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Allocation of Back-Pay Liability between Employer and Union: Bowen v. United States Postal Service

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NOTES

ALLOCATION OF BACK-PAY LIABILITY BETWEEN EMPLOYER AND UNION: *BOWEN V. UNITED STATES POSTAL SERVICE*

ON February 21, 1976, the United States Postal Service suspended Charles V. Bowen without pay following an altercation with another employee.[1] After the Service formally terminated Bowen on March 30, 1976, he filed a grievance with the American Postal Workers Union.[2] When the union refused to take Bowen's grievance to arbitration, Bowen filed suit against the Service and the union in federal district court. Bowen charged the Service with violating the collective bargaining agreement between the Service and the union[3] by discharging him without just

1. After being harassed by another employee, Bowen received permission to go home. While leaving, Bowen encountered the employee in a stairway. The two exchanged words and scuffled briefly. The Lynchburg postmaster suspended Bowen pending the completion of an investigation of the incident. On March 15, 1976, the postmaster notified Bowen that he would be dismissed. Brief for Petitioner at 4-5, *reprinted in* 16 LAW REPRINTS, LAB. L. SERIES (BNA), No. 3, at 77, 90-91 (1982-1983 Term).

2. The American Postal Workers Union is the recognized collective bargaining agent for United States Postal Service employees under its collective bargaining agreement with the Service. The recognized collective bargaining agent is elected by a majority of the employees, and the employer has a duty to bargain in good faith exclusively with the recognized bargaining agent. R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 374 (1976). The collective bargaining agreement is a written contract between the employer and the union. The labor contract establishes the relationship between the employer and its employees and among the employees themselves by setting job categories and seniority classifications. A labor contract normally contains provisions governing wages, hours, discipline, transfers and promotions, insurance, vacations and holidays, work assignments, and seniority. The agreement is not an employment contract, but rather an agreement governing the tenure and terms of employment of separately hired individuals. *Id.* at 540. *See generally* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973) (responsibilities and relationships created by collective bargaining agreements).

3. Bowen filed suit against the Postal Service under § 1208(b) of the Postal Reorganization Act which provides that "[s]uits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, 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." 39 U.S.C. § 1208(b) (1976).

Section 301 of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 185(a) (1976) states that "[s]uits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." Courts have recognized the general applicability of

cause.[4] Bowen also claimed that the union breached its duty of fair representation[5] by handling his grievance in an arbitrary and perfunctory manner.[6] The federal district court held that the Service wrongfully discharged Bowen and that the union breached its duty of fair representation.[7] The court found that Bowen lost $52,954 in wages and benefits and ordered the union to pay $30,000 and the Service to pay the remainder.[8] The United States Court of Appeals for the Fourth Circuit affirmed the district court's apportionment of fault but overturned the damage award against the union.[9] The United States Supreme Court granted certiorari. *Held, re-*

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law developed under § 301 to Postal Service suits arising under § 1208(b) of the Postal Reorganization Act. *See, e.g.*, National Post Office Mail Handlers Local No. 305 v. United States Postal Serv., 594 F.2d 988, 991 (4th Cir. 1979); National Ass'n of Letter Carriers v. United States Postal Serv., 590 F.2d 1171, 1174 (D.C. Cir. 1978); Pittsburg Metro Area Postal Workers Union v. United States Postal Serv., 463 F. Supp. 54, 57 n.3 (W.D. Pa. 1978), *aff'd*, 609 F.2d 503 (3d Cir. 1979). *But see* Smith v. Daws, 614 F.2d 1069, 1071-72 (5th Cir.) (court refused to follow decisions that based jurisdiction on § 301 of the Taft-Hartley Act even though court agreed that § 1208(b) of the Postal Reorganization Act is substantially identical to § 301), *cert. denied*, 449 U.S. 1011 (1980).

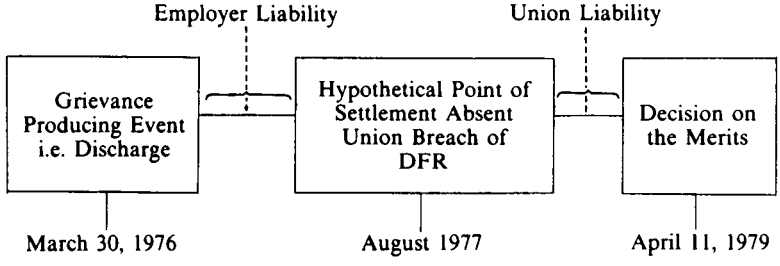
4. Just cause is defined as "[l]egitimate cause; legal or lawful ground for action; such reasons as will suffice in law to justify the action taken." BLACK'S LAW DICTIONARY 775 (5th ed. 1979).

