LABOR LAW—UNION'S DUTY OF FAIR REPRESENTATION PURSUANT TO MODIFIED SENIORITY CLAUSE IN COLLECTIVE BARGAINING AGREEMENT—*Smith v. Hussmann Refrigerator Co.*, No. 78-1034 (8th Cir. Jan. 21, 1980).

The duty of fair representation is a judicially formulated doctrine developed as a corollary to the congressional scheme designed to promote sound industrial labor relations.[1] Pursuant to this scheme the union has the right to be the exclusive bargaining agent for all employees within a bargaining unit. As exclusive bargaining agent, the union has the responsibility to represent not only the rights of the individuals, but also the interests of employees collectively.[2] In *Smith v. Hussmann Refrigerator Co.*,[3] the United States Court of Appeals for the Eighth Circuit, sitting *en banc*, held that a union's failure to represent successful job bidders in grievances filed by fellow employees with more seniority, who were denied promotion for the same jobs, constitutes a breach of this duty of fair representation.

Initially, Hussmann Refrigerator Company and Local 13889, United Steelworkers of America, entered into a three year collective bargaining agreement commencing May 1, 1974 whereby the union represented the maintenance and production employees of Hussmann.[4] In April of 1975, Hussmann posted two job openings for the position of a temporary maintenance pipefitter. These two openings were to be filled pursuant to the collective bargaining agreement.[5] Hussmann ultimately selected plaintiffs Smith and Pasley for the job.[6] On May 6, 1975 the company posted an announce-

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[1] National Labor Relations Act (Wagner Act), 29 U.S.C. §§ 151-68 (1976), *as amended*, Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. §§ 141-67, 171-87 (1976).

[2] Humphrey v. Moore, 375 U.S. 335, 342 (1964). *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38 (1953); Steele v. Louisville & N.R.R., 323 U.S. 192, 202 (1944).

[3] No. 78-1034 (8th Cir. Jan. 21, 1980).

[4] Brief for the Appellee at 8, Smith v. Hussmann Refrigerator Co., No. 78-1034 (8th Cir. Jan. 21, 1980) [hereinafter cited as Brief for Appellee].

[5] Slip op. at 4. The collective bargaining agreement provided:

> Article 9, SECTION 1. . . .
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> Seniority shall be by job classifications unless otherwise specified below.
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> Seniority, skill and ability to perform the work shall be considered by the Company in making promotions, transfers, layoffs and callbacks. Where skill and ability to perform are substantially equal, seniority shall govern. . . .
>
> Article 10, SECTION 2. Ability and required performance of an employee on the job shall be factors considered for promotion. When such factors are substantially equal between those being considered, seniority shall govern. . . .

Id. at 4 n.4.

[6] *Id.* at 4. After interviewing sixty-four employees, the company's maintenance foreman selected Smith and Pasley because of their superior ability and skill. They were chosen notwithstanding the seniority of other applicants. *Id.*

ment for the position of permanent maintenance pipefitter. Although forty-six employees applied for this opening, Pasley was given the job on the ground that he had already been working in that classification on a temporary basis.[7]

On May 13, 1975, Hussmann posted three more positions for maintenance pipefitters—two temporary and one permanent.[8] The permanent position was awarded to employee Curry who had already held the classification of maintenance pipefitter. The two temporary jobs were filled by another employee, Watson, and plaintiff Serini.[9] One week later plaintiff Smith, who had been working as a temporary pipefitter since April, bid into and was granted a permanent position as a result of another new opening.[10]

As a direct consequence of Hussmann awarding the above mentioned positions to plaintiffs, twenty-six employees who had more overall company seniority than the plaintiffs filed grievances.[11] The grievances alleged that "Hussmann had violated the collective bargaining agreement in [not] making the promotions"[12] on the basis of seniority. Of the twenty-six grievances filed, the union chose four to process.[13] These four grievances had been submitted "by the most senior employees with greater seniority than the successful bidders."[14] These grievances were subsequently processed through the arbitration procedure, as set forth in the collective bargaining agreement.[15] Although the plaintiffs were aware that the grievances were

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[7] *Id.* Many of the employees not selected for the position again had more seniority than Pasley.

[8] *Id.*

[9] Brief for Appellee at 13. The position of maintenance pipefitter was one of the sixty job classifications available at Hussmann Refrigerator Company. In order to be eligible for this position, an employee not only had to possess certain "skills and abilities," but also had to be capable of working without supervision. *Id.* at 12. This classification was a well respected and sought after position in the company. *Id.*

[10] Slip op. at 5.

