Moreover, only four unions accounted for over fifty percent of the total number of cases. Also noteworthy is the fact that the Airline Pilots Association, a relatively small union,¹³⁴ ranked sixth on the list, and that a number of large unions not known for the quality of their internal democracy, such as the Laborers Union,¹³⁵ ranked relatively low on the list.

131. See, e.g., *Smith v. Baltimore & Ohio R.R.*, 473 F. Supp. 572 (D. Md. 1979); *Buchholtz v. Swift & Co.*, 62 F.R.D. 581 (D. Minn. 1973).

132. These figures may somewhat undercount class actions, however, because the courthouse survey probably missed a number of Title VII class actions that also involved duty of fair representation claims. See *supra* text accompanying note 119.

133. State and federal courts have concurrent jurisdiction over cases based on section 301. See *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 101 (1962). An overwhelming number of the defense attorneys who responded to our attorney survey, or 96.6%, have a general policy of removing to federal court any duty of fair representation cases filed against their clients in state court, assuming the cases are removable.

134. The Airline Pilots Association, including its flight attendant and other airline employee divisions, has approximately 59,000 members. *DIRECTORY OF U.S. LABOR ORGANIZATIONS* 15-16 (C. Gifford ed. 1983) [hereinafter cited as *U.S. LABOR ORGANIZATIONS*].

135. See Barnes & Windrem, *Six Ways to Take Over a Union*, *MOTHER JONES*, Aug. 1980, at 34.

TABLE 7

NUMBER OF PUBLISHED OPINIONS PER UNION¹³⁶

Union	Number	Percent
Int'l Bhd. of Teamsters	238	29.4
United Auto Workers	84	10.4
United Steelworkers	51	6.3
Int'l Ass'n of Machinists	38	4.7
United Food & Commercial Workers	32	4.0
Airline Pilots Ass'n	27	3.3
Int'l Bhd. of Electrical Workers	20	2.5
United Transportation Workers	19	2.4
Bhd. of Railway & Airline Clerks	13	1.6
Communication Workers of America	13	1.6
Am. Postal Workers Union	12	1.5
Bakery & Confectionary Workers	10	1.2
United Bhd. of Carpenters	10	1.2
Amalgamated Transit Union	9	1.1
Nat'l Ass'n of Letter Carriers	8	1.0
United Ass'n of Plumbers & Pipefitters	8	1.0
United Rubber Workers	8	1.0
63 Unions	1-7	less than 1
34 Unions not identified	---	4.2

The figures in Table 7 invite speculation. Certainly a union's size is a major variable; one would expect larger unions to be involved in more duty of fair representation cases than smaller unions.¹³⁷ Table 8, however, demonstrates that size is not the only

136. This table represents the number of cases in which each union was implicated. The unions were not necessarily named as defendants in each case, although unions were named as defendants in 94.6% of the cases. *See supra* text accompanying note 130 (Table 6). The United Food and Commercial Workers Union (UFCW) resulted from the 1979 merger of the Retail Clerks and the Meat Cutters Unions. BUREAU OF NATIONAL AFFAIRS, LAB. REL. Y.B.—1979 235 (1980). The figures in this table referring to the UFCW include the pre-merger cases involving the Retail Clerks and the Meat Cutters.

The unions implicated in the courthouse cases are not included because geographical factors would have distorted the results. For example, the east and gulf coast longshoremen (the International Longshoremen's Association) would have been overrepresented, while the west coast longshoremen (the International Longshoremen's and Warehousemen's Union) would have been underrepresented.

137. On the other hand, very small unions may be particularly vulnerable to duty of fair representation litigation because their limited resources may preclude them from tak-

factor. It ranks by size the ten largest, predominantly private sector, labor unions and provides the percentage that each union's membership comprises of the total unionized, private sector workforce. A comparison of the figures in Table 8 with those in Table 7 indicates that the Teamsters, for example, are involved in more than triple the number of duty of fair representation cases than their size alone would suggest, and that the United Automobile Workers (UAW) are involved in almost seventy percent more.

TABLE 8

THE TEN LARGEST PRIVATE SECTOR UNIONS, AND
THEIR RESPECTIVE PERCENTAGES OF THE
UNIONIZED, PRIVATE SECTOR WORKFORCE¹³⁸

Union	Number of Members	Percent
Int'l Bhd. of Teamsters	1,891,000	8.6
United Auto Workers	1,357,000	6.2
United Food & Commercial Workers	1,300,000	5.9
United Steelworkers	1,238,000	5.6
Int'l Bhd. of Electrical Workers	1,041,000	4.7
United Bhd. of Carpenters	784,000	3.6
Int'l Ass'n of Machinists	754,000	3.4
Service Employees Int'l	650,000	3.0
Laborers Int'l	608,000	2.8
Communication Workers of Am.	551,000	2.5

A variety of factors may explain these disparities between a union's size and its involvement in duty of fair representation litigation. Unemployment levels and the general health of the particular union's industry may be factors. In industries—or regions of the country—where jobs are plentiful, discharged employees who can readily find new work would be less inclined to bring lawsuits to regain their old jobs than would workers in declining industries or areas of high unemployment.¹³⁹ Moreover, industries undergo-

ing many meritorious grievances to arbitration or from otherwise representing their members properly.

138. Compiled from statistics provided in U.S. LABOR ORGANIZATIONS, *supra* note 134, at 1, 2, 4 (based on 1980 figures).

139. Not only would the potential plaintiff have less incentive to sue, but so would the potential plaintiff's lawyer. Duty of fair representation cases are frequently handled on a

ing major structural changes, such as the trucking and airline industries (due to the effects of deregulation), are likely to generate increased numbers of grievances involving layoffs, loss of seniority, and changes in working conditions;¹⁴⁰ more grievances may result in more unhappy grievants, which may ultimately lead to the filing of more duty of fair representation cases. Furthermore, discharges in some industries are simply not the traumatic events they are in most. For example, construction workers and long-shoremen typically work on jobs of short duration obtained through union-run hiring halls, and are more likely to take in stride the loss of one particular job. In addition, when violations of the duty of fair representation occur in the administration of the hiring hall, remedies may be more easily obtained through the National Labor Relations Board than through the courts.¹⁴¹

Finally, the characteristics of the unions and their members must be considered. The UAW, for example, has a reputation for taking a very hard line towards settling these cases, so as not to encourage plaintiffs to sue.¹⁴² This policy undoubtedly generates published opinions for cases other unions might have settled. The UAW also litigates most heavily the defense of failure to exhaust internal union remedies, which has generated a large number of published opinions in recent years.¹⁴³ Some unions, such as the

contingency basis, and if lost wages can be easily mitigated, the amount of the plaintiff's recovery, and therefore the attorney's fee, would be reduced. Tobias, *supra* note 12 at 546.

140. See generally Arouca & Perritt, *Transportation Labor Law and Policy for a Deregulated Industry*, 1 LAB. LAW. 617 (1985); Flexner, *The Effect of Deregulation in the Motor Carrier Industry*, 28 ANTITRUST BULL. 185 (1983); Jansonius & Broughton, *Coping with Deregulation: Reduction of Labor Costs in the Airline Industry*, 49 J. AIR L. & COMMERCE 501 (1984).

141. Unlike many duty of fair representation claims which involve alleged wrongful conduct on the part of the employer as well as the union, and for which complete relief is therefore not available through the NLRB, see *supra* note 48, hiring hall violations frequently involve only union misconduct which can be fully remedied through NLRB proceedings. See C. MORRIS, *supra* note 12, at 1396-1406; Bastress, *Application of a Constitutionally-based Duty of Fair Representation to Union Hiring Halls*, 82 W. VA. L. REV. 31 (1979).

142. Such behavior is not uncommon among institutional "repeat players" who engage in frequent litigation of a given type. See Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

143. Of the published opinions addressing this defense, a disproportionately high 33.8% involved the UAW. Thus, it is not surprising to find that the UAW was a party in the one Supreme Court case involving this issue. Clayton v. UAW, 451 U.S. 679 (1981). The UAW's interest in this defense may be related to the fact that it utilizes an outside public review board to hear complaints of internal union misconduct. This makes the UAW one of the few unions with internal remedies which can be expected to operate in a reasonably unbiased manner. On the other hand, the UAW's public review board applies a

Airline Pilots Association, are comprised for the most part of well educated and well paid members, who may be more apt to sue because of their sophistication and level of financial resources; other unions, on the other hand, such as the Laborers, are generally comprised of lower paid, less well educated workers who may be less likely to seek out an attorney and file a lawsuit.¹⁴⁴

A number of different factors may be at work within the Teamsters Union. First, deregulation and the recent recession have caused tremendous upheaval and brought hard times upon the trucking industry.¹⁴⁵ Second, while Teamsters may not necessarily be better educated than the average employee, their incomes are often higher than most other blue collar workers.¹⁴⁶ Third, many Teamster collective bargaining agreements, particularly in the trucking and warehouse industries, establish joint union-management grievance committees to resolve grievances instead of other, more traditional types of arbitration.¹⁴⁷ These joint committees, comprised of an equal number of union and management representatives without a neutral outsider to break ties, operate in a manner that makes it particularly easy for union officials so inclined to violate their duty of fair representation by "horsetrading" grievances,¹⁴⁸ or seeing to it that unpopular or

more deferential standard than that used by most courts in evaluating charges against the union, and over the course of 20 years, it only once found that the union had breached its duty in grievance handling. Klein, *Enforcement of the Right to Fair Representation: Alternative Forums*, in *THE DUTY OF FAIR REPRESENTATION*, *supra* note 10, at 97, 103.

144. See Hallauer, *Low Income Laborers as Legal Clients: Use Patterns and Attitudes Toward Lawyers*, 49 DEN. L.J. 169 (1972); Hoyman & Stallworth, *Who Files Suits and Why: An Empirical Portrait of the Litigious Worker*, 1981 U. ILL. L. REV. 115, 127-28, 131-32.

145. See *supra* note 140, and accompanying text.

146. This tends to be the case among Teamsters in the trucking and warehousing industries. Many Teamsters in other industries, however, are not nearly as well paid. For example, cannery workers under Teamster contracts in California typically earn about \$6.00 to \$8.00 per hour, whereas truck drivers and warehouse workers under the Central States Supplement to the National Master Freight Agreement typically earn about \$13.40 per hour. Telephone interview with Ken Paff, Organizer for Teamsters for a Democratic Union (Feb. 18, 1985).

147. *Id.*

148. Most courts and commentators agree that the trading of a meritorious grievance—especially in a discharge case—for the benefit of another individual or the group violates the duty of fair representation. On the other hand, foregoing a weak grievance in exchange for an employer concession, at least when not motivated by hostility or bad faith, does not violate the duty. See, e.g., *Harrison v. United Transp. Union*, 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *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.

dissident members lose their grievances.¹⁴⁹ A fourth major factor is the unfortunate reality that the Teamsters Union is among the most corrupt and autocratic of major American unions.¹⁵⁰ Finally, the presence within the union of a well established, national opposition caucus, Teamsters for a Democratic Union (TDU), is an important factor. TDU plays a major role both in educating rank

1016 (1971); *Simberland v. Long Island R.R.*, 421 F.2d 1219 (2d Cir. 1970); *Miller v. Greyhound Lines, Inc.*, 95 L.R.R.M. (BNA) 2871 (E.D. Pa. 1977); Clark, *supra* note 12, at 1174-77; Leffler, *supra* note 12, at 58-60; Summers, *supra* note 12, at 270-73, 279; VanderVelde, *supra* note 12, at 1150-53.