5. Before Bowen could recover from the Postal Service for breach of the collective bargaining agreement, he had to prove that his union breached its duty of fair representation.

6. A national union official, working under a brief time extension, rejected Bowen's arbitration request after spending less than 30 minutes reviewing Bowen's file. Due to a heavy backlog of arbitration requests, this union official rejected arbitration on all cases that he reviewed on the day he refused Bowen's request. Brief for Petitioner at 6, *reprinted in* LAW REPRINTS, LABOR L. SERIES (BNA), No. 3, at 92 (1982-1983 Term).

7. Bowen v. United States Postal Serv., 470 F. Supp. 1127, 1130 (W.D. Va. 1979).

8. *Id.* at 1131. The court instructed the jury to determine the amount of compensatory damages to be awarded and to apportion liability for the damages between the Postal Service and the union. The court left the method of apportionment to the jury's discretion, but indicated that the jury could base the apportionment on a hypothetical date at which time the employee would have been reinstated but for the union's breach of its duty of fair representation. The jury returned a hypothetical date of August 1977 and apportioned damages accruing after that date to the union. *Id.* at 1129. The approach used by the district court is summarized by the following diagram:



Comment, *Apportionment of Damages in DFR/Contract Suits: Who Pays for the Union's Breach*, 1981 WIS. L. REV. 155, 171.

9. Bowen v. United States Postal Serv., 642 F.2d 79 (4th Cir. 1981). The court stated that since "Bowen's compensation was at all times payable only by the Service, reimbursement of his lost earnings continued to be the obligation of the Service exclusively. Hence, no portion of the deprivation—$47,000.00 plus $5,954.12—was chargeable to the Union." *Id.* at 82.

versed and remanded: When an employer breaches a collective bargaining agreement by wrongfully discharging an employee and the employee's union breaches its duty of fair representation in handling the employee's grievance with the employer, the union is liable for back-pay damages accruing after a hypothetical date on which the employee would have been reinstated but for the union's breach. *Bowen v. United States Postal Service*, 103 S. Ct. 588, 74 L. Ed. 2d 402 (1983).

I. THE HISTORICAL DEVELOPMENT OF THE DUTY OF FAIR REPRESENTATION/BREACH OF CONTRACT SUIT

A. The Union's Duty of Fair Representation

The United States Supreme Court first established the duty of fair representation in *Steele v. Louisville & Nashville Railroad.*[10] *Steele*, a Railway Labor Act[11] case, involved a racially discriminatory collective bargaining agreement that restricted black employees' entrance into certain jobs.[12] The Supreme Court of Alabama dismissed a complaint filed by a group of black employees, holding that a union had absolute authority to negotiate and modify the rights of company employees.[13] The United States Supreme Court reversed the Alabama court and held that the Railway Labor Act implicitly imposed a duty on the union to protect the interests of all affected employees.[14]

Nine years later the Supreme Court recognized a duty of fair representa-

10. 323 U.S. 192 (1944). For more detailed discussion of the history of the duty of fair representation, see Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Comment, *The Duty of Fair Representation*, 20 CATH. U.L. REV. 271 (1970).

11. 45 U.S.C. §§ 151-163 (1976 & Supp. V 1981). Lower courts have recognized the right of an employee to file an action under the Railway Labor Act similar to one brought under § 301 of the Taft-Hartley Act. Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 719-20 (1945), *aff'd on reh'g*, 327 U.S. 661 (1946); Moore v. Illinois Cent. R.R., 312 U.S. 630, 632-33 (1941); Comment, *supra* note 8, at 158 n.16; *see also* Feller, *supra* note 2, at 676-86 (discussing employee suits for breach of collective bargaining agreement under Railway Labor Act).

12. A group of black firemen sued the Louisville & Nashville Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen to enjoin enforcement of an agreement that provided that not more than 50% of the firemen in each job category could be negroes. The agreement further provided that all new vacancies be filled by white men until the 50% limit was reached. The agreement did not permit the employment of negroes in any job category in which they were not already working.

13. Steele v. Louisville & N.R.R., 245 Ala. 113, 16 So. 2d 416, 419-20 (1944). The court stated that " '[t]he [Union] had the power by agreement with the Railway to create the seniority rights of plaintiff, and it likewise by the same method had the power to modify or destroy these rights in the interests of all the members.' " 16 So. 2d at 419 (quoting Hartley v. Brotherhood of Ry. & S.S. Clerks, 283 Mich. 201, 277 N.W. 885, 887 (1938)).

