University of Michigan Journal of Law Reform

Volume 14

1981

A Proposal for Apportioning Damages in Fair Representation Suits

Kenneth B. McClain
University of Michigan Law School

A PROPOSAL FOR APPORTIONING DAMAGES IN FAIR REPRESENTATION SUITS

Unions enjoy exclusive control over both negotiations and grievance proceedings.[1] To protect employees from possible union abuse, the United States Supreme Court created the duty of fair representation, which requires that a union's statutory authority as exclusive bargaining representative be exercised fairly and without discrimination.[2] In the typical contract ad-

[1] Congress, in enacting federal labor laws, intended to achieve industrial peace by facilitating collective bargaining. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (1976) [hereinafter cited as NLRA]. *See also* Railway Labor Act § 2, 45 U.S.C. § 152 (1976) [hereinafter cited as RLA]. Congress believed that production uninterrupted by strikes and lockouts was best promoted by the settlement of industrial disputes through negotiations between the employer and employee representatives. To ensure the efficiency of such negotiations, federal labor laws make a properly chosen union the exclusive representative for collective bargaining. The NLRA, for example, provides in part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

NLRA § 9(a), 29 U.S.C. § 159(a) (1976). *See also* RLA, § 2 (para. 4), 45 U.S.C. § 152 (para. 4) (1976). Although these sections do not provide for a similar degree of control over grievance procedures, *see* NLRA § 9(a), 29 U.S.C. § 159(a) (1976), most collective bargaining agreements provide that the union has exclusive control over grievance processing. *See* Lehmann, *The Union's Duty of Fair Representation—Steele and Its Successors*, 30 FED. B.J. 280, 282 (1971).

[2] The duty of fair representation was first recognized in Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). The question presented there was whether an all-white union, certified under the RLA, could enter into a collective bargaining agreement which favored its members over black members in the bargaining unit. Black members attacked these racially restrictive covenants on constitutional grounds. Since the union derived its authority from the RLA, state action was present. To avoid the constitutional issue, the Court created the duty of fair representation which it analogized to the equal protection clause:

> We think the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the constitution imposes upon a legislature to give equal protection to the interest of those who it legislates.

Id. at 202. According to the Court, this duty had to be exercised in the interest of and on behalf of everyone represented by the union, without hostile discrimination, fairly, impartially, and in good faith. The doctrine has steadily expanded since *Steele*. In Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), the Supreme Court held that the duty was not limited to cases arising under the RLA but was equally applicable to cases arising

ministration dispute, an aggrieved employee will generally sue both the employer for the initial breach of the collective bargaining agreement, and the union for a subsequent breach of the duty of fair representation in failing to process the grievance adequately. If the court determines that both parties are indeed liable, the remedy question becomes central, requiring the court to demarcate the causal connections among the union's breach, the employer's breach, and the employee's injury.

Apportionment of damages in fair representation suits represents one of the most unsettled issues in labor law today. Although the Supreme Court has attempted to establish a single "governing principle" for apportioning damages, lower courts have read this principle as authorizing two divergent standards for apportionments.[3] Part I of this article traces the evolution from the Court's original standard presented in *Vaca v. Sipes*[4] through two subsequent applications of that standard: the *Czosek v. O'Mara*[5] standard, which interpreted *Vaca* as placing the bulk of damages on the employer, and Justice Stewart's standard taken from his concurrence in *Hines v. Anchor Motor Freight*,[6] which interpreted *Vaca* as placing most of the damages on the union. Part II assesses the adequacy of these two interpretive standards, with criticisms aimed at both of them. Finally, part III proposes a two-tiered analysis for apportioning damages in fair representation suits which synthesizes elements of the *Czosek* and Justice Stewart standards. The implementation of this article's two-tiered analysis would establish a workable apportionment standard consistent with Supreme Court pronouncements. As a result of such an implementation, a significant degree of predictability could be achieved in this complex area.

I. THE EVOLUTION FROM *Vaca v. Sipes* TO DUAL APPORTIONMENT STANDARDS FOR FAIR REPRESENTATION CASES

Vaca v. Sipes,[7] the landmark case in the duty of fair represen-

---

under the NLRA. Although the contours of the duty are still in a state of flux, it is well-established that it encompasses all phases of union security and activity under federal labor law in the negotiation and administration of rights under the collective bargaining agreement. *See* Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 152 (1957).

[3] *See* notes 43-44 and accompanying text *infra*.

[4] 386 U.S. 171 (1967).

[5] 397 U.S. 25 (1970).

[6] 424 U.S. 554 (1976) (Stewart, J., concurring).

[7] 386 U.S. 171 (1967).

tation area, established two standards: one defining the scope of the duty itself, and the second apportioning damages after the breach had been proven. In terms of the standard for breach of the duty, the Supreme Court in *Vaca* held that no breach of the duty of fair representation exists without proof that the union acted arbitrarily, discriminatorily, or in bad faith.[8] Lower courts have seized upon the words "arbitrary, discriminatory, or in bad faith" as the governing standard for breaches, but have disagreed about the words' true meanings.[9] The trend, however, seems to be moving from a bad faith approach toward a more easily breached negligence standard.[10] Under the latter standard, courts have found unions in breach of the duty for missing grievance filing deadlines,[11] failing to investigate arbitration cases fully[12] and failing to notify the grievant that his or her claim has been dropped.[13] Most commentators agree that a negligence standard will increase the likelihood that employees will bring fair representation suits against their unions.[14] Because

---

[8] *Id.* at 190. *Vaca* involved an employee who had been permanently discharged from his job in a meatpacking plant because of high blood pressure. The employee filed a grievance with the union, which processed it up to arbitration but declined to process it into arbitration after a neutral physician concurred with the judgment of company doctors. The employee sued the employer for breach of contract, and sued the union for breach of the duty of fair representation in not processing the grievance into arbitration. Although the Court took this opportunity to analyze the duty of fair representation in depth, it concluded that in the instant case the union had not breached its duty.

