Individual Control Over Personal Grievances Under *Vaca v. Sipes*

Last term, in a case involving a suit brought by an employee against his union, the Supreme Court set out the conditions under which an employee may sue his employer for breach of the collective agreement. In *Vaca v. Sipes* the Court held that an employee whose union chose not to press his claim to arbitration cannot litigate the underlying contract claim in court unless he can show that the union acted in breach of its duty of fair representation.[1] The practical impact of this is to handicap if not hamstring the aggrieved employee, however meritorious his claim against his employer, because of the difficulty of showing his union's bad faith. The analysis which follows will attempt to show that no public or private interest justifies the imposition of such a burden on the employee and that neither common law principles nor the relevant statutory provision dictates the Court's conclusion.

Vaca was brought by an employee who had been denied reinstatement to his former position on the ground that his high blood pressure made him physically unfit for the heavy manual work required by his job. Dissatified, the employee asked his union to process his grievance. On the basis of medical evidence supplied by his physician, the union took the case to the fourth stage of the grievance procedure established under the collective bargaining agreement, but at each stage the company denied reinstatement on the strength of its own medical examinations. In order to decide whether to press the grievance to arbitration, the union arranged and paid for an independent examination of the employee. The examination supported the company's position, and the union accordingly refused to bring the matter to arbitration. Denied the opportunity to arbitrate his claim, the employee commenced two suits in the Missouri state courts: the first against the union for damages, and the second against the company for breach of contract.[2] At the trial of the

1. 386 U.S. 171 (1967). Strictly speaking, the discussion of the Court on the requisites for a suit by the individual against his employer could be regarded as dicta, despite the extensive attention given to them in the opinion, since the employer was not a party to the instant proceedings. Indeed that is the position adopted in the concurring opinion of Mr. Justice Fortas. 386 U.S. at 200. But since Mr. Justice White, writing for a majority of the Court, and Mr. Justice Black in dissent, proceed on the contrary assumption, 386 U.S. at 185, 203-04, no lower court is likely to depart from this rationale.

2. While it is clear that the action of the employee against his employer is a Section 301 action, Smith v. Evening News Ass'n, 371 U.S. 195 (1962), it is much more difficult so to characterize the action of the employee against his union, since the obligation in question is created by statute and not by the collective agreement. Section 301(a) reads as follows:

action against the union, the employee's claim of improper dismissal was vindicated by a jury verdict against the union.[3] The trial judge set the verdict aside on the ground that since the subject matter of the case arguably constituted an unfair labor practice, jurisdiction rested exclusively with the NLRB. While the appeal was pending the employee died, and the name of Sipes, the administrator of his estate, was substituted for his own. The Missouri Supreme Court reversed the decision,[4] reinstating the verdict, and the case was brought to the Supreme Court on a writ of certiorari.[5] After holding that the state court had jurisdiction, the Supreme Court in turn reversed the Missouri court on the ground that the union's decision had been made in good faith and hence the employee could not as a matter of law recover from his union.

Insofar as the decision of the Court restates the proposition that union liability turns solely on the breach of fair representation, it has not altered federal labor law. But the elaborate discussion in *Vaca* concluding that the employee cannot maintain an action for breach of contract against the employer unless he can show that his union breached its duty of fair representation is at once more novel and more controversial. The duty of fair representation requires only that the union refrain from acting arbitrarily, discriminatorily or maliciously toward the employee; in short, it requires only that the union act in good faith.[6] The effect of *Vaca*, therefore, is that unless the union displays bad faith, the employee, even if discharged in breach of the collective agreement, has no remedy whatever against either the union or the employer.

This state of affairs can best be evaluated by contrasting it with the alternatives which could be constructed. The Court, having decided to treat the issue, could have held that the employee could sue his employer

(a) Venue, amount, and citizenship. Suits for violation of Contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction over the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Labor Management Relations Act (Taft-Hartley Act) § 301(a) [hereinafter cited as L.M.R.A.] 29 U.S.C. 185(a) (1964). Nonetheless, the Supreme Court, consistent with the expansive interpretation given Section 301(a) in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), appears to treat the action against the union as a Section 301 action, whether or not the employer is joined in the cause. 386 U.S. at 187.

3. The courts below appeared to treat the question of improper dismissal as determinative of the question of the union's bad faith. 386 U.S. at 189.

4. Sipes v. Vaca, 397 S.W.2d 658 (Mo. 1965).

5. 384 U.S. 969 (1966).