14. 323 U.S. at 202. During the same term the Supreme Court indicated in a dictum that unions governed by the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981), had the responsibility of fairly representing the interests of all employees. Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944). In *Wallace* a newly elected union refused membership to a group of employees because they had previously belonged to a competing union. Wallace discharged the employees because the collective bargaining agreement required that all employees be union members. The discharged employees then brought suit against the union seeking reinstatement of their employment with Wallace. The Court held that the employee's selection of a union as their collective bargaining agent imposed a responsibility on the union to represent the employees' interests fairly and impartially. *Id.*

tion in a collective bargaining agreement governed by the National Labor Relations Act.[15] In *Ford Motor Co. v. Huffman*[16] the Court discussed the issue of whether a union could create reasonable distinctions between employment groups. The Supreme Court upheld a collective bargaining agreement that granted seniority for military service to World War II veterans not employed by Ford Motor Company before the war.[17] Justice Burton, writing for a unanimous Court, reasoned that distinctions between employees are not necessarily invalid.[18] He stated, however, that the union, as the recognized collective bargaining agent, was responsible for the representation of the interests of all affected employees.[19]

The Court further delineated a union's duty of fair representation in *Vaca v. Sipes*.[20] In *Vaca* an employee filed a grievance with his union after being discharged from his job at a meat packing plant.[21] The union refused to arbitrate the employee's grievance, although the collective bargaining agreement provided for arbitration.[22] The Court concluded that the union's failure to take the grievance to arbitration constituted a breach of its duty of fair representation only if the union's conduct was arbitrary, discriminatory, or in bad faith.[23]

B. The Individual Employee's Suit Against the Employer for Breach of the Collective Bargaining Agreement

In *Textile Workers Union v. Lincoln Mills*[24] the Supreme Court considered the rights of parties to a collective bargaining agreement to bring suit in federal court for breach of the agreement under section 301 of the Labor Management Relations Act.[25] In *Lincoln Mills* the Textile Workers Union sued Lincoln Mills for breach of the collective bargaining agreement after the company refused to arbitrate the union's grievances as provided for by the agreement. The Court held that any party to a collective bargaining agreement may sue for breach of the agreement in federal court.[26]

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15. 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981).
16. 345 U.S. 330 (1953).
17. *Id.* at 331.
18. *Id.* at 338.
19. *Id.* Justice Burton declared that "[t]he bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents." *Id.*; *see also* Conley v. Gibson, 355 U.S. 41, 46 (1957) (duty of fair representation in administration of collective bargaining agreement, rather than its formation).
20. 386 U.S. 171 (1967).
21. Swift & Company dismissed the employee on the ground of poor health after Swift's company doctor determined that the employee's blood pressure was too high.
22. The collective bargaining agreement between Swift and the National Brotherhood of Packinghouse Workers provided for a five-step grievance procedure. The union refused to take the employee's grievance to arbitration, the fourth step of the grievance procedure, after receiving a medical report that failed to substantiate the employee's claim against Swift.
23. 386 U.S. at 193. The Court held that the union did not breach its duty of fair representation, because the union based its decision on sound medical evidence. *Id.* at 193-94.
24. 353 U.S. 448 (1957).
25. 29 U.S.C. § 185(a) (1976); *see supra* note 3.
26. 353 U.S. at 456. The Court based its holding on the legislative history of § 301.

Five years later, in *Smith v. Evening News Association*,[27] the Supreme Court recognized the right of an individual employee, rather than the union, to bring a section 301 action against his employer for breach of the collective bargaining agreement.[28] Smith and several other employees sued Evening News in federal district court for breach of a collective bargaining agreement, which did not include arbitration or grievance procedures, after the company prevented the employees from reporting to their regular shifts during a strike by a different union. The Court concluded that an individual employee could sue his employer for breach of the collective bargaining agreement.[29] The Supreme Court held in *Republic Steel Corp. v. Maddox*,[30] however, that an employee must attempt to exhaust grievance and arbitration procedures provided by the collective bargaining agreement before suing the employer for breach of the agreement under section 301.[31] Maddox filed suit against his employer for severance pay allegedly due him under the collective bargaining agreement. Maddox made no attempt to exhaust a three-step grievance procedure provided by the collective bargaining agreement. The Court concluded that an employee could not sue his employer for breach of the collective bargaining agreement without first attempting to exhaust contractually provided remedies,[32] but failed to discuss whether an employee could file suit if the contractually provided remedies failed to operate properly.[33]

Quoting from the House debate, the Court stated that § 301 proceedings can be " 'brought by the employers, the labor organizations, or interested individual employees . . . in order to secure declarations from the Court of legal rights under the contract.' " *Id.* (quoting 93 CONG. REC. 3656 (1947) (statement of Representative Barden)). The Court also concluded that federal substantive law applies to suits arising under § 301 of the Taft-Hartley Act. 353 U.S. at 456. *See generally* Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley Section 301*, 66 YALE L.J. 167 (1956) (applicability of state and federal law to suits under § 301).