149. Professor Summers' penetrating description of how Teamster joint committees operate identifies a number of factors which make joint committees particularly vulnerable to abuse: (1) the hearing frequently does not provide an adequate opportunity to present relevant evidence; (2) extensive ex parte discussions frequently occur between panel members and parties interested in the outcome of pending grievances; (3) the hearing process facilitates the trading of grievances under the guise of adjudication; (4) union representatives on grievance panels are susceptible to political pressure from the union hierarchy; (5) the panels are inherently lacking in neutrality, and panel members often have an indirect interest in the outcome of particular grievances; (6) joint committee decisions rarely have precedential value in later cases, so like cases need not be decided in a like manner; (7) joint committee decisions are rarely accompanied by a statement of the committee's reasoning or a description of the facts before it; and (8) there is no readily available record of the proceedings. Summers, *Teamster Joint Grievance Committees: Grievance Disposal Without Adjudication*, in NATIONAL ACADEMY OF ARBITRATORS, PROCEEDINGS OF THE 37TH ANNUAL MEETING 130 (1984). See also *Barrentine v. Arkansas-Best Freight System*, 615 F.2d 1194, 1201 (8th Cir. 1980), *rev'd on other grounds*, 450 U.S. 728 (1981); *General Drivers v. Young & Hay Transp. Co.*, 522 F.2d 562, 567 n.5 (8th Cir. 1975); R. JAMES & E. JAMES, *HOFFA AND THE TEAMSTERS* 167-85 (1965); Azoff, *Joint Committees As An Alternative Form of Arbitration Under the NLRA*, 47 TUL. L. REV. 325 (1973); Clark, *supra* note 12, at 1169-71; Feller, *supra* note 14, at 836-38.

Even when they function properly, joint committees are likely to present the appearance of impropriety, since the only way a grievant can lose before a joint committee is for one of the union representatives on the committee to vote against the grievant. In the event that the committee is deadlocked, the grievance usually proceeds to another joint committee comprised of higher level union and management officials. The appearance of impropriety inherent in these committees plausibly invites litigation. See Hoyman & Stallworth, *supra* note 144, at 132.

150. See, e.g., S. BRILL, *THE TEAMSTERS* (1978); D. MOLDEA, *THE HOFFA WARS* (1978); PROFESSIONAL DRIVERS COUNCIL, *TEAMSTER DEMOCRACY AND FINANCIAL RESPONSIBILITY: A FINANCIAL AND STRUCTURAL ANALYSIS* (1976); and almost any issue of *Convoy Dispatch*, the monthly newspaper of Teamsters for a Democratic Union. It should not be surprising that a union whose leaders are frequently convicted for labor racketeering and other crimes is a target for many duty of fair representation suits. See Hoyman & Stallworth, *supra* note 144, at 132-34. Three of the last five presidents of the Teamsters—Dave Beck, Jimmy Hoffa, and Roy Williams—were convicted of federal crimes while in office. According to the Senate Labor Committee, 49 Teamster officials were convicted of various types of labor racketeering between January of 1980 and June of 1983. Jackie Presser in *the Hot Seat*, NEWSWEEK, Aug. 20, 1984, at 57-61.

and file Teamsters about their legal rights, and in assisting them to obtain the services of attorneys when those rights have been violated.¹⁵¹

C. *The Nature of the Claims*

A distinction is generally made between a union's duty of fair representation in negotiating a collective bargaining agreement on the one hand, and in administering it, or handling grievances under it, on the other.¹⁵² Table 9 demonstrates that in approximately eighty percent of the published opinions and ninety percent of the cases in courthouse files, the alleged breach of the union's duty occurred in grievance handling, whereas breaches of the duty in contract negotiations were alleged in only about 12.5% and 7.5% of these cases, respectively. Of the breaches alleged in grievance handling, a substantial majority took place before arbitration, reflecting in part the large number of alleged breaches resulting from union decisions not to file or process grievances, or take grievances to arbitration.¹⁵³ But note that of the published cases alleging union misconduct at the final stage of the grievance procedure, 66.2% involved the Teamsters, and of those cases, fully 84.9% involved joint union-management grievance committees.¹⁵⁴

151. For example, the Teamsters for a Democratic Union published a 312 page legal rights handbook for its members. E. BOAL, *TEAMSTER RANK AND FILE LEGAL RIGHTS HANDBOOK* (rev. ed. 1984). See generally S. BRILL, *supra* note 150, at 312-20; S. FRIEDMAN, *TEAMSTER RANK AND FILE* 209-43 (1982); Benson, *Reform Among the Teamsters*, 26 *DISSENT* 153 (1979).

152. See, e.g., Blumrosen, *supra* note 50; Leffler, *supra* note 12; Summers, *supra* note 12, at 254-58.

153. See *infra* text accompanying note 160 (Table 11).

154. See *supra* note 149 and accompanying text. It is not surprising that *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), in which the Court extended the duty of fair representation doctrine to cases in which the underlying grievance had been taken through arbitration, involved a Teamster joint committee.

TABLE 9
LOCUS OF ALLEGED UNION MISCONDUCT¹⁵⁵

Locus	<u>Published Opinions</u>		<u>Courthouse Cases</u>	
	Number	Percent	Number	Percent
In negotiating or ratifying contract	101	12.5	14	7.5
In grievance handling before arbitration	463	57.2	133	70.7
In grievance handling at or after arbitration	190	23.4	37	19.7
Other locus ¹⁵⁶	83	10.3	13	6.9
Unknown or none alleged	64	7.9	8	4.3

Tables 10 and 11 provide a more detailed breakdown of the types of union misconduct alleged in contract negotiation and grievance handling cases. Table 10 indicates that in cases involving contract negotiation, the nature of the alleged wrong is much more likely to concern the substantive terms of the contract than the manner in which it was negotiated or ratified. This result is not surprising in light of the very limited legal recognition given to the importance of procedural democracy in the collective bargaining process.¹⁵⁷ Although alleged wrongful conduct in grievance handling is widely disbursed over a variety of different types, as indicated in Table 11, one particular category is surprisingly underrepresented: negligently missing a filing deadline. This is noteworthy because, given the attention this type of wrongful conduct has received from commentators, one would have thought the courts were swamped by such claims.¹⁵⁸

155. The percent columns in this table each total more than 100% because in a number of cases, plaintiffs alleged union misconduct in two or more loci.

156. Examples of this "other locus" category include the administration of union-run hiring halls and the union's discipline of its members.

157. For a thorough and enlightening discussion of this shortcoming in American labor law, see Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984). See also Finkin, *supra* note 12; Silverstein, *Union Decisions on Collective Bargaining Goals: A Proposal for Interest Group Participation*, 77 MICH. L. REV. 1485 (1979).

158. See, e.g., Cheit, *supra* note 12; VanderVelde, *supra* note 12; Note, *A Hint of Negligence*, *supra* note 66. In fairness to the commentators, it should be noted that allegations of

TABLE 10
NATURE OF ALLEGED UNION MISCONDUCT IN
CONTRACT NEGOTIATIONS¹⁵⁹

Type of Misconduct	<u>Published Opinions</u>		<u>Courthouse Cases</u>	
	Number	Percent	Number	Percent
Procedural irregularities in negotiations (e.g., not properly ratified, supplemental contract violates principal agreement)	40	39.6	4	28.6
Contract is substantively unfair or discriminatory	67	66.3	10	71.4

this type were present in several important cases. *See, e.g.*, *IBEW v. Foust*, 442 U.S. 42 (1979); *Ruzicka v. General Motors Corp.*, 649 F.2d 1207 (6th Cir. 1981); *Ruzicka v. General Motors Corp.*, 528 F.2d 912 (6th Cir. 1975).

159. The figures in the percent columns of this table represent the percentages of cases in which misconduct in contract negotiations was alleged, not the percentages of all cases. The percentages for the published opinions total more than 100% because in a number of cases alleging union misconduct in contract negotiations, plaintiffs also alleged misconduct in grievance handling.

TABLE 11
NATURE OF ALLEGED UNION MISCONDUCT IN
GRIEVANCE HANDLING¹⁶⁰

Type of Misconduct	<u>Published Opinions</u>		<u>Courthouse Cases</u>	
	Number	Percent	Number	Percent
Conscious refusal to file or process grievance	134	20.5	54	31.8
Conscious refusal to take grievance to arbitration	188	28.8	42	24.7
Unintentional failure to file grievance or seek arbitration (e.g., missing filing deadlines)	36	5.5	5	2.9
Improper conduct in handling grievance in preliminary steps of grievance procedure (e.g., failure to investigate, losing information, lack of communication with grievant)	156	23.9	49	28.8
Improper conduct at grievance or arbitration hearing (e.g., failure to call witnesses or present arguments, "horse-trading" grievance, improper "side agreement" with employer, arbitrator, or joint committee)	174	26.7	43	25.3

160. The figures in the percent columns of this table represent the percentages of cases in which misconduct in grievance handling was alleged, not the percentages of all cases. The percent columns each total more than 100% because in a number of cases alleging union misconduct in grievance handling, two or more types of misconduct were alleged.

Separating contract negotiation cases from grievance handling cases is only one means of classification. Another equally significant way of looking at these cases is to separate those in which plaintiffs allege some particular type of union hostility towards them on the part of their unions, from those in which the union's alleged misconduct does not involve animosity toward any particular individual or group.¹⁶¹ In terms of the Supreme Court's language,¹⁶² this approach would entail separating the cases that involve bad faith, hostility, or discrimination on the one hand, from those involving only perfunctory or arbitrary conduct on the other.¹⁶³

Classifying the published opinions in this manner, however, was difficult because, in a substantial minority of the cases, information in the opinion was not sufficient to determine whether bad faith or hostility of any type was alleged.¹⁶⁴ Where such information was explicitly provided, or could reasonably be read between the lines, allegations of hostility or discrimination were made in less than forty percent of the cases, as Table 12 demonstrates. Among the courthouse files examined, ninety-one percent provided sufficient information to make a determination. Of those cases, hostility or discrimination was alleged only twenty-two percent of the time. Table 12 provides data on the precise nature of the hostility or discrimination alleged.¹⁶⁵

161. See, e.g., NLRB MEMO, *supra* note 48; Cheit, *supra* note 12; Jacobs, *The Duty of Fair Representation: Minorities, Dissidents and Exclusive Representation*, 59 B.U.L. REV. 857 (1979); VanderVelde, *supra* note 12.

162. See *supra* text accompanying notes 55-77.

163. Of course, many cases involve allegations of perfunctory or arbitrary conduct in addition to allegations of bad faith, hostility, or discrimination.

164. For example, in many opinions addressing such procedural issues as the statute of limitations or exhaustion of internal union remedies, very little information about the merits of the plaintiffs' claims was provided.

165. All duty of fair representation cases alleging hostility or discrimination could not be included. See *supra* text accompanying notes 119-21.