[11] *Id.*

[12] *Id.* The grievants believed that their skills were equal to that of the plaintiffs; therefore, the provisions of the collective bargaining agreement concerning seniority should have been stringently adhered to. *See* note 5 *supra.*

[13] Slip op. at 5. The four grievances were those of employees Dattilo, Krassinger, Looney and Robinson. *Id.*

[14] Smith v. Hussmann Refrigerator Co., 100 L.R.R.M. 2238, 2241 (8th Cir. 1980).

[15] Article 7, Step 5 of the collective bargaining agreement provides: "The majority decision of the arbitration board shall be final and binding upon the parties. The Board of Arbitration shall be limited to determining questions involving the interpretation or application of the terms of this agreement or any agreement made supplementary hereto." *Id.* Brief for Appellee at 14.

going through the arbitration procedure, at no time were they invited to participate in the proceedings.[16]

In early October, the arbitrator issued an award[17] which rejected the grievances of two of the grievants finding their skill and ability to be inferior to that of the plaintiffs and two other grievants.[18] Further, the award granted six employees classification for only four available positions.[19] Claiming that the award was fraught with errors and ambiguities, the union and Hussmann requested a clarification of the award by the arbitrator.[20]

On October 31, 1975 the arbitrator conducted a hearing in response to these requests.[21] At this hearing, the union and the company apprised the arbitrator that they had reached an agreement whereby Dattilo, Krassinger, Watson and Pasley would receive classification.[22] The arbitrator then issued a supplemental finding on November 4, 1975. This decision in essence affirmed the prior agreement between Hussmann and the union that the four senior employees would get the positions.

Plaintiffs Smith and Serini subsequently filed grievances in opposition to the November 4 arbitration decision on the grounds that they were entitled to the classification.[23] The union failed to accept the plaintiffs' grievances, claiming that the collective bargaining agreement "requires [that] an arbitrator's decision . . . be considered the final resolution of a dispute."[24]

Plaintiffs subsequently brought suit in the United States District Court for the Eastern District of Missouri against both the union and the employer.[25] The complaint charged both defendants with breach of the collective bargaining agreement and breach of the duty of fair

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[16] The successful bidders were represented by the company's foreman who testified as to the nature and substance of his interviews with the plaintiffs. Slip op. at 5.

[17] *Id.*

[18] The grievances awarded were those of Dattilo and Krassinger. *Id.*

[19] *Id.* at 5. The classification pursuant to the award was as follows: Dattilo, Pasley, Smith, Watson, Krassinger and Serini. *Id.* The award also contained two other mistakes. It incorrectly stated the seniority of Smith, and granted employee Watson, a job for which he had not bid. *Id.* at 6.

[20] Brief for Appellee at 15.

[21] Slip op. at 6. "No additional testimony was taken and no employees were present except the representatives of Hussmann and the union." *Id.*

[22] Of the six individuals originally awarded classification by the arbitrator, the four employees who had the greatest overall company seniority were then granted the classification. *Id.* at 7.

[23] Plaintiff Pasley, on the other hand, "challenged the realignment of his seniority." *Id.* at 8.

[24] *Id.*

[25] *Id.* at 1.

representation.[26] These claims were tried to a jury which found in favor of the plaintiffs. After the jury verdict, the defendants moved for judgment notwithstanding the verdict;[27] this motion was granted by the district court.[28] The court noted that the collective bargaining agreement was not breached even though the defendants resubmitted the arbitrator's conclusion and failed to inform the plaintiffs of the arbitration proceedings.[29]

On appeal, the United States Court of Appeals for the Eighth Circuit reversed in a divided *en banc* decision.[30] Chief Judge Gibson, writing for the majority,[31] noted that the parameters of the duty of fair representation have yet to be specifically defined; "it 'is a legal term of art, incapable of precise definition,' and calls for an ad hoc review of each factual situation."[32] The court believed that the key element to be considered in each factual determination is whether or not the union has met its duty to fairly represent the interests of all of the employees,[33] without necessarily being required to process each and every grievance. Although a union must be afforded with "a full repertoire of discretionary powers"[34] to serve the interests of all its members, it may never employ hostility, discrimination, bad faith, or arbitrary conduct in any of its decisions.[35]