[9] *Compare* Cooper v. Westinghouse Elec. Corp., 416 F. Supp. 13, 17 (S.D. Ind. 1976) (some evidence of fraud, deceit, or dishonest conduct must be shown or there is no breach of duty of fair representation), *and* Papillon v. Hughes Printing Co., 413 F. Supp. 1313, 1317 (M.D. Pa. 1976) (there must be substantial evidence of fraud, deceitful action, or dishonest union conduct to show that the duty of fair representation has been breached), *with* De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 284 (1st Cir.) (meritorious grievance may not be ignored by union nor processed perfunctorily, although due care not yet part of union's duty), *cert. denied.*, 400 U.S. 877 (1970), *and* Ruggirello v. Ford Motor Co., 411 F. Supp. 758, 760 (E. D. Mich. 1976) (union that fails to process a grievance without determining its merits breaches the duty of fair representation despite lack of bad faith).

[10] *See* Note, *Determining Standards for a Union's Duty of Fair Representation: The Case for Ordinary Negligence*, 65 CORNELL L. REV. 634 (1980).

[11] Ruzicka v. General Motors Corp., 523 F.2d 306, 310-11 (6th Cir. 1975) (Court noted that "such negligent handling of the grievance unrelated as it was to the merits of [the] case, amounts to unfair representation. It is a clear example of arbitrary and perfunctory handling of a grievance.").

[12] Hines v. Anchor Motor Freight, 424 U.S. 554, 561 (1976) (union's failure to investigate the innocence claim of its discharged members breached the duty of fair representation).

[13] Minnis v. UAW, 531 F.2d 850, 854 (8th Cir. 1975) (employee's claim should not have been subject to summary judgment since the union had accepted his grievance yet inexplicably failed to represent him, and failed to notify him that it had dropped his grievance).

[14] *See* Summers, *The Individual Employee's Rights Under the Collective Agreement:*

more cases will be brought, a clear standard delimiting liability is needed.

A. *The* Vaca v. Sipes *Apportionment Standard*

Once a court establishes that the employer breached its contract and that the union subsequently breached the duty of fair representation, the second standard announced in *Vaca* comes into play. In analyzing the problem of damage apportionment, the *Vaca* Court focused on the relative harms caused to the employees by the different parties' actions.[15] The Court, while recognizing that the appropriate remedy for breach of a union's duty of fair representation should vary with the circumstances of the particular breach,[16] laid down a standard to be applied in all fair representation cases: liability for damages resulting from breaches of the duty should be apportioned in relation to the respective fault of the union and employer.[17] The Court thus re-

---

What Constitutes Fair Representation?, 126 U. PA. L. REV. 251, 278 (1977); Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 U. CIN. L. REV. 55, 74-76 (1972).

[15] Vaca v. Sipes, 386 U.S. 171 (1967). The early fair representation cases centered on the breach of the duty at the bargaining table. *See* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). The courts, therefore, focused their attention on the union's conduct in negotiating the contract. Generally the union's wrongful conduct was not tied to any breach of contract by the employer. Consequently, demands for compensation were restricted to unions, and the relief sought against employers was an injunction against implementation of the agreement. *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, 664 (1979). When the duty was extended from the bargaining table to contract administration, apportionment problems emerged. The dynamics of a fair representation suit at the collective bargaining table are completely different than the dynamics in contract administration. An employee can sue his employer for breach of the collective bargaining agreement under § 301 of the Labor Management Reporting Act. 29 U.S.C. § 185 (1976). But since most collective agreements provide that the union has the sole right to file grievances, the employee has to show that the union breached its duty of fair representation to avoid a defense of failure to exhaust contractual remedies. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). The union's breach of duty in this setting is seen not only as an independent source of liability, but as a vehicle to prevent breaching employers from hiding behind union wrongs. *See* Vaca v. Sipes, 386 U.S. 171, 186 (1967). Prayers for relief in these suits, therefore, are generally for damages against both the union and the employer. Courts initially faced with this problem applied tort damage principles and assessed joint liability. *See* Cunningham v. Erie R.R., 358 F.2d 640 (2d Cir. 1966).

[16] 386 U.S. at 195.

[17] The Court said:

> The governing principle, then, is to apportion liability between the employer and the union according to the damages 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

jected the view of fair representation damages as indivisible. The Court, however, did not clarify the meaning behind the term "fault of the parties."

An indication of what the Court meant, nonetheless, can be gained from its application of this standard in *Vaca*. In *Vaca*, an employee alleged that he had been discharged in violation of the collective bargaining agreement. The employee further charged that the union had "arbitrarily, capriciously and without just . . . cause" refused to take his grievance to arbitration.[18] The company was not a party to the suit.[19] The union alone appealed the lower court's award of damages against it, including contractual back pay. The Supreme Court ruled that damages flowing from the employer's breach of contract could not be assessed against the union.[20] The Court reasoned that although the union had violated a statutory duty in failing to press the grievance, the employer's unrelated breach of contract actually triggered the controversy causing the lost wages that the employee sought from the union.[21] The Court then stated that although damages attributable solely to the employer's breach of contract should not be charged to the union, *increases* if any in these damages caused by the union's refusal to process the grievance should not be charged to the employer.[22] Applying that standard to the facts of the case, the Court stated that even if the union had breached its duty, all or almost all of the employee's damages would still be attributable to the employer's discharge. The Court, consequently, held the damage award improper.[23]

Read in light of its holding *Vaca* indicates that an employer will be held liable for the bulk of the damages in fair representation suit. The union, on the other hand, will only be liable for the *increases* in those damages.[24]

---

union's refusal to process the grievance should not be charged to the employer. *Id.* at 197-98. The Court, in dictum, did recognize one instance where an apportionment on the basis of fault was not necessary. The Court said that in the event of union collusion with the company or wrongful inducement of the discharge by the union, or to the extent the union's conduct clearly made it more difficult for the employee to remedy the company's breach, joint and several liability would be appropriate. *Id.* at 197 n.18.

[18] *Id.* at 173.