TABLE 12

Type of Hostility	Published Opinions			Courthouse Cases		
	Number	Percent	Adjusted	Number	Percent	Adjusted
			Percent ¹⁶⁶			Percent ¹⁶⁷
No information available	381	47.1	---	17	9.0	---
None alleged	265	32.6	61.7	134	71.3	78.4
Race, sex, religious, national origin, age, or handicap discrimination	76	9.4	17.8	6	3.1	3.5
Dissident activity or union rival	29	3.6	6.8	16	8.5	9.4
Personality conflict	21	2.6	4.9	5	2.7	2.9
Not union member	15	1.9	3.5	1	0.1	0.1
Other	22	2.7	5.1	9	4.8	5.3

Table 13 provides information about the claims asserted against employers in hybrid section 301/fair representation cases. Not surprisingly, discharge claims constitute a majority, probably because plaintiffs are likely to have a greater incentive to sue when a job is lost. In this regard, it may be noted that many seniority disputes also entail loss of employment, although the precise number of such cases was not broken down. Finally, in concluding this subsection on the allegations made by plaintiffs in the cases studied, Table 14 presents data on additional allegations that sometimes accompany section 301 or duty of fair representation claims.

166. The percentages in this column are computed by using only those opinions in which sufficient information was provided to determine whether any hostility was alleged.

167. The percentages in this column were computed by using only those courthouse files in which sufficient information was provided to determine whether any hostility was alleged.

TABLE 13
NATURE OF ALLEGED EMPLOYER MISCONDUCT¹⁶⁸

Type of Misconduct	<u>Published Opinions</u>		<u>Courthouse Cases</u>	
	Number	Percent	Number	Percent
Discharge without cause	458	56.6	109	58.0
Seniority dispute	133	16.4	37	19.7
Race, sex, religious, national origin, age, or handicap discrimination	60	7.4	9	4.8
Pay dispute	52	6.4	14	7.5
Dispute over pension or other fringe benefits	37	4.6	9	4.8
Improper change of work rules or working conditions	33	4.1	7	3.7
Discipline without cause, short of discharge	16	2.0	5	2.7
Other	32	4.0	19	10.1
None alleged	51	6.3	6	3.2
Unknown	35	4.3	1	0.5

168. The percent columns in this table each total more than 100% because in a number of cases, two or more types of misconduct were alleged.

TABLE 14
ADDITIONAL CLAIMS ASSERTED IN
DFR LITIGATION¹⁶⁹

Type of Claims	<u>Published Opinions</u>		<u>Courthouse Cases</u>	
	Number	Percent	Number	Percent
No other allegations	567	70.1	131	69.7
Claims under statutes prohibiting discrimination on grounds of race, sex, religion, national origin, age, or handicap	103	12.7	9	4.8
Tort claims	50	6.2	35	18.6
Labor-Management Reporting and Disclosure Act of 1959 ¹⁷⁰ claims	31	3.8	2	1.1
Pension claims	14	1.7	2	1.1
Other allegations	55	6.8	17	9.0

D. The Resolution of the Claims: Who Wins and on What Grounds?

Data on the parties and on the nature of the claims asserted are, for the most part, readily available from published opinions on the duty of fair representation. Information on the ultimate outcome of such litigation, however, is less complete. Of the published opinions included in this study, almost one fourth were interlocutory opinions that did not result directly in a judgment for any party.¹⁷¹ Similarly, no clear winner was revealed in a majority of the cases surveyed in courthouse files. An analysis of the data available, however, leaves little doubt that plaintiffs hardly ever prevail in duty of fair representation litigation.

169. The percent columns in this table each total more than 100% because in a number of cases, two or more additional allegations were present.

170. 29 U.S.C. §§ 401-531 (1982).

171. Of the published opinions, summary judgment motions were denied in 5.9% because of disputes of material fact; in 6.2%, defendants' motions to dismiss or for summary judgment on statute of limitations grounds were denied; and in 5.3%, defendants' motions to dismiss or for summary judgment on exhaustion of internal union remedies grounds were denied. The remainder of the interlocutory opinions involved a wide variety of issues not subject to useful classification.

1. *Cases in Which Plaintiffs Prevail.* As Table 15 indicates, plaintiffs prevailed on the merits of their claims in only 4.3% of the duty of fair representation cases generating published opinions between 1977 and 1983, and they prevailed in an even smaller percentage (1.6) of the cases filed in three district courts between 1977 and 1982. Since more than one-third of the cases in the courthouse files settled out of court, however, the terms of the settlement agreements reached must be evaluated before a true picture of plaintiffs' success rates can be drawn. The attorney survey was used to obtain this information, and as Table 16 demonstrates, settlements favorable to plaintiffs were obtained in only 14.3% of the settlements about which information was available, or 3.7% of the total number of cases surveyed in the courthouse files.¹⁷²

TABLE 15

THE OUTCOME OF CASES REACHING FINAL JUDGMENT
ON FAIR REPRESENTATION AND/OR BREACH OF
CONTRACT CLAIMS

Outcome	<u>Published Opinions</u>		<u>Courthouse Cases</u>	
	Number	Percent	Number	Percent
Judgment entered for plaintiff	35	4.3	3	1.6
Judgment entered for one or more defendants	591	73.1	86	45.7
Case settled	---	---	67	35.6
Case still open	---	---	25	13.3
No information re: outcome	183	22.6	7	3.7

172. It is very difficult, of course, to classify out-of-court settlements, which by definition entail some compromise by each party, as "favorable to plaintiff" or "favorable to defendant." For present purposes, all settlements resulting in either the reinstatement of a discharged plaintiff, or the payment of more than \$10,000 (including attorneys' fees) to a plaintiff, were classified as a settlement favorable to plaintiff. This classification is obviously not foolproof, since a payment of \$4500, for example, to a plaintiff who was not discharged may be a substantial victory. Nevertheless, since close to 80% of the courthouse cases involved discharges or seniority disputes which may have entailed layoffs, *see supra* text accompanying note 168 (Table 13), this classification scheme seems reasonable. Only 7 of 188 courthouse cases resulted in favorable settlements so defined.

TABLE 16

THE NATURE OF THE OUT-OF-COURT SETTLEMENTS
OBTAINED BY PLAINTIFFS IN THE COURTHOUSE CASES

Terms of the settlement	Number	Percent	Adjusted Percent ¹⁷³
No reinstatement, and received no money	10	14.9	20.4
No reinstatement, and received under \$1000	10	14.9	20.4
No reinstatement, but received \$1001 - \$5000	13	19.4	26.5
No reinstatement, but received \$5001 - \$10,000	6	9.0	12.2
No reinstatement, but received over \$10,000	6	9.0	12.2
Obtained reinstatement and received under \$1000	1	1.5	2.0
Other	3	4.5	6.1
No information available	18	26.9	---

The data are, quite clear, therefore, that plaintiffs prevail in only a small fraction of duty of fair representation cases. Adding the number of judgments for plaintiffs found among the published opinions and the courthouse cases to the number of favorable out-of-court settlements generated among the courthouse cases indicates that plaintiffs succeeded in only 4.5% (45 out of 997) of the cases surveyed. Although the sample was perhaps too small for its findings to be considered conclusive, the characteristics of the cases that may be considered plaintiff victories yielded some interesting results.

The Teamsters union was involved in 22.2% of the forty-five cases in which plaintiffs prevailed, whereas it was involved in a slightly greater percentage (29.4) of all the cases generating published opinions.¹⁷⁴ The Steelworkers and Postal Workers, on the

173. The percentages in this column were computed by using only those settlements about which information could be obtained through the attorney survey. *See supra* text accompanying note 123.

174. *See supra* text accompanying note 136 (Table 7). There were 809 cases generating published opinions. *See supra* text accompanying notes 108-109.

other hand, which accounted for 11.1% and 8.9% of plaintiff victories, respectively, were somewhat overrepresented in relation to their percentage of the total published opinions (6.3% and 1.5%, respectively). The United Auto Workers, however, which accounted for 4.4% of plaintiff victories, was somewhat underrepresented, since it comprised 10.4% of the total opinions.¹⁷⁵

Cases in which the alleged union misconduct involved the negotiation or ratification of a collective bargaining agreement were also somewhat overrepresented among cases in which plaintiffs prevailed—17.8% compared with 11.5% of all the cases surveyed.¹⁷⁶ These figures are surprising because the courts purport to give unions more leeway in negotiating contracts than in administering them.¹⁷⁷ The source of this apparent anomaly may lie in the fact that twenty-five percent of these contract negotiation cases also involved allegations of race or sex discrimination prohibited by Title VII of the Civil Rights Act of 1964.¹⁷⁸ If those cases were eliminated from consideration, the percentage of cases involving contract negotiation in which plaintiffs prevailed would drop to a more consistent 13.3%.

As to litigation involving issues of union misconduct in grievance handling, the distribution of the types of such misconduct for the cases in which plaintiffs prevailed corresponded roughly to the distribution of such misconduct for all of the cases surveyed,¹⁷⁹ with one important exception: in only 6.7% of the cases in which plaintiffs prevailed did the union's alleged wrongful conduct involve a conscious refusal to take a grievance to arbitration, whereas such claims were made in 23.1% of all surveyed cases. These figures strongly suggest that courts are quite reluctant to second guess union decisions of this type. This result conforms with the analysis of the court in *Dutrisac v. Caterpillar Tractor Co.*,¹⁸⁰ which noted that courts are much more likely to apply a negligence-like standard in cases involving the ministerial acts of

175. *Id.*

176. There were 115 cases out of 997 surveyed involving the negotiating or ratifying of a contract, of which only eight plaintiffs prevailed. *See supra* text accompanying note 155 (Table 9).

177. *See supra* text accompanying notes 55-77.

178. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

179. *See supra* text accompanying note 160 (Table 11).

180. 749 F.2d 1270 (9th Cir. 1983).

unions, as opposed to union exercises of discretion.¹⁸¹

It is difficult to determine whether plaintiffs won a disproportionate number of cases in which they alleged some type of animosity on the part of the union towards themselves as individuals or as members of disfavored groups, because information about the presence of such allegations was often absent from the published opinions.¹⁸² Allegations of animosity, however, were present in one-third of the cases in which the plaintiffs prevailed. This figure is slightly lower than the 38.1% of cases involving animosity in the total of published opinions for which information was available, but it is substantially higher than the adjusted percentage of 21.2 representing such allegations in courthouse cases.¹⁸³

The allegations of employer misconduct in cases plaintiffs won differ in a number of ways from such allegations in all the surveyed cases. For example, cases in which no employer misconduct was alleged are somewhat overrepresented, comprising 13.3% of the cases in which plaintiffs prevailed, but only 5.7% of all cases. Moreover, where employer misconduct was alleged, discharge and seniority disputes are slightly underrepresented, comprising respectively 48.8% and 11.1% of the cases in which plaintiffs prevailed, as opposed to 56.9% and 17.1% of all the cases studied. Cases alleging race, sex, or other types of employment discrimination, on the other hand, are overrepresented, comprising 17.8% of the cases in which plaintiffs prevailed, but only 6.9% of all cases.¹⁸⁴

Finally, the cases in which plaintiffs prevailed involve the disproportionate presence of a number of additional claims aside from the ordinary breach of the duty of fair representation and breach of contract claims. For example, it should come as no surprise in light of the foregoing findings¹⁸⁵ that Title VII and other employment discrimination claims are overrepresented in the cases in which plaintiffs prevailed, comprising 19.5% of those cases, but only 11.2% of the total.¹⁸⁶ Also overrepresented among

181. See *supra* text accompanying notes 62-68.

182. See *supra* text accompanying notes 164-65.

183. See *supra* text accompanying note 166 (Table 12).

184. See *supra* text accompanying note 168 (Table 13).

185. See *supra* text accompanying notes 177-78.

186. See *supra* text accompanying note 169 (Table 14).

the cases plaintiffs won are claims arising under the Landrum-Griffin Act,¹⁸⁷ which were present in 6.7% of such cases, compared to 3.3% of all the cases surveyed.

