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DETERMINING STANDARDS FOR A UNION'S DUTY OF FAIR REPRESENTATION: THE CASE FOR ORDINARY NEGLIGENCE

A labor union's duty of fair representation is a judicially created doctrine grounded in the union's statutory position as exclusive representative of the members of its bargaining unit. The doctrine requires that the union represent all members of the bargaining unit "without hostile discrimination, fairly, impartially, and in good faith." Courts have long applied this standard to intentional union action that deprives an employee of fair representation. Recently, several courts have extended the duty to unintentional action, holding that gross or ordinary negligence by union officials may constitute a breach of their duty.

Although the National Labor Relations Board (NLRB) and federal courts apply the statute in construing the duty of fair representation, the Board lagged years behind the courts in fully defining the scope of an employee's right to fair representation. The Board has traditionally declined to hold that negligent union conduct constitutes a breach of the union's duty. Recent decisions of the Board, however, indicate a possible change in that position.

The Board should adopt an ordinary negligence standard. This standard would most effectively protect the rights of individual members and safeguard important union functions. In addition, the Board's adoption of an ordinary negligence standard would free employers from some of the burdens of federal breach-of-contract suits.

I

HISTORICAL BACKGROUND

The Supreme Court first articulated the union's duty to represent fairly all members of the bargaining unit in Steele v. Louis-

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3 323 U.S. at 204.
4 Conduct that is hostile, in bad faith, or arbitrary is intentional. See notes 13-19 and accompanying text infra.
5 See notes 20-36 and accompanying text infra.
7 See notes 10-12, 37 and accompanying text infra.
8 See notes 44-52 and accompanying text infra.
9 See notes 54-68 and accompanying text infra.
ville & Nashville Railroad. In that 1944 case, the Court held that a union covered by the Railway Labor Act could not discriminate against black members of the bargaining unit. On the same day the Court announced its decision in Steele, it extended the duty of fair union representation to other types of union discrimination and to unions covered by the National Labor Relations Act. In the following thirty-six years, the Court extended the obligation of fair representation to all phases of union representation, including contract enforcement and administration.

Federal courts defining the scope of a union's duty of fair representation have focused on contract administration rather than contract negotiation. This emphasis may stem from employee acceptance of the need to compromise some individual interests for the benefit of the majority in the negotiation process. Because grievance processing involves an individual, rather than a group, employees are more likely to contest the union's rejection or compromise of a meritorious grievance.

In Vaca v. Sipes, the Supreme Court defined the basic elements of the duty of fair representation in grievance processing. The Court rejected an employee's claim of an absolute right to arbitration, the final step in the grievance procedure, and held that a union's decision not to champion a grievance breaches the duty of fair representation only if it is "arbitrary, discriminatory, or in bad faith." The Court added that a union also breaches the duty by ignoring a grievance or by "perfunctory" processing. Vaca did not clarify whether arbitrary conduct unaccompanied by bad faith breached the duty. This omission is significant because a "bad faith" requirement proscribes only intentional conduct, such as discrimination, dishonesty, fraud, or misrepresentation.

Most circuits do not require plaintiffs alleging unfair griev-

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10 323 U.S. 192 (1944).
11 Wallace Corp. v. NLRB, 323 U.S. 248 (1944).
14 Id. at 191.
15 Id. at 190.
16 Id. at 194.
17 Ness v. Safeway Stores, Inc., 598 F.2d 558, 560 (9th Cir. 1979); Foust v. International Bhd. of Electrical Workers, 572 F.2d 710, 715 (10th Cir. 1978), rev'd in part on other grounds, 99 S. Ct. 2121 (1979); Barton Brands, Ltd. v. NLRB, 529 F.2d 793, 799 (7th Cir. 1976); Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975); Beriault v. Local 40, Longshoremen's Union, 501 F.2d 258, 264 (9th Cir. 1974); Jones v. TWA, 495 F.2d 790,
ance processing to show bad faith. Rather, they find a breach of duty of fair representation when the union’s conduct is arbitrary.

798 (2d Cir. 1974); Sanderson v. Ford Motor Co., 483 F.2d 102, 110 (5th Cir. 1973); Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972); Smith v. Pittsburgh Gage & Supply Co., 464 F.2d 870, 875 (3d Cir. 1972); Retana v. Elevator Operators, Local 14, 453 F.2d 1018, 1023 n.8 (9th Cir. 1972).

For the First Circuit position, compare Brough v. United Steelworkers, 437 F.2d 748 (1st Cir. 1971) (union not liable to injured worker for negligent inspection of machine because federal labor law imposes duty of good faith, not duty of due care) with DeArroyo v. Sindicato De Trabajadores Packinghouse, 425 F.2d 281, 284 (1st Cir. 1970), (“While due care has not been made a part of the union’s duty," union held liable for failing to investigate or process grievances even though union showed no bad faith, because reason for failure was inexplicable and without rational basis) cert. denied sub nom., 400 U.S. 877 (1970). Although the Eighth Circuit has not explicitly rejected the bad faith requirement, rejection can be implied from the cases discussed in text accompanying notes 55-63 infra.

The Supreme Court also appears to have rejected the bad faith requirement. In Motor Coach Employees v. Lockridge, 408 U.S. 274, 301 (1971), the Court seemed to require bad faith by stating that "deliberate and severely hostile and irrational" conduct established a breach, while "honest, mistaken" conduct, without bad motive or intent, did not. Yet, in Hines v. Anchor Motor Freight Co., 424 U.S. 554 (1976), the Court may have eliminated any requirement of bad faith. Hines held that an arbitration award could be set aside if tainted by the union’s failure to thoroughly investigate the employee’s grievance, even though the union’s failure arose from an honest belief that the discharge was valid. Id. at 556.

The Hines case involved three employees discharged for inflating motel expense vouchers. The employer supported the discharge with affidavits from the motel clerk and owner asserting the accuracy of the motel records. The union, faced with the employer’s affidavits, did not investigate the motel despite the employees’ insistence. Arbitration upheld the discharges. In their suit against the union and the employer, the employees produced a deposition from the motel clerk in which he admitted falsifying the records for his own advantage. Id. at 556-59.

Hines’ effect on the bad faith requirement is unclear, because the Supreme Court did not rule on the merits of the fair representation question. While the Sixth Circuit found sufficient evidence to establish a prima facie case against the union for breach, 506 F.2d 1153, 1156 (6th Cir. 1974), the Supreme Court did not review that issue; it held only that the district court erred in granting the employer’s motion for summary judgment and that the employer should be reinstated as a defendant. The Court held that he could not avoid liability for breach by relying on an arbitration award tainted by the union’s failure to properly investigate the grievance. 424 U.S. at 569-72. See Rabin, The Duty of Fair Representation in Arbitration, in The Duty of Fair Representation 84, 86 (J. McKelvey ed. 1977) [hereinafter cited as McKelvey]; 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, 656-57 (1977). Compare Lipsitz, The Implications of Hines v. Anchor Motor Freight, in McKelvey, supra at 55, 58 & n.9 and Swedo, Rusicka v. General Motors Corp: Negligence, Exhaustion of Remedies, and Relief in Duty of Fair Representation Cases, 33 Arb. J., June 1978, at 6, 8 and Note, The Union’s Duty of Fair Representation—Fact or Fiction, 60 Marq. L. Rev. 1116, 1125-26 (1977) with Fanning, The Duty of Fair Representation, 19 B.C. L. Rev. 813, 819 (1978) and Rabin, supra at 89.

See, e.g., note 17 supra and cases cited therein. Arbitrary decisions lack a rational basis; non-arbitrary decisions are based on relevant, permissible factors and the interests of all employees:
Eliminating the "bad faith" requirement has allowed courts to interpret the duty of fair representation as imposing an affirmative duty on unions, rather than simply proscribing intentional conduct, and has thus raised the possibility that negligence alone might constitute "arbitrary" conduct that breaches the union's duty of fair representation. The Second, Sixth, Eighth, and Ninth Circuits and several district courts have adopted such a view, ruling that negligent grievance processing constitutes a breach of the union's duty. The First, Third, Fourth, and Seventh Circuits have held to the contrary.