6. *See, e.g.*, Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

in court for a breach of the collective agreement without regard to the grievance machinery provided by the contract. Or, on a principle analogous to the principle of exhaustion of available remedies, the Court could have required the employee to press his claim as far as possible within the private grievance machinery—i.e., until the union refused to further pursue his grievance against the employer.[7] A more extreme solution, although one not readily suggested to the Court by the framing of the issues in *Vaca*,would be to allow the individual employee to press his own grievance, if necessary to arbitration, within whatever private settlement process the collective agreement provided; this right could be made absolute or conditional upon the refusal of the union to process the grievance further.[8]

These alternatives differ as to the time at which and forum in which the individual employee would be allowed to pursue his claim against the employer for a breach of the collective agreement. As the later analysis will show, these variables of time and place affect the relative desirability of each alternative and the ease with which each could be assimilated to the existing framework of labor law. All the alternatives can, however, be grouped together as choices which would at some point allow the individual to process and pursue his own grievance against the employer. This categorization is profitable because *Vaca v. Sipes* stands for precisely the opposite rule: the employee must rely on his union to represent his interests, and absent specific malfeasance by his union he may not secure an adjudication of any claim he may have against his employer either through internal grievance machinery or in court.

The subordination of the individual interest to union control in *Vaca* is patterned upon the like subordination during the negotiation of the collective bargaining agreement. Thus, the Court says, without noting the distinction between the negotiation of the collective agreement and the settlement of grievances arising under it:

> The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all the employees in a bargaining unit.[9]

7. In fact, the first of these alternatives had been rejected and the second accepted before *Vaca* came before the Court. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

8. In practice, it will make little difference whether or not individual control over personal grievances is made conditional upon the union refusal to process it further, since there will be few cases in which the employee will assume the burdens of processing his own case where the union is willing to act on his behalf. But if it can be shown that no other interest is compromised in the extreme case of the absolute right, then it follows that none will be compromised in those important, but less extreme, cases where the union refuses to process further.

9. 386 U.S. at 182.

The Taft-Hartley Act, like the Wagner Act before it, made any union which could command the support of a majority of the employees within a bargaining unit the exclusive bargaining representative of all the employees.[10] The justification offered for this creation of monopoly power over contract negotiations,[11] with its consequent limitation upon the individual freedom of contract,[12] is the need for and ability of a single bargaining representative to prevent repeated minority strikes and work stoppages, which could disrupt the work of the unit, reduce output and generate industrial strife.[13] But even if such a grant of power to the union is justified during the negotiation of a collective agreement, the same reasoning does not justify a similar grant of power in the settlement of individual grievances under that agreement, for the weight attached to the competing interests does not remain unchanged during the life of the collective agreement. In particular, the employee's interest in his personal grievance is stronger than his comparable interest in his control over contractual terms, which is subordinated during the negotiation of the collective agreement. During that negotiation, the rights of no single employee alone are at stake. Any interest of a particular employee threatened in these negotiations will not be an interest peculiar to him but will be shared by a class of workers similarly situated. If that class of workers believes that its interests are inadequately protected by the union, it can use collective political action or informal pressure to achieve its contractual objectives, threatening if necessary to seek the recognition of an independent union with its own bargaining representative.[14] Where there is only a personal grievance, on the other

10. L.M.R.A. § 9(a), 29 U.S.C. § 159(a) (1964). For text of this section, see p. 576 *infra*.

11. *See* Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 21 (1963), on the uses of monopoly power by unions. *See also* Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945), and National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967).

12. *See* J. I. Case Co. v. NLRB, 321 U.S. 332 (1944), where it was held that the collective agreement superseded prior valid contracts between the employer and the employee, even where their terms were more favorable to the employees in question.

13. The theory behind the creation of the exclusive bargaining agent runs into difficulties where the unit of representation does not include all those workers necessary for the successful operation of the economic unit. *See, e.g., In re* American Potash & Chemical Corp., 107 N.L.R.B. 1418 (1954), where the economic need for large units was weighed against the right of craft employees to separate union representation under L.M.R.A § 9(b)(2), 29 U.S.C. 159(b)(2) (1964), and found wanting.