2. *Cases in Which Plaintiffs Lose.* The next major inquiry is to determine why so many plaintiffs lose; are they losing on the merits of their claims, or on procedural grounds unrelated to the merits? Table 17 provides some answers to these questions. It shows that in a very large percentage of cases, the plaintiffs lost without ever having the opportunity to present the merits of their claims to the court. In approximately forty-five percent of the cases, plaintiffs lost because they filed their action after the expiration of the statute of limitations, or without first attempting to exhaust available internal union remedies.¹⁸⁸ With so many cases being resolved on procedural grounds, it is not surprising that few duty of fair representation cases ever reach trial. Table 18 shows the procedural postures of the courts' decisions.

IV. THE POLICY IMPLICATIONS OF THE STUDY

A. *The Procedural Roadblocks*

Professor Summers once described a hypothetical case of a union which refused to process a grievance for wages owed under a collective bargaining agreement as "the case of the paper prom-

187. Labor-Management Reporting and Disclosure Act of 1959 §§ 1-707, 29 U.S.C. §§ 401-531 (1982). See *supra* note 120.

188. See *supra* text accompany notes 173 (Table 15), and 189 (Table 17). Of 677 cases in which judgment was entered for defendants, a missed statute of limitation or the failure to exhaust internal union remedies was the cause of 306 of such judgments.

TABLE 17
 THE BASIS OF PLAINTIFF LOSSES IN
 DFR LITIGATION¹⁸⁹

Basis of Loss	<u>Published Opinions</u>		<u>Courthouse Cases</u>	
	Number	Percent	Number	Percent
Alleged union misconduct resolved in defendant's favor	368	62.3	40	46.5
Alleged employer misconduct resolved in defendant's favor	149	25.2	22	25.6
Plaintiff missed statute of limitations	170	28.8	20	23.3
Plaintiff failed to exhaust internal union remedies	99	16.8	17	19.8
Plaintiff failed to exhaust contractual remedies	38	6.4	4	4.7
Other	27	4.6	7	8.1

189. The percentages in this table are based on the number of cases in which a final judgment was entered for one or more of the defendants—591 cases generating published opinions, and 86 courthouse cases. The percentages total more than 100% because in many cases, defendants prevailed on more than one basis.

TABLE 18
PROCEDURAL POSTURES OF THE COURTS' DECISIONS¹⁹⁰

Procedural Posture	<u>Published Opinions</u>		<u>Courthouse Cases</u>	
	Number	Percent	Number	Percent
Motion to dismiss, or appeal therefrom ¹⁹¹	193	23.9	35	39.3
Motion for summary judgment, or appeal therefrom ¹⁹²	488	60.3	41	46.1
Trial judge's opinion following a bench trial	70	8.7	7	7.9
Jury verdict	---	---	6	6.7
Trial judge's opinion following a jury trial ¹⁹³	6	0.1	8	9.0
Appeal from bench trial	37	4.6	--	---
Appeal from jury trial	22	2.7	--	---
Other procedural posture	56	6.9	2	2.3
Unclear	6	0.1	--	---

ise."¹⁹⁴ Unfortunately, the fact that so few plaintiffs now prevail in hybrid section 301/fair representation suits suggests to many plaintiffs' attorneys that it is the duty of fair representation itself which is the "paper promise." Moreover, plaintiffs' low success rates are particularly troublesome because so many losing plaintiffs never have a day in court on the merits of their claims, due to

190. The percentages in this table are not based on all the published opinions included in the study, but on only those courthouse cases which reached a final judgment, or 89 cases. The percentages total more than 100% because in some cases, the court's decision entailed more than a single procedural posture.

191. Defendants' motions for judgments on the pleadings are treated as motions to dismiss for purposes of this table.

192. Motions to dismiss which were treated by the court as motions for summary judgment because they were supported by matters outside the pleadings are treated as motions for summary judgment for purposes of this table.

193. This category includes rulings on motions for directed verdicts and for judgments notwithstanding the verdict.

194. Summers, *supra* note 12 at 263.

their inability to surmount the procedural obstacles thrown in their path. In this regard, it is worth noting these remarks from Justice White:

The importance in our jurisprudence of the opportunity for a hearing need not be reviewed, but at the very least it teaches that where persons with otherwise justiciable claims cannot obtain a hearing under the law, the law is subject to close scrutiny to discover the circumstances compelling this result.¹⁹⁵

In duty of fair representation litigation, "this result" is to a large extent a product of the interaction between a short limitations period and requirements of exhaustion of internal union remedies, on the one hand,¹⁹⁶ and the characteristics of the plaintiffs and their attorneys, on the other. Indeed, the evolution and current operation of the hybrid section 301/fair representation cause of action is, in many respects, a classic illustration of Professor Galanter's theory of "why the 'haves' come out ahead."¹⁹⁷ Plaintiffs tend to be unsophisticated "one-shot" litigants, without ready access to the assistance of counsel (and in most cases without *any* access to experienced labor lawyers),¹⁹⁸ facing the combined and usually substantial resources of defendants. These defendants

195. *Amalgamated Ass'n of Motor Coach Employees v. Lockridge*, 403 U.S. 274, 330 (1971) (White, J., dissenting).

196. Approximately 45% of plaintiffs' losses in the cases examined for this study were the result of missed statutes of limitations, or failures to exhaust internal union remedies. *See supra* text accompanying note 189 (Table 17).

197. *See Galanter, supra* note 142.

198. Obtaining the services of an attorney for duty of fair representation cases is no easy matter. A recently discharged worker is likely to have difficulty paying any significant retainer, and lawyers familiar with this cause of action are usually willing to take only the strongest cases on a contingency basis, because they are aware of how difficult it is for plaintiffs to prevail. *See Tobias, in THE CHANGING LAW, supra* note 8.

Moreover, very few lawyers with experience in labor law are willing to risk alienating their union or management client in order to represent rank and file employees. *See Rabin, The Impact of the Duty of Fair Representation Upon Labor Arbitration*, 29 SYRACUSE L. REV. 851, 876 (1978); *cf. Modjeska, Which Side Are You On?*, 41 OHIO ST. L.J. 273 (1980) (discussing the polarized nature of the labor law bar). Indeed, the attorney survey revealed that 35.5% of the plaintiffs' lawyers had no prior experience handling duty of fair representation cases, whereas only 7.5% of the defendants' lawyers were inexperienced. Similarly, 62.9% of the plaintiffs' lawyers, but only 8.9% of defendants' lawyers, devoted less than 10% of their legal practice to labor law. In addition, 67.2% of the defendants' lawyers devoted over 75% of their practices to labor law, while only 17.8% of the plaintiffs' lawyers specialized in labor law to this degree. Important efforts to improve the quality of representation available to plaintiffs have recently been initiated by the Plaintiff Employment Lawyers Association, headed by Cincinnati attorney Paul H. Tobias.

are generally experienced "repeat players," and are represented by labor law specialists who have helped their clients structure their transactions to take advantage of familiar legal rules—rules which these specialists may have even helped to shape in prior litigation.

Given this background, the six month limitations period adopted by the Court in *DelCostello v. International Brotherhood of Teamsters*¹⁹⁹ is too short. It should be lengthened to at least a year either by the Court, upon its reconsideration of the issue, or by Congress. Otherwise, the courts should at the very least adopt a liberal policy towards tolling the start of the period where appropriate. For example, the six month period should begin to run only when the grievant learns, or reasonably should have learned, that the grievance has been lost or that the union is no longer processing it.²⁰⁰ In addition, the limitations period should be tolled pending the exhaustion of internal union remedies, where such exhaustion is required.²⁰¹

Ironically, the rationale for a longer limitations period can be found in the *DelCostello* decision itself, which had substituted the six month limitations period in the place of an even shorter one. The Court explained quite accurately the position of many employees after they have lost their grievance, or after their union has decided not to take the grievance to arbitration:

[T]he employee will often be unsophisticated in collective-bargaining matters, and he will almost always be represented solely by the union. He is called upon, within the limitations period, to evaluate the adequacy of the union's representation, to retain counsel, to investigate substantial matters that were not at issue in the arbitration proceeding, and to frame his suit.²⁰²

199. 462 U.S. 151 (1983). See *supra* text accompanying notes 96-100.

200. See, e.g., *Brown v. College of Medicine*, 167 N.J. 532, 401 A.2d 288 (1979).

201. The Supreme Court acknowledged the propriety of such tolling in *Clayton v. UAW*, 451 U.S. 679, 695 (1981). See also *Pesola v. Inland Tool & Mfg., Inc.*, 423 F. Supp. 30 (E.D. Mich. 1976). Indeed, even where not required by *Clayton*, the voluntary exhaustion of internal union remedies should toll the limitations period for two reasons. First, the grievant may not know whether such exhaustion would be futile, and he or she should not be forced to choose between missing the limitations period, on the one hand, or risking dismissal for failure to exhaust, on the other. Second, as the court in *Clayton* recognized, exhaustion of even futile internal remedies can be beneficial. For example, it could result in the grievant deciding not to pursue his or her claim in court, "either because the union offered him a favorable settlement, or because it demonstrated that his underlying . . . claim was without merit." 451 U.S. at 689.

202. 462 U.S. at 166.

Unfortunately, the Court's preoccupation with "uniformity in the labor law field"²⁰³ led it to adopt a six month limitations period better suited to administrative proceedings. As the Court later acknowledged in an analogous context:

[T]he practical difficulties facing an aggrieved person who invokes administrative remedies are strikingly different [from those facing the plaintiff in a lawsuit]. . . . A person's sole responsibility under [an administrative] scheme is to 'make, sign and file with the [agency] a complaint in writing under oath' The complaint need contain no more than the name and address of the person or entity alleged to have committed the discriminatory act [and] 'the particulars thereof'. . . . [H]e has no obligation to investigate his allegations more fully. The entire burden of investigating and developing the case rests on the [administrative agency].²⁰⁴

If the Supreme Court's concern with "the realities of labor relations and litigation"²⁰⁵ is sincere, perhaps the findings of this study will help it to realize that the six month limitations period it adopted in *DelCostello* is insufficient.

The findings here also suggest that the courts should be more sensitive to the realities of labor relations when ruling on defense motions to dismiss duty of fair representation suits for failure to exhaust internal union remedies. It is true, of course, that *Clayton v. United Automobile Workers*²⁰⁶ was a victory for plaintiffs, since it requires exhaustion of internal union remedies in only limited circumstances.²⁰⁷ However, it is likely that many unions, spurred on by their fear of increased liability in the wake of *Bowen v. United States Postal Service*,²⁰⁸ will succeed in tailoring their internal reme-

203. *Burnett v. Grattan*, 104 S. Ct. 2924, 2931 n.14 (1984) (explaining *DelCostello*).

204. *Id.* at 2930 (citations omitted). In *Burnett*, the Court held that Maryland's six month limitations period for filing employment discrimination complaints with the state human rights agency did not provide a sufficient period for filing federal employment discrimination suits pursuant to the Reconstruction era civil rights statutes (codified as amended at 42 U.S.C. §§ 1981, 1983, 1985, 1986 (1982)). Although the majority in *Burnett* distinguished *DelCostello* because of the importance of uniformity in labor law, 104 S. Ct. at 2931 n.14, the dissent expressly noted that "the 'practicalities' of litigation seem materially the same" in the two cases. *Id.* at 2935 (Rehnquist, J., dissenting). This argument supports a longer limitations period for duty of fair representation suits as well as it supports the dissent's preference for a shorter period in civil rights suits.