27. 371 U.S. 195 (1962).

28. *Id.* at 200-01.

29. *Id.* at 200; *see* Recent Decisions, *Suits by Individual Employees for Breach of Collective Bargaining Agreements May be Brought Under Section 301 of the Labor Management Relations Act*, 24 MONT. L. REV. 161, 176 (1963); *see also* Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1962) (individual employee rights prior to *Smith*).

30. 379 U.S. 650 (1965). For a discussion of *Maddox*, see Note, *Labor Law—Section 301 and Requiring Exhaustion of Grievance Procedures*, 25 LA. L. REV. 949 (1965). *See also* Fox & Sonenthal, *Section 301 and Exhaustion of Intra-Union Appeals: A Misbegotten Marriage*, 128 U. PA. L. REV. 989 (1980) (consequences of requiring exhaustion of intra-union grievance procedures); Comment, *The Exhaustion of Internal Union Remedies as a Prerequisite to Section 301 Actions Against Labor Unions and Employers*, 55 CHI.-KENT L. REV. 259 (1979) (discussion of internal union remedies and § 301 actions).

31. 379 U.S. at 652-53. Justice Harlan observed that "it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so." *Id.* at 653.

32. *Id.* The Court noted that certain exceptions to the exhaustion rule may prevail. Severance claims, however, are within the general rule of exhaustion. *Id.* at 654-56.

33. Martucci, *Employer Liability for Union Unfair Representation: The Judicial Predilection and Underlying Policy Considerations*, 46 MO. L. REV. 78, 87 (1981).

C. *The Duty of Fair Representation/Breach of Contract Suit*

The Supreme Court first recognized the possibility of bringing a combined action for breach of the duty of fair representation and breach of the collective bargaining agreement in *Humphrey v. Moore*.[34] In that case a group of discharged employees challenged a joint union-employer modification of their contractual seniority rights. The Court permitted the employees to bring a single action against the employer for breach of contract and against the union for breach of its duty of fair representation,[35] but held that neither the union nor the employer breached their respective responsibilities.[36]

The Court's next opportunity to consider a combined breach of duty of fair representation/breach of contract suit arose three years later in *Vaca v. Sipes*.[37] The Court found no evidence that the union had breached its duty of fair representation, but did state that if a union breaches that duty, the employer may not assert the defense of the employee's failure to exhaust contractual remedies prior to filing a suit for breach of the collective agreement.[38] In addition, the Court established a governing principle for apportioning damages once a breach of the union's duty of fair representation has been established.[39] Specifically, damages are to be allocated between the union and the employer based on the respective fault of each party.[40]

The Supreme Court first implemented *Vaca*'s apportionment rule in *Czosek v. O'Mara*,[41] a Railway Labor Act[42] case in which a group of discharged employees sued both the employer and the union after their union declined to take the employees' grievances to arbitration. The defendant

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34. 375 U.S. 335 (1964). For a discussion of *Humphrey*, see Recent Cases, *Labor Law—NLRA—Union's Duty to Represent Fairly*, 17 VAND. L. REV. 1310, 1328 (1964).

35. 375 U.S. at 343-44. For a discussion of the procedural difficulties encountered in a duty of fair representation/breach of contract suit, see 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).

36. 375 U.S. at 351.

37. 386 U.S. 171 (1967); *see supra* notes 20-22 and accompanying text (facts in *Vaca*).

38. 386 U.S. at 186.

39. Justice White, writing for a five-member majority, established the following standard for apportionment of liability between the union and the employer:

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

Id. at 197-98. Before a court applies *Vaca*'s rule in apportioning damages between the union and the employer, the employee must prove that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement. *Id.* at 187-88. For a discussion of the application of *Vaca*'s governing principle, see Linsey, *The Apportionment of Liability for Damages Between Employer and Union in § 301 Actions Involving a Union's Breach of its Duty of Fair Representation*, 30 MERCER L. REV. 661 (1979); Martucci, *supra* note 31; Comment, *supra* note 8.

40. 386 U.S. at 197-98.

41. 397 U.S. 25 (1970).