Without the benefit of precise guides as to what the duty of fair representation was, or exactly what constituted hostile or discriminatory conduct, the court primarily relied on four leading Supreme

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[26] *Id.* at 1-2. The complaint was brought in three counts. Count I dealt with the purported breaches. Counts II and III filed by Pasley alleged racial discrimination and were filed pursuant to 42 U.S.C. §§ 1981 & 1985 (1977). *Id.* Pasley failed to prove that any action taken by the defendants was the result of racial discrimination and Counts II and III were removed from jury consideration. Smith v. Hussmann Refrigerator Co., 433 F. Supp. 690 (E.D. Mo. 1977), *rev'd en banc*, No. 78-1034 (8th Cir. Jan. 21, 1980).

[27] Smith v. Hussmann Refrigerator Co., 442 F. Supp. 1144, 1145 (E.D. Mo. 1977), *rev'd en banc*, No. 78-1034 (8th Cir. Jan. 21, 1980).

[28] *Id.* at 1146. The court also found no breach in the union's failure to process the plaintiffs' grievances after the revised arbitrator's decision was decided. *Id.*

[29] *Id.*

[30] Smith v. Hussmann Refrigerator Co., No. 78-1034 (8th Cir. Jan. 21, 1980).

[31] Chief Judge Gibson was joined in his opinion by Judges Heaney and McMillan. Concurring opinions were filed by Judge Lay and by Judges Bright and Ross. Judge Heaney dissented in an opinion joined by Judge Stephenson.

[32] Slip op. at 10 (quoting Griffin v. UAW, 469 F.2d 181, 182 (4th Cir. 1972)).

[33] Slip op. at 10. The union's obligation to fairly represent employees is comparable to their "broad authority . . . as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract." Humphrey v. Moore, 375 U.S. 335, 342 (1964). *See* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

[34] Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119, 1120 (1973).

[35] *See* Vaca v. Sipes, 386 U.S. 171, 177 (1967).

Court decisions for the basis of their reversal.[36] Even though the Court of Appeals for the Eighth Circuit relied on these Supreme Court holdings, that Court has never committed itself to one specific fair representation standard in any of these decisions. The doctrine was first espoused in *Steele v. Louisville & Nashville Railroad*.[37] The *Steele* Court formulated an extremely broad statement as to a union's responsibility to its members while examining only one violation—racial discrimination.[38] In the three cases following *Steele*, the Court again opted not to formulate any specific rules on the parameters of the duty of fair representation that courts could follow, but instead decided to dispose of each case on its own merits.[39]

In the last of these three decisions, *Vaca v. Sipes*,[40] the Court made its first attempt to define the duty of fair representation. It described the doctrine as "a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."[41] The *Hussmann* court relied heavily on this definition and its subsequent interpretation in *Griffin v. UAW*[42] to hold that there can be no question that "the scope of the duty of fair representation encompasses plaintiffs' interest in this situation."[43]

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[36] *See* Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Steele v. Louisville & N.R.R., 323 U.S. 192, 202 (1944).

[37] 323 U.S. 192 (1944).

[38] The Supreme Court would not allow a white employee's union to abolish jobs held by black employees. *Id.* at 204. The Court in addition to requiring the union to represent its members as a whole, for the first time, concluded that unions must give fair representation to every member of the group. *Id.* at 207.

[39] The three cases relied on were: Vaca v. Sipes, 386 U.S. 171 (1967) (wrongful discharge of employee culminating in union refusal to take employee's grievance through arbitration procedure); Humphrey v. Moore, 375 U.S. 335 (1964) (class action against union and company to prevent Joint Conference Committee decision which determined seniority rights); Ford Motor Co. v. Huffman, 345 U.S. 330 (1954) (class suit to invalidate a seniority clause in collective bargaining agreement).

[40] 386 U.S. 171 (1967).

[41] *Id.* at 177.

[42] 461 F.2d 181 (4th Cir. 1972) The Court of Appeals for the Fourth Circuit stated:

> A union must conform its behavior to each of these three separate standards. First, it must treat factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.

Id. at 183. Great import was placed on *Griffin* by the *Hussmann* court which quoted at length from the earlier opinion.