Ruzicka v. General Motors Corp. was the first case to explicitly hold that negligent grievance processing constituted a breach of duty. The union, without evaluating the merits of a discharged

[W]e think a decision to be non-arbitrary must be (1) based upon relevant, permissible union factors which excludes the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) a rational result of the consideration of those factors; and (3) inclusive of a fair and impartial consideration of the interests of all employees.


A bad-faith standard of fair representation cannot enforce the union's affirmative responsibilities. It can prohibit invidious distinctions like race and possibly sex, and it can inhibit deliberate attempts to sacrifice the rights of individual employees, but it cannot insure that a union will offer minimal representation to all the employees it serves.


23 Prior to Ruzicka, the type of conduct held to be arbitrary supported a negligence standard by implication. In Thompson v. International Ass'n of Machinists, 258 F. Supp. 225, 239 (E.D. Va. 1966), the court held that the union breached its duty to properly represent the employee when its representation was careless and perfunctory. The court found that the combination of the union's inadequate preparation, its inadequate presentation at the hearing and its failure to notify the employee of the date of the arbitration constituted a breach of the duty. Id. In Holodnak v. Avco Corp., 381 F. Supp. 191, 199-
employee's grievance, failed to file a crucial paper in the grievance procedure.\textsuperscript{25} The Sixth Circuit held that "[s]uch negligent handling of the grievance, unrelated as it was to the merits of [the employee's] case, amounts to unfair representation. It is a clear example of arbitrary and perfunctory handling of a grievance."\textsuperscript{26} By emphasizing the union's failure to evaluate the merits of the employee's claim,\textsuperscript{27} the court hinted that negligence served merely as evidence of arbitrary conduct—not as a separate standard sufficient to establish the union's breach.\textsuperscript{28} Such an interpretation would preclude plaintiffs from establishing a breach simply by proving unintentionally careless conduct. The court also failed to explain whether ordinary rather than gross negligence would breach the duty. In a concurring opinion, Judge McCree declared that the union's inexplicable failure to act constituted "behavior so egregious" that it breached the duty of fair representation.\textsuperscript{29} The use of the word "egregious" suggests that only

\begin{itemize}
\item 200 (D. Conn. 1974), \textit{aff'd in part, rev'd in part}, 514 F.2d 285 (2d Cir.), \textit{cert. denied}, 423 U.S. 892 (1975), the trial court found the union liable for perfunctory and passive representation of an employee at an arbitration hearing on his discharge. The company discharged the employee for publishing an article critical of his employer in a political newspaper. 381 F. Supp. at 199-200. The union representative failed to make effective arguments based on the employee's right to free speech and instead argued that the employee deserved leniency because he was ignorant and stupid. \textit{Id.} at 196, 199-200. On appeal, the Second Circuit did not review the fair representation decision. 514 F.2d at 287. In Schum v. South Buffalo Ry., 496 F.2d 328, 331-32 (2d Cir. 1974), the court implicitly recognized the possibility that, in the accompanying action against the union, a breach of the union's duty might be found in the union's unintentional failure to pursue fully the employee's grievance and to notify the employee of its inaction.

\item Ruzicka, fired for intoxication on the job, filed a timely grievance with his union. The company answered his complaint, and a local union official initiated the third stage of the procedure by filing a "notice of unadjusted grievance." The official nonetheless left uncompleted this third stage by failing to file a "statement of unadjusted grievance," even though the union had sought and received two deadline extensions. 523 F.2d at 308-10. Before filing suit in federal court, Ruzicka pursued union remedies against the local official who failed to file the statement. A trial before the local union committee found the official guilty of negligence but not of willful inaction. The NLRB dismissed Ruzicka's complaint against the official. \textit{Id.}

\item \textit{Id.} at 310.

\item The union asked the Sixth Circuit to affirm the trial court, which had found no breach because Ruzicka failed to show union bad faith or hostility. The Sixth Circuit held that the employee need not show bad faith. \textit{Id.} at 309-10. \textit{See also} Ruzicka v. General Motors Corp., 528 F.2d 912, 913 (6th Cir. 1975).

\item 523 F.2d at 309-10.

\item Judge McCree stated that "a total failure to act, whether negligent or intentional, except for a proper reason, is behavior so egregious that, as in the case of bad faith, hostile discrimination, arbitrariness or perfunctoriness, the union should be held responsible." 523 F.2d at 316.
\end{itemize}
such a standard comports with the majority's emphasis on the lack of any reason for the union's conduct. Action taken for no reason represents conduct so unreasonable as to constitute gross, rather than ordinary, negligence.

Courts adopting the Ruzicka standard have not explained whether a gross or ordinary negligence standard should apply. The Eighth Circuit found union conduct negligent only if it was neither grounded in reason nor based on the union's good faith evaluation of the merits of the employee's claim. The Ninth Circuit found a breach of the duty of fair representation when the union's conduct showed reckless disregard for an employee's rights. After Ruzicka, however, the Sixth Circuit suggested that

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Ordinary negligence is failure to exercise the care that a reasonable, ordinary man would exercise in similar circumstances. There are differing concepts of gross negligence. Some view gross negligence as the intermediate point on a scale between ordinary negligence and willful, wanton or reckless conduct. Others define gross negligence as qualitatively different from ordinary negligence. This definition includes conduct with conscious indifference to the consequences so great as to suggest willingness to achieve the consequences. See generally, W. PROSSER, LAW OF TORTS 149-50, 183-86 (4th ed. 1971). Judge McCree's concept of negligence embraces both types.

31 "The Union made no decision as to the merits of Appellant's grievance, but merely allowed it to expire out of negligent and perfunctory handling." 523 F.2d at 310 (emphasis added). In its decision on a petition for rehearing, the court limited Ruzicka to cases in which "unexplained union inaction . . . has barred an employee from access to an established union-management apparatus for resolving grievances." Ruzicka v. General Motors Corp., 528 F.2d 912, 913 (6th Cir. 1975) (emphasis added). Relying on this language, several commentators interpret Ruzicka to proscribe procedural negligence rather than substantive negligence in a union's decision on the merits of a grievance. See Swedo, supra note 18, at 10; 44 FORDHAM L. REV. 1062, 1067 (1976). See generally Rabin, supra note 30, at 857.

32 Ethier v. United States Postal Serv., 590 F.2d 733 (8th Cir.), cert. denied, 100 S. Ct. 49 (1979); Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978); Minnis v. UAW, 531 F.2d 850 (8th Cir. 1975). Cf. Franklin v. Southern Pac. Transp. Co., 593 F.2d 899 (9th Cir. 1979) (failure of union to present medical record to arbitration board was at most negligent and thus not breach).

33 In Minnis v. UAW, 531 F.2d 850 (8th Cir. 1975), the court overturned a summary judgment dismissal of Minnis' claim of union breach. The employee alleged that the union accepted his grievance yet inexplicably failed to represent him and delayed six months in notifying him it had dropped his grievance. In Ethier v. United States Postal Serv., 590 F.2d 733 (8th Cir.), cert. denied, 100 S. Ct. 49 (1979), the court applied the inexplicable action standard. Because unclear contract language explained the union steward's failure to file Ethier's grievance within the time limits, the court held the union had not breached its duty of fair representation. Id. at 736-37. The court also noted the union's substantial efforts to resolve the grievance through informal discussions with the employer. Id. at 736.

34 In Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978), the union sought arbitration of the employee's discharge grievance after the arbitration deadline had passed. The union eventually relinquished the employee's right to arbitrate in exchange for
negligence alone will establish a breach, thus broadening the union's duty to include ordinary as well as gross negligence. In a recent case, the Eighth Circuit also apparently adopted an ordinary negligence standard.