42. 45 U.S.C. §§ 151-163 (1976 & Supp. V 1981).

employer was dismissed from the suit because the plaintiffs failed to exhaust their administrative remedies and failed to allege that the employer took part in the union's purported discrimination.[43] The Court refused to assess back-pay damages against the union because the wrongful discharge by the employer was independent of any wrongful conduct by the union.[44]

In *Hines v. Anchor Motor Freight Inc.*[45] the employer discharged a group of employees for misrepresenting their motel expenses. An arbitrator sustained the discharges based on evidence that was later shown to be false. After discovering that the evidence was false, the employees sued the employer and also charged their union with breach of the duty of fair representation since the falsified evidence should have been discovered by the union. The Supreme Court held that an employer may not assert defensively the finality of a favorable arbitration ruling if the union has breached its duty of fair representation.[46] The Court remanded the case to determine whether the employer had breached the collective bargaining agreement.[47] The opinion failed to discuss how the lower court should apportion damages if the employer had breached the agreement. Justice Stewart, however, in a concurring opinion interpreting *Vaca* clearly outlined a method for apportioning damages.[48] According to Justice Stewart, the employer is not liable for back pay when the employer had relied in good faith on a binding arbitration ruling.[49]

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43. 397 U.S. at 26-27.

44. *Id.* at 28-29. The Court declared that "damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer." *Id.* at 29.

45. 424 U.S. 554 (1976). For a discussion of both *Vaca* and *Hines*, see Comment, *Duty of Fair Representation—Consequences for Breach*, 17 B.C. INDUS. & COM. L. REV. 1042 (1976).

46. 424 U.S. at 567. Justice White, writing for the court, noted that

> "it makes little difference whether the union subverts the arbitration process by refusing to proceed as in *Vaca* or follow the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee. In neither case, does the employee receive fair representation."

Id. at 572 (quoting Margetta v. Pam Pam Corp., 501 F.2d 179, 180 (9th Cir. 1974)). One commentator criticizes *Hines* as destroying the traditional adversary nature of grievance arbitration. Coulson, Vaca v. Sipes' *Illegitimate Child: The Impact of Anchor Motor Freight on the Finality Doctrine in Grievance Arbitration*, 10 GA. L. REV. 693 (1976).

47. 424 U.S. at 572.

48. *Id.* at 573. Justice Stewart asserted:

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

Id. Although Justice Stewart's concurrence provided a simple explanation of *Vaca*'s governing principle, it was not followed by any other member of the Court.

49. *Id.*

The Supreme Court again faced a combined duty of fair representation/breach of contract suit in *International Brotherhood of Electrical Workers v. Foust*.[50] In *Foust* a discharged employee sued both his union and his employer after the union failed to file a grievance within the sixty-day period provided for by the collective bargaining agreement. The employee alleged that the union's failure to file the grievance within the specified period constituted a breach of the union's duty of fair representation. The Fourth Circuit Court of Appeals affirmed the district court's award of compensatory and punitive damages against the union.[51] The Supreme Court held, however, that punitive damages could not be imposed on a union for breach of its duty of fair representation.[52] Although the lower court had assessed back-pay damages against the union, the Court refused to consider whether the apportionment of those damages was proper since neither party appealed that portion of the lower court's decision.[53]

Although the *Vaca* decision attempted to establish a straightforward rule of apportionment, lower courts have applied it inconsistently.[54] The Fourth Circuit in *Bowen v. United States Postal Service*[55] was the first court of appeals to consider *Vaca*'s apportionment rule when reviewing a district court finding that the union's breach of its duty of fair representation caused an increase in the damages incurred by an employee. The Fourth Circuit's holding that only the employer may be held liable for

50. 442 U.S. 42 (1979). Foust's employer dismissed him for failure to request a medical leave extension as required by the collective bargaining agreement.

51. *Id.* at 45. The Court, however, remanded the case for a determination of whether the award of punitive damages was excessive. *Id.*

52. *Id.* at 52. The Court based its decision on the ground that federal labor policy does not favor punishment. In addition, this imposition of punitive damages would inflict a substantial burden on union funds and could undermine the flexibility and efficiency necessary for fair grievance procedures. *Id.* at 50-52. Although concurring in the result, Justice Blackmun, joined by Chief Justice Burger and Justices Rehnquist and Stevens, disagreed with the majority's holding that punitive damages are never appropriate when a union has breached its duty of fair representation. *Id.* at 52-53. Blackmun outlined four principles the majority relied on in establishing a per se rule against imposing punitive damages against a union: (1) an employee should only be compensated for his injury; (2) punitive damages are against federal labor policy; (3) punitive damages could deplete union treasuries, impairing a union's ability to bargain effectively; and (4) punitive damages would limit the broad discretion that *Vaca* afforded unions, thus disrupting rational decisionmaking. *Id.* at 54-57.