14. One need only witness the special settlement procured by the United Auto Workers against Ford for its skilled workers, whose discontent with prior collective agreements had received political expression. N.Y. Times, Oct. 20, 1967, at 1, col. 2. Political activity by a minority appears to be ineffective in cases involving a merger of seniority rosters, where of necessity some workers will lose employment after the merger. The problem here is that there is no possible intermediate position that satisfactorily adjusts the claims of the two conflicting groups, since the question of employment or no, unlike that of compensation, does not admit of gradations. Under these situations, if the political means fail, the

hand, the employee affected stands alone, with but limited political means at his disposal, and at a time when his very livelihood and not just a question of contractual expectations are at stake. The individual interest in the enforcement of personal contract rights is, without more, like any other contract interest, and prima facie it is entitled to the same legal protection.

Hence, a shift in both the extent of the individual interest and the non-legal means available to protect it takes place between the negotiation of the collective agreement and the settlement of individual grievances under it. Accordingly, there is reason to question whether the combined dominance of the employer and the union should continue to prevail at settlement as it does at negotiation. If it can be shown that no legitimate competing interest, social or private, is adversely affected by the recognition of the individual right to process grievances, then it follows that no denial of that right is justified.

Before this can be done, however, a threshold criticism of the distinction between the negotiation of the collective agreement and the settlement of grievances arising under it must be met, since if that distinction cannot be drawn, then all arguments that depend upon it must fall as well. Professor Cox has contended that this distinction is not viable, arguing that every decision has ramifications for the future course of relationships between the employer and the union. According to Cox, since each decision has precedential value for the future determination of like disputes under the contract, the "[a]djudication of past rights [cannot] be separated from rule making for the future," because "[b]oth pertain to the interstices of the contract."[15]

This argument is not persuasive for two reasons. First, since the resolution of most grievances will turn only on factual issues, the doctrine of precedent will not normally apply.[16] Second, nothing can prevent

aggrieved employees will resort to legal proceedings for redress although their prospects for success are not bright. *See, e.g.*, Humphrey v. Moore, 375 U.S. 335 (1964); Britt v. Trailmobile Co., 179 F.2d 569 (6th Cir. 1950). *But see* Ferro v. Railway Express Agency, Inc., 296 F.2d 847 (2d Cir. 1961).

15. Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 625 (1956). *See also* Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1475-76 (1963). Blumrosen begins by characterizing the distinction as "artificial," but appears to accept its viability after this initial hesitation.

16. Professor Cox acknowledges the force of this point when he notes that disputes under thousands of collective bargaining agreements

> require scant implementation through day-to-day negotiation. Few questions of interpretation can arise, and when they do there is little likelihood of internal competition among the interests of the different employees in the bargaining unit. Alleged contract violations turn chiefly on questions of fact; their outcome will have little weight

the union and employer from agreeing to eliminate the precedential value of all points of law decided in all grievances not processed by the union. Indeed, even in the absence of such a provision, the union would not be bound by any determination unless it were a party to the proceedings in which the determination was made.

II. The Competing Interests Affected by the Individual Control of Grievances

A. *The Social Interest in Industrial Peace*

When all that is at stake is a personal grievance of an individual employee, the threat to industrial peace is not comparable to its counterpart during the negotiation of the collective agreement. Where the employee processes his own grievance, under any of the alternatives set out above, neither the union nor the employer will want to use its economic weapons against the other, for they are in essential agreement on the proper disposition of the grievance. Hence under any of the alternatives to the Supreme Court rule, any threat to industrial peace that lies in the recognition of an individual's right to control his own grievance must be far more subtle and of far smaller magnitude than that of the lockout or the strike.[17] Whether the right to control the grievance is given or denied the individual, the only consequence affected is whether, and in accordance with what rules, the grievance will be arbitrated, litigated or abandoned. If any of these alternative dispositions of the individual grievance threaten industrial peace, those threats must stem from the creation of tensions and the impairment of good working relations within the employee-union-employer matrix. Two major arguments have been advanced to show that these threats to industrial peace are sufficient to warrant denying the individual em-

as precedent. Many of these contracts will contain neither a grievance procedure nor provision for arbitration.

Cox, *supra* note 15, at 653. These observations apply with equal force to the vast majority of individual grievances that arise under more complex collective agreements. Certainly no question of law was presented in the grievance at issue in *Vaca*.

17. The point here is much the same as the point made by Judge Learned Hand in United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951) when he rejected a clear and present danger standard as the test of the government's right to protect the social interest in national security against an individual's claim to First Amendment freedoms. A clear and present danger test only takes into account the probability of harm and makes no reference to its expected intensity. "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 183 F.2d at 212. So here we must consider not only the probability of a threat to industrial peace but also the extent of disruption should that threat actually occur.

ployee control over his own grievance.[18] First, it has been argued that if the individual right to arbitrate is made absolute, so many frivolous claims will be brought that the grievance machinery will be abandoned as too costly and inefficient by the only parties that have the power to establish and maintain it, the union and the employer.[19] Second, it is contended that the use of the grievance machinery by the individual employee can become a vehicle for the intensification of union rivalry within the bargaining unit.