II

THE NLRB'S ROLE

In defining the scope of the union's duty of fair representation, the NLRB has slowly followed the direction set by the federal courts. Eighteen years after the Supreme Court enunciated...
the duty in *Steele*,\(^3\) the Board found in *Miranda Fuel Co.*\(^39\) that a breach of this duty constituted an unfair labor practice.\(^40\) The Board found a breach when "irrelevant, invidious or unfair" considerations determined the handling of an employee's grievance\(^41\)

lations. Federal courts can review NLRB unfair labor practice decisions when the Board seeks enforcement or when an aggrieved party appeals a Board decision. Thus, the Board is bound by federal court decisions in a limited number of cases; it need not follow federal decisions that do not review Board actions. See M. FORKOSCH, A TREATISE ON LABOR LAW §§ 295-296 (1953); F. MCCULLOUGH & T. BORNSTEIN, THE NATIONAL LABOR RELATIONS BOARD 116 (1974); K. McGuINNESS, HOW TO TAKE A CASE BEFORE THE NATIONAL LABOR RELATIONS BOARD §§ 17-23, 17-24 (4th ed. 1976).

Nonetheless, doctrinal consistency is desirable because state and federal courts share jurisdiction with the NLRB over cases involving the fair representation duty. Cf. *Vaca v. Sipes*, 386 U.S. 171, 180-88 (1967) (state courts have jurisdiction over § 301 suits alleging breach of fair representation duty although NLRB deems such union conduct within Board's jurisdiction); *Smith v. Evening News Ass'n*, 371 U.S. 195, 196-98 (1962) (state courts have jurisdiction over § 301 suits alleging breach of conduct although conduct may also be unfair labor practice).

\(^40\) Id. The Board majority stated that § 9 of the National Labor Relations Act (NLRA) (29 U.S.C. § 159(a) (1976)) establishes a union as the exclusive bargaining agent once selected by a majority of the union members. This status confers a correlative duty to represent all bargaining unit members fairly and impartially. The duty of fair representation constitutes an aspect of the employee's right, under § 7 of the NLRA (29 U.S.C. § 157 (1976)), to bargain collectively. Thus a union that breaches its implied § 9 duty also interferes with the employee's right to bargain collectively. In turn, such interference is an unfair labor practice under § 8(b)(1)(A) of the NLRA. 29 U.S.C. § 158(b)(1)(A) (1976). 140 N.L.R.B. at 184-86, 51 L.R.R.M. at 1586-87.

The Second Circuit rejected the Board's finding of an unfair labor practice in *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963). The court stated that the union's breach of the duty of fair representation constitutes an unfair labor practice only when union actions are motivated by union considerations, such as a desire to promote union membership or to punish workers opposing the union leadership. Id. at 175-80. Subsequently, three circuits have upheld the Board's view of when violations of the fair representation duty constitute an unfair labor practice. See *NLRB v. Local 106, Glass Bottle Blowers*, 520 F.2d 693 (6th Cir. 1975); *Truck Drivers Local 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967); *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

The Board remains divided on the scope of the fair-representation unfair labor practice. Chairman Fanning has expressed doubts as to whether the union's § 9 obligation to represent impartially is included in an employee's § 7 rights and would find an unfair labor practice only when the union's breach of duty "restrains or coerces" an employee in the exercise of these rights (i.e., violated § 8(b)(1)(A)). He would not extend unfair labor practice status to other violations of § 8(b), which forbids union action to coerce employers to discriminate against employees (§ 8(b)(2), 29 U.S.C. § 158(b)(2) (1976)) and prohibits union refusals to bargain (§ 8(b)(3), 29 U.S.C. § 158(b)(3) (1976)). Fanning, *supra* note 18, at 832.


\(^41\) 140 N.L.R.B. at 185, 51 L.R.R.M. at 1587.
and characterized such actions as arbitrary. \(^42\) *Miranda Fuel*’s emphasis on rationality in decisionmaking \(^43\) could have provided a convenient springboard for the Board’s adoption of the view that arbitrary conduct constituted a breach of duty. Instead, the Board insisted that plaintiffs, to establish a breach, prove that the union acted in bad faith. \(^44\)

In 1975, the Board appeared to eliminate the bad faith requirement. In *Truck Drivers Local 315 (Rhodes & Jamieson, Ltd.),* \(^45\) the Board declared that the union’s duty was, in part, of a fiduciary nature that entailed affirmative responsibilities as well as the obligation to refrain from activity tainted by bad faith or hostility. \(^46\) The affirmative aspect of the duty proscribed arbitrary and unfair union action. \(^47\) *Rhodes & Jamieson* appeared to aban-

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\(^{42}\) Id. at 185-86, 51 L.R.R.M. at 1587.


\(^{44}\) In General Truck Drivers Local 692, 209 N.L.R.B. 446, 447-48, 85 L.R.R.M. 1385, 1386-87 (1974), the Board said:

>[W]e do not equate mere negligence with the irrelevant, invidious, or unfair considerations which the Board, in *Miranda* ... also characterized as "arbitrary conduct."

\[\ldots\]

\[\ldots\] something more than mere negligence is required ....

\[\ldots\] It is clear that negligent action or nonaction of a union by itself will not be considered to be arbitrary, irrelevant, invidious, or unfair so as to constitute a breach of the duty of fair representation violative of the [Labor Management Relations] Act.


\(^{45}\) 217 N.L.R.B. 616, 89 L.R.R.M. 1049 (1975), enforced, 545 F.2d 1173 (9th Cir. 1976).

*Rhodes & Jamieson* involved a union contract with several employers that gave employees a right to reassignment on the basis of seniority when a company eliminated jobs. The union reserved the option not to apply the provision in a particular case. After a company announced that several delivery drivers would lose their regular assignments, the union polled its membership on the reassignment issue. The wording of the referendum inaccurately implied that many workers would be reassigned, and the members voted against reassignment. 217 N.L.R.B. at 616-19, 89 L.R.R.M. at 1050-52.

\(^{46}\) Id. at 617, 89 L.R.R.M. at 1051.

\(^{47}\) The Board noted that it had adopted in *Miranda Fuel* the view that the duty of fair representation is "in a sense fiduciary in nature." Id. at 617, 89 L.R.R.M. at 1051, quoting *Miranda Fuel,* 140 N.L.R.B. at 189, 51 L.R.R.M. at 1589. The Board continued:

>Its fiduciary nature connotes some degree of affirmative responsibility. ....

>the duty of fair representation is more than an absence of bad faith or hostile motivation. ....

Another way this elusive element of the duty of fair representation has been authoritatively described is the avoidance or arbitrary conduct. Here again, although phrased in negative terms, the duty is to some extent an
don the bad faith requirement and to allow plaintiffs to establish a breach of the duty of fair representation by showing arbitrary action or unfair decisionmaking.\footnote{48}

Since \textit{Rhodes \& Jamieson}, the Board has wavered in its approach. In a number of cases the Board based its finding of a breach of duty on the presence of bad faith.\footnote{49} The Board sometimes strained to identify a scintilla of hostility in order to rectify what appeared to be negligent conduct.\footnote{50} The facts in other

affirmative one, for a common characteristic or [sic] arbitrariness is the \textit{absence} of some ingredient in the decisionmaking process. \ldots

The prohibition of decisionmaking supported by no reason, as well as decisionmaking for impermissible reasons, is a modest enough beginning for us. \ldots And if a duty to avoid arbitrary conduct, as part of an affirmative, fiduciary responsibility, means anything, it must mean at least that there be a reason for action taken. Sometimes the reason will be apparent, sometimes not. When it is not the circumstances may be such that we will have no choice but to deem the conduct arbitrary if the union does not tell us what it is.