53. *Id.* at 45 n.4.

54. *See, e.g.*, Seymour v. Olin Corp., 666 F.2d 202, 214-15 (5th Cir. 1982) (court refused to impose back-pay damages on labor union since such damages constitute natural consequences of employer's breach); Milstead v. International Bhd. of Teamsters Local 957, 580 F.2d 232, 236-37 (6th Cir. 1978) (court imposed all back-pay damages on employer since record failed to support allocation of damages against union), *cert. denied*, 454 U.S. 896 (1981); DeArroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 289-90 (1st Cir.) (employer forced to pay all back-pay damages since evidence failed to show that but for union's breach employee would have been reinstated or reimbursed at earlier date), *cert. denied*, 400 U.S. 877 (1970); St. Clair v. Local 515, Int'l Bhd. of Teamsters, 422 F.2d 128, 132 (6th Cir. 1969) (employer held liable for back-pay damages because damages caused by union's breach are virtually de minimus when union's actions are not cause of employees' discharge). *But see* Ruzicka v. General Motors Corp., 523 F.2d 306, 312 (6th Cir. 1975) (court held labor union and employer jointly liable for back-pay damages based on assumption that gravity of both parties' actions as well as chronology of events were appropriate factors in determining how damages were to be apportioned between defendants).

55. 642 F.2d 79 (4th Cir. 1981), *rev'd*, 103 S. Ct. 588, 74 L. Ed. 2d 402 (1983).

back-pay damages[56] conflicted with the Supreme Court's holding in *Vaca* that damages should be apportioned between union and employer on the basis of relative fault.

II. *BOWEN V. UNITED STATES POSTAL SERVICE*

In *Bowen v. United States Postal Service* the Supreme Court addressed the question of whether a labor union that breached its duty of fair representation could be held liable for back pay accruing after a hypothetical arbitration date.[57] Relying on *Vaca*, the Court held the union liable for back pay accruing after a hypothetical date on which Bowen would have been reinstated but for the union's breach.[58] The employer who breached the collective bargaining agreement by wrongfully discharging the plaintiff was held liable for back pay accruing prior to that date.[59] Justice Powell, writing for the majority,[60] reiterated the *Vaca* principle that the damages must be apportioned in accordance with the respective fault of each of the parties.[61]

The majority found the policy interests underlying federal labor law persuasive.[62] The foremost of these policy interests is the right of the injured employee to be made whole.[63] The Court reaffirmed *Vaca*'s holding that the union's breach of its duty of fair representation should not shield the employer from the consequences of its breach.[64] The union's breach of duty, however, which negates the employer's defense of failure to exhaust contractual remedies, also requires that the union bear the responsibility of the increased damages caused by its breach of the duty of fair representation.[65] The Court also considered the unfairness of imposing back-pay damages arising from the union's breach of duty on the employer.[66] The Court emphasized the inappropriateness of holding the employer liable for the consequences of the union's actions, stating that to impose all back-pay

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56. 642 F.2d at 82.

57. 103 S. Ct. 588, 590, 74 L. Ed. 2d 402, 407 (1983); *see supra* note 8.

58. 103 S. Ct. at 599, 74 L. Ed. 2d at 417-18.

59. *Id.* The Court limited its holding to situations where neither the union nor the employer participate in the other's breach. *Id.* at 595 n.11, 74 L. Ed. 2d at 413 n.11. The Court also reversed the decrease in damages by the court of appeals and reinstated the district court's findings. *Id.* at 599, 74 L. Ed. 2d at 417-18. All the dissenting Justices concurred with the reinstatement of damages except for Justice Rehnquist, who filed a separate opinion concerning the damages issue. *Id.* at 607-08, 74 L. Ed. 2d at 428-29.

60. Justice Powell was joined by Chief Justice Burger and Justices Brennan, Stevens, and O'Connor.

61. *Id.* at 593, 74 L. Ed. 2d at 410 (quoting Vaca v. Sipes, 386 U.S. 171, 197-98 (1967)).

62. 103 S. Ct. at 594-95, 74 L. Ed. 2d at 412-13. The Court cited *Vaca* as establishing the interests that "provide a measure of its principle for apportioning damages." *Id.* at 595, 74 L. Ed. 2d at 412.

63. *Id.*

64. *Id.*

65. *Id.*, 74 L. Ed. 2d at 413. The Court stated that "[e]ven though both the employer and the union have caused the damage suffered by the employee, the union is responsible for the increase in damages and, as between the two wrongdoers, should bear its portion of the damages." *Id.* (footnote omitted).

