The Contractual Duty of Competent Representation

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Unions have a duty to represent employees fairly, but it is not at all clear that they have a duty to represent them well. If an employee files a grievance against her employer, and the union fails to represent her adequately because she's female, or because she's black, or because she supported the losing slate of candidates in the last union election, the union has violated its duty of fair representation. That kind of intentional differential treatment is unfair in both the statutory and the common-sense meaning of the word unfair; the union has treated her differently than it would treat other, similarly situated persons because of factors deemed irrelevant or inappropriate such as race, gender or political activity. But what if the union fails to represent the employee adequately because the union grievance handler misplaced her form, or miscalculated and filed the grievance too late? That may be incompetent and careless, but it is not unfair in the same way that gender, racial or political discrimination is unfair.

The federal courts have long had difficulty with the issue of whether negligent or incompetent—but not intentionally discriminatory—handling of employee grievances violates the duty of fair representation. The Sixth and Ninth Circuits have held that a union's negligent failure to process a grievance in a proper and timely manner may breach the duty of fair representation without any showing of bad intent. The leading proponent of the opposite view is the Seventh Circuit: it requires a showing of intentional misconduct and has repeatedly declined to find a breach of the duty even in cases of extreme carelessness. The Seventh Circuit's approach—"the most rigid standard for establishing a breach of the duty of fair representation"—is open to criticism as leading to overly harsh results.

It is extremely harsh when an employee unjustly loses her job and fails to regain it because of the union's negligence. But that begs the
essential question: should the duty of fair representation protect against intentionally discriminatory or unfair treatment? In this article I argue that the Seventh Circuit's approach to the statutory duty of fair representation is basically sound. That court is right when it holds that the duty of fair representation as it has developed sets a standard for union fairness, and not a standard for union competence. But that does not necessarily mean that employees are entirely without remedies for union incompetence or that, as the Seventh Circuit implies, their only remedy is to kick out the union and replace it with a more careful and competent one. The relationship between a union and the workers it represents is both a statutory and a contractual one. The contractual part of the relationship may very well establish meaningful and enforceable obligations of union care and competence, and when unions breach those contractual obligations there is no persuasive reason why they cannot be called to task before a federal or state court or another appropriate forum.

I. THE GRIEVANCE HANDLING PROCESS

Although it is certainly possible for a union to be negligent or incompetent in other areas, most of the duty of fair representation cases involving negligence or incompetence arise in the area of grievance handling. Nearly all collective bargaining agreements between employers and the unions representing their employees include a procedure for handling employee grievances. Typically, the procedure gives an employee one or more opportunities to present the grievance to management officials. If that does not resolve the matter, most agreements provide for some sort of final and binding arbitration. The great majority of such agreements provide that an employee on his own cannot invoke arbitration, "the most costly and time-consuming step in the grievance procedure"; that decision must be made by the union, which usually shares the cost of arbitration with the employer and thus has a strong financial incentive to avoid taking nonmeritorious cases to arbitration.\(^2\)

Unions do not take every asserted grievance to arbitration, and quite naturally the care and effort a union takes in representing a grievant varies considerably from case to case and from union to union. Some unions hire lawyers to handle grievances; others use highly-skilled lay grievance

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3. The union has other incentives to avoid taking nonmeritorious grievances to arbitration as well. Pursuing nonmeritorious grievances can be destructive of the valuable working relationship between union and company representatives. Employers may consider such conduct to be a form of harassment, and the union will lose valuable credibility if it takes every case to arbitration (i.e., invoking arbitration will no longer be regarded as a sign of serious union concern).
handlers who are full-time, paid employees or officers of the union; still others rely on unpaid union officers—co-workers of the grievant who have been elected to their union positions. Most unions make some sort of subjective evaluation of the importance and merit of each case and allocate their efforts and resources accordingly, expending considerable resources on important and meritorious cases, applying somewhat less effort on cases seen as less important or of lesser merit, and declining to take nonmeritorious cases to arbitration at all. In discussing potential arbitration cases with management representatives, union grievance handlers may engage in “horse trading,” agreeing to drop weak or unimportant cases in return for favorable settlement of stronger or more important cases.

The union representative’s evaluation of the importance and strength of any particular grievance may not coincide fully with that of the grievant, and conflicts may arise when the union drops a grievance or devotes less effort to it than the grievant believes it deserves. In addition to disagreements over the merits of grievances, disputes may arise over the care and competence of the union’s representation. Sometimes grievance papers are lost; the competence and experience of some lay grievance handlers and of some lawyers is limited; and the diligence of the union’s representation may depend upon whether the grievant is in the union’s good graces and on whether his cause is popular. Grievances may be lost or dropped out of negligence, as a result of incompetence, or because of hostility toward the grievant or his claim.

When an employee is unhappy with the outcome of his grievance, his options are limited. Section 301 of the Labor Management Relations Act\(^4\) authorizes employees to seek relief in court for violation of their rights under a collective bargaining agreement,\(^5\) but those rights are defined and limited by the collective bargaining agreement which creates them, and in nearly all cases the agreement will provide that the exclusive remedy is that which results from the operation of the grievance procedure. An employee must exhaust the contractual remedies before seeking relief in court, and in most cases the outcome of the contractual process is final and binding, whether that outcome is determined by an arbitrator’s decision, by the decision of the union not to take a case to arbitration, or by neglect, incompetence or procedural error making arbi-

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5. Smith v. Evening News Ass’n, 371 U.S. 195 (1962). Section 301 authorizes “[s]uits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations.” Smith interpreted § 301 to allow suits by employees claiming breach of such contracts.
II. THE DUTY OF FAIR REPRESENTATION IN THE SUPREME COURT

One of the few ways in which an employee may be able to avoid the final and binding effect of the resolution reached through the grievance procedure is by demonstrating that the union's handling of the matter breached the duty of fair representation and thereby precluded the employee from exhausting the contractual remedy in a meaningful way. The Supreme Court's initial application of the duty of fair representation came in a case under the Railway Labor Act involving a union's substantive position in contract negotiations rather than its role as grievance handler. The Brotherhood of Locomotive Firemen and Engineers, which limited its membership to whites, was nevertheless (by operation of the statute) the exclusive representative for a bargaining unit of Louisville & Nashville Railroad firemen which included a substantial minority contingent of black firemen. In 1940, the Brotherhood announced a desire to amend its collective bargaining agreement with the Louisville & Nashville and other railroads in a way that would ultimately exclude all blacks from employment as firemen. Early the next year, the railroads agreed to new collective bargaining provisions limiting the employment of black firemen. Steele, a black fireman, sued claiming that the union's conduct violated his rights under the Railway Labor Act. The Supreme Court, reversing a decision of the Supreme Court of Alabama, upheld Steele's claim:

We think that 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 interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it has also imposed on the representative a corresponding duty. We hold that [the Act] expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

9. The Brotherhood sought a rule limiting promotion to engineer to whites coupled with a rule that only "promotable" workers should be employed as firemen. Id. at 195.
10. Id. at 202-03 (citations omitted).
Eleven years later, the Court held that the National Labor Relations Act included a similar duty of fair representation.\textsuperscript{11}

Although the initial duty of fair representation cases dealt with union efforts to adopt and enforce racially discriminatory workplace standards, the Court soon extended the duty to other situations.\textsuperscript{12} The Court set the standard for evaluating duty of fair representation claims involving grievance handling in \textit{Vaca v. Sipes}.\textsuperscript{13} In that case, an employer discharged a worker named Owens after the company doctor judged that Owens's high blood pressure rendered him unfit for work. The union represented Owens through the preliminary steps of the grievance procedure. Under the collective bargaining agreement, employees did not have a right to take grievances to arbitration on their own; the decision to arbitrate a grievance had to be made by the union's executive board. Before taking Owens's case to arbitration, the union sent him to another doctor of Owens's choice at union expense. That doctor issued a report supporting the company's position, and the union decided not to arbitrate the matter. Owens filed a section 301 suit, claiming that the doctors were wrong and that in any event he had a right to an arbitrator's determination on the merits of his grievance. There was no allegation or evidence of racial hostility or other personal animosity between Owens and the union officials who decided not to take his grievance to arbitration.

The Supreme Court held that Owens's claim was of a breach of the duty of fair representation but that the evidence—which at most showed that the determination of medical unfitness was incorrect and which would not support a finding of bad faith or arbitrariness—failed to sustain the claim:

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. . . . Some have suggested that every individual employee should have the right to have his grievance taken to arbitration. Others have urged that the union be given substantial discretion . . . to decide whether a grievance should be taken to arbitration, subject only to the duty to refrain from pa-

\textsuperscript{11} Syres v. Oil Workers Int'l Union, Local No. 23, 350 U.S. 892 (1955), rev'g 223 F.2d 739 (5th Cir. 1955). In \textit{Syres}, the Court, relying on \textit{Steele}, summarily reversed a Fifth Circuit decision that there was no duty of fair representation under the National Labor Relations Act. The case involved racial allegations similar to those in \textit{Steele}.

\textsuperscript{12} See, e.g., Humphrey v. Moore, 375 U.S. 335, 342 (1964) (allowing a union decision to dovetail seniority rosters); Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38 (1953) (allowing a union's agreement to seniority credit for military veterans).

\textsuperscript{13} 386 U.S. 171 (1967).
tently wrongful conduct such as racial discrimination or personal hostility.

Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.\(^{14}\)

The Court went on to say that “[i]n a case such as this, when Owens supplied the Union with medical evidence supporting his position, the Union might well have breached its duty had it ignored Owens’ complaint or had it processed the grievance in a perfunctory manner.”\(^{15}\)

In deciding fair representation claims ever since, courts have invoked the litany “arbitrary, discriminatory, or in bad faith,” but there has been substantial disagreement as to the meaning of those words.\(^{16}\) If a union bases its collective-bargaining or grievance-handling decisions on racial animosity, the status of the grievant in the union or his support of the union leadership, personal hostility, or any other form of intentional misconduct, it certainly has breached its statutory duty. But the Supreme Court has not decided whether union carelessness or incompetence, without malicious intent, violates the duty. Is negligent or incompetent advocacy (or negligent failure to pursue a grievance) what the Court means by “perfunctory treatment”?

### III. NEGLIGENT GRIEVANCE HANDLING IN THE COURTS OF APPEALS

The courts of appeals have had to devise a more precise definition of the duty of fair representation. They have been faced with a variety of claims involving simple forgetfulness and carelessness in the more mechanical aspects of grievance processing,\(^{17}\) failure to interview the

\(^{14}\) Id. at 190-91 (footnotes and citations omitted).

\(^{15}\) Id. at 194.

\(^{16}\) The Supreme Court has decided relatively few duty of fair representation cases since Vaca and none have significantly expanded upon or clarified its standard. In Amalgamated Ass’n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 299-301 (1971), the Court in dicta implied that the Vaca standard required a showing of “fraud, deceitful action or dishonest conduct” on the part of the union. Five years later, however, the Court ignored Lockridge and reiterated that arbitrary or perfunctory handling of grievances violates the duty of fair representation. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 568-69 (1976). See also DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 164 (1983) (indicating that a union breaches the duty of fair representation when it handles a grievance in a “discriminatory, dishonest, arbitrary or perfunctory fashion”); Bowen v. United States Postal Serv., 459 U.S. 212, 222 (1983) (breach of the duty of fair representation characterized as “wrongful union conduct”).

\(^{17}\) See, e.g., Graf v. Elgin, Joliet & E. Ry., 697 F.2d 771 (7th Cir. 1983); Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1272 (9th Cir. 1983); Hoffman v. Lonza, Inc., 658 F.2d 519, 520 (7th Cir. 1981); Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975).
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18. Such failures might result in the union not taking a meritorious case to arbitration because of a mistaken evaluation of its merit, or in poor representation at grievance hearings or before an arbitrator. See, e.g., Dober v. Roadway Express, Inc., 707 F.2d 292, 293-94 (7th Cir. 1983); Cote v. Eagle Stores, Inc., 688 F.2d 32, 34 (7th Cir. 1982), cert. denied, 459 U.S. 1218 (1983).


20. 697 F.2d 771 (7th Cir. 1983).

21. Graf, who had been working for the railroad for two years, had sustained an injury on the job. In investigating the injury the railroad learned that he had also been injured on a previous job and had failed to report that injury or that previous job on his application. Id. at 773.