[43] Slip op. at 13. The court felt that "processing grievances is within the broad authority of the union as the employees' exclusive agent in the administration of the collective bargaining

The majority's reversal of the district court's finding was based on four separate but somewhat interrelated reasons. First, and most importantly, Chief Judge Gibson strongly believed that a union owes a "fiduciary duty" to protect all its members' rights and interests pursuant to the collective bargaining agreement.[44] The union breached its duty of fair representation by not protecting the collective bargaining rights of some of its members when it processed the four grievances challenging plaintiffs' promotions granted by the company foreman on the basis of skill and ability.[45] The fact that the company may have taken a stand advantageous to the plaintiffs did not persuade the court that a union may abandon affording certain individuals fair representation under the collective bargaining agreement.[46] The collective bargaining agreement between Hussmann and the union included a "modified seniority clause,"[47] which specifically permitted Hussmann to weigh an employee's seniority and merit in affording all promotions under the collective bargaining agreement. Consequently, the court held that the union was obligated to comply with the company's decision and not challenge the promotion on the basis of seniority alone.[48]

In addition, the court found fault with the union's failure to inform the plaintiffs of, or invite them to, the initial arbitration hearing.[49] Generally, a union's failure to notify one of its constituents that his or her rights are being affected at an arbitration hearing does not in itself constitute a breach of a duty of fair representation.[50] In

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agreement." *Id.* at 13-14. *See also* Vaca v. Sipes, 386 U.S. at 177. The court went on to further note that the union should have been cognizant of the fact that in processing the four grievances, other union members' interest could be detrimentally affected. *See* Tedford v. Peabody Coal Co., 533 F.2d 952, 959 (5th Cir. 1976); Bond v. Local Union 823, Int'l Bhd. of Teamsters, 521 F.2d 5, 9 (8th Cir. 1975); Butler v. Local Union 823, Int'l Bhd. of Teamsters, 514 F.2d 442, 445 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975).

[44] Slip op. at 17.

[45] *See* note 5 *supra* for the applicable provision of the collective bargaining agreement.

[46] *See* Deboles v. Trans World Airlines, Inc., 552 F.2d 1005 (3d Cir.) *cert. denied*, 434 U.S. 837 (1977); Price v. Int'l Bhd. of Teamsters, 457 F.2d 605 (3d Cir. 1972).

[47] A modified seniority clause gives a company the power to grant promotions notwithstanding seniority on the basis of skill and ability.

[48] Even though unions have traditionally followed a policy whereby seniority has been the paramount consideration governing promotion, once a modified seniority clause becomes part of the collective bargaining agreement, a union can no longer strictly adhere to a seniority principle. *See generally*, Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 TEX. L. REV. 1037, 1102 (1973) (unions are not allowed to "[choose] the easier path because of convenience or rigid adherence to 'union policy'").

[49] Slip op. at 22.

[50] *Id.* at 23. As long as the employee's rights have been arguably protected, no breach will generally occur. *See* Humphrey v. Moore, 375 U.S. 335, 350-51 (1964) (the presence of stewards at the arbitration hearing was deemed adequate protection). *See also* Bernard v. McLean

the instant case, Chief Judge Gibson acknowledged that where the union made no conscious effort to protect or represent the interests of its employees at the arbitration hearings and the employees were "prejudiced" by the final determination, "a breach of the duty of fair representation has been demonstrated."[51] The majority rejected the union's contention that the plaintiffs' interests were protected by the company foreman at the hearing.[52] They noted that any protection afforded by this testimony was totally negated by the grievants' ability to testify as to their own skill, experience and know-how at the hearing.[53] The majority concluded that the impact of the statements by the grievants without any counterbalancing testimony by the plaintiffs or evidence in support of their position unduly prejudiced the plaintiffs.[54]

The court observed that concurrent with the above mentioned two breaches of the duty of fair representation, the union also breached this duty by resubmitting the initial arbitration award. The majority determined that this resubmission was an unwarranted intrusion on the collective bargaining agreement's clause which provided that arbitration is a final and binding resolution of a dispute.[55] Furthermore, the majority concluded that the union's failure to process the plaintiffs' grievances and its refusal to let them be heard at a union meeting evidenced bad faith, resulting in a breach.[56]

Judges Bright and Ross concurred with Judge Gibson's finding that the union breached its duty of fair representation to the employees.[57] They agreed with all of Judge Gibson's reasoning except that, in their opinion, the plaintiffs were adequately represented

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Trucking Co., 429 F. Supp. 284, 286-87 (D. Kan. 1977) (no breach where no harm or prejudice was suffered by plaintiff's receiving late notice of the arbitrator's decision); Siskey v. General Teamsters, Local No. 261, 419 F. Supp. 48, 53 (W.D. Pa. 1976).

