Fordham Law Review

Volume 44 | Issue 5 Article 9

1976

Recent Developments

RECENT DEVELOPMENT

Labor Law—Union's Duty of Fair Representation Held to be Breached by Negligent Failure to Act on Behalf of Members.—Plaintiff was fired from his job at a General Motors plant for being intoxicated and for using abusive and threatening language towards his supervisors. He complained that this penalty was unduly harsh and in violation of the national collective bargaining agreement. His union followed the first steps of the established grievance procedure by filing a timely grievance. When General Motors filed its answer, the union filed a "notice of unadjusted grievance," but did not file the required "statement of unadjusted grievance."[1] The result of this failure was that plaintiff's right to invoke arbitration was lost, and he was left without remedy under the collective bargaining contract. Plaintiff alleged that the responsible union official deliberately had not filed the statement because of personal hostility; the union local asserted that it had merely been negligent. After exhausting his intra-union remedies, plaintiff filed suit in federal district court, claiming that the union had breached the duty of fair representation which it owed to him.[2] The district court, finding that the allegation of deliberate failure to prosecute the grievance had not been proven, held for the union on the ground that negligent conduct did not constitute unfair representation.[3] On appeal the Sixth Circuit reversed. *Ruzicka v. General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975).

The concept of a union's duty of fair representation was developed by the judiciary.[4] Its basic premise is that since a recognized union has been empowered to act as the exclusive bargaining agent of all the employees in the unit, it must represent those employees fairly and in good faith.[5] The first major application of this doctrine was in *Steele v. Louisville & Nashville R.R.*,[6] in which a white-only union negotiated a contract discriminating against the minority of black railroad firemen. The Court found this to violate the union's duty of fair representation.[7]

1. Ruzicka v. General Motors Corp., 523 F.2d 306, 308 (6th Cir. 1975). The national agreement required that the union file a "notice of unadjusted grievance" to begin the third step of the grievance arbitration procedure. If the union wanted to invoke arbitration it was required to file a "statement of unadjusted grievance" with General Motors. Although it received two time extensions, the local did not file this statement. Id.

2. Ruzicka v. General Motors Corp., 75 CCH Lab. Cas. ¶ 10,455 (E.D. Mich. 1973), rev'd, 523 F.2d 306 (6th Cir. 1975).

3. Id. ¶ 10,455, at 17,551-52.

4. See Clark, The Duty of Fair Representation: A Theoretical Structure, 51 Texas L. Rev. 1119, 1119-20 (1973) [hereinafter cited as Clark]; Flynn & Higgins, Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee, 8 Suffolk U.L. Rev. 1096, 1099 (1974) [hereinafter cited as Flynn & Higgins]; Comment, Post-Vaca Standards of the Union's Duty of Fair Representation: Consolidating Bargaining Units, 19 Vill. L. Rev. 885 (1974) [hereinafter cited as Post-Vaca Standards].

5. Retana v. Apartment Operators Local 14, 453 F.2d 1018 (9th Cir. 1972); Clark, supra note 4, at 1119-20; see Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 632-34 (1956).

6. 323 U.S. 192 (1944).

7. Id. at 202-03. The Court observed that this duty extends to all members of the bargaining unit and is not limited to union members. Id. at 201.

In the leading case of *Vaca v. Sipes*,[8] the Supreme Court attempted to clarify and delineate the nature and scope of this duty. In *Vaca* a union member attempted to return to his job after a sick leave caused by high blood pressure. Though his family doctor certified that he was able to work, the company doctors disagreed. After the union doctor examined him and gave an unfavorable report, the union declined to pursue the matter, and the member went to court.[9] The Supreme Court held that an employee does not have an absolute right to have his grievance submitted to arbitration.[10] The Court recognized the presence of competing interests: those of the individual in having his rights protected against arbitrary or unfair management practices, and those of the collective group in maintaining a union able to negotiate with management from a position of strength. If the union did not have the discretionary power to halt questionable proceedings before they reached arbitration, management would have little incentive to deal seriously with the union.[11] In an attempt to balance these competing interests the court stated:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.[12]

In order to establish a breach of the duty of fair representation, then, the employee must prove "arbitrary or bad-faith conduct on the part of the Union in processing his grievance."[13] The Court warned, however, that "a union may not arbitrarily *ignore a meritorious grievance or process it in perfunctory fashion* . . . ."[14] The application of these guidelines to concrete controversies has led to widely differing judicial interpretations.

One group of decisions has strictly required a showing of bad faith on the part of the union before finding a breach of the duty of fair representation.[15]

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8. 386 U.S. 171 (1967). For fair representation cases between 1944 and 1967, see, e.g., Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952).

9. 386 U.S. at 174-76. The union member died of hypertension before the case reached the Supreme Court.