The Board found that because the union scheduled the vote after the layoff and limited voting to those who would be affected by the "bumping" at issue, the election itself was designed so that it could express, not fairness, but only the conflict of interest of each member of the electorate.

The duty of fair representation being an affirmative duty, the obligations it encompasses cannot be avoided by delegating the authority to make decisions. Here the Union in effect delegated this authority \ldots It could not \ldots abdicate the responsibility for fair treatment of the employees affected by the decision.

By selecting the method for determining its action the Union underwrote the fairness of the method. \ldots [T]he method was not fair. We hold that it did not meet the minimum statutory standard of fairness.

\textit{Id.} at 619, 89 L.R.R.M. at 1052-53.

\footnote{48} The Ninth Circuit upheld the Board decision, saying that the timing and narrow scope of the referendum made the decision arbitrary and without rational basis. The court thus incorporated fairness into the standard of non-arbitrary conduct. NLRB v. Truck Drivers Local 315, 545 F.2d 1173, 1175-76 (9th Cir. 1976).

\footnote{49} See, \textit{e.g.}, Local 417, UAW (Falcon Indus. Inc.), 245 N.L.R.B. No. 75, 102 L.R.R.M. 1466 (1979) (breach of fair representation duty found from failure to properly process grievance either without any reason or because the union had had dispute with the employee or resented the allegation of racial discrimination in connection with the grievance. Chairman Fanning relied on evidence of union official's animosity toward employee in finding breach); Pacific Coast Utilities Serv. Inc., 238 N.L.R.B. No. 82, 99 L.R.R.M. 1619 (1978) (union breached duty by failure to fully process grievance because discharged employee supported rival union). Clerks \& Checkers Local 1593, 234 N.L.R.B. No. 511, 94 L.R.R.M. 1328 (1978) (union refused to process grievance because member failed to withdraw it earlier, despite threat of reprisals); ITT Arctic Servs., Inc., 238 N.L.R.B. No. 14, 99 L.R.R.M. 1659 (1978) (union's failure to investigate grievance and to give employee opportunity to be heard constituted breach; steward hostile because employee had criticized steward's performance).

\footnote{50} In Local 3784, United Steelworkers, 223 N.L.R.B. 1184, 92 L.R.R.M. 1108 (1976), employer discharged grievant as a result of a misunderstanding regarding the date grievant would be able to return to work. When the grievant requested that the union file a grievance, and told the union president she had obtained a medical excuse for her absence,
cases indicated the presence of hostility, although the Board did not cite them as grounds for its decision. Recent cases indicate that the Board has finally discarded the bad faith requirement. In several decisions, the Board has found breaches of the duty of fair representation despite explicit findings that hostility was absent. The Board has also found breach by applying the arbitrary conduct standard alone, without explicitly finding that bad faith was absent and without any hint of bad faith in the facts.

he said that he didn't "give a damn" and refused to process the grievance. Id. at 1184, 92 L.R.R.M. at 1108. He falsely contended that the seven-day period for filing a grievance had passed, and even after the employer showed the union president a letter from the doctor explaining the delay in the employee's recovery, the union officer filed no grievance. Id. at 1186-89, 92 L.R.R.M. 1108-09.

The Board affirmed an administrative law judge's finding that there had been "a total failure and refusal on the part of the [union] to file and process a grievance for Beshears . . . , that the refusal was based on hostility to Beshears." Id. at 1188. Evidence of hostility consisted of the union president's statements that he "didn't give a damn" and that the grievance period had expired. The union president also demonstrated hostility on the witness stand when he described the employee's repeated complaints about work assignments as "just bitching." Id. at 1189 n.18.

In Glass Bottle Blowers Ass'n Local 106, 240 N.L.R.B. No. 29, 100 L.R.R.M. 1294 (1979), the union refused to process two seniority grievances and failed to tell the grievants that the union officers believed the grievants had waived their seniority rights. Although the Board found this conduct perfunctory and therefore a breach, it noted that "there is considerable background evidence of hostility . . . toward the skilled trades . . . ." 100 L.R.R.M. at 1295. The Board also found evidence of hostility in the remarks of the union officials as well as their resistance to filing and their failure to state the grievants' case fully upon presentation to the Local's executive board. 100 L.R.R.M. at 1295-96. Such conduct, however, could be simply evidence of arbitrary, perfunctory processing.

51 See, e.g., Brown Transp. Corp., 239 N.L.R.B. No. 91, 100 L.R.R.M. 1016 (1978) (where employee was discharged after he complained of racial discrimination and mentioned Teamsters Union as replacement for employees' association, association breached duty by failing to investigate his complaint, to argue on his behalf at hearing, and to defend him from racial slurs or allow him to complete his testimony); Penn Indus., Inc., 233 N.L.R.B. 928, 97 L.R.R.M. 1299 (1977) (union breached duty by refusing, for irrelevant reason, to process grievance of union activist opposed by union leaders but supported by members). The Board's continuing emphasis on the bad faith requirement may stem from a division on the board. See notes 69-71 and accompanying text infra.

52 See, e.g., Newport News Shipbldg. & Dry Dock Co., 236 N.L.R.B. 1470, 98 L.R.R.M. 1465 (1978) (majority found no hostility in union's perfunctory processing, although administrative law judge maintained action was motivated by grievant's non-union status); Service Employees Int'l, Local 579, 229 N.L.R.B. 692, 95 L.R.R.M. 1156 (1977) finding breach of duty because failure to process grievance was arbitrary and unreasonable, although evidence insufficient to show that refusal was based on grievant's failure to attend union meetings); P & L Cedar Prods., 224 N.L.R.B. 244, 261, 93 L.R.R.M. 1341, (1976) (record insufficient to show that union's failure to investigate and process grievances motivated by animosity between grievants and shop steward). Cf. Forsyth Hardwood Co., 243 N.L.R.B. No. 150, 102 L.R.R.M. 1019 (1979) (refusal to process employee's grievance not breach because refusal neither arbitrary nor hostile).

In *P & L Cedar Products*, the Board first moved beyond the arbitrary conduct standard to find that grossly negligent union treatment of employee grievances breached the duty of fair representation. A factory owner discharged two shinglemakers, Stalcup and Holmgren, after they complained about safety conditions and the quality of work materials. Union representatives discussed the grievance with their employer without interviewing Stalcup and Holmgren. The union officials apparently acquiesced in Stalcup's discharge, but won reinstatement for Holmgren. The following day, the employer reneged on the reinstatement. The union officials repeatedly refused to file grievances for either employee. The NLRB affirmed the administrative law judge's finding that the union had breached its duty to both employees. The judge applied the arbitrary conduct test to the union's failure to insist that the employer honor her promise to reinstate Holmgren, and found that the union acted "without any rational explanation." In Stalcup's case, the judge went further than the arbitrary conduct test, holding that the union's duty of fair representation included "the duty to act as advocate for the grievant. Failure to discuss the case with [Stalcup] was not mere negligence, it was a reckless disregard of his [sic] rights.'" The judge applied a gross negligence standard, similar to that enunciated by Judge McCree in *Ruzicka*.