[51] Slip op. at 24. *See also* Thompson v. Int'l Ass'n of Machinists, 258 F. Supp. 235, 239 (E.D. Va. 1966), where the court found that the union breached its duty of fair representation to an employee by not informing him of an arbitration hearing when they knew no other witnesses would offer evidence in support of his position. *Id.*

[52] Slip op. at 24.

[53] *Id.*

[54] *Id.* at 24-25. The court believed this was especially true because of the emphasis the arbitrator placed on the grievants' testimony regarding their "background experience" when determining their skill and ability. *Id.* at 24. The plaintiffs obviously were unable to inform the arbitrator of any outside work activities.

[55] *Id.* at 25. Article 7, Section 1 of the collective bargaining agreement provides: "[t]he majority decision of the arbitration board shall be final and binding upon the parties." *Id.* at 25 n.14.

[56] *Id.* at 27. *But see* Humphrey v. Moore, 375 U.S. 335 (1964) (union has power not to process grievance if this decision is made after good faith evaluation).

[57] Slip op. at 35 (Bright, Ross, J.J., concurring).

at the first arbitration hearing.[58] Judge Lay also concurred in the result reached by Judge Gibson. Judge Lay, however, surmised that "the only evidence of bad faith [on the] record" was the agreement between the union and company to ask the arbitrator to rearbitrate his award without informing the plaintiffs.[59]

Finding that the majority had "effectively rewrit[ten] this and thousands of similar collective bargaining agreements," Judge Heaney, joined by Judge Stephenson, filed a forceful dissent.[60] They preferred the alternative view that the court had no right to "overturn the arbitrator's decision," since it was based on the collective bargaining agreement which provided that the arbitrator should make the final determination in the resolution of any disputes that may arise over the course of the collective bargaining agreement.[61]

The dissent argued that the majority erred in their failure to recognize the importance of the principle of seniority.[62] Seniority's importance is illustrated by the cornerstone position it is generally afforded in collective bargaining agreements.[63] The role of the union in the negotiations which surround a collective bargaining agreement, therefore, becomes a matter of major importance to the union and its membership.[64] In order to neutralize the effect of seniority provisions in collective bargaining agreements, modified seniority clauses[65] are incorporated into the agreement whereby seniority will prevail only "if skill and ability are substantially equal."[66] While seniority

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[58] *Id.* at 35-36 (Bright, Ross, J.J., concurring). Judges Ross and Bright believed that the union's primary breach occurred subsequent to the initial arbitration award. *Id.*

[59] *Id.* at 35 (Lay, J., concurring). *See* Buchholtz v. Swift & Co., 609 F.2d 317, 333 (8th Cir. 1979), *cert. denied*, 100 S. Ct. 672 (1980) (Lay, J., dissenting) (discussion by Judge Lay of bad faith).

[60] Slip op. at 47 (Heaney, J., dissenting).

[61] *Id.* at 47 n.6. *See* United Steelworkers v. Enterprise Corp., 363 U.S. 593, 596 (1960) ("The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."); Kewanee Machinery v. Local 21, Int'l Bhd. of Teamsters, 593 F.2d 314 (8th Cir. 1979). *See also* note 88 *infra* and accompanying text.

[62] Slip op. at 44 (Heaney, J., dissenting).

[63] *See* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1534 (1962). Seniority provisions give the employees with the longest service tremendous job security and the first chance to advance within the company. *Id.*

[64] *See generally*, N. CHAMBERLAIN, THE UNION CHALLENGE TO MANAGEMENT CONTROL 93-94 (1948). Chamberlain notes the importance of seniority in that it does away with "favoritism and willfulness." *Id.* at 94.

[65] *See* note 5 *supra* for the modified seniority clause included in this collective bargaining agreement.