10. Id. at 191; accord, e.g., Sanderson v. Ford Motor Co., 483 F.2d 102, 114 (5th Cir. 1973); Lewis v. Magna Am. Corp., 472 F.2d 560, 561 (6th Cir. 1972); Cecil v. Local 1336, UAW, 383 F. Supp. 616, 618 (W.D. Ky. 1973); Tuma v. American Can Co., 373 F. Supp. 218, 222-23 (D.N.J. 1974); Gleason v. T.I.M.E. DC, Inc., 84 L.R.R.M. 2107, 2110 (D. Colo. 1972). Earlier commentators had urged otherwise. E.g., Murphy, The Duty of Fair Representation Under Taft-Hartley, 30 Mo. L. Rev. 373, 389 (1965); Summers, Individual Rights in Collective Agreements and Arbitration, 37 N.Y.U.L. Rev. 362, 399-404 (1962).

11. 386 U.S. at 191-92; see Cox, Rights under a Labor Agreement, 69 Harv. L. Rev. 601 (1956). See also Flynn & Higgins, supra note 4, at 1105-08 (1974).

12. 386 U.S. at 190.

13. Id. at 193.

14. Id. at 191 (emphasis added).

15. In addition to the cases discussed at notes 16-24 infra and accompanying text, see, e.g., Gardner v. UAW, 87 L.R.R.M. 2097, 74 CCH Lab. Cas. ¶ 10,281 (E.D. Mich. 1974); Brock v. Bunton, 383 F. Supp. 127, 130 (E.D. Mo. 1974), aff'd, 512 F.2d 720 (8th Cir. 1975); Freeman v. Grand Int'l Bhd. of Locomotive Eng'rs, 375 F. Supp. 81 (S.D. Ga.), aff'd, 493 F.2d 628 (5th Cir.

For example, in *Dill v. Greyhound Corp.*,[16] an employee charged a breach of the duty of fair representation when his union decided not to process his seniority grievance. The court required the plaintiff to show bad faith, fraud, hostility or malice before the union's failure to invoke arbitration could be said to violate its duty of fair representation.[17] A similar bad faith standard was applied by the Ninth Circuit in *Local 13 ILWU v. Pacific Maritime Association.*[18] An even more rigid view was expressed by the Second Circuit in *Cunningham v. Erie R.R.*,[19] where the court required "[s]omething akin to factual malice" on the part of the union.[20] This view will not even permit consideration by the court of the merits of a grievance in determining whether or not there had been bad faith.[21]

In *Amalgamated Association of Street Employees v. Lockridge*,[22] the Supreme Court noted in dictum that a breach of the duty of fair representation required proof of discrimination that was "intentional, severe, and unrelated

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1974); Henry v. K.S.A.N., 374 F. Supp. 260 (N.D. Cal. 1974); Gorshak v. Ex-Cell-O Corp., 83 L.R.R.M. 2505, 71 CCH Lab. Cas. ¶ 13,871 (E.D. Mich. 1973); Bruen v. Local 492, IUEW, 313 F. Supp. 387, 391-92 (D.N.J. 1969), aff'd, 425 F.2d 190 (3d Cir. 1970) (per curiam).

16. 435 F.2d 231 (6th Cir. 1970), cert. denied, 402 U.S. 952 (1971). Greyhound wished to add a large number of new drivers for the New York World's Fair and arranged for an independent driving school to provide training. Id. at 233. Because its own records were disorganized, Greyhound decided to accept the date of application to the school, rather than the date of application to Greyhound, as the employee's hiring date. The union, after consideration, agreed to accept this departure from the contract terms, but plaintiff argued that he was adversely affected by the procedure. Id. at 235-36 & n.3.

17. Id. at 238.

18. 441 F.2d 1061 (9th Cir. 1971), cert. denied, 404 U.S. 1016 (1972). The court, reversing the district court's grant of a summary judgment in favor of the international union, reasoned that the pleaded facts could indicate bad faith on the union's part in barring a local union official from working as a longshoreman. Id. at 1066-67. It appears, however, that the Ninth Circuit would also find arbitrary conduct alone sufficient for liability. See notes 34-35 infra and accompanying text.

19. 266 F.2d 411 (2d Cir. 1959).

20. Id. at 417. On retrial the district court found "hostile discrimination" on the part of the union, and the Second Circuit affirmed. 243 F. Supp. 571 (S.D.N.Y. 1965), aff'd, 385 F.2d 640 (2d Cir. 1966).