As conceived by the Board, the duty to advocate currently includes the responsibility to investigate the grievance and to present the grievant's case fully and fairly. The Board applies a

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55 Id. at 249, 255-56.
56 Id. at 256.
57 Id. at 255-57, 260.
58 Id. at 244, 260.
59 Id. at 260.
60 Id. (quoting E.L. Mustie & Sons, Inc., 215 N.L.R.B. 203, 208, 88 L.R.R.M. 1328 (1975), quoting Truck Drivers Local 705 (Associated Transp., Inc.), 209 N.L.R.B. 630, 86 L.R.R.M. 1119 (1974)). The judge found that the union action in handling Stalcup's grievance was "half-hearted and fell far short of the standards which govern a union's representation of its members." 224 N.L.R.B. at 260. The union representative failed to interview Stalcup before meeting with the employer, and in the meeting, accepted without investigation the employer's uncorroborated assertions of Stalcup's insubordination "despite the fact that the surrounding circumstances cried out for an investigation." *Id.*
gross negligence standard in assessing the adequacy of the union's presentation of a grievant's case. The Board has held that an outright statement contrary to the employee's interest constituted a breach,\textsuperscript{62} while a careless lapse that revealed damaging evidence to the employer did not.\textsuperscript{63} The Board has waffled on the standard of conduct necessary to establish a breach of the union's responsibility to investigate a grievance adequately. After holding in \textit{P & L Cedar Products} that failure to investigate and acquiescence to the employer's position on discharge was gross negligence,\textsuperscript{64} in \textit{Service Employees Local 579} \textsuperscript{65} the Board characterized similar conduct as "arbitrary."\textsuperscript{66} The Board maintained that it would not impose on unions the ordinary negligence standard of care applicable, for example, to attorney-client relationships.\textsuperscript{67} Sub-

\textsuperscript{62} Truck Drivers Local 705 (Associated Transp., Inc.), 209 N.L.R.B. 292, 86 L.R.R.M. 1119 (1974) (duty to advocate breached when union representative told grievance board that grievance lacked merit) \textit{petition for review denied}, 532 F.2d 1169 (7th Cir. 1976).

\textsuperscript{63} Teamsters Local 542 (Golden Hill Convalescent Hosp.), 223 N.L.R.B. 533, 537, 91 L.R.R.M. 1556 (1976). (Union attorney's failure to impeach employer's witness held not to breach union's duty to fully and fairly represent the grievants). See also UAW Local 122, 239 N.L.R.B. No. 151, 100 L.R.R.M. 1124 (1978).

\textsuperscript{64} 224 N.L.R.B. at 260.


\textsuperscript{66} \textit{Id.} at 692, 95 L.R.R.M. at 1157. The employer discharged the grievant for switching shifts with another employee, although the employee had oral permission from her supervisor as required by contract. The employer justified the discharge to the union steward on the basis of the grievant's prior disciplinary record. The administrative law judge concluded that the union officials abdicated their responsibilities toward [the grievant] by failing to question, or even consider, the validity of the reason assigned for [the grievant's] discharge. [The grievant] was discharged for allegedly switching shifts without permission, not for her past derelictions... [The steward] did not seek [the grievant's] side of the story... This failure to inquire into the validity of the stated reason for the discharge, and willingness to evaluate the worth of an employee solely through the eyes of the employer, is more than mere negligence or ineptitude. It is perfunctory grievance handling and so unreasonable as to be arbitrary. \textit{Id.} at 695-96.

A similar failure to fully investigate the grievant's case was held to be arbitrary conduct breaching the duty in \textit{Newport News Shipbldg. & Dry Dock Co.}, 236 N.L.R.B. 1470, 98 L.R.R.M. 1465, 1466 (1978). Twenty employees working on an exposed platform in subfreezing weather stopped work for 20 minutes until their spokesman ascertained that they would not be sent home because of bad weather. The company discharged the spokesman the next day. The union agent talked briefly with two of the employees involved, but not with the spokesman, before acquiescing in the discharge. The union refused to appeal the discharge or reply to the grievant's appeal request. The administrative law judge in \textit{Newport News} found the union's representation "arbitrary and perfunctory," but used none of the gross negligence language of \textit{P & L Cedar Prosds.}, 224 N.L.R.B. 244, 260 (1978), 93 L.R.R.M. 1341 (1976).

\textsuperscript{67} But we do not adopt any implication that, in the informal, investigative, or bargaining stage of a grievance, a collective-bargaining representative's duty to an employee it represents is analogous to that owed by an attorney to a client.
sequently, the Board arguably appeared to return to a negligence standard of due care.68

The fluctuation in the Board's position reflects the differing views of its members. Member Truesdale would retain the bad faith requirement,69 yet would find that extreme neglect, such as gross negligence, would breach the duty of fair representation.70

The nature of the relation between a labor organization and an individual employee is more nearly that of a legislator to a constituent. Cf. Steele v. Louisville & Nashville Railroad Co., et al., 323 U.S. 192 (1944). Although that requires that union decisions affecting employees be made in good faith, application of the strict standard of allegiance owed by an attorney to a client might well preclude representation by a union of more than one member because of the potential conflicts of interest.

229 N.L.R.B. at 692 n.2, 95 L.R.R.M. at 1157.

68 In Boilermakers Local 667 (Union Boiler Co.), 242 N.L.R.B. No. 167, 101 L.R.R.M. 1430 (1979), the union hiring hall followed an unwritten policy of delaying the referral to field jobs of persons who quit shop jobs. Two grievants, denied field jobs under this policy, filed a grievance. The Board concluded that the union's unwritten policy was not arbitrary conduct, breaching the duty of fair representation, because the policy had a reasonable basis—to prevent closing of shops and the concomitant loss of jobs. However, the Board held that the union breached its duty by failing to articulate the rule in definite terms and publicize it to the membership. The Board thus applied a more stringent standard than arbitrariness and imposed a standard that could be characterized as ordinary, rather than gross, negligence. In Newspaper Guild Local 35, 239 N.L.R.B. No. 175, 100 L.R.R.M. 1179 (1979), an employee challenged the promotion of a less senior employee. The union processed her grievance without investigating the qualifications of the less senior employee. The Board found that the contract was unclear on whether seniority or superior qualifications governed promotions when both employees were equally qualified. The Board said, however, that in a case where the language of the agreement clearly made seniority dispositive only when qualifications were equal, the union "would, of course, have been obliged to consider the relative qualifications of the two applicants." Id., 100 L.R.R.M. at 1181. The Board thus endorsed the same policy the Eighth Circuit applied in Smith v. Hussmann Refrig. Co. (No. 78-1034 (8th Cir., filed Jan. 21, 1980) (en banc)) which required that the union's decision be based on careful investigation. This policy goes beyond the arbitrary standard, requiring care that satisfies the "reasonable man" standard.

69 Truesdale argued that eliminating the bad faith requirement, thus allowing arbitrary and negligent conduct to breach the duty, would encourage courts and the Board to intrude into intraunion judgments. Speech before Federal Bar Association, 1979, Southwest Regional Conference, Dallas, Tex., (Mar. 1, 1979), reprinted in [1979] 4 LAB. L. REP (CCH) ¶ 9186, at 15,757 (hereinafter cited as Truesdale Speech); Newport News Shipbldg. & Dry Dock Co., 236 N.L.R.B. 1470, 1471 n. 9, 98 L.R.R.M. 1465, 1467 n. 9 (1978); see United States Postal Serv., 240 N.L.R.B. No. 178, 100 L.R.R.M. 1371, 1373 (1979) (dissenting opinion, Truesdale).

70 4 LAB. L. REP. at 15,758. Truesdale prefers the standard set in Barhite v. Kroger Co., 99 L.R.R.M. 2663 (W.D. Mich. 1978), in which the court held that "extreme neglect or intentional disregard of a grievant's case ... must occur before [the union's action] becomes 'arbitrary' action .... All that plaintiff alleges is that the union acted negligently. Unless this negligence shocks the conscience of the court so as to rise to the level of gross negligence," plaintiff has not established a prima facie case of breach. Id. at 2669-70. Judge McCree, concurring in Ruzicka, 523 F.2d 306 (6th Cir. 1975), contended that gross negligence was equivalent to bad faith or hostile discrimination. Id. at 316. Thus, Truesdale can reconcile his inclusion of gross negligence with his insistence on the presence of bad faith.
Chairman Fanning has shown similar reluctance to abandon the bad faith requirement and holds a more limited view of the application of the duty of fair representation than do other members. The Board's General Counsel recently issued guidelines stating that bad faith, arbitrary conduct, and, possibly, gross negligence equivalent to reckless disregard should establish a breach, but that "inept, negligent, unwise and insensitive, or ineffectual" conduct alone should not. The counsel's position does not bind the Board, however. Only definitive action by the Board itself will clarify the role of negligence in the duty of fair representation.