22. The appeal form was handwritten, as is apparently customary at that workplace. It stated: "Please consider this as a appeal to your disson ... [terminating Graf]. I can't except your disson and therefore appeal to the next highest officer of the carrier. We ask that he be reinstated with seniority intack and all back wages. [sic]" Id. at 774.

grievant or to investigate the facts of the grievance, and incompetent or inadequate advocacy by a union representative at preliminary grievance hearings or before an arbitrator, and they have handled these claims in varied ways. Some courts—with the Sixth and Ninth Circuits leading the way—have held that at least under some circumstances union negligence does breach the statutory duty of fair representation while others—particularly the Seventh Circuit—have flatly rejected that view. It is useful to examine the contrasting approaches in some depth.

Perhaps the paradigmatic case of union negligence—and certainly a good illustration of the Seventh Circuit's approach—is Graf v. Elgin, Joliet & Eastern Ry. Graf was discharged for omitting a portion of his employment history on his job application. He filed a grievance, which was denied at the initial level, and asked his union representative to appeal. The union man agreed, filled out the appeal form, put it in his pocket, and found it still there after the 60-day time period for filing appeals had elapsed. There was no evidence that the union representative was guilty of anything but carelessness; it seems that he simply misplaced and forgot about the appeal form. The Seventh Circuit held that the carelessness of the union representative did not give rise to a claim of breach of the duty of fair representation:

The standard is as follows. The union has a duty to represent every worker in the bargaining unit fairly but it breaches that duty only if it deliberately and unjustifiably refuses to represent the worker. Negligence, even gross negligence . . . is not enough; and, obviously, intentional misconduct may not be inferred from negligence, whether simple or gross. . . . [The union representative] was not trying to do in Graf; nor does his lapse of memory signify such a reckless indifference to Graf's interests that it can be called intentional misconduct. . . . There is no evidence that [the union representative] was acting in bad
faith.23

The court did not attempt to attribute this standard to any words of the Supreme Court. To the contrary, it acknowledged that "[t]he proper standard cannot be determined by parsing ambiguous dicta."24 Instead, it rested on its conception of how unions operate, are staffed and maintain their status as exclusive representative:

A practical consideration in favor of a narrow standard of liability is suggested by the text of the appeal drafted by Evans. Most of the union officers who process grievances and commit the gaffes that propel the Grafs of this world into court are not professional advocates. They are hourly workers "grieving" on a part-time basis. It would not be realistic to try to hold them to the same standard as lawyers, who are liable in damages if they fail to file their clients' appeals on time, and yet Graf wants us to judge Evans' inaction by what amounts to a concept of professional malpractice.25

Although Graf involved an employment relation governed by the RLA, rather than the Taft-Hartley Act, the Seventh Circuit has applied the same standard and used the same reasoning in Taft-Hartley cases.26

In another case—Dober v. Roadway Express, Inc.27—the court made clear the reason for its rigid distinction between unfair representation and inadequate or incompetent representation: only in the former is intervention required. "[Workers] do not need our protection against representation that is inept but not invidious. If a local union does an incompetent job of grieving, its members can vote in new officers who will do a better job or they can vote in another union."28 An individual employee or a minority group of employees suffering intentionally discriminatory treatment would have little power to oust the union. In fact, the unfair treatment of these employees may bolster the union's support among the majority of employees. But negligence or incompetence—randomly distributed—is likely to be of concern to everyone and the employees in the bargaining unit can be expected to force change (either of the union's grievance handlers and officers or of the union itself) when the level of service falls below their minimum standard.

The Seventh Circuit's approach in Graf may be contrasted with that

23. Id. at 778-79. This was the court's statement of its duty of fair representation standard under the general federal labor laws. The court went on to hold that the standard also applies to cases under the Railway Labor Act.
24. Id. at 778.
25. Id. at 779.
26. See, e.g., Camacho v. Ritz-Carlton Water Tower, 786 F.2d 242 (7th Cir.), cert. denied, 106 S. Ct. 3282 (1986); Dober, 707 F.2d 292; Hoffman, 658 F.2d 519.
27. 707 F.2d 292 (7th Cir. 1983).
28. Id. at 295.
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of the Ninth Circuit in *Dutrisac v. Caterpillar Tractor Co.*

and the Sixth Circuit in *Ruzicka v. General Motors Corp.*

In *Dutrisac*, Caterpillar Tractor Company fired Bill Gamble allegedly for excessive absenteeism, but he claimed the discharge was racially motivated and filed a grievance. Caterpillar denied the grievance at the preliminary steps and the union decided to take the case to arbitration. But the union representative made a mistake in calculating the date on which the formal request for arbitration was due, and he filed it two weeks late. The arbitrator dismissed the grievance as untimely. Gamble then sued the union, claiming that its mishandling of the grievance breached the duty of fair representation. The court of appeals upheld the claim, even though it specifically acknowledged that there was no evidence of intentional misconduct.

Although the court noted that the union should be given wide discretion in matters involving judgment—for example, in evaluating the merits of a grievance—it found that “no purpose” would be served by allowing the employee’s rights to be determined by the union’s negligent “failure to perform ministerial acts.”

*Ruzicka* involved similar facts. General Motors fired William Ruzicka for being intoxicated on the job and for verbally abusing his supervisor. Ruzicka did not deny his actions or contest their impropriety, but he filed a timely grievance claiming that the penalty was unduly harsh. The company denied the grievance at the preliminary steps, and the union filed the notice required to invoke arbitration. But the collective bargaining agreement also required the union to file a detailed statement of the grievance; the union, without explanation, failed to file the statement, and the grievance expired. Ruzicka sued the union, claiming a violation of the duty of fair representation. The district court dismissed the suit, holding that mere neglect, rather than intentionally hostile inaction, was insufficient to establish a duty of fair representation claim. The court of appeals reversed, holding that the union’s “negligent and perfunctory handling” of Ruzicka’s grievance constituted unfair representation.