[19] *Id.* at 176 n.4. The company was defending a separate action, which was pending below at the pretrial stage.

[20] *Id.* at 196-97.

[21] *Id.* at 197.

[22] *Id.* at 197-98.

[23] *Id.*

[24] *See* Tobias, *supra* note 16, at 76:

The Court in *Vaca* held that the company, rather than the union, usually should be responsible for most of the loss of employment damages suffered by the

B. *The* Czosek *Standard: Refining* Vaca

Although *Vaca* laid down the governing principle for apportioning damages in fair representation suits, the parameters of that principle remained largely undefined. In particular, confusion enshrouded the Court's cryptic statement about the union's liability for "increases" in the damages.

The Court clarified this ambiguity in *Czosek v. O'Mara*,[25] a case arising under the Railway Labor Act. In *Czosek*, former employees of the Delaware Lackawanna Railroad claimed they had been replaced in violation of a merger agreement. The union allegedly remained hostile to the claim throughout, and gave no indication that it would protect the employees' interests. The employees failed to exhaust their administrative remedies by not appealing to the Railroad Adjustment Board; therefore, their complaint against the employer was dismissed.[26] The court of appeals, however, upheld the claim against the union for breach of the duty of fair representation.[27]

In reviewing the union's claim that it should not have been sued alone because the breach had its roots in the employer's improper discharge, the Supreme Court clarified the *Vaca* principle by adopting a "bright line" standard for apportionment of damages in fair representation suits. Under the *Czosek* rule, the employer's liability covers those damages related to "loss of employment", *i.e.*, contractual backpay and benefits. The union's liability extends only to the "added" expenses the employee expends in "collecting from the employer," *i.e.*, attorney fees and court costs.[28] Clearly, the Court viewed the employer's breach of

---

plaintiff. It reasoned that since the company caused and triggered the wrongful discharge, the union should only be liable in the event of union collusion with the company or wrongful inducement of the discharge by the union, or to the extent the union's conduct clearly made it more difficult for the employee to remedy the company's breach. Thus the principal target in most wrongful discharge suits is the company and not the union. [footnote omitted].

[25] 397 U.S. 25 (1970).

[26] *See* O'Mara v. Erie L.R.R., 407 F.2d 674, 677-78 (2d Cir. 1969), *aff'd sub nom.* Czosek v. O'Mara, 397 U.S. 25 (1970). The railroad industry is unique because an employee may present a contractual claim for lost wages against an employer to the Railroad Adjustment Board without union aid or approval. RLA § 3(i), 45 U.S.C. § 153(i) (1976).

[27] O'Mara v. Erie L.R.R., 407 F.2d 674, 678 (2d Cir. 1969); *aff'd sub nom.* Czosek v. O'Mara, 397 U.S. 25 (1970).

[28] The Court stated:

Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle

contract as the cause of any wages lost to employees, whereas the union's breach of the duty of fair representation only caused the legal expenses paid out by the employees to enforce their contractual rights.

The *Czosek* standard, which holds the employer liable for all contractual damages including backpay while holding the union liable for all legal fees, makes sense considering the nature of collective bargaining agreements. Although the collective bargaining agreement shares a number of characteristics with a conventional contract, most of these similarities are superficial. While technically both are agreements between two signatory parties, the union is not the obligor of any contractual duty running to the employees.[29] The employer, as the obligor, should logically shoulder the costs of any damages flowing from the breach of contract. The union's only duty, implied from the statute[30] and existing wholly apart from the contract,[31] is to represent the employees fairly without discrimination.[32] The union that had fairly represented the employee in the grievance procedure would bear the legal fees with the employee receiving the entire amount of the backpay award. In the typical unfair representation case, however, the union's breach of duty forces the employee to hire outside counsel to sue the employer. Unless successful plaintiffs are awarded attorneys fees, they will have to pay them out of the backpay award.[33] As a result, plaintiffs would not be made whole, and in fact would be worse off than if they had been successful in arbitration.[34] Given these features of

---

> the grievances *added to the difficulty and expense of collecting* from the employer. If both the union and the employer have independently caused damage to employees, the union cannot complain if separate actions are brought against it and the employer for the portion of the total damages caused by each.

397 U.S. at 29 (emphasis added).

[29] *See* R. GORMAN, BASIC TEXT ON LABOR LAW 540 (1976).

[30] *See* note 2 *supra*.

[31] That the duty exists outside of the contract is evidenced by its application to the bargaining table. If the duty were derived from the contract, there would be no duty in this precontract negotiation period. *See* Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183, 186-93 (1980).

[32] *See* note 2 and accompanying text *supra*.

[33] *See* Tobias, *supra* note 14, at 84. The author indicates that for a variety of reasons, including the plaintiff's lack of funds, the general unwillingness of defendants to settle, and the inherent difficulties of the cases, plaintiff's counsel may charge a contingency fee of between 33 and 45 percent of any recovery.

[34] The theory behind an award of attorney's fees against the union derives from the well-established principle that a tortfeasor's liability for compensatory damages includes legal fees which proximately result from his wrongful act. *See generally* 22 AM. JUR. 2d DAMAGES § 166 (1965), and Annot., 45 A.L.R. 2d 1183 (1956) (where defendant's tort forces plaintiff to litigate against a third party, the plaintiff's legal fees should be treated as consequential damages caused by the original wrongful act.)

collective bargaining agreements, the *Czosek* interpretation represented a much needed clarification of the original *Vaca* standard.

C. *The Justice Stewart Standard*

In *Hines v. Anchor Motor Freight, Inc.*,[35] Justice Stewart arrived at an interpretation of *Vaca* which differs significantly from the "bright line" standard established in *Czosek*.[36] The Court in *Hines* held that a contractually binding arbitration decision could be set aside by a showing that an employer had breached the contract and that the union had breached the duty of fair representation. On the remedy issue, the Court merely noted that after an employee had proven a wrongful discharge and a breach of the duty of fair representation, he would be entitled to an "appropriate remedy against the employer as well as the Union."[37] The Court, while not explaining the meaning of an "appropriate remedy," presumably referred to the apportionment scheme devised in *Vaca* and refined in *Czosek*.