66. *Id.*

damages on the employer would overlook the interests of the parties to the collective bargaining agreement.[67] On the other hand, the Court found it fair to impose on the union the burden of financial responsibility for its wrongful actions.[68] The Court noted that the union assumed responsibility for its actions by seeking and acquiring the exclusive right to represent a group of employees. In addition, an employer, as a party to a collective bargaining agreement, should be able to rely on a union's decision not to process a discharged employee's grievance to the same extent that the employer could rely on an employee who failed to exercise his independent right to act on his own behalf.[69] The Court concluded that the inability of an employer to rely on a union's decision would be detrimental to the orderly settlement of grievances between the parties.[70] In the absence of an allocation of back pay to the union, an employer would also be less likely to enter into a collective bargaining agreement that included a customarily written arbitration clause.[71]

The Court next discussed the relationship created between an employer and a labor union by a collective bargaining agreement.[72] The Court confirmed the status of the grievance procedure as a fundamental element of federal labor policy.[73] The existence of grievance procedures in standard collective bargaining provides the parties with a peaceful method of negotiation, thus strengthening the collective bargaining agreement.[74] Requiring the union to pay its share of the damages would not impose a burden inconsistent with federal labor policy but rather would provide the union with an additional incentive to process the claims of its members diligently.[75] The Court viewed holding the union accountable for increases in damages as a proper means of enforcing a duty owed to union members and enforcing a contractual obligation owed by the union to the

67. *Id.* at 596, 74 L. Ed. 2d at 414.

68. *Id.* at 597, 74 L. Ed. 2d at 415.

69. *Id.* at 596-97, 74 L. Ed. 2d at 415.

70. *Id.* at 597, 74 L. Ed. 2d at 415-16.

71. *Id.*, 74 L. Ed. 2d at 416.

72. *Id.* at 596, 74 L. Ed. 2d at 414. The Court compared the relationships created in a collective bargaining agreement to those created in an ordinary contract, stating that "a collective-bargaining agreement 'is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.' " *Id.* (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960)).

73. 103 S. Ct. at 596, 74 L. Ed. 2d at 414 (citing John Wiley & Sons v. Livingston, 376 U.S. 543, 549 (1964); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960)). The Court stated that the grievance procedure "promotes the goal of industrial peace by providing a means for labor and management to settle disputes through negotiation rather than industrial strife." 103 S. Ct. at 596, 74 L. Ed. 2d at 414.

74. *Id.*

75. *Id.* at 597-98, 74 L. Ed. 2d at 416. The Court noted that holding the union liable for its share of the employee's damages is consistent with International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1978), which held that punitive damages could not be imposed on a union for breach of its duty of fair representation. *Id.* at 48-52. The *Bowen* Court reasoned that "[a]n award of compensatory damages . . . normally will be limited and finite. Moreover, the union's exercise of discretion is shielded by the standard necessary to prove a breach of the duty of fair representation. Thus, the threat that was present in *Foust* is absent here." 103 S. Ct. at 598 n.16, 74 L. Ed. 2d at 416 n.16.

employer.[76]

Finally, the Court distinguished *Bowen* from its holding in *Czosek v. O'Mara*.[77] In *Czosek* the Court held that only the employee's added expense of collecting damages from the employer could be assessed against the union as a result of the union's breach.[78] In *Bowen*, however, the Court explained that the applicable law in *Czosek*, the Railway Labor Act, provided the discharged employee with an alternative remedy in the event of a union's decision not to process the employee's grievance.[79] Since the injured employee had immediate access to an alternate remedy, the union's breach of its duty of fair representation did not increase the damages incurred by the discharged employee except for the added expense of recovering damages from the employer.[80] The Court reasoned that *Czosek*'s holding is consistent with *Vaca* because the added expense of collecting from the employer is the only damage attributable to the union's wrongful actions.[81]

Justice White, in a dissenting opinion joined by Justices Marshall, Blackmun, and Rehnquist, disagreed with the majority's interpretation of *Vaca*. Justice White first discussed the history of the duty of fair representation suit and the breach of contract suit,[82] and cited *Vaca* as holding that the only consequence of the union's breach is the lifting of the bar to the individual employee's suit against the employer for breach of contract before the employee has exhausted contractual grievance procedures.[83] Furthermore, Justice White interpreted *Vaca*, *Czosek*, and *Hines* as establishing that the union's independent breach would not shield the employer from the natural consequences of its breach of the collective bargaining agreement.[84] Justice White argued that the majority's reliance on the alternative remedy provided by the Railway Labor Act was misplaced because the availability of an alternative remedy has never been considered relevant in determining the proper apportionment of damages under *Vaca*.[85]

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76. *Id.* at 597-98, 74 L. Ed. 2d at 416.