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71 See, e.g., Local 417, UAW (Falcon Indus.), 245 N.L.R.B. No. 75, 102 L.R.R.M. 1466 (1979), in which Fanning voted to find breach solely because the administrative law judge found that the union's failure to process a grievance stemmed from the union president's animosity toward the grievant. Fanning did not reach the issue of "whether, absent animosity ... [the union's] inaction amounted to a willful failure to process her grievance." Id. at 2081.

72 NLRB General Counsel, Memorandum on Duty of Fair Representation, July 9, 1979, reprinted in 48 U.S.L.W. 2081 (July 31, 1979).

73 Id. at 2081.

[T]he mere fact that the union is inept, negligent, unwise, and insensitive, or ineffectual, will not, standing alone, establish a breach of the duty. It is clear that a union breaches its duty ... if its actions are attributable to improper motives or fraud...

... If there is no basis upon which the union's conduct can be explained, the conduct is arbitrary. For example, the union would [breach] if it refused to process a grievance without any inquiry or with such a perfunctory inquiry that it is tantamount to no inquiry at all. If there is a contract or internal union policy that clearly and unambiguously supports the employee's position, and the union refuses to support the employee without explanation, such conduct would be arbitrary ....

... [T]he union's inquiry into the facts ... need not be the kind of exhaustive inquiry that one would expect from a skilled investigator. ... So long as the union makes some inquiry into the facts, and so long as the union's contract interpretation has some basis in reason, the union's refusal to process the grievance will not be considered arbitrary.

Although it is well established that mere negligence will not establish a breach of the duty ..., there could be cases where the negligence is so gross as to constitute reckless disregard of the interests of the employee. ... [T]he Sixth and Ninth Circuits have indicated that gross negligence may violate § 8(b)(1)(A) ....

74 The General Counsel acts as a prosecutor before the Board, and has absolute authority over whether a complaint shall issue in an unfair labor practice case. The Board cannot overrule his refusal to prosecute. The Board acts as a court, ruling on cases presented by the General Counsel. Thus the Counsel's conception of the duty of fair representation, though based on Board decisions, does not bind the Board. See K. McGuinness, supra note 37, at §§ 2-1, 2-2, 2-4.
III

WHAT STANDARD OF CARE?

Conflicting Board and court decisions on the proper standard for measuring the duty of fair representation raise the question of whether the Board and the courts should adopt ordinary negligence, or some other standard more protective of the union.\(^7\)

Three arguments support the adoption of an ordinary negligence standard. First, this standard most effectively protects the employee. Because many contracts provide for union control of the grievance process,\(^7\) a union official's negligent failure to file a timely grievance or to investigate or advocate an employee's grievance adequately may leave the employee without a contractual means to remedy the employer's wrong.\(^7\) As a result, the union, through its negligence, shields the employer rather than protects


\(^7\) See note 131 and accompanying text infra.

\(^7\) The unusually short statutes of limitations within which to file a grievance, incorporated into most collective bargaining agreements, can leave an employee whose union files an untimely grievance remediless. . . .

The importance of the doctrine of finality of labor arbitration often means that the employee's court of last resort is the internal arbitration proceeding. Negligent representation during arbitration can be as detrimental to an employee as an absolute refusal to file a grievance by the union. Flynn & Higgins, *supra* note 75, at 1145 (footnote omitted).

the employee. This result flies in the face of federal labor policy. Second, adoption of an ordinary negligence standard may ameliorate inherent conflicts of interest between an institutionalized union and its membership. The interests of a well-established union extend beyond the interests of its membership. Large unions must strike a balance between maintaining a congenial relationship with the employer and retaining support of a majority of the employees. These often conflicting interests may cause careless grievance processing because the union leadership, consciously or subconsciously, might prefer to avoid pursuing so many grievances that the employer becomes upset, particularly where the grievances are filed by unpopular individuals and will have little direct impact on the majority of members. Yet the benefits to the membership of diligent processing of meritori-

Negligent grievance handling by the union not only forecloses the employee from his contractual remedies, but also deprives him of a federal court remedy in circuits that impose a higher threshold of conduct to establish union breach. An employee cannot sue his employer under § 301 of the Labor Management Relations Act (29 U.S.C. § 185 (1976)) unless he can first establish that the union breached its fair representation duty. See note 101 infra.

Thus, the union that carelessly neglects to file a grievance on time, or forgets to file a timely demand for arbitration, ... or fails to contact key witnesses or inspect important documents, is immune from liability. In addition, the employer is also immune from liability and can use the union's negligence as a shield against its own misconduct.


Note, The Duty of Fair Representation and Exclusive Representation in Grievance Administration: The Duty of Fair Representation, 27 SYRACUSE L. REV. 1199, 1208-11 (1976). Institutionalized unions also must satisfy requirements imposed by the national union office. Id.

See id. at 1211-14. The union can legitimately screen out nonmeritorious grievances, because an individual employee does not have an absolute right to full processing of his grievance through arbitration. Vaca v. Sipes, 386 U.S. 171, 191 (1967). The union's decision that a grievance lacks merit because the employer's conduct does not violate the contract differs from a decision that a grievance lacks merit because it does not advance the interests of a majority of the union membership. The latter rationale can disguise the union's own political interests. Note, supra note 80, at 1213-14.
ous grievances are substantial.\textsuperscript{82} Established precedents,\textsuperscript{83} as well as the threat of vigorous union action, may deter the employer from further contract breaches. To the extent it prevents such carelessness, a negligence standard would buttress the employee's interest in effective grievance processing against contrary union tendencies. Third, some courts, including, arguably, the Supreme Court, regard the union's duty as fiduciary in nature.\textsuperscript{84} Unions actively seek and voluntarily assume their positions as exclusive bargaining agents. In many cases the union negotiates a contract giving the union complete control over the grievance process and suspending the employee's statutory right to present grievances independently.\textsuperscript{85} Because of this fiduciary relationship,\textsuperscript{86} the

\textsuperscript{82} "Thus, where a representative serves its own political or other interests, causing the loss of a meritorious grievance, the union many actually have acted against the bargaining unit's interest in contract enforcement." Note, supra note 80, at 1216.

\textsuperscript{83} Id.

\textsuperscript{84} Although the Supreme Court has not explicitly held that the union owes a fiduciary duty to employees in the bargaining unit, the Court has described the fair representation duty in similar terms. The Court grounded the duty in the "principle ... 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 ...." Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202 (1944) (emphasis added). In another case, the Court said exclusive bargaining agents "must execute their trust without lawless invasions of the rights of other workers." Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768, 774 (1952) (emphasis added).

Lower courts have interpreted these statements as imposing a fiduciary duty on unions. The Fourth Circuit recognized that "Although the Supreme Court has not explicitly characterized this obligation [of fair representation] by the very term 'fiduciary relationship,' its treatment of the subject is tantamount thereto. ... [I]t is plain that in the Supreme Court's view the federal statutory duty of fair representation is not unlike a common law fiduciary obligation." Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191, 201 (4th Cir. 1963). See Smith v. Hussmann Refrig. Co., No. 78-1034, slip op. at 16 (8th Cir., filed Jan. 21, 1980) (en banc) (Employee plaintiffs "possessed rights under the collective bargaining agreement which the union had a fiduciary duty to protect."); Bazarte v. United Transp. Union, 429 F.2d 868, 871 (3d Cir. 1970) ("The fiduciary duty of fair representation"); IBEW Local 801 v. NLRB, 307 F.2d 679, 683 (D.C. Cir. 1962) ("The requirement of fair dealing between a union and its members is in a sense fiduciary in nature ....").