Justice Stewart offered a different interpretation of the *Vaca* apportionment standard. In his concurrence, Stewart said that a showing that the union breached its duty of fair representation would remove the bar of finality from an arbitration decision. Such a showing, however, should not render an employer liable for backpay accruing between the time of the "tainted" arbitration decision and a subsequent "untainted" determination that the discharges were after all wrongful. Stewart argued that if an employer relies in good faith on a favorable arbitration decision, his failure to reinstate a discharged employee cannot be wrongful, until there has been a contrary determination.[38] To Stewart, the critical phrase in *Vaca* — "increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer" — means that the lost wages and legal fees incurred *after* the breach of the duty of fair representation must be charged to the union.[39] Stewart contended that a contrary result would leave an employer liable for conduct "precisely in accord with the dictates of the collective agreement."[40]

---

[35] 424 U.S. 554 (1976).
[36] *Id.* at 572-73 (Stewart, J., concurring).
[37] *Id.* at 572.
[38] *Id.* at 573 (Stewart, J., concurring).
[39] *Id.* (Stewart, J., concurring) (quoting Vaca v. Sipes, 386 U.S. 171, 197-98 (1967)).
[40] 424 U.S. at 573 (Stewart, J., concurring).

Justice Stewart's placement of liability for lost wages on the union is totally inconsistent with the *Czosek* standard. The original *Vaca* apportionment principle, however, is sufficiently ambiguous to justify Stewart's interpretation. The *Czosek* standard seeks to separate the damages on the basis of what duty is owed to the employee. Because the employer's duty is contractual, the *Czosek* standard places the contractual damages on the employer. Similarly, because the union's duty is to represent the employee, *Czosek* places the cost of securing outside counsel and related expenses on the union. Stewart, on the other hand, does not focus upon the type of duty involved. Rather, the Justice apportions damages on the basis of *when* the union's breach occurred in relation to the employer's breach. Stewart would hold the employer liable for its breach of contract only up to the point where the union's exercise of its duty of fair representation could have gotten the employee reinstated. This standard would place all liability on the union for damages beyond that point, because the union's breach of duty can be viewed as an intervening cause.

Justice Stewart's standard, by focusing on fairness to the employer, facilitates the private settlement of labor disputes. Employers should be encouraged to use private grievance and arbitration procedures because this furthers the goal of achieving industrial peace without government intervention. To this end, employers should be able to rely on an arbitrator's final determination of liability even though their original contract breach preceded the union's breach of duty. If employers cannot rely on the grievance and arbitration procedures set up in the collective bargaining contract, they will be less likely during contract negotiations to agree to such procedures. This would of course frustrate the objective of private settlements.

II. CRITICISMS OF THE STEWART AND *Czosek* STANDARDS

The *Czosek* and Stewart standards represent fundamentally different views about the purpose of damages in fair representation suits. *Czosek* interpreted *Vaca* to mean that a union may not be charged with any damages attributable solely to the employer's breach of contract, even those arising after the union had breached its duty, because to do so would "be a real hardship on the union."[41] Justice Stewart in *Hines*, on the other

[41] Vaca v. Sipes, 386 U.S. 171, 197 (1967), *cited in* Czosek v. O'Mara, 397 U.S. 25, 29

hand, focused on fairness to the employer. To Stewart the union's breach of the duty of fair representation should be viewed as the cause of any damages which occur after that point. In Stewart's view, the union should be held liable for any damages which occurred after its breach of the duty of fair representation because those damages cannot be viewed as "solely" flowing from the employer's contract breach, but are perceived more properly as "increases . . . in those damages."[42] As a result, Stewart placed all liability for these damages on the union.

The distinction between *Czosek's* and Justice Stewart's standards has important practical consequences. Lower federal courts are split as to which standard should apply; consequently two lines of cases have emerged, one following *Czosek*[43] and the other applying the Stewart standard.[44] With the battle lines so clearly drawn between placing the bulk of fair representation damages on the union or on the employer, courts presented with apportionment questions clearly need direction as to which standard ought to be applied in particular situations.

A. Problems Plaguing the Justice Stewart Standard

Justice Stewart's standard, while bolstering employer confidence in the grievance system, suffers from four major shortcomings: an oftentimes misplaced concern for the breaching employer; the questionable causal basis underlying his views on

---

(1970).

[42] 386 U.S. at 197-8, quoted in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 573 (1976) (Stewart, J., concurring).

[43] Segarra v. Sea-Land Service, Inc., 581 F.2d 291, 298 (1st Cir. 1978) (*Czosek* used to illustrate that attorney fees were properly awardable against unions in fair representation suits); Milstead v. International Bhd. of Teamsters Local 957, 580 F.2d 232, 236-37 (6th Cir. 1978) (lower court's award of damages overturned because lost wages may have been included in damages assessed against the union); Scott v. Local 77, Int'l Bhd. of Teamsters, 548 F.2d 1244, 1246 (6th Cir. 1977) (*Czosek* cited as the proper standard on which to apportion damages in remanding for a determination of liability); DeArroyo v. Sindicata de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir. 1970) (court used a "but for" analysis to illustrate that the union was not liable for contractual damages), *cert. denied*, 400 U.S. 877 (1970).

[44] Clayton v. ITT Gilfillan, 102 L.R.R.M. 2190 (9th Cir. 1979) (citing *Hines* concurrence as the proper interpretation of *Vaca*); Battle v. Clark Equipment Co., 579 F.2d 1338, 1350 (7th Cir. 1978) (citing Justice Stewart's concurrence for the generalized principle that an employer's liability should only extend to the point of the union's breach of duty); Attwood v. Pacific Maritime Ass'n, 432 F. Supp. 491 (D. Or. 1977) (citing Stewart for the proposition that employers are entitled to argue that part of plaintiff's damages attributable to the union); Keane v. Eastern Freightways, Inc. 78 Lab. Cas. 20,895 (D. N.J. 1976) (relying on Stewart's standard to hold that an employer cannot be held liable if it relies on an arbitral award).

union liability; his failure to appreciate fully the realities of fair representation litigation; and the limited precedential value of Stewart's concurrence in *Hines*, the source of the Stewart standard.