205. *Id.* at 2931 n.14; *DelCostello*, 462 U.S. at 167.

206. 451 U.S. 679 (1981).

207. *See supra* text accompanying notes 101-103. Indeed, the published opinions from 1982, the first full year after the *Clayton* decision, indicate that defendants obtained dismissals for failure to exhaust internal union remedies only half as often as in 1980, the last full year before the decision.

208. 459 U.S. 212 (1983). *See infra* text accompanying notes 91-95.

dies so that exhaustion will be required under *Clayton*.²⁰⁹ In this event, courts should be receptive to good faith arguments by plaintiffs that they were unaware of the availability of such remedies.²¹⁰ The union should have the burden of proving that it informed the plaintiff specifically of the internal union remedies at the time his or her grievance was withdrawn or lost.²¹¹ Courts must also be alert to the very real possibility of bias in many internal union procedures, and should waive exhaustion requirements where any evidence of such bias is present.²¹²

B. *The Standard Revisited*

Procedural roadblocks aside, it may be argued that plaintiffs prevail in so few duty of fair representation suits because they simply have non-meritorious claims which they deserve to lose. Certainly this is true in many cases. For example, I was frankly sur-

209. See *supra* note 95. Thus, while there has been a drop since *Clayton* in the number of cases in which defendants successfully used the exhaustion defense, see *supra* note 207, that drop may be only temporary.

210. As Fox and Sonenthal point out:

[U]nions are not required to supply even their members with copies of their constitutions, which contain information about both the exhaustion requirement and the appeals procedures. Moreover, when the union ceases to be the employee's advocate in a grievance proceeding, and suddenly becomes his adversary in a potential intra-union disciplinary proceeding, one may safely assume that it will do little to inform the employee about, much less to assist him in exhausting, intra-union remedies. Most union constitutions also prohibit outside legal counsel from representing members in intra-union proceedings. Under these circumstances, it is absurd to think that a union member will, by himself, be able to pursue quasi-judicial union procedures or effectively to advocate a union breach of its statutory duty of fair representation.

Fox & Sonenthal, *supra* note 12, at 1031.

211. *Id.*

212.

As a practical matter . . . there are likely to be strong ties of interest between local officers and the national union officials who may later be required to evaluate the conduct of their local colleagues. To be sure, the politics of each union differ, and there may even be situations in which national union officials are politically hostile toward local officers whose conduct in processing a grievance is before them on review, but normally the administrators of any organization will unite to resist challenges to their authority posed by outsiders. Clearly, a claim of unfair representation may appear as just such a challenge. Moreover, in some cases, there may be a political conflict important to the international union underlying the unfair-representation claim—for example, when the grievant is a member of an opposition group within the union

Id. at 1005-06.

prised during our courthouse survey at how many of these cases had been filed (often originally in a state court) as ordinary breach of contract actions, with no indication on the face of the pleadings that the plaintiffs' attorneys had any idea that they would have to prove a breach of the duty of fair representation before the court would reach their contract claims.²¹³ Cases of this type, however, are usually disposed of quickly and cheaply;²¹⁴ they should not be used as an excuse for maintaining unnecessarily harsh standards which have the effect of throwing the baby out with the bath water.

There has been ample comment in recent years on the manner in which the "arbitrary or perfunctory" branch of the *Vaca* standard should be applied in the absence of allegations of hostile or discriminatory conduct;²¹⁵ thus, there is no need to enter that fray here. There may be some value, however, in examining its application where there is also evidence of hostility between the grievants and their union—for in a number of recent cases, courts have revealed an unwarranted readiness to grant defendants' motions for summary judgment on the merits of their duty of fair representation claims, in spite of the presence of substantial evidence of union hostility towards the plaintiffs.²¹⁶

213. Of course, this is further evidence that experienced labor lawyers are not readily available to represent employees in these cases; the fact that duty of fair representation allegations were not made does not always mean they could not have been made by more knowledgeable lawyers. *See supra* note 198. Moreover, the bare contract claims uncovered in the study did not necessarily lack merit.

214. The attorney survey revealed that most defense lawyers in fair representation litigation, especially those representing unions, have extensive experience defending such cases. For such lawyers, it would not be a major project to "cut and paste" effective, albeit boilerplate, motions to dismiss and supporting memoranda in cases like those described in the text. The courthouse files revealed that many such motions were sufficient to secure a stipulated dismissal from the plaintiff without even the need for a ruling from the bench.

215. *See, e.g.,* Cheit, *supra* note 12; Harper & Lupu, *supra* note 12; Summers, *supra* note 12; VanderVelde, *supra* note 12; Note, *The Case for Ordinary Negligence*, *supra* note 66.

216. *See, e.g.,* Early v. Eastern Transfer, Inc., 699 F.2d 552 (1st Cir.), *cert. denied*, 104 S. Ct. 93 (1983); Russom v. Sears, Roebuck & Co., 113 L.R.R.M. (BNA) 2353 (E.D. Mo. 1982); Spielmann v. Anchor Motor Freight, Inc., 551 F. Supp. 817 (S.D.N.Y. 1982); Thompson v. Teamsters Local 988, 109 L.R.R.M. (BNA) 3261 (S.D. Tex. 1982); Hanson v. Knutson, 112 L.R.R.M. (BNA) 3259 (D. Mont. 1981); Sears v. Automobile Carriers, Inc., 526 F. Supp. 1143 (E.D. Mich. 1981); Compofelice v. United Food & Commercial Workers, Local 400, 105 L.R.R.M. (BNA) 2839 (D.D.C. 1980); Mangiaguerra v. D & L Transp., Inc., 410 F. Supp. 1022 (N.D. Ill. 1976); *cf.* Winter v. Teamsters Local 639, 569 F.2d 146 (D.C. Cir. 1977) (exhaustion of internal union remedies not futile despite the knowledge of union officials that plaintiff was engaging in dissident activities).

In the context of hostility between union officials and union members, courts must be aware that misconduct which appears to constitute mere negligence or poor judgment may actually be something more. Union officials intent on mishandling a grievance can ordinarily be counted on to do so subtly, in order to keep any sign of a "smoking gun" well hidden. To foreclose juries from examining the evidence and drawing the appropriate inferences in such cases is to virtually guarantee that such union misconduct will never be remedied.²¹⁷ Moreover, questions of malice, bad faith, and discriminatory intent necessarily involve inquiries into the defendants' states of mind, and in such cases, summary judgment is particularly disfavored.²¹⁸

As the Supreme Court recently stated in an employment discrimination action, a plaintiff "may prove his case by direct or circumstantial evidence," and a trial court should not require plaintiffs "to submit direct evidence of discriminatory intent."²¹⁹ Thus, at least in discharge cases, which many courts have acknowledged require particularly careful treatment,²²⁰ evidence of apparent negligence or poor judgment in the union's grievance handling, combined with evidence of actual or potential hostility—for ex-

217. See *Hughes v. Teamsters Local 683*, 554 F.2d 365, 368 (9th Cir. 1977):

Appellant is caught between a hostile employer and a [hostile] union If summary judgment would be proper in the present case, all a union would have to do to protect itself against a fair representation suit would be to go through the motions of processing an employee's grievance short of arbitration sufficient to withstand a claim that these motions were merely perfunctory. In this way, an employee with a legitimate claim against his employer would have no means of adjudicating his claim.

Cf. *Alvey v. General Electric Co.*, 622 F.2d 1279, 1290 (7th Cir. 1980) (reversing jury verdict for defendants because jury was prohibited from considering "the heated words expressed on both sides, and the underlying antagonism between" two groups of employees, without which a determination of whether the union violated the duty of fair representation "cannot fairly be made"); *Hall v. Pacific Maritime Ass'n*, 281 F. Supp. 54 (N.D. Cal. 1968) (allegations of personal animosity and procedural irregularities at joint committee hearing were sufficient to withstand motion to dismiss).

218. See, e.g., *Baldini v. Local 1095, UAW*, 581 F.2d 145, 151 (7th Cir. 1978); *Hines v. Teamsters Local 377*, 506 F.2d 1153, 1157 (6th Cir. 1974), *rev'd on other grounds sub nom.* *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). See generally 10A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 2730 (1983).

219. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) (emphasis added).

220. See, e.g., *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1274 (9th Cir. 1983); *Miller v. Gateway Transp. Co.*, 616 F.2d 272, 277 n.12 (7th Cir. 1980); *Griffin v. UAW*, 469 F.2d 181, 183 (4th Cir. 1972).

ample, the grievant's open participation in dissident activities directed at the union officials who handled his or her grievance—should be sufficient to defeat a defendant's summary judgment motion and permit the case to go to a jury.²²¹

C. *Alternative Causes of Action*

The most troubling aspect of the operation of the duty of fair representation in hybrid section 301 suits is that many workers who have in fact been wrongfully discharged by their employers are barred from any remedy because their unions' conduct in handling their grievances did not amount to breaches of the duty according to current standards. Aside from lowering some of the procedural roadblocks and easing the burden of proving a breach of the duty, there are alternatives for some of these wrongfully discharged workers: additional causes of action which already exist, although clearly in the shadow of the hybrid section 301/fair representation suit.

1. *Actions to Vacate Arbitration or Joint Committee Awards Because of Fraud, Partiality, or other Misconduct on the Part of the Arbitrator or Committee Members.* The first additional cause of action is one to vacate an arbitration award because of fraud, partiality, or other misconduct on the part of the arbitrator.²²² This cause of action may be particularly valuable to employees whose breach of contract claims have been rejected by joint labor-management grievance committees such as those commonly established under

221. As one commentator, who for the most part rejects the use of a negligence standard in duty of fair representation cases, stated:

Although courts should continue to reject a pure 'negligence' standard for grievance processing in favor of a standard that asks whether the union's presentation was so poor that it deprived plaintiff of a fair hearing, carelessness should be sufficient by itself if the employee presents any evidence of animosity. Otherwise, the danger of letting unions 'throw' grievances would nullify the employee's chance for a fair determination of his contract rights.

Clark, *supra* note 12, at 1171.

222. See, e.g., *Morris v. Werner-Continental, Inc.*, 466 F.2d 1185, 1190-91 (6th Cir.), *cert. denied*, 411 U.S. 965 (1972); *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 n.27 (3d Cir. 1969); *Yates v. Yellow Freight Sys.*, 501 F. Supp. 101, 104 (S.D. Ohio 1980); *Holodnak v. Avco Corp.*, 381 F. Supp. 191 (D. Conn. 1974), *aff'd on other grounds*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975); cf. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) ("[w]e cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another").

Teamster contracts.²²³ As the president of the American Arbitration Association stated, "[t]he joint grievance committee system of arbitration found in Teamster contracts 'is so clearly defective as an impartial mechanism that it is not surprising that we keep seeing it tested in the courts.'"²²⁴

In some respects, proving bias or misconduct on the part of the members of a joint committee in order to vacate a grievance award is similar to proving a breach of the duty of fair representation on the part of the union officials processing the grievance. Indeed, one of the principal defects of the joint committee system is that union officials seeking to sabotage the grievances of unpopular or dissident members can appear to vigorously present grievances to the committee, thereby insulating themselves from charges of breaching the duty, while relying on political allies on the committee to reject the grievance.²²⁵ This creates a void in the duty of fair representation, however, since a number of courts have held that union representatives on joint committees owe no duty to grievants from other locals.²²⁶ Thus, an action to vacate a grievance award on the basis of committee member misconduct can be an effective means of filling this gap in coverage.