\textsuperscript{85} The fact that unions have, by contract, asserted exclusive control over enforcement of the collective agreement imposes on them a heavier responsibility to exercise that control on behalf of, rather than against, the individual employee. The collective agreement creates rights in the individual employee that are enforceable under Section 301. [29 U.S.C. § 185 (1976)]. In the absence of a union-controlled grievance procedure, the individual can sue and enforce his rights on his behalf. ... The union, having deprived the individual of his ability to enforce his own rights, has a special obligation to act on his behalf.

Summers, The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation, in McKelvey, supra note 18, at 63-64 (footnote omitted). See Comment, supra
union should be held to the same due care standard courts have imposed on other fiduciaries.\textsuperscript{87}

Opponents of an ordinary negligence standard maintain that it would require a higher level of expertise and literacy than the average shop steward possesses.\textsuperscript{88} The cost of properly training shop stewards (or hiring lawyers to assume the stewards’ grievance duties) might prove prohibitively expensive for small unions and divert resources from other union activities.\textsuperscript{89} These fears are unwarranted. Unions can minimize training costs by using simple written materials and videotapes. Representatives from union headquarters could supervise grievance handling and present cases at arbitration, avoiding the need for each local to retain a lawyer.

\footnote{\textsuperscript{78}, at 1783. Section 9 of the National Labor Relations Act (29 U.S.C. § 159 (1976)) gives employees the right to present grievances to their employer directly or through their union, but employees may vote to approve a contract that surrenders their § 9 right to present grievances directly.}

\textsuperscript{86} See Flynn & Higgins, supra note 75, at 1148-49; Jones, The Origins of the Concept of the Duty of Fair Representation, in McKelvey, supra note 18, at 27-28; Rolnick, The Duty of Fair Representation in Processing Grievances to Arbitration Under the Connecticut Teacher Negotiation Act, 49 Conn. B.J. 92, 102 (1975); Summers, supra note 75, at 276-77; Tobias, supra note 75, at 524-25.

\textsuperscript{87} The Supreme Court has already imposed on union officials the fiduciary duty to act with good faith when exercising discretion or judgment. In a contract negotiation case where the union accepted a clause that benefited some members but caused the layoff of others, the Supreme Court allowed the union “[a] wide range of reasonableness ... in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion,” Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) (emphasis added). The Court later imposed the same standard on discretionary decisions in grievance processing. Humphrey v. Moore, 375 U.S. 335, 349-50 (1964).

\textsuperscript{88} See Vladeck, The Conflict Between the Duty of Fair Representation and the Limitations on Union Self-Government, in McKelvey, supra note 18, at 44-45.

We should not forget that unions are governed and administered by non-lawyers, working people who come from the shops. . . .

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At the initial but very important stages of the processing of grievances, who is involved on the union side? A worker in the shop. . . . [T]he level of literacy of the shop steward is often not adequate for making a sharply defined claim. The written grievance statement is frequently incomprehensible and has no clear reference to any specific contractual violation. In this connection, it must be remembered that the shop steward has been chosen by coworkers not because he can read the contract, not because he can effectively present grievances to an employer at the first step, but because they like him.

\textit{Id.} at 44-45.

Critics also argue that an ordinary negligence standard might reduce the effectiveness of shop stewards. Union members often select a steward because he is popular or approachable, not because he is the candidate best suited to investigate and process complaints. Critics argue that if the workers were required to select a person better able to process grievances, he might be less approachable. Consequently, fewer meritorious grievances might be filed. The success rate of the grievances filed by a trained steward, however, would probably increase, because he could investigate thoroughly, frame the grievance precisely, and advocate effectively. The net result would be an increase, rather than a decrease, in steward effectiveness.

Critics also argue that an ordinary negligence standard would greatly reduce the union's discretion to sift meritorious from frivolous grievances and to settle meritorious grievances without arbitration. The adoption of this standard, however, will have no effect on the union's discretionary power. In applying the negligence standard, courts require careful investigation and processing of grievances, but do not evaluate the merits of the union's decisions. In fact, the due care standard would protect the union's discretionary power since full investigation would produce the reasoned judgment necessary to sustain a discretionary decision when challenged.

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90 See note 88 supra.
91 See note 87 supra.
92 Courts that impose the due care standard have confined their scrutiny to the union's procedures in accepting and processing grievances. See Smith v. Hussmann Refrig. Co. No. 78-1034 (8th Cir., filed Jan. 21, 1980) (en banc) (when contract provides that seniority governs promotions only when qualifications of two candidates are equal, union has duty to investigate qualifications of promotee and challenger before deciding to file seniority grievance for challenger); Milstead v. International Bhd. of Teamsters, Local 597, 580 F.2d 232, 235 (6th Cir. 1978) (duty of fair representation breached when "union ineptly handles a grievance because it is ignorant of those contract provisions having a direct bearing on the case.").
93 Courts have required that a union must act honestly and in good faith when processing and settling grievances (Humphrey v. Moore, 375 U.S. 335, 349 (1964)), but court decisions have not affected the union's power to settle a grievance before arbitration. Vaca v. Sipes, 386 U.S. 171, 190-91 (1967). See note 87 supra. Vaca added the requirement that the discretionary decision not be arbitrary. "Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration. . . . " Id. at 191. The addition of the arbitrary standard means that the union's decision must be rational. Tedford v. Peabody Coal Co., 553 F.2d 952, 957 (5th Cir. 1977); note 19 and accompanying text supra. Thus, if a union collects substantial evidence on both sides of a grievance, and bases its decision on the evidence, its decision will withstand the arbitrary test.
Opponents of an ordinary negligence standard also fear that the adoption of this standard would flood the grievance process with complaints. They argue that unions, fearful of employee suits, might pursue frivolous complaints. Although additional grievances might be arbitrated, the fear that grievance processes would be paralyzed is exaggerated. Commentators voiced a similar fear when courts expanded the scope of the union's duty in the past, but their fears proved unwarranted. By requiring an employee to prove that the union's negligence substantially prejudiced him, courts have reduced the unions' fear of suit. Unions can take other steps to protect themselves from suit, such as increasing supervision of the grievance process by central union officers and establishing standardized procedures for determining how far to pursue a grievance. If the union accepts a grievance but later decides not to pursue or fully advocate it, the union

94 Rabin, supra note 30, at 858. Some observers fear that the grievance process would break down under the load. See, e.g., Vaca v. Sipes, 386 U.S. 171, 192 (1967).
95 See Rabin, supra note 30, at 858. Rabin discusses a University of Michigan survey that showed that 15% of all arbitration cases result from fear of a fair representation suit. Id. at 858 n.44, citing ABA SECTION OF LABOR RELATIONS LAW REPORT OF 1974 PROCEEDINGS 102, 105-06 (1974). See also Summers, The Individual Employee's Rights under the Collective Agreement: What Constitutes Fair Representation, PROCEEDINGS OF 27TH ANNUAL MEETING OF NATIONAL ACADEMY OF ARBITRATORS 14, 32, 36-37, 42, 55 (1975).

Fear of court suit should only motivate unions to process meritorious grievances because a member will only be able to successfully sue in court if he has a meritorious grievance that was not fully processed to arbitration by the union. The most that this will do is to force a union in borderline cases to give the benefit of the doubt to the discharged grievant and process the grievance through arbitration.