Justice Stewart's concern for the employer seems misplaced in cases where the union's breach cannot be represented as bad faith misconduct. In *Wyatt v. Interstate & Ocean Transport Co.*,[45] for example, employee Wyatt sued his employer for an on-the-job injury. After settling the personal injury action, the employer fired Wyatt on the pretext of his medical unfitness for work. Wyatt immediately filed a grievance with his union which, after reassurances by the employer that Wyatt was indeed medically unfit for work, failed to take any further actions. A frustrated Wyatt brought suit against the union for a breach of its duty of fair representation and against the employer for breach of contract. The union's position was that its breach of duty — not fully investigating the employee's claim — rested upon a good faith, though misplaced, reliance on the employer's representations about the employee's medical condition, and that the employer possessed the full facts surrounding the discharge and could have reinstated Wyatt at any time to avoid further damages.[46] In cases like *Wyatt*, the employer's wrongful discharge and arbitrary conduct may be found to cause the bulk of damages, and the union's breach plays only a small role in the actual damages caused to the employee. The focus, therefore, should be on fairness to the *union*, not fairness to the employer.

The speculative nature of the damages illuminates a second major weakness in the Stewart formulation. His standard suffers under the difficulty of actually showing a causal connection between the union's breach and a subsequent dismissal or adverse arbitral holding. In most cases no assurance exists that an arbitrator would have found for the employees even if the union had fairly represented them. *Self v. Drivers Local 61*[47] illustrates vividly this second weakness of Stewart's standard. In *Self*, a group of employees engaged in a work stoppage unauthorized by the union.[48] The employer assured the employees that none of them

---

[45] 439 F. Supp. 1310 (E.D. Va. 1977), *rev'd in part, aff'd in part*, 623 F.2d 88 (4th Cir. 1980).

[46] *See* 439 F. Supp. at 1312.

[47] 620 F.2d 439 (4th Cir. 1980).

[48] *Id.* at 442. The plaintiffs were employed by Carolina Freight Carriers Corporation as truck drivers. Due to the union's lack of communication, the truck drivers thought they were working without a contract when in reality a new one had just gone into effect. The drivers began picketing with signs reading "No Contract No Work," and refused to return to work.

would be fired for activities during work stoppage.[49] Despite these assurances, the employers discharged the workers but the union did not protest. The district court held that this amounted to a breach of duty, charging the union for lost wages.[50] The district court's theory of union liability postulated that if the union had protested the dismissal, the employees "might" not have been discharged, or "might have been reinstated but for the union's improper action or inaction."[51] The court of appeals, however, considered this an overly speculative basis for the imposition of liability.[52]

In cases like *Self*, all that can be asserted is what "might or might not have been" — a speculative determination. Stewart's standard would assess liability on this precarious basis. By dividing the liability in all cases at the point where the union breaches its duty of fair representation, Stewart bases liability on the conjecture of what might have been. Considerations of fairness to employers are not sufficient to justify this result.

The *Self* case also illustrates a third reason why Stewart's standard fails: the standard does not recognize the realities of fair representation litigation. In the typical case, the union's breach of duty will have occurred within a few months of the employer's wrongful discharge. Due to the overcrowded condition of the federal courts, the process of trial and appeal for these cases often takes many years.[53] In *Self*, for example, the

---

[49] *Id.* The plaintiffs and other drivers returned to work on the understanding that no employee would be fined for his participation in the work stoppage. Within a few days, however, a large number of drivers received letters from the employer announcing its intention to investigate the stoppage and suggesting that disciplinary action might be taken against some employees.

[50] *Id.* at 443.

[51] The court of appeals said:

> The District Court states: But for Local 61's participation, by action and inaction, in breach of its duty of fair representation, plaintiffs *might well* have not even been discharged; but for the breach by Local 61 of its duty to fairly represent plaintiffs in the grievance procedure plaintiffs would have had full representation and a fair hearing under the applicable procedures before the Bi-State Committee and an independent arbitrator, and *might well* have been restored to their jobs and made whole for their losses in the initial grievance proceeding.

Id. at 443 n.11 (emphasis added).

[52] The court stated: "The union properly does bear responsibility, however, for any expense incurred by the plaintiff directly as a result of the failure of the union to press their initial grievance against the employer. This resolution comports with authority holding a union liable to its members only for damages attributable to its misconduct." *Id.* at 444.

[53] *See, e.g.*, Ruzicka v. General Motors Corp., 336 F. Supp. 824 (E.D. Mich. 1972), *rev'd*, 523 F.2d 306 (6th Cir. 1975), *on remand*, 96 L.R.R.M. 2822 (E.D. Mich. 1977), *appeal docketed*, No. 78-1198 (6th Cir. May 22, 1978). *Ruzicka* is still being appealed after eight years in court.

litigation commenced in 1970 and was not resolved until 1980. The district court determined that lost wages, benefits, and attorneys' fees incurred by these employees from the time of the duty breach amounted to $600,000.[54] Despite the relatively minor nature of the union's breach, the district court placed all these damages on the union.[55] Thus, if Stewart's standard ruled, employers would be liable only for a few months of lost wages, while unions would be liable for the damages accruing during the trial and appeal process. This result is obviously unfair in most fair representation cases, given the length of time between the filing and resolution of the suits in federal court.

Finally, Stewart's standard has only limited precedential value. Justice Stewart's formulation has never commanded the support of a majority of the court. If a majority in *Hines* had been willing to accept Justice Stewart's qualification on the damage issue, there would have been no need for him to concur. Moreover, Justice White authored all three majority opinions in *Vaca, Czosek,* and *Hines.* White's *Hines* opinion does not address the damage issue, presumably because he saw no reason to disturb his majority holding in *Vaca.*[56] Stewart's view on damage apportionment did not persuade White to alter the *Vaca* standard, nor did the majority need Stewart's vote. These facts, along with the criticisms detailed above, indicate that the interpretation of *Vaca* in his *Hines* concurrence belongs uniquely to Justice Stewart.