[66] Slip op. at 46 (Heaney, J., dissenting). Compare this view with Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975), where the court held that when skill and ability are substantially equal, a union breaches its duty of fair representation in failing to insist that in the merger of two companies straight company seniority, as opposed to relative seniority in each company, be used. *Id.* at 452.

was emphasized by the dissent, they also recognized management's legitimate concern with promoting skill and ability.[67] Judges Heaney and Stephenson determined that the existence of this clause in the collective bargaining agreement did not give the majority the right to hold that " '[t]he Union's choice to process all grievances based on seniority discriminated against employees receiving promotions on the basis of merit.' "[68]

The dissent concluded that the union's actions were clearly justified. After taking into account the relative importance of seniority to all employees under a collective bargaining agreement, the dissent proffered the opinion that the union's processing of the grievances of the members with the most overall company seniority would have been warranted.[69] The dissent also stressed that the union's decision was made with "a conscious assessment of competing values and . . . consistent with past practice."[70] Furthermore, the dissent insisted that the relevant case law clearly establishes that a breach of the duty of fair representation only arises if a union's actions in processing the grievances were in bad faith,[71] or grossly or inexplicably negligent.[72]

A close scrutiny of the *Hussmann* decision indicates that the majority placed undue reliance on its notion that "[t]he union's choice to process all grievances based on seniority . . . may be viewed as a perfunctory dismissal of the interests and rights of the plaintiffs."[73] Although the majority consistently pointed out that "[d]isregard for the qualification of superior skill and ability"[74] can result in a breach of

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[67] Slip op. at 46 (Heaney, J., dissenting).

[68] *Id.* at 52 (quoting Slip op. at 18).

[69] *Id.* at 44-53. It is important to note that twenty-six unsuccessful bidders for the position of maintenance pipefitters filed grievances. The union, however, ultimately selected only four grievances of employees who had greater seniority than the successful bidder.

[70] *Id.* at 51-52.

[71] *Id. See* Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972). In *Griffin*, the court determined that the union breached its duty of fair representation by filing the discharge grievance with the person whom the plaintiff had had a fight with, which resulted in his discharge. *Id.* at 184. This action, the court concluded, was "motivated by bad faith." *Id.* at 185.

[72] Slip op. at 51-52 (Heaney, J., dissenting). *See* Foust v. IBEW, 572 F.2d 710, 715 (10th Cir. 1978) (union inexcusably neglected to file employee's grievance within the required time pursuant to the collective bargaining agreement); Minnis v. UAW, 531 F.2d 850, 853 (8th Cir. 1975) (union did not notify employee of its determination not to arbitrate the grievance until six months later); Ruzicka v. General Motors Corp., 523 F.2d 306, 310-11 (6th Cir. 1975) (union bargaining agent took grievance through only two out of three stages of the grievance procedure); De Arroyo v. Sindicato de Trabajadores Packing House, AFL-CIO, 425 F.2d 281 (1st Cir.), *cert. denied sub nom.* Puerto Rico Telephone Co. v. De Arroyo, 400 U.S. 877 (1970) (bargaining agent failed to properly investigate employee's grievances).

[73] Slip op. at 18.

[74] *Id.* at 19.

the union's duty of fair representation, the cases they relied on[75] clearly insisted upon the existence of the elements of bad faith or inexplicable negligence.[76] In the absence of either of these two elements, a union is acting in "good faith applying a neutral principle"[77] and should not be held liable for a breach of its duty of fair representation. Although the union is the agent of all the employees, a decision favoring one group of employees is not necessarily made in bad faith.[78] A union must continuously balance the interests of various groups of employees; some choices inevitably result in benefit to some and harm to others.[79] Thus, as the dissent correctly concludes, if the majority's position on favoring one group of employees is subsequently followed, "an intolerable burden [will be placed] on [the] bargaining unit representatives."[80] This burden would most likely include a hearing before filling all positions so that skill level of all applicants may be compared with seniority.[81]

Although it appears that the majority may be placing too great a burden on the bargaining unit in modified seniority clause situations, they were correct in finding the union liable for inadequately notifying and representing the plaintiffs at the hearing.[82] Courts must carefully scrutinize each factual situation surrounding an arbitration hearing in order to determine precisely whether the plaintiff's rights have been sufficiently protected. In certain instances where "plaintiffs [have] presented their case on skill and ability to management, and management presented that same case to the arbitrator,"[83] the protection could be deemed adequate.[84] However, where the arbitrator has dwelled "heavily upon the testimony of the grievants relating

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[75] In support of this proposition, the majority relies on Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972); and De Arroyo v. Sindicato de Trabajadores Packing House, AFL-CIO, 425 F.2d 281 (1st Cir.), *cert. denied sub nom.* Puerto Rico Telephone Co. v. DeArroyo, 400 U.S. 877 (1970).

[76] *See* notes 68, 69 *supra* and accompanying text.

[77] Slip op. at 18.

[78] *See* Vaca v. Sipes, 386 U.S. 171, 190 (1967).