Note, Fair Representation—Discharge Cases Demand a High Degree of Care, 51 J. Urb. L. 575, 582 (1974).
96 E.g. Hines v. Anchor Motor Freight, 424 U.S. 554 (1976). Hines held that an arbitration award could be set aside if the union's breach of duty tainted the arbitration process. See note 77 supra.
97 Since Hines, courts have required the disappointed grievant to prove not only that the union breached its duty but that the breach "seriously undermined the integrity of the grievance procedure." Comment, The Union's Duty of Fair Representation: Group Membership Interests v. Individual Interests, 16 Duq. L. Rev. 779, 789-90. See Cofrancesco v. City of Wilmington, 419 F. Supp. 109, 111 (D. Del. 1976); Siskey v. General Teamsters Local 261, 419 F. Supp. 48, 53 (W.D. Pa. 1976).
98 A group decision process would protect the union from charges of negligence and arbitrariness by fostering careful investigation of grievances. Under such a system, the committee would compare the facts of each case to established standards before deciding whether to accept and process the grievance. This comparison would tend to produce reasoned decisions, which could rebut subsequent claims of arbitrariness. Group decision-making would likewise insulate the decision from allegations of individual caprice. See Rolnick, supra note 86, at 203-04.
could notify the employee so that he could hire his own attorney to represent him in the grievance process.99

Employers may oppose adoption of an ordinary negligence standard for unions because potential employer liability for contract breach would increase. Because an aggrieved employee cannot recover damages from an employer in a section 301 suit100 for breach of contract unless he proves that the union breached its duty of fair representation,101 the adoption of an ordinary negligence standard increases the employee's chances of reaching his employer. Once the employee proves a breach, the employer bears the primary burden of compensating him. The fear of increased employer exposure to liability is not a legitimate basis on which to oppose a higher standard of care for unions. Congress did not intend the union's breach to serve as a barrier to employer liability.102

Finally, employers and other opponents of an ordinary negligence standard argue that this standard would increase employer litigation costs by encouraging employees to institute judicial proceedings. An employee who has been wronged by his employer and whose union has breached its duty of fair representation has three avenues of redress. First, he may sue the employer for

99 See Tobias, supra note 75, at 560 (suggesting that courts should grant de novo hearing when union fails to allow employee reasonable opportunity to retain his own lawyer). A union might accept a grievance because contract terms are violated, but might not pursue it because of the insignificance of the contract term or the minimal impact of the breach. For example, a contract may provide that the employer will not pay for overtime worked without prior union approval. If the employer, however, routinely pays for non-approved overtime, his failure to do so in one or two instances might not seem a serious breach to the union.


101 Under § 301 of the Labor Management Relations Act (29 U.S.C. § 185 (1976)), an employee generally may sue his employer for breach of the collective bargaining agreement. Smith v. Evening News Ass'n, 371 U.S. 195 (1962). If the collective bargaining agreement provides that the union has the sole right to raise grievances with the employer, however, the employee must attempt to exhaust these contractual remedies before filing suit. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). The employee may escape the exhaustion requirement if he can show the futility of relying on the union because of its breach of the duty of fair representation. Vaca v. Sipes, 386 U.S. 171, 185 (1967). Thus, employees who sue employers often must also file a suit against the union.

102 We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive procedures, intended to confer upon unions... unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements.

breach of the contract under § 301 of the Labor Management Relations Act. Second, he may sue the union for breach of the duty of fair representation and may join the employer. Finally, he may petition the NLRB to prosecute the union for having committed an unfair labor practice. By refusing to recognize negligent grievance processing as a breach of the union's duty of fair representation, the NLRB has driven many employees into the courts to vindicate their rights. If the Board opened its doors to these employees by adopting an ordinary negligence standard, the employee could petition the Board to bring an unfair labor practice charge against the union. Because the employer would not be a party in this proceeding he would bear no litigation expenses. If the Board found that the union breached its duty, the NLRB could order the union to process the grievance or provide an outside attorney to do so. The NLRB order could specify that if the grievance process vindicated the employee, the union would be liable for backpay lost as a direct result of the union's breach.

103 See note 101 supra.
104 In Vaca v. Sipes, 386 U.S. 171, 197 (1967), the Supreme Court noted that the employer might be joined as a defendant in the action so that the employer could not "hide behind the union's wrongful failure to act." Each defendant would be liable for damage that it proximately caused. Thus, union liability would generally be slight, unless it actually caused the discharge or another contract violation. Subsequently, the Supreme Court held a union liable for damages to the extent that its breach added to the difficulty and expense of recovering from the employer. Czosek v. O'Mara, 397 U.S. 25, 29 (1970); see Tobias, supra note 75, at 550. Such damages would usually be limited to attorney's fees and costs of a § 301 suit.
105 See notes 39-42 and accompanying text supra.
106 The NLRB's position has not forced employees to seek judicial relief in the circuits that have not yet accepted the ordinary negligence standard. See note 22 supra. In these jurisdictions, an employee who can only allege ordinary negligence in the handling of his grievance is foreclosed from any remedy.
107 Hiring an outside attorney would avoid the risk that union hostility or disinterest would taint the Board-ordered grievance processing. Although union negligence may cause the initial breach, forcing the union to represent the employee before the NLRB may engender true hostility. See Tobias, supra note 75, at 553. The Board has discretionary power to order affirmative action to correct the unfair labor practice as long as that corrective action is not punitive. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938); K. McGuiness, How To Take A Case Before the National Labor Relations Board 296 (4th ed. 1976). The board has recently assessed reimbursement of litigation expenses in unfair labor practice cases. Id. at 311.
108 Additionally, a federal suit may provide for a greater monetary recovery. The employer cannot be joined as a party in an NLRB unfair labor practice complaint unless the employee alleges that he conspired in the union breach. Thus, an employee filing a claim with the NLRB can recover only from the union. See Note, supra note 43, at 447. In addition, the NLRB can award only backpay. A federal court, however, can compensate
wanted full compensatory damages.\textsuperscript{109} The Board would thus promote the use of grievance procedures to resolve alleged contract breaches and reduce employee recourse to the courts. In addition, Board-ordered grievance presentations by outside attorneys would enhance the binding effect of the resulting arbitration by insuring full advocacy.\textsuperscript{110} Grievants disappointed by arbitration results would be discouraged from suing the employer, because they would have little chance of overturning the award.

**CONCLUSION**

Federal courts originally limited the union's duty of fair representation to the obligation to refrain from racial and political discrimination. In subsequent decisions, a number of circuit courts expanded the duty to include an affirmative obligation to use due care in accepting and processing grievances.\textsuperscript{111} The National Labor Relations Board has lagged behind these courts in extending fair representation to include an affirmative duty.\textsuperscript{112} Such a duty would most effectively protect the employee and would reduce the harmful effects of union institutionalization on grievance processing. The negligence standard is appropriate because the union stands in a fiduciary relationship to the members of its bargaining unit. Board action based on an ordinary negligence stan-

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\textsuperscript{109} In some instances an employee might prefer restoration of his contractual rights to compensatory damages, less the attorney's contingent fee, particularly where the employee is still working but had been denied seniority by the employer. In such cases, the difference between the backpay the Board could award and the compensatory damages a federal court could order would be slight. Even in discharge cases, where compensatory damages are likely to be higher than backpay, some workers might rather win access to the grievance process at their former workplace than hunt for another job and face the delays and uncertainties of federal court litigation.

The Board remedy has another advantage for the employee: He need not pay any litigation costs, because the NLRB General Counsel would prosecute his case. See note 74 supra.


\textsuperscript{111} See note 21 and accompanying text supra.

\textsuperscript{112} The General Counsel has indicated that he will only prosecute breaches of the duty of fair representation when the union's conduct is grossly negligent. See note 73 supra. The General Counsel's decision on this matter is not reviewable by either the Board or the courts. K. McGuiness, *How to Take a Case Before the National Labor Relations Board* 27 (4th ed. 1976). If the General Counsel continues to follow this policy, the Board will have few opportunities to consider cases where only ordinary negligence is alleged.
standard would encourage the union to protect the employee, who otherwise is limited in enforcing his contractual rights. Further, adoption of a due care standard by the NLRB would significantly reduce employer litigation costs by providing an alternate forum through which the employee can require the union to fulfill its obligation to carefully and fairly represent him in the contractual grievance procedure.

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