B. Problems with the Czosek *Standard: Deterring Egregious Union Misconduct*

The *Czosek* standard fills most of the gaps apparent in Stewart's *Hines* concurrence by separating the damages according to who caused the injury rather than focusing on when the injury occurred. By placing the contractual damages on the employer and the representation fees on the union, the *Czosek* standard avoids the inequity of saddling the union with the lost backpay and benefits that the employee incurs during the trial and appeal process. Finally, *Czosek* represents the only Supreme Court holding on the precise issue of apportionment. As a result of

---

[54] *See* 620 F.2d at 440-41.

[55] See *id.* at 443. The district court ordered the union to pay compensation in the form of back pay, losses from lapse of benefits, and allowances from the time of the discharge up to the date of decision, plus attorneys' fees and costs.

[56] *See* note 37 and accompanying text *supra.*

these considerations, *Czosek* clearly serves as the preferred standard in the majority of fair representation cases. The *Czosek* standard, however, does have its disadvantages. Most importantly, the *Czosek* standard leaves courts without a method to deter egregious union misconduct, especially in light of the Supreme Court's holding in *IBEW v. Foust*,[57] forbidding awards of punitive damages in fair representation suits. *Foust* illustrates graphically the competing interests in damage apportionment, and merits extended discussion. In *Foust*, an employee sued his union for failing to file a grievance within the deadlines established by the collective bargaining agreement. The jury awarded the employee both actual and punitive damages against the union. The Tenth Circuit held that punitive damages are appropriate where a union acts wantonly or in reckless disregard of an employee's rights, but remanded to determine whether the punitive damage award was excessive.[58] On certiorari, the Supreme Court reversed the court of appeals, holding that punitive damages were never appropriate in fair representation suits.[59] The Court, noting that the "actual damages caused by a union's failure to pursue grievances may be *de minimis*,"[60] construed *Vaca* as setting limits on union liability.[61]

According to the *Foust* majority, the *Vaca* apportionment scheme attempted to avoid burdening unions beyond the extent necessary to compensate employees for their injuries.[62] In some instances this rule does not deter unions from engaging in egregious misconduct because they are liable for the legal fees in any event. The Court said, however, that deterrence provided an insufficient reason to give juries unbridled discretion to award punitive damages, thereby endangering the financial stability of unions.[63] The minority concurred[64] on the inappropriateness of

---

[57] 442 U.S. 42 (1979).

[58] *See id.* at 45-46.

[59] *Id.* at 52. The majority of five Justices voted to establish this *per se* rule, but the concurring minority of four Justices voted only to ban punitive damages in this and like cases not involving egregious conduct.

[60] *Id.* at 48.

[61] *Id.* at 49.

[62] The Court said:

> The Court in *Vaca* applied the compensation principle not only to gauge the sufficiency of relief but also to limit union liability. Because an employee can recover in full from his employer for its breach of contract, we reasoned that a union which fails to process a grievance predicated on that breach cannot be held liable for damages attributable to the employer's conduct.

Id. at 49-50.

[63] Justice Marshall writing for the majority stated, "Inflicting this risk on employees, whose welfare depends upon the strengths of their union, is simply too great a price for

punitive damages in this case, but expressed concern about erecting a *per se* rule against punitive damages.[65] The concurring Justices wrote that although punitive damages should be unavailable when unions breach the duty in good faith, such damages should be available when unions "notoriously misbehav[e]."[66]

Although *Foust* primarily concerned punitive damages, the Court's opinion illustrates a major shortcoming of *Czosek*. The majority and concurring minority agree that the *Czosek* interpretation of *Vaca* leads to the correct allocation of damages in the majority of cases.[67] The two groups differ over the proper way to handle egregious union misconduct. The majority, while conceding the undesirability of such conduct, shied away from remedying this problem with punitive damages because it feared giving juries the power to bankrupt locals.[68] The concurring Justices feared that courts would not be able to deter wrongdoers without being given some tool to curb egregious union misconduct.[69] *Foust*, therefore, illustrates the problems with the current state of the law on apportionment. The *Czosek* standard, clearly preferred by a majority of the Court, works well in most cases. Apportionment under *Czosek*, however, fails to deter egregious union misconduct because malicious unions suffer no greater liability than merely negligent or careless unions. The inadequacy of the current standards explains the confusion

---

whatever deterrent effect punitive damages may have." *Id.* at 51.

[64] *Id.* at 52 (Blackmun, J., concurring).

[65] The concurring minority noted that: The Court now adopts a *per se* rule that a union's breach of its duty of fair representation can never render it liable for punitive damages, no matter how egregious its breach may be. *Id.* at 52 (Blackmun, J., concurring).

[66] *Id.* at 57 (Blackmun, J., concurring).

[67] The majority wrote in reference to the *Vaca* scheme:

> Recognizing the "real hardship" that large damage awards could impose on unions, the Court found "no merit in requiring [them] to pay the employer's share of the damages." To avoid burdening unions beyond the extent necessary to compensate employees for their injuries, we refused to create an exception even for those unions with indemnification rights against employers. Although acknowledging that this apportionment rule might in some instances effectively immunize unions from liability for a clear breach of duty, the Court found considerations of deterrence insufficient to risk endangering the financial stability of such institutions.

Id. at 50 (citations omitted). The concurrence wrote: "As the court notes, the damages a union will be forced to pay in a typical unfair representation suit are minimal; under *Vaca's* apportionment formula, the bulk of the award will be paid by the employer, the perpetrator of the wrongful discharge, in a parallel § 301 action." *Id.* at 57 (Blackmun, J., concurring) (citations omitted).

[68] *Id.* at 50.