This test has been followed in Jackson v. TWA, Inc., 457 F.2d 202, 204 (2d Cir. 1972); Hiatt v. New York Cent. R.R., 444 F.2d 1397, 1398 (7th Cir. 1971). These two cases involved groups of employees protesting specific terms of the collective bargaining agreement. One commentator has suggested that "the use of the 'factual malice' test is appropriate in the situation where one or more employees claim that the union had discriminated against a group of employees in agreeing to specific terms, as opposed to the instance wherein an employee asserts that the union has acted arbitrarily toward him or her individually in refusing to process a grievance." Post-Vaca Standards, supra note 4, at 890 (emphasis omitted).

21. Simberlund v. L.I.R.R., 421 F.2d 1219, 1225-26 (2d Cir. 1970); see Kroner, The Individual Employee—His "Rights" in Arbitration after Vaca vs. Sipes, N.Y.U. 20th Ann. Conf. on Labor 75, 78 (T. Christensen ed. 1968). See also Clark, supra note 4, at 1172-73 (discussing a similar holding in Steinman v. Spector Freight Sys., Inc., 441 F.2d 599 (2d Cir. 1971)).

22. 403 U.S. 274 (1971). Lockridge forfeited his union membership, and consequently his job, by nonpayment of dues. Id. at 278-79.

to legitimate union objectives . . . ."[23] It has been suggested that the Court merely intended to explain existing law, not to limit *Vaca*.[24]

A second category of cases interpreting *Vaca* has determined that unions can breach a duty of fair representation without bad faith or hostility.[25] For example, in *De Arroyo v. Sindicato de Trabajadores Packinghouse*,[26] a group of employees sued their union for failing to process their seniority grievances.[27]

In examining the union's conduct the court ruled out "any possibility of subjective bad faith, hostility, discrimination, or dishonesty on the part of the Union officials."[28] Nevertheless the court found a violation on the ground that "arbitrary and perfunctory handling by a union of an apparently meritorious grievance is not acceptable under the standard of fair representation."[29]

In *Griffin v. UAW*[30] a union filed a discharged employee's grievance with a company official with whom the employee had just had a fight, even though another official could have been chosen. The court held that, whether or not the union acted in good faith, its conduct could be considered so arbitrary as to breach its duty. It stated:

> Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation.[31]

Similarly, in *Retana v. Apartment Operators Local 14*,[32] a Spanish speaking union member dismissed from her job sued the union for breach of its duty of fair representation. She charged that the union's failure to process her grievance "was arbitrary, discriminatory and/or in bad faith."[33] In addition she alleged that the union, which represented many Spanish speaking employees, made no attempt to translate the collective bargaining agreement, to

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23. Id. at 301; see, e.g., See v. UAW Local 417, 83 L.R.R.M. 2512 (6th Cir. 1973); Buzzard v. Machinists Local 1040, 480 F.2d 85 (9th Cir. 1973).

24. Clark, supra note 4, at 1125.

25. In addition to the cases discussed at notes 26-35 infra and accompanying text, see, e.g., Harrison v. UTU, No. 74-1737 (4th Cir., Dec. 5, 1975); Beriault v. Local 40, IL&WU, 501 F.2d 258, 264 (9th Cir. 1974); Holodnak v. Avco Corp., 87 L.R.R.M. 2337 (D. Conn. 1974), aff'd on other grounds, 514 F.2d 285 (2d Cir. 1975). See also Brough v. Steelworkers Union, 437 F.2d 748, 750 (1st Cir. 1971) (plaintiff required to allege union's failure to use good faith); Tedford v. Peabody Coal Co., 383 F. Supp. 787, 794-95 (N.D. Ala. 1974) (showing of bad faith, but not hostility, required).

26. 425 F.2d 281 (1st Cir.), cert. denied, 400 U.S. 877 (1970); see Clark, supra note 4, at 1135; Flynn & Higgins, supra note 4, at 1147-48; Post-Vaca Standards, supra note 4, at 897-98.

27. 425 F.2d at 283.

28. Id. at 284.

29. Id.

30. 469 F.2d 181 (4th Cir. 1972).

31. Id. at 183. The 4th Circuit, in effect, held that Vaca had established three separate tests for union conduct. The union must represent without discrimination or hostility; it must exercise its discretion in good faith; and it must avoid arbitrary conduct. Id.

32. 453 F.2d 1018 (9th Cir. 1972).