Neither the *Ruzicka* nor the *Dutrisac* court addressed the arguments

29. 749 F.2d 1270 (9th Cir. 1983).
30. 523 F.2d 306 (6th Cir. 1975).
31. 749 F.2d at 1272.
32. *Id.* at 1274. The court's decision was not without limits: “[W]e limit our holding that union negligence may breach the duty of fair representation to cases in which the individual interest at stake is strong and the union’s failure to perform a ministerial act completely extinguishes the employee’s right to pursue his claim.” *Id.*
33. 523 F.2d at 310. The same approach was taken by the First Circuit in *De Arroyo v. Sindicato De Trabajadores Packing House*, 425 F.2d 281, 284 (1st Cir. 1970).
made in *Graf* and other Seventh Circuit opinions. *Ruzicka* relied primarily on the ambiguous dicta of *Vaca v. Sipes*, and *Dutrisac* simply saw no purpose in insulating unions from liability for their negligence and asserted that the threat of liability would promote greater care.\(^{34}\)

**IV. SHOULD NEGLIGENT GRIEVANCE HANDLING BE INCLUDED WITHIN THE DUTY OF FAIR REPRESENTATION?**

This, of course, brings us to the point where we must ask which of the two divergent views should carry the day. There are two strong arguments which have been made in favor of including union negligence within the duty of fair representation, but neither seems entirely persuasive. First of all, as Professors Harper and Lupu point out, the explanation of pure negligence ("I forgot" or "I miscalculated the filing date and was late") may be an easy disguise for hostility. After intentionally failing to file an arbitration demand in a timely manner because the grievant was on the outs with the leadership or his cause was unpopular, a union defending a duty of fair representation lawsuit would be unlikely to admit its improper motive, but much more likely—especially in the Seventh Circuit—to claim inadvertent error. "We decided not to take the case to arbitration" becomes all too easily "we forgot" or "we misplaced the

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Under some of the models, negligent grievance handling would generally breach the duty of fair representation. *See Cheit, Summers and VanderVelde, supra*. In others it would not. *See Harper & Lupu, supra*. Perhaps the most ingenious means of fitting negligence cases into a model that would otherwise seem to exclude them was that devised by Professors Harper and Lupu. Their equal protection model of fair representation rejects any "duty-of-care norm" for union grievance handling, but accommodates cases of carelessness and serious neglect by in effect assuming that pure negligence never occurs. Their model includes "an irrebuttable presumption that the use of unreasoned negligence as a justification for departing from [a union's] usual grievance handling processing standards hides an improper motive" and therefore breaches the duty of fair representation. *Harper & Lupu, supra*, at 1275. One must ask why, under their equal protection model, this presumption must be irrebuttable, unless they are merely unwilling to adhere to a model which would rule out liability for negligence. Suppose, for example, that a union shop steward was handling a grievance for an employee who just happens to be his neighbor, his best friend, and his brother-in-law, all in one. He carefully fills out the form demanding arbitration, checks all the details with the grievant, places it on top of the pile in his briefcase to be filed the next morning (the deadline date), but then in the press of an unexpectedly busy day at work (or because he is distracted by his wife's illness or his son's destruction of the family automobile) he simply forgets to turn in the form. Under such circumstances, what justification is there for an "irrebuttable presumption [of] improper motive"?
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form" or "we inadvertently filed it too late." The Seventh Circuit's rule
is almost certain to shelter some intentional misconduct.

This criticism at most warrants a refinement of the intentional mis-
conduct rule, not its abandonment. Even in the Seventh Circuit a trial
court should be free, upon hearing evidence that the allegedly negligent
union conduct was toward a disfavored employee or in regard to a disfa-
vored cause, to make a determination that the action was not negligent at
all, but was instead intentional, improper conduct. The court would be
required to make the kind of credibility determination trial courts often
have to make and should consider both the evidence of the grievant's
unpopularity (or that of his cause) and evidence of the likelihood that the
union's conduct was inadvertent in light of the union's grievance-hand-
ling record and its procedures. There seems no need for any irrebut-
table presumption of improper conduct in such cases, but neither is there
any good reason to prohibit the court from making a credibility determi-
nation against the union.

The second argument in favor of including union negligence within
the duty of fair representation is that the contrary rule leads to overly
harsh results, especially in discharge cases. When an employee is termi-
nated in breach of his contractual rights and fails to win reinstatement
solely because the union failed to protect those rights in a careful and
competent manner, should he be left without any recourse?35 Stated this
way, the argument is weak. The duty of fair representation clearly does
not protect employees against unjust dismissals or other harsh outcomes.
The duty sets no minimum level of procedural protection or representa-
tional service; it does not require unions to play any part in the grievance
process or to negotiate for any procedural protection for dismissals. A
union may negotiate a collective bargaining agreement allowing an em-
ployer complete discretion in matters of hiring, firing, promotion, job
assignment and so forth.36 The union may decide that the employees it

35. Some may argue that this is unlikely ever to happen, because if an employee can truly
demonstrate that his discharge was improper, his employer will reinstate him without the assistance
of the union. But even in a case of plain employer error (e.g., firing the wrong "John Smith" or
discharging an employee for some misconduct that is later proven to have been committed by some-
one else), will an employer not only reinstate the wronged employee but also pay him for the time
away from the job? More importantly, most cases of wrongful discharge are not so simple. Arbitra-
tors often find that a discharge is wrongful and order reinstatement not because of such glaring
employer errors, but because the employer failed to follow the required procedures, did not use
"progressive discipline," or imposed too harsh a penalty for the offense. In such cases, it seems
highly unlikely that an employer would reverse itself voluntarily. See F. E L K O U R I & E. E L K O U R I,
How Arbitration Works 650-707 (4th ed. 1985); R. FLEMING, The Labor Arbitration Pro-

36. Or a union might negotiate a collective bargaining agreement which provides that employ-
ees cannot be dismissed except for just cause, but that provides either no mechanism for enforcing
represents are better off giving the employer that discretion in return for better pay, benefits or working conditions. An employee "unjustly" discharged who is covered by such an agreement could complain of no violation and would have no remedy arising from the federal labor law or the terms of the agreement. That, too, is a harsh result, but not one that breaches the statutory duty of fair representation.