2. *Actions to Vacate Arbitration or Joint Committee Awards on the Ground That the Awards Violate Public Policy.* A second cause of action may also be available to workers whose grievances have been taken through arbitration: to vacate an arbitration or joint committee award on the ground that it violates public policy.²²⁷ This cause of action would be available, for example, to a truck driver

223. See *supra* text accompanying notes 147-49. Although these joint committees are quite different from grievance procedures using neutral, outside arbitrators, the Supreme Court has generally treated them as though they were the same. See, e.g., *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Humphrey v. Moore*, 375 U.S. 335 (1964); *General Drivers v. Riss & Co.*, 376 U.S. 517 (1963).

224. *Arbitration and Supreme Court Rulings*, 107 L.R.R.M. (BNA) 147 (June 2, 1981) (quoting Robert Coulson). See also *supra* note 149.

225. See Summers, *supra* note 149.

226. See, e.g., *Early v. Eastern Transfer, Inc.*, 699 F.2d 552, 557-60 (1st Cir.), *cert. denied*, 104 S. Ct. 93 (1983); *Teamsters Local 30 v. Helms Express, Inc.*, 591 F.2d 211, 217 (3d Cir.), *cert. denied*, 444 U.S. 837 (1979).

227. See, e.g., *Kane Gas Light & Heating Co. v. International Bhd. of Firemen & Oilers, Local 112*, 687 F.2d 673 (3d Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983); *Local P-1236, Amalgamated Meat Cutters v. Jones Dairy Farm*, 680 F.2d 1142, 1143-44 (7th Cir. 1982); *Permaline Corp. of Am. v. Local 230, Int'l Bhd. of Painters*, 639 F.2d 890 (2d Cir. 1981); *World Airways, Inc. v. International Bhd. of Teamsters, Airline Div.*, 578 F.2d 800 (9th Cir. 1978).

discharged for refusing to violate state or federal truck safety regulations, but whose discharge was upheld by a joint grievance committee because of union negligence in handling the grievance insufficient to constitute a breach of the duty of fair representation.²²⁸

Most cases challenging arbitration awards as violative of public policy, however, have been brought by unions or employers.²²⁹ In fact, a recent decision by the Third Circuit, *Vosch v. Werner Continental, Inc.*,²³⁰ held that individual employees do not even have standing to bring such actions themselves unless they can prove that their unions breached the duty of fair representation. *Vosch* is correct, of course, in asserting that an employee who has lost a grievance and who subsequently attacks the arbitration award as violative of public policy is not in a very different position from an employee who has lost a grievance and attacks the award as being a simple violation of the collective bargaining agreement. The ultimate relief sought is the same, and the two claims can perhaps even be asserted in a single action. It is therefore tempting to conclude that if proof of a union's breach of the duty of fair representation is required in one case, it should also be required in the other.

Unfortunately, such a conclusion is seriously flawed. It focuses on the superficial similarities in the positions of the plaintiffs, and ignores the much more significant differences in the purposes and the underlying characteristics of the two types of challenges to arbitration awards. When a plaintiff is simply claiming that his or her employer breached the collective bargaining agreement, a number of major policies, basic to the scheme of modern American labor law, counsel against allowing the employee unfettered access to the courts in order to sue the employer. These policies and principles, as developed in the *Steel-*

228. Cf. *Teamsters Local 249 v. Consolidated Freightways*, 464 F. Supp. 346 (W.D. Pa. 1979) (vacating a grievance award which upheld the employer's right to compel truck drivers to drive tractors without mudflaps, and to haul trailers without trailer plates, both required by state law, so long as the employer agreed to pay any fines if the drivers received citations for the violations). The plaintiffs in *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 155 (1983), and *Miller v. Gateway Transp. Co.*, 616 F.2d 272 (7th Cir. 1980), among other cases, alleged that they were discharged for refusing to drive unsafe or unlawful equipment.

229. See *supra* note 227.

230. 734 F.2d 149, 154-55 & n.10 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 784 (1985).

*workers Trilogy*²³¹ and the line of cases culminating in *Vaca v. Sipes*,²³² include the notions that contract grievance machinery is at the heart of industrial self-government;²³³ that the parties to a collective bargaining agreement have bargained for an arbitrator's (or grievance committee's) interpretation of their agreement, not a court's;²³⁴ that unions, as the exclusive representatives of their bargaining units, have an interest in controlling the presentation of grievances;²³⁵ and that the parties' motivation for establishing grievance procedures would be undermined if grievance decisions were subject to frequent and broad judicial review.²³⁶ All of these policies militate against allowing employees access to the courts for ordinary contract disputes, unless the employee can first prove that the grievance process "has fundamentally malfunctioned" by reason of a union's breach of its duty of fair representation.²³⁷

None of these policies and principles, however, apply when the employee is challenging the grievance award as being violative of public policy. For example, no court has ever suggested that industrial self-government entails the right to enter into contracts which violate the law, or the right to enforce otherwise legal contracts in an illegal manner. On the contrary, public policy challenges to grievance awards are designed precisely to prevent such conduct.²³⁸

Similarly, public policy challenges to grievance awards do not undermine the parties' preference for arbitrators or grievance committees as the final interpreters of their collective bargaining agreements. A court, by vacating a grievance award as contrary to public policy, is not reinterpreting the contract; it is simply holding that the contract, as interpreted by the arbitrator or grievance

231. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

232. 386 U.S. 171 (1967). *See, e.g.*, *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

233. *Warrior & Gulf Navigation Co.*, 363 U.S. at 580-81.

234. *Id.* at 582; *Enterprise Wheel & Car Corp.*, 363 U.S. at 596-99.

235. *Maddox*, 379 U.S. at 653.

236. *Vaca*, 386 U.S. at 192.

237. *Hines v. Anchor Motor, Inc.*, 424 U.S. 554, 569 (1976).

238. As the court stated in *Permaline Corp. of Am. v. Local 230, Int'l Bhd. of Painters*, 639 F.2d 890, 895 (2d Cir. 1981): "If . . . the award in question is contrary to law or public policy, it is open to, indeed it is incumbent upon, the court to step in."

committee, violates public policy. But when an *arbitrator* invokes public policy to resolve a grievance, he is relying on “considerations . . . wholly independent of the collective bargaining agreement [H]e has overstepped his authority and the court[s] may review the substantive merits of the award.”²³⁹

Neither fears of too frequent, or too broad, judicial review of grievance awards, nor unions’ interests in controlling the presentation of grievances justify a requirement that employees prove breaches of the duty of fair representation before they can challenge awards as being violative of public policy. Most discharge grievances involve such mundane fact patterns as employees who are habitually late or absent; employees who have been caught drinking, fighting, or stealing on the job; or employees who believe their seniority was violated in a layoff situation. Only rarely will grievances involve important public policy issues.²⁴⁰ Unions need only fear losing control of the small number of grievances which culminate in decisions that violate public policy. For these grievances, union control obviously does not yield results worthy of judicial deference.

There are other strong countervailing reasons why a breach of the duty of fair representation should not be required where public policy issues are involved. Unlike ordinary contract claims, which typically involve only the interests of the employer, the union and the employees, public policy challenges by definition concern the interests of a significant additional “party”—the public. The public’s interest in vacating unlawful grievance awards is totally separate and distinct from the grievant’s interest in being fairly represented by his or her union. In the event the union or the employer fails to challenge unlawful grievance awards, it serves the public’s interest to permit the aggrieved employees to do so in their stead, without having to prove an unrelated fair representation claim. As the Supreme Court stated in an analogous context:

[E]ven if the employee’s claim were meritorious, his union might, without

239. Local P-1236, *Amalgamated Meat Cutters v. Jones Dairy Farm*, 680 F.2d 1142, 1144 (7th Cir. 1982).

240. Cf. Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1947 (1983) (“[c]ourts typically define [public policy] in extremely broad terms In applying this concept to wrongful discharge cases, however, many courts have reached remarkably narrow results”).

breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration. . . . [A] union balancing individual and collective interests might validly permit some employees' [interests] to be sacrificed if [it] would result in increased benefits in the bargaining unit as a whole.²⁴¹

Unions and employers obviously have no incentive to challenge grievance awards resulting from this type of balancing, even where the awards violate public policy. The public interest will therefore remain undefended unless individual employees are permitted to raise these challenges, independent of any fair representation claims they may have.²⁴²

3. *State Tort Actions for Wrongful Discharge in Violation of Public Policy.* Finally, employees discharged in violation of public policy may be able to pursue state tort remedies even if their union decides not to take the employees' discharge grievance to arbitration. Many states in recent years have recognized a public policy exception to the employment at will doctrine,²⁴³ and a growing

241. *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 742 (1981); *see also* *McDonald v. City of West Branch*, 104 S. Ct. 1799, 1803 (1984); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 & n.19 (1974).

242. Even where the collective bargaining agreement contains a provision essentially adopting a statutory or regulatory standard, the Supreme Court has counseled against deferring to the grievance award:

To be sure, the tension between contractual and statutory objectives may be mitigated where a collective bargaining agreement contains provisions facially similar to those of Title VII [of the Civil Rights Act of 1964]. But other facts may still render arbitral processes comparatively inferior to judicial processes in protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to 'the law of the shop, not the law of the land.'

Alexander, 415 U.S. at 57. This is especially true when joint grievance committees are used to resolve grievances. *See, e.g., Barrentine*, 450 U.S. at 743. "Moreover, even though a particular arbitrator may be competent to interpret and apply statutory law, he may not have the contractual authority to do so." *Id.* at 744. Thus, where a plaintiff has alleged facts relating to a grievance award which, if proven, would establish a violation of public policy, and where that plaintiff has enough evidence supporting his or her claim to survive a summary judgment motion, he or she is entitled to a trial de novo on the claim.

243. *See, e.g.,* *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 225, 685 P.2d 1081, 1089 (1984) (en banc); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 572-73, 335 N.W.2d 834, 840 (1983); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 67-69, 417 A.2d 505, 509-12 (1980); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 176, 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 844 (1980); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W.Va. 1978); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 647-48, 245 N.W.2d 151, 153 (1976); *Geary v. United States Steel Corp.*, 456 Pa. 171, 181-85, 319 A.2d 174, 178-80 (1974). *See generally* Note, *supra* note 240; Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153 (1981).

number of courts have been expressly extending this exception to employees covered by collective bargaining agreements.²⁴⁴ Perhaps the key distinction is not whether the plaintiff is an at will or unionized employee, but whether another remedy is available to the plaintiff. According to one court:

It is clear . . . that the whole rationale undergirding the public policy exception is the vindication or the protection of certain strong policies of the community. If these policies or goals are preserved by other remedies, then the public policy is sufficiently served. Therefore, the application of the public policy exception requires two factors: (1) that the discharge violate some well-established public policies; and (2) that there be no remedy to protect the interest of the aggrieved employee or society.²⁴⁵

Employers, of course, can be expected to argue that contractual grievance procedures provide all the protection employees need, and all they are entitled to. Contractual remedies, however, may not be adequate to protect the public interest. In submitting a grievance to arbitration or to a joint grievance committee, an employee seeks to vindicate only his contractual rights under the collective bargaining agreement and nothing more:

As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective bargaining agreement If an arbitral decision is based 'solely on the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective bargaining agreement, the arbitrator has 'exceeded the scope of his submission,' and the award will not be enforced.²⁴⁶

Employers may also argue that an extension of state wrongful discharge actions to employees covered by collective bargaining agreements undermines the federal labor policies that favor the timely resolution of labor disputes through contractually created grievance procedures.²⁴⁷ Certainly this argument is quite persua-

244. See, e.g., *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 53 U.S.L.W. 3807 (1985); *Messenger v. Volkswagon of Am.*, 117 L.R.R.M. (BNA) 23 (S.D.W. Va. 1984); *Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984); *but see Vantine v. Elkhart Brass Mfg. Co.* 762 F.2d 511 (7th Cir. 1985); *Smith v. Greyhound Lines, Inc.*, 117 L.R.R.M. (BNA) 2253 (W.D. Pa. 1984).