33. Id. at 1025.

furnish a bilingual union liason, to bargain for bilingual supervisors, or to show the Spanish speaking unit members how to file grievances.[34]

The Ninth Circuit reversed a lower court's dismissal of the action, indicating that plaintiff's allegations in the alternative that the union had acted arbitrarily or in bad faith were sufficient to withstand a motion to dismiss. The court stated that "[a] union's obligation of fair representation is not necessarily satisfied by refraining from wrongful conduct," and further indicated that, under *Vaca,* arbitrary treatment of a meritorious claim was sufficient for liability.[35]

While the courts thus appear split on the question of the standard to be applied in situations involving wilful conduct of unions, neither category of cases discussed above has interpreted the duty of fair representation to encompass liability for mere negligence.[36] The cases that have considered the effects of union negligence have been uniform in holding the unions free from liability on grounds of public policy.[37] In *Whitten v. Anchor Motor Freight, Inc.,*[38] a union attorney incorrectly advised the union that an employee's discharge was lawful under the collective bargaining contract, so that the union did not proceed with the grievance. The court held that although the union may have acted negligently or exercised poor judgment, this was insufficient to support a claim of unfair representation.[39]

Similarly, the Third Circuit, in *Bazarte v. UTU,*[40] stated:

> It is . . . essential to plaintiff's claim that there should have been proof of "arbitrary or bad-faith conduct on the part of the Union in processing his grievance." It follows from this that proof that the union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation.[41]

The Eighth Circuit agreed with this view in *Minnis v. UAW.*[42] Plaintiff complained that his union breached its duty of fair representation by inadequately preparing and presenting his grievance. The court, after finding the union's conduct arbitrary enough to be a breach of its duty, noted in dictum that

> negligence or poor judgment in exercising this discretion [deciding which grievances to pursue] will not expose a union to liability so long as it acts with "complete good faith and honesty of purpose" . . . and not in a perfunctory manner.[43]

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34. Id. at 1023.

35. Id. at 1024 n.10.

36. See Post-Vaca Standards, supra note 4, at 896.

37. In addition to the cases discussed at notes 38-44 infra and accompanying text, see, e.g., Berry v. Pacific Intermountain Express Co., 85 L.R.R.M. 2408, 73 CCH Lab. Cas. ¶ 14,274 (D.N.M. 1974); Vedda v. Avery Eng'r Co., 74 CCH Lab. Cas. ¶ 10,112 (N.D. Ohio 1974); Olsieski v. Transco Plastics Corp., 66 CCH Lab. Cas. ¶ 12,059 (N.D. Ohio 1971).

38. 521 F.2d 1335 (6th Cir. 1975).

39. Id. at 1341.

40. 429 F.2d 868 (3d Cir. 1970).

41. Id. at 872.

42. No. 75-1167 (8th Cir., Dec. 16, 1975).

43. Id. at 8.

Various district courts have made similar statements.[44]

The court's finding in *Ruzicka* that "[s]uch negligent handling of the grievance, unrelated as it was to the merits of Appellant's case, amounts to unfair representation,"[45] marks a significant departure from preexisting views. The rationale for this decision lies in the court's conclusion that this negligence amounted to arbitrary conduct on the union's part, violating the standard set by the Supreme Court in *Vaca*. The Sixth Circuit concluded

> that when a union makes no decision as to the merit of an individual's grievance but merely allows it to expire by negligently failing to take a basic and required step towards resolving it, the union has acted arbitrarily and is liable for a breach of its duty of fair representation.[46]

It is submitted that this apparent conflict among the circuits may be harmonized by distinguishing various types of negligence. One type, which might be called procedural negligence, is unrelated to the discretionary determinations made by a union; it involves merely ministerial functions, such as being aware of time deadlines, giving notice, filing required statements, etc.[47] The other type, substantive negligence, involves the negligent determination of discretionary matters, such as whether a particular grievance has merit.[48] In order to give unions full scope to represent their members, public policy may require that they be insulated from liability for substantive negligence. If a union decision not to pursue a grievance were open to attack on grounds of negligence, so that the merits of the grievance would be fully argued despite the union decision, the effectiveness of the union in bargaining with management would be largely destroyed. These considerations do not apply in the case of procedural negligence, however. The rights of all the members of the collective bargaining unit will not be strengthened by allowing a union to escape liability for the damage it has caused to an individual member or employee through its negligent failure to follow required procedure. On the contrary, imposing liability for procedural negligence should serve as a reminder of the union's fiduciary duty towards the people it represents.

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44. E.g., Nagel v. International Bhd. of Teamsters, 396 F. Supp. 391, 394 n.3 (E.D.N.Y 1975) ("mere negligence does not establish a breach of the duty of fair representation"); Luster v. International Ass'n of Machinists, 7 E.P.D. ¶ 9222, at 7082 (N.D. Ga. 1973) ("[p]roof that the union may have acted negligently or exercised poor judgment is not sufficient to support a claim of unfair representation . . . ."); Linzy v. Brotherhood of Ry. Carmen, 67 CCH Lab. Cas. ¶ 12,496, at 23,644 (N.D. Ill. 1971) (plaintiff must "show that the handling of the grievance by the union was more than merely negligent or inept: that it . . . was based in bad faith or arbitrariness' ").

45. 523 F.2d at 310.

46. Id.

47. This is the type of negligence with which Ruzicka was concerned.

48. The cases discussed in notes 37-44 supra, and accompanying text, appear to be in this category.