[79] *See* Humphrey v. Moore, 375 U.S. 335, 349-50 (1964). "Conflict between employees represented by the same union is a recurring fact." *Id.*

[80] Slip op. at 47 (Heaney, J., dissenting). The union will be forced to hold an internal union hearing every time two or more people apply for the same job and a person with less seniority is granted the position. *Id.* The hearing will be necessary to determine whether the employees who had more seniority and yet were not awarded the job had skill and ability equivalent to the employee given the job.

[81] *Id.*

[82] *See* notes 49-64 *supra* and accompanying text.

[83] Slip op. at 52 (Heaney, J., dissenting).

[84] *See* Humphrey v. Moore, 375 U.S. 335, 350-51. Justice White concluded that where the employees did not prove they "could have added to the hearing by way of facts or theory if they had been differently represented" the decision of the committee would stand. *Id.*

their background experience . . . outside the plant,"[85] an employee is unduly prejudiced by not being able to convey the same type of information to the arbitrator which the company did not possess. When such an "*ex parte* presentation,"[86] takes place, a court should require a union to provide its constituents greater protection.

A novel aspect of the *Hussmann* decision was that the argument and resubmission of the initial arbitrator's decision was found to be a breach of the collective bargaining agreement.[87] Article 7, Section 1 of the Collective Bargaining Agreement does provide that "'[t]he majority decision of the arbitration board shall be final and binding upon the parties.'"[88] But, should the clarification of the initial award to correct its mistakes be categorized as a resubmission?[89] Notwithstanding Chief Judge Gibson's legitimate concern for adherence to the collective bargaining agreement,[90] the first arbitrator's award could not be implemented because of its mistakes.[91] Therefore, the clarification was not a resubmission in the true sense of the word. Based on this line of reasoning, the "final and binding" clause of the collective bargaining agreement could not legitimately be used by a court to hold the union liable for breaching its duty of fair representation. Since the arbitration proceeding was not complete until there was a final disposition of the dispute, the ultimate resolution of this labor dispute being the second arbitrator's decision, the major portion of the dissent's analysis was on point when it contended that the second decision should not have been overturned.[92]

In order "[t]o effectuate the strong federal policy favoring arbitration as a means of resolving labor disputes, [the court's] review of arbitrator's awards [should be] limited."[93] This limited review should only be invoked, as the dissent points out, in situations where bad faith or gross and inexplicable negligence is established.[94] In

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[85] Slip op. at 24-25.

[86] *Id.* at 24.

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

[88] Slip op. at 25 n.14.

[89] *See* notes 19-21 *supra* and accompanying text.

[90] *See* note 44 *supra* and accompanying text.

[91] *See* note 19 *supra*.

[92] Slip op. at 47 n.6 (Heaney, J., dissenting).

[93] Kewanee Machinery Division v. Local 21, Int'l Bhd. of Teamsters, 593 F.2d 314, 316-17 (8th Cir. 1979). *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). *See also* Resilient Floor v. Welco Mfg. Co., 542 F.2d 1029 (8th Cir. 1976); General Drivers v. Sears, Roebuck & Co., 535 F.2d 1072 (8th Cir. 1976).

[94] Compare Vaca v. Sipes, 386 U.S. 171 (1967), where the Court held that the statutory duty of fair representation is only violated "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190.

Hussmann, the only evidence of bad faith or negligence on the record was the union's failure to adequately represent its members at the first arbitration hearing. Given the lack of bad faith, the majority's decision places too great a burden on the unions. It cannot be denied that some aggrieved employees would be injured by holding a union liable only for bad faith or negligent conduct.[95] A union, however, must be afforded some discretion in the manner in which it represents the members of its bargaining unit.

The Court of Appeals for the Eighth Circuit's attempt to provide employees with greater employment protection was noble; however, its decision went too far when one considers the present state of the relevant case law on the duty of fair representation and the union's "conscious assessment of competing values [that were] consistent with past practice."[96] Until a more specific fair representation standard is formulated, courts will have to refrain from holding a union liable simply because they believe an injustice has been done to a certain group of individuals.

Peter John Frazza

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[95] The arbitrary, discriminatory or bad faith standard of *Vaca v. Sipes* can be substituted for bad faith or negligence; however, the standard espoused in the dissent of Hussmann probably affords a union employee greater protection because of its inclusion of negligence.

[96] Slip op. at 51-52 (Heaney, J., dissenting).