245. *Wehr v. Burroughs Corp.*, 438 F. Supp. 1052, 1055 (E.D. Pa. 1977) (footnote omitted), *aff'd*, 619 F.2d 276 (1980). See also *Bonham v. Dresser Indus.*, 569 F.2d 187, 195 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

246. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974) (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

247. That argument is advanced in Pincus & Gillman, *The Common Law Contract and Tort Rights of Union Employees: What Effect After the Demise of the "At-Will" Doctrine?*, 59 CHI[-

sive with regard to state causes of action that are based on a theory of implied contract or implied covenant of fair dealing,²⁴⁸ since collective bargaining agreements preempt individual contracts of employment and must be interpreted according to federal, not state law.²⁴⁹ However, state remedies for a violation of public policy generally sound in tort, rather than contract,²⁵⁰ and state tort actions are often exempt from federal preemption.²⁵¹ Moreover, tort actions may offer more complete relief (in the form of compensatory and punitive damages) than would be available through a contractual grievance procedure. It would be ironic if these additional remedies were to be withheld from unionized employees, while they were made available to non-union, at will employees. Indeed, this would undermine the national labor policy of encouraging collective bargaining,²⁵² because it would increase the "costs" of union representation.

Even liberally construed, these three causes of action are available to only a small minority of wrongfully discharged employees. Nevertheless, unions as well as employees should encourage the law's development in this direction, because it would mean that at least some wrongfully discharged workers will be able to obtain remedies for their employers' wrongful conduct without the necessity of suing their unions. Moreover, because two of the three causes of action provide remedies for discharges that violate

]KENT L. REV. 1007 (1983). See generally Wheeler & Brown, *Preemption of Wrongful Discharge Claims of Employees Covered by Collective Bargaining Agreements*, 1 LAB. LAW. 593 (1985).

248. See Note, *supra* note 240, at 1935-36.

249. See, e.g., *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337-38 (1944). Moreover, state remedies for some types of retaliatory discharges may be preempted by the National Labor Relations Act if the employer's conduct is arguably an unfair labor practice. See generally Comment, *State Actions for Wrongful Discharge: Overcoming Barriers Posed by Federal Labor Law Preemption*, 71 CALIF. L. REV. 942 (1983); Comment, *NLRA Preemption of State Wrongful Discharge Claims*, 34 HASTINGS L.J. 635 (1983).

250. See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 176, 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 844 (1980) ("an employer's obligation to refrain from discharging an employee who refuses to commit a criminal act does not depend upon any express or implied promises set forth in the [employment] contract . . . but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes").

251. See, e.g., *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 305 (1977) (intentional infliction of emotional distress); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 65 (1966) (malicious defamation).

252. See National Labor Relations Act § 1, 29 U.S.C. § 151 (1982).

public policy, they can play an important role in protecting not only employees, but the general public as well, from employers who abuse the power they have over their employees.

CONCLUSION

The empirical study reported in this Article has demonstrated that plaintiffs win less than five percent of the duty of fair representation cases they file. Moreover, in up to forty-five percent of these cases, plaintiffs lose without ever having the merits of their claims heard by a judge or jury.²⁵³ These findings suggest that something is seriously wrong with the duty of fair representation in practice. Indeed, a majority of both the plaintiffs' and defendants' bars would probably agree with this assessment, although for different reasons. From the plaintiffs' perspective, it can be argued that too many workers are left without remedies for serious wrongs suffered at the hands of their employers and their unions. Justice Black's criticism of the Court's decision in *Vaca v. Sipes* seems all too perceptive: "The Court today opens slightly the courthouse door to an employee's incidental claim against his union for breach of its duty of fair representation, only to shut it in his face when he seeks direct judicial relief for his underlying and more valuable breach-of-contract claim against his employer."²⁵⁴ From the defendants' perspective, on the other hand, it can be argued that the plaintiffs' low success rates demonstrate both that unions are doing an adequate job representing employees, and that too many frivolous fair representation suits are being filed.

A third perspective may also be taken. It may be argued that even though so few plaintiffs prevail, the duty of fair representation effectively protects most workers from union misconduct because the mere threat of litigation, and the associated defense costs, deter wrongful conduct on the part of unions and encourages unions to better train shop stewards, business agents, and other union officials involved in grievance handling. Unfortunately, this view is probably not as plausible as it may seem. Procedural roadblocks in the form of an unnecessarily short limitations period and the usually futile requirement that internal union rem-

253. See *supra* text accompanying notes 187-89.

254. 386 U.S. at 203 (Black, J., dissenting).

edies be exhausted,²⁵⁵ along with the insistence in several circuits that plaintiffs prove intentionally wrongful conduct on the part of their unions,²⁵⁶ combine to permit most defendants to prevail on virtually boilerplate motions to dismiss or for summary judgment. Defense costs in such cases are low—they may even be covered by liability insurance—and the deterrent effect of these suits is likely to be minimal.

Writing for the majority in *Vaca v. Sipes*, Justice White praised the duty of fair representation “as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.”²⁵⁷ Certainly Justice White is correct in asserting that the duty of fair representation has evolved into a protective bulwark, but the findings of this study suggest that at least in hybrid section 301/fair representation cases, it is a bulwark operating to protect employers from their workers, not workers from their unions.

A number of recent developments, however, suggest that major changes in the doctrine may be approaching. For example, a profound split in the circuits has emerged as the lower courts have been wrestling with the uncertain standards for proving a breach of the duty.²⁵⁸ The Supreme Court will in all likelihood be called upon to resolve this split in the near future. Moreover, the Court’s recent decision in *Bowen v. United States Postal Service*²⁵⁹ is having the unintended and ironic effect of encouraging at least some unions to consider returning to individual workers some of the control over discharge grievances which unions struggled so hard to achieve twenty years ago.²⁶⁰ Whatever direction these changes may take, one would hope, along with Justice Black, that they do not continue to manifest a preference “for accommodating the wishes of employers and unions in all things over the desires of individual workers.”²⁶¹

255. See *supra* text accompanying notes 194-212.

256. See *supra* text accompanying note 77.

257. 386 U.S. at 182.

258. See *supra* text accompanying notes 64-77.

259. 459 U.S. 212.

260. See *supra* note 91-95.

261. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 663 (1965) (Black, J., dissenting).

APPENDIX

A. *Survey Form for Published Opinions*

DFR SURVEY (Form 1)

Your initials _____

Date _____

1. Case name and citation:
2. Prior history:
3. Subsequent history:
4. Defendants:
 - 0 ___ Unclear from opinion
 - 1 ___ Employer only
 - 2 ___ Union only
 - 3 ___ Both
 - 4 ___ Additional defendant(s), describe:
5. Union involved (whether or not a defendant):
6. Employer involved (whether or not a defendant):
7. Procedural posture:
 - 0 ___ Unknown or unclear from opinion
 - 1 ___ Motion to dismiss (or appeal therefrom)
 - 2 ___ Motion for summary judgment (or appeal therefrom)
 - 3 ___ Motion for preliminary injunction
 - 4 ___ Trial judge's opinion following bench trial on merits
 - 5 ___ Trial judge's opinion following jury trial on merits
 - 6 ___ Appeal from bench trial on the merits
 - 7 ___ Appeal from jury trial on the merits
 - 8 ___ Other (explain):
8. Locus of alleged union misconduct:
 - 0 ___ Unknown or unclear
 - 1 ___ In negotiating contract
 - 2 ___ In handling a grievance before arbitration
 - 3 ___ In handling a grievance at or subsequent to arbitration
 - 4 ___ Other (explain):
9. Nature of the union misconduct:
 - 0 ___ Unknown or unclear
 - 1 ___ Refusing to file or process grievance due to a con-

- scious choice
- 2 — Negligently failing to file or process grievance or seek arbitration (e.g. missing filing deadlines)
- 3 — Conscious refusal to take grievance to arbitration
- 4 — Improper or negligent conduct in handling grievance in preliminary steps of grievance procedure (e.g. failure to investigate, losing information, lying about status of grievance)
- 5 — Improper representation at a grievance hearing or arbitration hearing (e.g., not saying anything, not calling witnesses, not bringing out relevant evidence)
- 6 — Contract not properly ratified by rank and file, or supplement to contract adopted which was not properly ratified, or contrary to primary contract, or improper conduct in obtaining contract
- 7 — Improper application of seniority provisions of contract
- 8 — Negotiated contract is discriminatory or unfair
- 9 — Other (explain):
- 10 — Not applicable
10. Basis of union hostility toward plaintiff:
- 0 — No information in opinion
- 1 — None alleged
- 2 — Dissident activity
- 3 — Union rival (may overlap with dissident activity)
- 4 — Race, sex, religious, national origin, handicap, or age discrimination
- 5 — Personality conflict between plaintiff and union official(s)
- 6 — Other (explain):
- 7 — Not member of union
11. Nature of the employer's misconduct:
- 0 — No information, or opinion unclear
- 1 — Not applicable
- 2 — Discharge without cause (explain employer's stated grounds for discharge, e.g., absenteeism, drinking, stealing, etc., if known):
- 3 — Violation of seniority, or layoff and recall provisions

of contract

- 4 Pay dispute (e.g. employee claims he should have received overtime pay for certain work, or over amount of vacation pay employee is entitled to, etc.)
 - 5 Discipline, short of discharge, without cause (explain employer's stated reason):
 - 6 Improper change of contract or work rules or working conditions (explain):
 - 7 Race, sex, religious, national origin, handicap, or age discrimination
 - 8 Dispute over pension benefits, other fringe benefits
 - 9 Other (explain):
12. Other allegations or causes of action in the case, besides the union's breach of the duty of fair representation, and/or the employer's breach of the collective bargaining agreement:
- A Against union only
 - B Against employer only
 - C Against both
 - D Against other defendants
 - 0 None made
 - 1 Tort (describe, e.g., assault, infliction of mental distress, interference with contractual relationship, etc.):
 - 2 ERISA (pension claims)
 - 3 LMRDA
 - 4 Race, sex, religious, national origin, handicap, or age discrimination under federal or state civil rights statutes
 - 5 Other (explain):
 - 6 Unclear if any made
13. Type of arbitration system involved in the case:
- 0 None involved
 - 1 Neutral outside arbitrator, or tie-breaker
 - 2 Joint labor-management grievance committee (look closely if a Teamster case)
 - 3 Unclear
 - 4 Other (explain):
14. Did the opinion resolve procedural issues, and if so, who won and what was the court's reasoning:

- P Decided in plaintiff's favor
- D Decided in defendant's favor
- 0 Procedural issues not addressed in opinion
- 1 Statute of limitations
- 2 Exhaustion of internal union remedies
- 3 Exhaustion of contractual remedies
- 4 Class certification
- 5 Other procedural issues, labor law related (explain):
- 6 Other procedural issues, not 1.1. related (explain):
Explain court's reasoning briefly:

15. Did the opinion resolve the allegations of union misconduct on the merits, and if so, who won and what was court's reasoning:

- 0 Not reached or not applicable
 - 1 Resolved in plaintiff's favor
 - 2 Resolved in defendant's favor
 - 3 Other (explain):
 - 4 Resolved in defendant's favor on motion to dismiss or summary judgment (i.e., without a trial)
 - 5 Factual dispute precludes summary judgment
- Explain the court's reasoning briefly:

16. Did the opinion resolve the allegations of employer misconduct on the merits, and if so, who won and what was the court's reasoning:

- 0 Not reached or not applicable
 - 1 Resolved in plaintiff's favor
 - 2 Resolved in defendant's favor
 - 3 Other (explain):
 - 4 Resolved in defendant's favor on motion to dismiss or for summary judgment (i.e., without a trial)
 - 5 Factual disputes preclude summary judgment
- Explain the court's reasoning briefly:

17. Disposition on appeal

- 0 Not applicable
- 1 Affirmed on the same issue as lower court opinion
- 2 Affirmed on other grounds
- 3 Reversed on the same grounds as were ruled on by lower court
- 4 Reversed on other grounds

- 5 In part reversed, and in part affirmed
 6 Unclear

18. Prevailing party

- 1 Plaintiff
 2 Defendant
 3 Unclear
 4 Other (explain):

19. Describe and discuss any additional significant facts or issues in the case not covered above:

B. Survey Form for Courthouse Cases

D.F.R. SURVEY (Form 3)

Your initials _____

Date _____

1. Case name and docket number:
2. Attorneys' names and phone numbers:
3. Court:
 - 1 E.D. Pa.
 - 2 D. Md.
 - 3 S.D.N.Y.
4. Current status:
 - 1 Case closed
 - 2 Case still open in district court
 - 3 Case up on appeal
 - 4 Other (explain):
5. Defendants:
 - 1 Employer only
 - 2 Union only
 - 3 Both
 - 4 Additional defendant(s) (describe):
6. Union involved (whether or not a defendant):
7. Employer involved (whether or not a defendant):
8. Jury trial demanded:
 - 1 Yes

- 2 No
- 8a. Removed from state court:
1 Yes
2 No
9. Was the case filed as a class action:
1 No
2 Yes, but the class was never certified
3 Yes, and the class was certified
10. Locus of the alleged union misconduct:
1 Unknown or unclear
2 In negotiating the contract
3 In handling a grievance before arbitration
4 In handling a grievance at or subsequent to arbitration
5 Other (explain):
11. Nature of the alleged union misconduct:
1 Unknown or unclear
2 Refusing to file or process grievance due to a conscious choice
3 Negligently failing to file or process a grievance (e.g., missing a filing deadline)
4 Conscious refusal to take grievance to arbitration
5 Improper or negligent conduct in handling grievance in preliminary steps of grievance procedure (e.g., failure to investigate, losing information, lying about status of grievance) (explain):
6 Improper representation at a grievance or arbitration hearing (e.g., not saying anything, not calling witnesses, not bringing out relevant evidence, undermining grievant's case) (explain):
7 Contract not properly ratified by rank and file, or supplement to contract adopted which was not properly ratified, or contrary to primary contract, or improper conduct in obtaining contract (explain):
8 Improper application of seniority provisions of the contract (explain):
9 Negotiated contract is discriminatory or unfair (explain):

- 10 Other (explain):
11 Not applicable
12. Basis of union hostility toward the plaintiff:
1 Unknown or unclear
2 None alleged
3 Dissident activity
4 Union rival (may overlap with dissident activity)
5 Race, sex, religious, national origin, handicap, or age discrimination
6 Personality conflict between plaintiff and union official(s)
7 Plaintiff is anti-union (e.g., seeks decertification, refuses to join) (explain):
8 Other (explain):
13. Is plaintiff a member of the union:
1 Unknown or unclear
2 Yes
3 No
14. Nature of the employer's misconduct:
1 Unknown or unclear
2 Not applicable
3 Discharge without cause (explain employer's stated grounds for discharge, if known, e.g., absenteeism, drinking, causing an accident, etc.):
4 Other discipline, short of discharge, without cause (explain nature of discipline, and the employer's stated reason, if known):
5 Violation of seniority, or layoff and recall provisions of the contract (explain):
6 Pay dispute (e.g., employee claims he should have received overtime or vacation pay) (explain):
7 Improper change of contract or work rules or working conditions (explain):
8 Race, sex, religious, national origin, handicap, or age discrimination
9 Dispute over pension benefits or other fringe benefits (explain):

- 10 Other (explain):
15. Other allegations or causes of action in the case, besides the union's breach of the duty of fair representation, and/or the employer's breach of contract:
- 1 No other allegations made
 - 2 Tort claims (describe, e.g., assault, infliction of mental distress, interference with contractual relationship):
 - 3 ERISA claims (pensions) (explain):
 - 4 LMRDA claims (union democracy) (explain):
 - 5 Race, sex, religious, national origin, handicap, or age discrimination claims under federal or state civil rights statutes (explain):
 - 6 Other (explain):
16. If other allegations or causes of action are in the case, whom were they made against:
- 1 Not applicable
 - 2 Employer only
 - 3 Union only
 - 4 Both
 - 5 Additional defendant(s) (explain):
17. Type of arbitration system involved in the case:
- 1 None involved
 - 2 Unknown or unclear
 - 3 Neutral outside arbitrator, or tie-breaker
 - 4 Joint labor-management grievance committee (look closely if Teamster case)
 - 5 Other (explain):
18. If the case is closed, what was the outcome:
- 1 Not applicable
 - 2 Plaintiff won on DFR grounds (describe relief awarded):
 - 3 Plaintiff lost on DFR grounds, but won on other grounds (explain):
 - 4 Plaintiff won on other grounds, and the DFR claims were never resolved (explain):
 - 5 Defendant won, and the case was dismissed (explain if the defendant was awarded attorneys fees, or any

other relief (e.g., damages on a counterclaim)):

6 ____ The case was settled (explain the terms of the settlement agreement, if known):

7 ____ Other (explain):

19. If the case is still open, and if there are other causes of action in the case, are the DFR claims still open, or have they been resolved:

1 ____ Not applicable

2 ____ Still pending

3 ____ Resolved in plaintiff's favor (describe relief awarded):

4 ____ Resolved in defendant's favor (explain if defendant was awarded attorneys fees, damages on counterclaims, or other relief):

5 ____ DFR claims settled (describe terms of the settlement, if known):

6 ____ Other (explain):

20. If plaintiff won the DFR claims, regardless of whether other claims are still pending, what was the procedural posture:

1 ____ Not applicable

2 ____ Motion for summary judgement

3 ____ Judge's opinion following bench trial

4 ____ Judge's opinion directing verdict in jury trial

5 ____ Jury verdict

6 ____ Judge's opinion following jury trial (e.g., motion for JNOV) (explain):

7 ____ Other (explain):

21. If plaintiff lost the DFR claims, regardless of whether other claims are still pending, what was the procedural posture:

1 ____ Not applicable

2 ____ Motion to dismiss

3 ____ Motion for summary judgment

4 ____ Judge's opinion following bench trial

5 ____ Judge's opinion directing verdict in jury trial

6 ____ Jury verdict

7 ____ Judge's opinion following jury trial (e.g., motion for JNOV) (explain):

- 8 ____ Other (explain):
22. If plaintiff lost the DFR claims, regardless or whether other claims are still pending, was the loss on procedural grounds:
- 1 ____ Not applicable
2 ____ No, lost on the merits
3 ____ Yes, missed statute of limitations (describe the limitations period applied by the court):
4 ____ Yes, failed to exhaust internal union remedies
5 ____ Yes, failed to exhaust contractual remedies
6 ____ Yes, lost on other procedural grounds (explain):
23. Did the court resolve the allegations of union misconduct on the merits, and if so, who won and what was the court's reasoning:
- 1 ____ No, not reached
2 ____ Resolved in plaintiff's favor
3 ____ Resolved in defendant's favor
4 ____ Other (explain):
Explain briefly the court's reasoning, if known:
24. Did the court resolve the allegations of employer misconduct on the merits, and if so, who won and what was the court's reasoning:
- 1 ____ No, not reached
2 ____ Resolved in plaintiff's favor
3 ____ Resolved in defendant's favor
4 ____ Other (explain):
Explain briefly the court's reasoning, if known:
25. Was there an appeal at any stage of the proceedings, and if so, explain:
- 1 ____ No appeal
2 ____ Yes, interlocutory appeal (explain issue on appeal and its resolution by appellate court):
3 ____ Yes, appeal after final judgment by trial court (explain issues on appeal and resolution by appellate

court):

26. Describe and discuss any additional significant facts or issues in the case not covered above:

C. *Attorney Questionnaire*

DUTY OF FAIR REPRESENTATION QUESTIONNAIRE

Instructions: Please use a separate questionnaire for each case cited in the cover letter accompanying this questionnaire. Each questionnaire should be filled out by, or on behalf of, the attorney in your office primarily responsible for handling each case. If more than one questionnaire is to be filled out by, or on behalf of, a single attorney, only the first questionnaire need be filled out in its entirety, and only questions 1-3 need be filled out in the remaining questionnaires.

I would like to emphasize once again that your answers will be kept strictly confidential, especially those relating to such sensitive areas as the terms of any settlement agreements.

1. Case name and docket number:
2. Name, address, and phone number of the attorney primarily responsible for handling the above-cited case.
3. If the above-cited case settled, please answer the following questions:
 - a) If the underlying dispute involved the discharge of an employee, did the settlement provide for the reinstatement of the employee?
 Not applicable
 Yes
 No, because the employee did not seek reinstatement
 No, because the employer objected to reinstatement.
 No, for other reasons (please explain):
 - b) Did the settlement agreement provide for the plaintiff to receive monetary compensation from the defendant(s), and if so, how much did the plaintiff receive?
 Plaintiff received no money
 Under \$1000

- \$1000 - \$5000
- \$5001 - \$10,000
- \$10,001 - \$25,000
- Over \$25,000 (please state how much):

- c) Please describe briefly any other terms of the settlement agreement:
4. In what year was the attorney identified in question 2 admitted to the bar?
5. At the time that attorney began work on the case cited in question 1, approximately what percentage of his or her practice was in the area of labor law, excluding employment discrimination and workers' compensation cases?
- Less than 10%
 - 10% - 25%
 - 25% - 50%
 - 50% - 75%
 - 75% - 100%
6. How many DFR cases had that attorney handled over the course of his or her career before beginning work on this case?
- None
 - 1 - 2
 - 3 - 5
 - 6 - 10
 - Over 10
7. If you regularly represent defendants in DFR cases, please answer the following questions:
- a) Is it your general policy to remove to federal court any DFR cases filed against your clients in state court (assuming the case is removable)?
 - b) Approximately how many DFR cases did you handle for your clients in the courts from 1977 through 1982?
 - c) Approximately how many times from 1977 through 1982 did you represent clients against whom charges had been filed with the NLRB alleging breaches of the duty of fair representation?
 - d) In how many of those cases did the NLRB issue com-

plaints alleging DFR violations by your clients?

8. If you have any views on the duty of fair representation which you would like to share — whether in general terms or with specific reference to the case cited in question 1 (for example, how would you like to see the cause of action changed, if Congress were going to reform it through legislation) — please do so on the back of this page.

Thank you for your cooperation.