[69] *Id.* at 57 (Blackmun, J., concurring).

among lower courts concerning how to apportion damages in fair representation suits.[70]

III. A PROPOSED ANALYSIS FOR FAIR REPRESENTATION CASES: SYNTHESIZING *Czosek* AND STEWART

The Court's bright line *Czosek* standard represents in most cases, a workable accommodation of the competing policies at issue in fair representation suits. This standard fully compensates employees[71] while at the same time placing the damages on the actor that caused them.[72] In light of the trend toward allowing negligent conduct to breach the duty of fair representation, *Czosek* also relieves the fear that a relaxed standard will mean increased union liability.[73] This apportionment standard should not be adopted without qualification, however, because it fails to provide courts with any method to deter union wrongdoing — a serious shortcoming. The Supreme Court originally created the duty of fair representation to prevent unions from

---

[70] A dramatic illustration of this confusion is supplied by Ruzicka v. General Motors Corp., 96 L.R.R.M. 2822 (E.D. Mich. 1977), *appeal docketed*, No. 78-1198 (6th Cir. May 22, 1978). In this case an auto worker (Ruzicka) was discharged after reporting to work apparently intoxicated. Ruzicka immediately filed a grievance protesting company action and seeking reinstatement. After Ruzicka failed to gain redress through his intra-union remedies he filed suit against G. M. for wrongful discharge and against the union for breach of the duty of fair representation. When the district court was finally presented with the issue of apportionment it was reluctant to accept either the employer's or the union's position. The union argued that the company should be liable for all the damages, including backpay and legal fees flowing from Ruzicka's wrongful discharge. The company, citing Stewart's concurrence, argued that although Ruzicka's discharge was wrongful, the wrong would have been corrected years earlier by an arbitral award in plaintiff's favor had the union not breached its duty of fair representation in mishandling his grievance for reimbursement. The company further argued that although the grievance proceeding was eventually ruled defective it should have been able to rely in the interim on the finality provisions of the grievance procedure. The court rejected both these arguments. Although the court recognized that *both* formulas were supported logically and in the case law it fashioned its own remedy. Stating that it considered the combined action of the parties as the source of Ruzicka's continuing wrong, the court divided the damages in half. 96 L.R.R.M. at 2837.

[71] *See* note 62 and accompanying text *supra*.

[72] See notes 29-32 and accompanying text *supra*.

[73] *See* Vladeck, *The Conflict between the Duty of Fair Representation and the Limitations on Union Self-Government*, in THE DUTY OF FAIR REPRESENTATION 44, 46 (J. McKelvey ed. 1977):

> My primary concern is that while the courts are imposing what appear to be higher and higher standards for the performance of this duty, they do not appear to understand upon whom they are imposing such obligations . . . . We should not forget that unions are governed and administered by nonlawyers, working people who come from the shops.

abusing their exclusive power; such conduct should not go unpunished.[74] Consequently, when union conduct is so egregious[75] that it would support independent liability, additional damages are warranted.[76]

When considered separately, both Justice Stewart's approach and the *Czosek* apportionment method fail to handle the full range of fair representation situations adequately. Justice Stewart's approach seems overly concerned with being equitable to the employer — the party whose breach precipitated the union's breach.[77] This standard could place exorbitant damages on the union for merely negligent conduct, an unacceptable result.[78] Likewise, the *Czosek* analysis, which focuses on causation, will never place more than nominal damages on the union. In the contract administration setting the employee's damage has its roots in the employer's breach of contract.[79] Consequently, it can rarely be said "but for" the union's breach the employee would not have been damaged.

Stewart's analysis, nevertheless, seems especially valuable as a device to deter egregious union conduct without permitting juries to impose unlimited punitive damages. Significantly, Stewart's apportionment approach in the cases of egregious conduct solves the dilemma the Court faced in *IBEW v. Foust*.[80] Both the majority and concurrence in *Foust* recognized that union misconduct should be deterred;[81] they merely disagreed on whether punitive damages provided the vehicle for curbing such conduct. Stewart's standard answers the majority's concern about giving juries unchecked power to wreak havoc on union treasuries[82] because damages will be limited by the employee's

---

[74] Unless the Court provides a method of deterring notorious union wrongdoing, courts may seek ways of distinguishing *Foust* and assess punitive damages anyway. *See* Anderson v. United Paperworkers Int'l Union, 484 F. Supp. 76 (D. Minn. 1980). In *Anderson*, the court held that *Foust* did not create a *per se* rule against punitive damages, but merely a rule which forbade punitive damages where the union had only been negligent. The court in this case found an intentional misrepresentation by the union to the employees and asssessed punitive damages.

[75] Justice Blackmun, writing for the concurring minority in *Foust*, listed as examples of the type of conduct which can be characterized as egregious: "intentional racial discrimination, deliberate personal animus, or conscious infringment of speech and associational freedoms . . . ." 442 U.S. at 60. While this list is by no means exhaustive, it is indicative of the type of conduct being referred to.

[76] See Linsey, *supra* note 15, at 678-79.

[77] *See* notes 46-47 and accompanying text *supra*.

[78] *See* note 55 and accompanying text *supra*.

[79] *See* Summers, *supra* note 14, at 254-63.

[80] 442 U.S. 42 (1979). *See* notes 68-69 and accompanying text *supra*.

[81] *See* notes 66-69 and accompanying text *supra*.

[82] *See* note 68 and accompanying text *supra*.

actual losses. It also answers the concurring Justices' concern about leaving courts without the tools to curb egregious union misconduct.[83] The threat of being assessed a large portion of compensatory damages, which follows from Stewart's standard, would deter those unions inclined to discriminate or engage in other wrongful conduct.