But the argument can be stated in a stronger way: of course unions need not negotiate any substantive or procedural protection against unjust discharges or other unfair employer action, but when they do negotiate substantive rights that could ordinarily be enforced by individual employee suits under section 301, and then agree to exclusive contractual remedies that both preclude section 301 suits and give the union (rather than the employee) control over the employee's grievance, then the union is obligated to exercise care and competence in handling the matter for the employee. 37

There are several faults with the argument stated this way, as well. To begin with, because it is dependent upon the existence of a certain contractual arrangement (substantive rights coupled with exclusive union control of the remedial procedure) which may vary greatly from contract to contract, it seems more an argument about the contractual obligations of unions rather than their statutory obligations. In effect, it assumes an additional contractual clause, one that requires the union to exercise a certain degree of care when it has exclusive control, but it makes that assumption without regard to contractual evidence. More importantly, whether we consider the obligation of care and competence to arise out of contract or out of the statute, it is not at all clear that it is an obligation that should be imposed on every union. It is not self-evident that whenever a union negotiates for exclusive control over the grievance process (or at least over arbitration) the employees would be willing to pay for the highest degree of care. Care is not cost free; it costs much more to have lawyers handle grievances than to have full-time paid

that right or even a final and binding mechanism pursuant to which the decision in the end is left completely in the hands of the employer. Such a grievance procedure might provide, for example, that discharged employees have a right to appeal the decision through several layers of upper management, with or without union representation, but that the management decision at the highest level is final and binding. Union agreement to such provisions would not violate the duty of fair representation, even though they might result in unjustly discharged employees having no recourse.

37. This argument may be analogized to due process: even though the government is not required to provide specific substantive entitlements, once it does so the courts have a constitutional duty to oversee that the distribution of those entitlements is done in a fair and careful way. The courts have rejected the argument that recipients must accept arbitrary or perfunctory procedural protection if that is all that is provided with the discretionary entitlement. But of course collective bargaining relationships are private, not governmental ones, and it is clear that private agreements can provide substantive benefits without any procedural protections whatsoever.
union grievance handlers, and it costs more to have full-time, paid griev-
ance handlers than to rely upon part-time, perhaps even unpaid, union
officers. Training, record-keeping and supervision all have costs, and it is
not at all certain merely because the union has assumed exclusive control
that the workers wish it to incur (and to pass on in the form of dues
increases) all of those costs. For example, a union might estimate that if
it hired a professional to handle grievances, or assigned a full-time cleri-
cal employee to keep track of the progress of grievances it could prevent
the negligent loss of only one or two grievances during the term of a
three-year collective bargaining agreement. The union must then deter-
mine whether that improvement justified the cost, and there seems to be
no persuasive reason why it should be subject to liability when it decides
in good faith (and perhaps even correctly) that the improvement is not
worth the cost.

In addition, the argument looks at one piece of an integrated pack-
age in isolation, assuming that employers do not take into account the
means of enforcement when they agree to substantive rights. It may very
well be incorrect to assume that if the union did not acquire exclusive
control over the grievance process, the employer would still agree to the
same substantive rights. It thus may be incorrect to assume that were it
not for the union's exclusive control, the employees would have and
would be able to enforce these rights on their own through arbitration or
section 301 suits. Employers agree to substantive rights with the knowl-
dge that the union will exercise a screening and mediating function and
knowing that expensive litigation is quite unlikely. It is not at all certain
that they would agree to the same employee rights without union control
over the grievance procedure, so it is inappropriate to look at the situa-
tion as one in which the union prevents the employees from enforcing
rights they would have and be able to enforce absent union control.

This brings us to the two primary arguments against including
union negligence and incompetence within the statutory duty of fair rep-
representation. First of all, neither the analytical underpinnings support-

38. The Seventh Circuit decisions contain two other arguments against including union negli-
gence within the duty of fair representation: 1) such a rule would embroil courts in employment
relations and would be contrary to the national policy favoring voluntary resolution of employment
relations disputes through arbitration (see, e.g., Camacho, 786 F.2d 242 (7th Cir. 1986); Dober, 707
F.2d 292 (7th Cir. 1983)); and 2) unions might be willing to falsely claim negligence and thus assist
workers in obtaining a remedy against the employer (see, e.g., Camacho, 786 F.2d 242; Hoffman, 658
F.2d 519 (1981)).

Neither of these arguments seems persuasive. The first would argue against recognizing any
duty of fair representation, and does not tell us why a negligence standard would be inappropriate
while an intentional misconduct standard would be appropriate. Moreover, in many of the negli-
gence cases the union's conduct has prevented the dispute from ever being decided by an arbitrator.
ing the duty of fair representation nor anything else in the federal labor statute support the imposition of a duty of care and competence. The duty of fair representation developed as a corollary of the statutory concept of exclusive representation. As the Court held in Steele v. Louisville & Nashville R.R., Congress conferred upon unions the authority to bargain on behalf of all employees in a bargaining unit, including those employees who opposed the union or who belonged to groups or held ideas found repugnant by the majority of the workers or by the dominant faction. That authority carries with it an obligation to "exercise fairly the power . . . in behalf of all those for whom [the union] acts, without hostile discrimination against [any of] them." The gravamen of the duty of fair representation is thus fairness, or the absence of hostile discrimination against disfavored individuals or groups.

This notion of fairness does not encompass an obligation to supply any particular level of care or competence. A union may be careless without being discriminatory, and it may be incompetent without being unfair or having any hostile motivation. If the carelessness or incompetence is uniform or random, it does not raise the concerns of abuse of power that underlie Steele and the later fair representation decisions. When a union forgets or loses a grievance form or bungles its presentation before an arbitrator, it is not twisting its statutory authority to serve impermissible ends, it is merely demonstrating (perhaps excessive) human failings.

If a duty of care and competence is not included in the duty of fairness implied by the power of exclusive representation, it is certainly not found in any other part of the federal labor statute. None of the union unfair labor practices found in section 8(b) of Taft-Hartley can be stretched to require a union to do its job well, nor can such an obligation

See e.g., United States Postal Serv. v. Bowen, 459 U.S. 212 (1983); Vaca v. Sipes, 386 U.S. 171 (1967); Graf v. Elgin, Joliet & E. Ry., 697 F.2d 771 (7th Cir. 1983); Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981). The court would not be second-guessing an arbitral decision and in some cases may even have the authority to order arbitration to take place.

The second argument carried more weight before the Supreme Court decided Bowen. Although acknowledging negligence (especially by an elected organization with elected officers) always has costs, before Bowen those costs were limited. But in that case the Supreme Court held that a union is liable for that portion of the backpay liability accruing after the date on which the employee would have received his arbitral remedy had the union not breached its statutory duty. Considering the likely delay between the discharge and even the initial trial court decision in fair representation cases, the financial liability of the union is likely to be great, perhaps even greater than that of the employer. Unions are thus likely to have a powerful incentive to disprove any allegation that they breached the duty of fair representation.