77. 397 U.S. 25 (1970).

78. *Id.* at 29.

79. 103 S. Ct. at 599, 74 L. Ed. 2d at 417. Section 153 First (i) of The Railway Labor Act, 45 U.S.C. § 153 First (i) (1976) permits an employee whose union fails to process his grievance to process it himself. Section 153 First (i) provides:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

80. 103 S. Ct. at 598-99, 74 L. Ed. 2d at 417.

81. *Id.* at 599, 74 L. Ed. 2d at 417.

82. *Id.* at 600-02, 74 L. Ed. 2d at 419-21.

83. *Id.* at 600, 74 L. Ed. 2d at 419.

84. *Id.* at 600-02, 74 L. Ed. 2d at 419-21.

85. *Id.* at 602 n.5, 74 L. Ed. 2d at 421 n.5.

Justice White next argued that the majority opinion went beyond the Court's holding in *Vaca*. Even though the union cannot reinstate the employee, the majority insulated the employer from further liability after the hypothetical arbitration date.[86] The union will therefore usually bear the larger portion of the damages since the hypothetical arbitration date normally occurs within one year of the discharge.[87] Justice White maintained that the majority's holding would detrimentally affect the grievance machinery since unions would bring unmeritorious grievances to arbitration to protect themselves from liability for back-pay damages.[88] Finally, Justice White outlined two situations in which a union should be held liable for back-pay damages. First, the union and the employer should be jointly liable for back-pay damages when the union has induced the employer to breach the collective bargaining agreement. Second, the union should be secondarily liable to the plaintiff when the union has not induced the employer's breach but the union's breach of its duty of fair representation has prevented the injured employee from collecting from the employer.[89]

Justice Rehnquist authored a separate dissent disagreeing with the majority's reinstatement of the damages found by the district court.[90] Justice Rehnquist based his decision on Bowen's failure to cross-appeal the district court's award of damages against the Postal Service. He stated that Bowen should have filed a conditional cross-appeal seeking to increase damages against the Service if the court of appeals held the union not liable. By failing to cross-appeal, according to Rehnquist, Bowen lost his right to increase his award against the Service.[91]

III. CONCLUSION

In *Bowen v. United States Postal Service* the United States Supreme Court held that a labor union that fails to represent a union member fairly in a grievance proceeding against his employer for breach of the collective bargaining agreement is liable for the employee's damages accruing after a hypothetical arbitration date. The Court based its decision on *Vaca v. Sipes*, the relationships and interests created by the collective bargaining agreement, and the national labor policy favoring peaceful arbitration of grievances. The opinion provides the first comprehensive explanation of

86. *Id.* at 602-03, 74 L. Ed. 2d at 422.

87. *Id.* at 603, 74 L. Ed. 2d at 422-23. The average time lag between the filing of a grievance and an arbitration decision ranged from a high of 268.3 days in 1977 to a low of 223.5 days in 1975 and 1978. *Id.* at 601 n.4, 74 L. Ed. 2d at 421 n.4 (citing FEDERAL MEDIATION & CONCILIATION SERV., THIRTY-FOURTH ANNUAL REPORT 39 (1981)).

88. 103 S. Ct. at 605, 74 L. Ed. 2d at 425. The validity of Justice White's prediction depends upon the ability of lower courts to interpret consistently the standard delineated in *Vaca* for breach of the duty of fair representation. *See supra* note 23 and accompanying text. If the lower courts interpret the standard consistently, the union is required only to remain within that standard. If, however, the courts fail to do so, many unions may choose to take all grievances to arbitration in order to avoid the possibility of incurring liability for back pay.

89. 103 S. Ct. at 605-06, 74 L. Ed. 2d at 425-26.

90. *Id.* at 607-08, 74 L. Ed. 2d at 428; *see supra* note 8 and accompanying text.

91. 103 S. Ct. at 608, 74 L. Ed. 2d at 428.

the *Vaca* decision regarding allocation of damages in labor disputes. The *Bowen* decision establishes a "but for" test of causation to be used in determining the appropriate apportionment of back-pay damages, and should prompt labor unions to consider carefully a union member's grievance before refusing to take it to arbitration, since the consequences of an incorrect decision will now fall upon the union rather than the employer. The Court's allocation of liability in *Bowen* provides incentives to insure that both parties to a collective bargaining agreement will perform their respective duties.

C. John Scheef III