A. A Two-Tiered Analysis for Fair Representation Suits

This article recommends that courts adopt a two-tiered analysis for fair representation cases. Under the first tier of the analysis, a court in general would presume that the *Czosek* standard applies. The employer, then, would be responsible for all damages flowing from his breach of contract — *i.e.*, wages, lost benefits, and fringes. Similarly, the union would be liable for all damages resulting from its failure to fairly represent the employee — *i.e.*, attorney fees and court costs. Under the second tier of the analysis, however, a court uncovering evidence of "egregious union misconduct" would apply Stewart's standard rather than *Czosek* when apportioning damages.[84] Accordingly, the union would be liable for damages which accrued after its misconduct, including both back pay and litigation costs. This two-tiered analysis synthesizes the best elements of the *Czosek* and Stewart standards.

A critical problem for this analysis is in defining "egregious union misconduct". A court following the guidelines discussed here would undertake in every fair representation suit a factual investigation of the union's conduct. Obviously, no bright line can be drawn between "egregious" and other union behavior. Certain broad categories of activities, nevertheless, can be singled out as examples of egregious union misconduct. Intentional discrimination of any type, deliberate personal animus, or a conscious infringement of speech or associational freedoms, for example, could serve as starting-point characterizations of egregious union misconduct.[85] If a court found any one of these types of behavior when measuring the union's behavior, then the

---

[83] *See* note 69 and accompanying text *supra*.

[84] Since the presumption favors the *Czosek* apportionment standard, it would be in the employer's best interest to bring forth evidence of union misconduct because it would be relieved of a large portion of damages. If due to a statute of limitations or other procedural problem the employer cannot be joined in the suit, it would be in the employee's best interest to bring forth evidence of union animus to receive full compensation.

[85] *See* note 75 and accompanying text *supra*.

second tier of the analysis would govern damage apportionment. Courts, of course, would refine the concept of egregious misconduct on a case-by-case basis.

B. Applying the Two-Tiered Analysis

A hypothetical example, based upon *Ruzicka v. General Motors Corp.*,[86] illustrates how this article's two-tiered analysis facilitates equitable apportionment of damages in fair representation suits. In *Ruzicka*, the supervisor encountered the plaintiff, an autoworker, in an apparently drunken state. Rather than following shop custom by sending him home for the balance of the shift, the foreman took Ruzicka to the company's labor relations office for a disciplinary interview.[87] During the wait, Ruzicka made a number of threats to the supervisor. The company discharged Ruzicka immediately after the interview, even though the arbitrator later found that at most a thirty-day suspension without pay was justified.[88] Ruzicka thereafter filed a grievance seeking reinstatement. The union, however, allegedly failed to meet the deadlines mandated by the contract for grievance processing, and GM refused to consider the grievance further.[89]

How should the damages be apportioned in a hypothetical suit brought by Ruzicka against both the employer and the union? A court employing the two-tiered analysis would first determine the reasons why the union failed to process the grievance. If the union's failure amounted to merely negligent conduct, then the first tier of the analysis dictates that the *Czosek* standard apply. A court determining that the union's failure constituted egregious misconduct, on the other hand, would be compelled under the second tier of this analysis to apply Stewart's *Hines* standard.

In the hypothetical above, where the court characterizes the union's breach as negligent[90] rather than as egregious[91] misconduct, the equities clearly favor assessing the employer with the bulk of the damages — a result achieved through the use of the *Czosek* standard. The employer breached the contract by discharging Ruzicka for an infraction that only warranted a suspen-

---

[86] 96 L.R.R.M. 2822 (E.D. Mich. 1977), *appeal docketed*, No. 78-1198 (6th Cir. May 22, 1978).

[87] *Id.* at 2825.

[88] *Id.* at 2828.

[89] *Id.* at 2825.

[90] *See* note 14 and accompanying text *supra*.

[91] *See* note 75 and accompanying text. *supra*.

sion penalty. At all times thereafter, the employer alone held the power to reinstate Ruzicka and award him backpay. Yet, the company refused to take such an action. In contrast, the union though negligent, acted in good faith. Although they missed a grievance filing deadline, they still attempted to process the complaint. Under *Czosek*, the union would only be assessed legal fees and court costs, clearly a more equitable result in this situation. Consequently, a court examining this hypothetical fair representation suit would utilize only the first tier of the suggested apportionment.

A change in the hypothetical's facts demonstrates how the second tier of the analysis operates. If the court discovers, for example, that the local failed to meet the filing deadline because the union hierarchy disliked employee Ruzicka, then Stewart's standard should be applied.[92] Under these facts, the union breached its duty through conscious discrimination — egregious conduct under any definition. If the union had processed the grievance, an arbitrator probably would have found the company in breach of contract, and reinstated Ruzicka with backpay.[93] In this situation, the equities side with the employer. Although the employer initially breached the contract, the union willfully undermined the grievance procedure which could have resolved the entire dispute.

The Supreme Court developed the duty of fair representation to curb this type of discriminatory union conduct.[94] Placing the bulk of damages on the union to deter egregious misconduct, therefore, is logically sound. The second tier of the proposed analysis, which accomplishes this task, should by applied whenever the court uncovers evidence of gross union misconduct.

CONCLUSION

Although the law of apportionment is still in a confused state, the present Supreme Court seems to view the *Czosek* standard as the correct method of apportioning damages. Justice Stewart's standard outlined in *Hines*, however, presents an attractive

---

[92] In *Ruzicka*, the plaintiff had attempted to show that his grievance was not processed because of the hatred his union steward had for him. He was, however, unable to demonstrate conclusively that the steward's personal animus was the proximate cause of the failure to meet the deadline. *See* 96 L.R.R.M. at 2826.

[93] In every other similar situation the most severe penalty imposed for first time on-the-job intoxication was a disciplinary layoff. *Id.* at 2828.

[94] *See* note 2 and accompanying text *supra*.

method for overcoming the problem that the Court created by banning punitive damages in fair representation suits. His standard provides courts with a way to curb union wrongdoing without endangering the financial strength of unions if juries were granted the power to award massive punitive damages. This article's synthesis of the *Czosek* and Stewart standards preserves the goal of promoting industrial peace through collective bargaining, without the jeopardy to individual rights which results if union misconduct is allowed to go unchecked.

—Kenneth B. McClain