39. 323 U.S. at 202-03.
40. Id.
be found elsewhere. In fact, as the Seventh Circuit has noted, the elec-
tion machinery of section 9 of Taft-Hartley\textsuperscript{42} and the democratic safe-
guards of the Landrum-Griffin Act\textsuperscript{43} imply that Congress believed that
the best way to ensure that employees remain satisfied with the perform-
ance of their union was to give them full freedom to participate in union
governance and, when the need arises, to remove or replace the union.

The second argument against including union negligence or incom-
petence within the duty of fair representation reflects the necessary and
desirable variation among unions. Unions vary greatly in size, sophisti-
cation and resources. Some are in-house organizations representing the
employees of but one small employer, having no paid staff of their own
and charging insignificant dues. Others represent millions of people who
work for thousands of employers in the United States and other coun-
tries, have hundreds of full-time paid union employees including a staff of
lawyers, and charge each represented employee annual dues of several
hundred or even a few thousand dollars. Most fall somewhere between
these two extremes. The federal labor laws give employees the right to
choose their own representatives for collective bargaining purposes, and
this includes the right to choose a union with a grievance-handling
budget so low that it cannot possibly meet the standard of care and com-
petence expected of a lawyer or a professional business agent. Workers
may choose a lower standard of representation in order to save money, to
use its resources elsewhere (e.g., on a strike fund or on insurance benefits
for workers or retirees), or they may simply believe that in the long run
an aggressive, legalistic approach to grievances will sour the relationship
between the employees and their employer and would not be worth it for
that reason.\textsuperscript{44}

A uniform statutory duty of fair representation which included a

\textsuperscript{43} Labor-Management Reporting and Disclosure Act of 1959, as amended 29 U.S.C. §§ 401-
531 (1982).
\textsuperscript{44} In making this argument, the Seventh Circuit has sometimes stated that we should not be
overly concerned with a union's representation because if the workers do not like it they can select a
different union or at least replace the officers in charge of grievance handling. \textit{See Camacho}, 786
F.2d at 245 ("the casual handling of grievances may not be what the employees want, but if perfun-
tory representation defeats rather than implements the wishes of the employees, they may install a
ewn team of grievers"); \textit{Dober}, 707 F.2d at 295 ("If a local union does an incompetent job of griev-
ing, its members can vote in new officers who will do a better job or they can vote in another
union."). But as the court in \textit{Dober} acknowledged, this argument—which can be made in all duty of
fair representation cases—should not be taken too far. The right to vote for a different union or new
officers is no comfort to members of a minority faction within the union whose interests the union
has intentionally neglected. They are the very ones the duty of fair representation must protect, and
their votes may never be sufficient to bring about change. The argument makes sense in the context
of truly negligent conduct, but its logic would be flawed if applied to cases of intentional misconduct.
minimum duty of care and competence in grievance handling would limit the right of workers to choose a union which did not meet that minimum. Of course it is probably correct that workers never say that they want a careless and incompetent (but cheap) union, but they do resist dues increases, they do favor unions that are less costly over others that charge more, they do want their unions to do other things with their dues money than just represent grievants, and they do try to avoid excessive confrontation. A statutory duty of minimum care and competence would limit the options of the unions (and union officers) democratically chosen by the workers to use limited resources as they see fit, and in some cases it might force unions to spend more time and money on grievance handling than the workers want to spend. It may at times seem harsh that a worker might lose her job or another valid claim against her employer merely because the majority of employees in her union have chosen not to pay for the highest level of grievance handling competence. But, under the system of exclusive representation, lots of decisions will be made by or on behalf of the majority that might disadvantage others. That is inherent in exclusive representation, and is not unfair unless the disadvantages are distributed in some intentionally unfair way.

Because the duty of fair representation sets a statutory minimum, a duty of care and competence would apply to the smallest and the poorest unions as well as to the largest and the wealthiest; it might even have the effect of putting some unions out of business or at least making it impossible for them to agree to grievance procedures that include any substantial representational role for the union. And because an employer may very well be more reluctant to grant substantive rights if it knows that those rights can be enforced by individual employees through time-consuming and expensive litigation, the inability of the union to assume a screening role in the grievance process might result in reduced substantive rights for employees.

V. THE CONTRACTUAL OBLIGATIONS OF UNIONS IN GRIEVANCE HANDLING

The reason courts have had great difficulty devising rules or models to accommodate both the kinds of discrimination and intentional misconduct that the duty of fair representation was originally created to handle and cases of union carelessness or incompetence is that they have been trying to fit two conceptually distinct causes of action into one model. The duty of fair representation was established as a statutory duty establishing minimum standards to be applied to all unions. When
a court establishes a rule that certain union conduct violates the duty of fair representation, it is establishing a standard of conduct for all unions. Representation which might seem inadequate on the part of a sophisticated and well-financed union with a large legal staff may fall well within the expected norm for a single-company, poorly-financed union with no paid union employees. The statutory duty is seen as one that must set a uniform, minimum standard of fairness that can be met by all fair and responsible unions, including those with very limited resources; it cannot prohibit the "inadequate" representation of the well-endowed union if to do so would also prohibit the adequate representation of a union with fewer resources.

The uniformity expected of a statutory standard need not apply to contractual obligations, however. As an example in a wholly different context, the law imposes a statutory duty on companies engaged in mining to observe certain minimum safety standards, which are uniform throughout the industry. But there is no reason why such companies cannot assume contractual duties to observe more rigid standards, nor any reason why such greater contractual duties cannot be enforced in court. Similarly, unions may, as part of their contractual obligations toward workers, assume duties of representational care, competence and service above and beyond that imposed by the statutory duty of fair representation. For example, it is well-established that the statutory duty of fair representation does not require unions to take every discharge case to arbitration, but there is absolutely no reason why a union could not contract with workers to do so. And even if—as the Seventh Circuit holds—the duty of fair representation does not cover union negligence, there is no reason why a union could not agree to compensate employees for economic harm caused by the union's negligence. Because such obligations are derived from contractual arrangements that vary considerably from union to union and even from workplace to workplace represented by the same union, the obligations themselves vary greatly.

It seems to me that the proper way to consider claims against a union for negligent grievance handling is the same way claims against other agents are handled: as possible breaches of express or implied con-

tractual obligations. The performance of unions should not be evaluated in accordance with some abstract standard of minimum care, but should be considered on a case-by-case basis in accordance with the care, competence and services the union has agreed to supply.

Suppose two unions were competing for the same group of employees, the very kind of competition the Seventh Circuit’s decisions assume will occur. Union A, the incumbent, charges that if it were turned out in favor of Union B, the employees would incur much higher dues obligations. Union B responds by admitting that its dues are substantially higher, but that this is more than made up for by the services the union provides. The union statement emphasizes the services it provides to discharged workers: “Unlike Union A, under the terms of our union constitution whenever an employee files a grievance protesting his discharge, we will take the case to arbitration and we will supply an experienced labor lawyer who will exercise the highest degree of care and professional competence in representing the employee before the arbitrator.” Union B wins the election, employee Smith subsequently gets discharged and files a grievance, and the union assigns to the case a lay grievance handler (rather than a lawyer) and he proceeds to bungle the case, failing to investigate the matter and filing the demand for arbitration too late.

Under such (admittedly extreme) circumstances, there is no reason why Smith should not be able to sue the union for breach of its obligation to supply a competent lawyer. More importantly, there is no reason why a union should not be liable for contract damages under less extreme circumstances, where the collective bargaining agreement, the union constitution and by-laws, oral representations by the union, or the prior course of dealing between the union and represented workers gives rise to a contractual obligation to provide particular services at a particular level of care and competence. As in many contract cases, it will often be difficult to establish exactly what contractual obligations a union has incurred, but once that is done, contract damages should be available for breach.46

Of course, in deciding claims that negligent or incompetent grievance handling by unions violates contractual duties, courts will have to decide what the background rule should be. In particular, should a collective bargaining agreement under which the union assumes exclusive control over the entire grievance procedure (or at least over the final

46. Both the difficulty, and in the end the possibility, of establishing what contractual obligations a union has incurred can be analogized to the surmountable difficulty of determining the terms of implied employment contracts in wrongful discharge cases.
DUTY OF COMPETENT REPRESENTATION

step) be construed to include a contractual obligation of care and competence unless the parties specify to the contrary, or should it be interpreted to include such a duty only if it is specifically set out in the agreement? There are powerful arguments for each side. On the side against including a duty of care and competence (unless provided for) is the argument that contractual obligations are voluntary and should not be inferred absent some indication in the agreement, especially where, as here, it would not be so difficult to draft contract language to cover the issue and it is not something so rare that the parties would not think of including it if they wanted to do so. On the other side is the argument that, as between the union and individual employees, the union is in the best position to prevent the loss (i.e., to avoid negligence or incompetence) and to insure against the loss. 47 Similarly, there is the argument that when the terms of a contract are in doubt, the doubt should be resolved against the party that drafted or negotiated the contract and was in the better position to achieve favorable contract language if it wanted that language (i.e., as between the union and individual employees, the union). 48 Although I favor the latter side of the argument, and would include a contractual duty of care and competence unless specifically excluded, it seems less important to decide what the background rule should be than it is to identify the need for such a rule.

VI. ENFORCEMENT OF CONTRACTUAL OBLIGATIONS OF UNIONS

Saying that claims of union negligence or incompetence are conceptually distinct from the kinds of unfairness claims usually considered under the duty of fair representation and should be treated as contract claims does not answer the question of how and where such claims should be enforced. There seems to be at least three possibilities. First, the duty of fair representation could be expanded to include this conceptually distinct category of claims, requiring a two-part test. 49 Second, because the union’s representational role is expressly established in the collective bargaining agreement, the claims could be considered as section 301 suits alleging violation of the collective agreements. Third, the


48. Another way of putting it is that, as between the union and individual employees, the transaction cost of getting favorable language would be less for the union, so it should be required to pay that cost if it wants the favorable rule.

49. The first part of the test would examine whether the employee’s treatment involved intentional misconduct, and the second part—reached only if the first is failed—would examine whether the union’s conduct breached its contractual obligation of competence and care.
claims could be considered as independent contract claims under state law.

The first possibility, implicitly rejected by the Seventh Circuit, suffers several faults. The duty of fair representation is a statutory duty established by Congress; it would seem most unusual to determine the scope of that duty by examining the intent of the parties to a particular collective bargaining agreement. Moreover, Congress and the courts have made it abundantly clear over the years that breaches of the obligations established by collective bargaining agreements are not unfair labor practices or violations of the labor laws. Congress has decided that such breaches are best left to the contractual remedies included in the agreement, and there seems no reason to treat these contractual claims differently. The traditional deference of courts to labor arbitrators reflects this congressional decision, and the fact that violations of the duty of fair representation are considered unfair labor practices, while breaches of collective bargaining agreements are not, is further evidence that it would be inappropriate to incorporate essentially contractual claims within the duty of fair representation. The duty of fair representation began as a minimum standard of protection against unfair—intentionally discriminatory—treatment, and it should remain that. There seems no good reason to try to consider contractual obligations, which must be determined on a case-by-case basis, in the same framework as a uniform statutory duty. To do so simply confuses both claims.

The second possibility—considering these claims as section 301 claims—offers many advantages, but it is not clear under existing precedent whether federal courts would have jurisdiction over such claims under section 301. Certainly a suit claiming that a union was negligent or incompetent in carrying out its representational role is in part a suit under the collective bargaining agreement. After all, it is the collective agreement that establishes the representational role, and an employee making a claim would first have to establish the union's role (under the agreement) before he could even attempt to establish a contractual duty of care and competence in fulfilling that role. Moreover, the federal policy concerns that led to the establishment of a uniform federal common law governing the interpretation of collective bargaining agreements in


section 301 suits would apply to suits claiming union negligence and incompetence as well.\textsuperscript{52} Certainly federal labor policy would be ill-served if the obligations of unions (including the background rules for contract interpretation) would be determined by biased state courts (with the bias in some courts in favor of unions and in other courts against unions).\textsuperscript{53} In addition, thirty years after the Supreme Court's \textit{Lincoln Mills} decision, a substantial body of uniform federal labor law has been fashioned which would be of great use in deciding these claims. In particular, it would be important to refer to the federal law governing section 301 suits to ensure that the resolution of claims against unions does not contravene federal laws or policies.\textsuperscript{54}

Federal labor policy might best be served by considering these suits against unions under section 301, and it can certainly be said that the suits will also involve at least in part obligations contained in collective bargaining agreements which are ordinarily enforceable under section 301. However, the suits in many cases will involve claims that are not firmly grounded in collective bargaining agreements. For example, an employee might claim that the union constitution or by-laws obligate it to exercise care and competence in handling grievances, or he might assert that oral representations (perhaps made during organizational campaigns) form the foundation for the obligations, or even that the union's prior course of dealings with employees give rise to the obligation. Similar claims of implied contractual duties are not unfamiliar to the law of contracts or commercial transactions, but it is not clear that they can be entertained in section 301 suits which by statutory definition must allege "violation of contracts between an employer and a labor organization . . . or between any such labor organizations."\textsuperscript{55} The Supreme Court recently held, in a suit between a local union and its parent international union, that the international's constitution was a section 301 contract, but it specifically reserved the question of whether individual union members could bring section 301 suits alleging violations of union con-

\textsuperscript{52} The Supreme Court held that courts must apply a federal common law to govern § 301 suits, and that such law must be fashioned from the policy of the federal labor laws. Textile Workers v. Lincoln Mills, 353 U.S. 448, 456-57 (1957).

\textsuperscript{53} The concern here is not that state courts are more likely to be biased than federal courts; to the contrary, § 301 suits may be heard in either state or federal courts. \textit{Charles Dowd Box Co.}, 368 U.S. at 491. The concern is that any bias which may exist be tempered by a uniform body of federal law.

\textsuperscript{54} For example, it would conflict with federal law if a state court construed the role of unions in grievance handling to require unions to take every asserted case to arbitration. \textit{See Vaca v. Sipes}, 386 U.S. at 191.

\textsuperscript{55} 29 U.S.C. § 185(a) (1982).
And, in *Motor Coach Employees v. Lockridge*, the Supreme Court implied that federal courts would not have jurisdiction under section 301 to enforce "union employee contracts that are said to be implied at law" and that are not "governed by the terms of the collective bargaining agreement itself."\(^{57}\)

A holding that employees could not use section 301 to enforce contractual obligations found elsewhere than in collective bargaining agreements seems to rest on an excessively narrow view of section 301 and also seems to contravene the federal policies expressed in *Lincoln Mills* and later cases in favor of uniform federal treatment of most collective bargaining disputes. Particularly when the union's obligations rest at least in part on the terms of the collective bargaining agreement, federal labor policy would best be served by allowing their enforcement under section 301. But if federal courts take the contrary view, state suits (following state law rather than uniform federal law) would be able to fill the void, and the cases could be considered as independent contract actions under state law.

Of course unions may set up their own grievance procedure, perhaps culminating in arbitration, to resolve claims brought against them.\(^{58}\) Unions may also seek contractual commitments from employers to indemnify the unions for all or part of their liability. Employers have an interest in avoiding unnecessary arbitrations, and they therefore have an interest in having unions screen out claims they see as unlikely to succeed. Because unions facing contractual liability for negligent grievance handling may be reluctant to call close cases against grievants (*i.e.*, to decide not to go to arbitration and thus risk contract suits), employers may find it in their interest to wholly or partially indemnify unions to ensure that they will call those close cases as they see them.

It might be argued that this way of proceeding would be unsatisfactory because employees unjustly discharged want their jobs back, and that remedy would be unavailable in a contract suit against the union. That is certainly correct, but it is no different from the situations faced by clients who sue their lawyers for malpractice or other principals who sue their agents for breach of their contractual obligations. In most cases, the malpractice of one's lawyer provides only a cause of action against

56. *Plumbers & Pipefitters v. Local 334, Plumbers & Pipefitters*, 452 U.S. 615, 626-27 n.16 (1981). It is hard to understand how the Court could ever decide that even though union constitutions are § 301 contracts, and employees are generally permitted to sue under § 301 for violations of contracts, they could not sue for violation of union constitutions.

57. 403 U.S. 274, 300-01 (1971).

the lawyer, not any right of recovery against a third party or a right to have a judgment set aside. The interest in finality is seen as outweighing the client's interest in a complete recovery. The same can be said in the context of employment discharge cases. Moreover, this is another area where one might expect to see employers enter into contractual obligations to rehire workers, because the cost to an employer of rehiring discharged workers might very well be substantially less than the cost to the union of paying damages for lost jobs.

I must emphasize that courts must not lightly infer that unions have assumed contractual obligations to supply the highest level of grievance handling care and service. As in all cases, such contractual obligations arise voluntarily, when the union has agreed to supply a certain level of services and care in return for the votes or the dues of the employees. Most unions agree to supply only lay grievance handlers in most cases, and although these grievance handlers take their task seriously and by and large do a competent job, they cannot be held to the high standard of lawyers or professional agents. A certain amount of inadvertent error is bound to occur, and ordinarily it would not violate the contractual understanding. Mistakes will occasionally occur, even when the union's actions meet the contractual standard of care. However, if the union does not supply the contractually required level of services or meet express or implied contractual standards of care and competence, and the grievant suffers a loss attributable to the union's breach (e.g., a discharged employee fails to win reinstatement when he would have, had the union fulfilled its obligations), then the union should be liable to the employee for contract damages. If the duty of fair representation is to be kept to its proper limits in order to allow the market to function with competing unions promising a variety of services in return for varying levels of dues, then unions should be held accountable for the services and the care they agree to provide.

CONCLUSION

The statutory duty of fair representation is just that: a duty to represent workers fairly. It is not an insurance policy against honest union error, nor a safety valve to correct the occasional misfunction of the arbitration system. As the Seventh Circuit has repeatedly held, the duty of fair representation performs the important, but limited, function of protecting workers from intentional union misconduct. Such misconduct is prohibited of all unions, large and small, rich and poor, sophisticated and unsophisticated.
The problem with trying to apply the statutory duty of fair representation to inadvertent union error is that such error cannot be considered in the abstract, and no uniform rule will come close to handling all situations properly. Whether a union's error should be considered unacceptable depends on the degree of care, competence and perfection expected of that union, and that will vary from case to case and from union to union depending upon what the union has undertaken to do and what standard it has promised to meet. By considering questions of union error and negligence as contractual issues, wholly apart from the statutory duty of fair representation, courts will avoid the dilemma they now face when they have to choose between setting a statutory standard all unions can reasonably meet and leaving victims of unusual incompetence and negligence without a remedy.