1. *Frivolous Claims and the Preservation of the Grievance Machinery*

In *Vaca v. Sipes* the Court argued that if an individual right to process grievances were recognized, individuals would bring so many unfounded and frivolous claims that the employer and the union would not find the continued operation of the grievance machinery worthwhile.[20] Alternatively, the union might feel compelled to sacrifice its credibility by pressing to arbitration all manner of frivolous grievances in order to maintain its position in the unit.[21] In either case, the creation of an individual's right to process his own grievances might increase the expected cost of the grievance machinery to the employer above its perceived value to his employees. If so, a rule prohibiting the individual employee from using the grievance machinery would be necessary to prevent its abandonment. But even if the fear of frivolous claims is justified, it does not warrant the rule of *Vaca v. Sipes.* The recognition of the right of an individual employee to sue his employer in court despite his union's good faith in deciding not to take his claim to arbitration could not possibly increase the cost of operating the grievance machinery.

Indeed, even if the individual seeks the right to insist on arbitration, the recognition of such a right might not destroy the worth of the grievance machinery. The record in *Vaca v. Sipes* strongly suggests

18. The court also makes the argument that union control over grievances gives the employer and the union the opportunity to resolve differences over the interpretation of the collective agreement. 386 U.S. at 191. But the resolution of these differences need not depend upon the presentation of a particular grievance, for the employer and the union are always free to renegotiate the collective agreement.

19. Thus, the Court: "In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. 386 U.S. at 191. *See also* Cox, *supra* note 15, at 626.

20. *See, e.g.*, Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179, 186 (2d Cir. 1962).

21. *See* Cox, *supra* note 15, at 625-26.

that employees do not regard it in their own interest to press forward grievances that are without merit. The grievance provisions in the collective bargaining agreement established a five-stage procedure. In the first two stages, either the employee personally or the union on his behalf could take the grievance to the appropriate representative of the employer.[22] Both the employer and the union indicated satisfaction with the established procedures, because it facilitated the efficient settlement of grievances short of arbitration.[23] There was no indication that employees, who had complete control over their own grievances during the first two stages of the procedure, abused their rights. To the extent the employees acted responsibly when given the limited right to press their grievances without the intervention of the union, it seems reasonable to believe that they would act reasonably if their rights were extended. Indeed, there is even less likelihood that employees will abuse the grievance machinery at its advanced stages, since the costs which they personally will bear in pursuing their individual grievances will increase while potential benefits remain unchanged.

Moreover, there are means whereby the costs to the parties can be reduced significantly without denying the individual's right to process grievances to arbitration. Once it is settled that the claim will be brought to arbitration by an employee acting on his own behalf, there is no need for the grievance to follow its customary course through the grievance machinery. Where the union has abandoned the grievance, there is no point in requiring the grievance to be taken through the customary steps short of arbitration, since both the union and employer representatives on the grievance panel may well act in concert to deny the claim for relief.[24] And since the disposition of the grievance need not have any precedential implications for the future course of union-employer relationships, an arbitration at the local instead of the national level could lead to a decisive savings in costs without denying the employee the benefits of an impartial determination of his grievance.[25]

If necessary, additional controls could be imposed to reduce the costs

22. Vaca v. Sipes, 386 U.S. 171, 175 (1967).

23. *Id.* at 192. The employer filed an amicus curiae brief supporting the position of the union. *Id.* at 172-73.

24. In the third and fourth of the five stages of the grievance machinery in question in *Vaca*, union and company officials alone determined the disposition of a grievance. 386 U.S. at 175. *See* Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362, 402 (1962), on problems connected with the selection of an arbitrator where a grievance is individually prosecuted.

25. The collective agreement in *Vaca* called for arbitration by a national arbitrator. 386 U.S. at 175.

of frivolous grievances still further. Thus, the arbitrator could be empowered to assign the costs of the proceeding. If the individual employee chose to process his claim without the assistance of the union, or to pursue it after the union withdrew, he could be required to bear his proportionate share of the costs. In fact, if his claim is frivolous, he could be assigned all or part of his employer's costs as well. As an offset, unions which have declined to press the employee's grievances could be required to pay his costs should he succeed.

Under such a system there is no reason to believe that the union will feel compelled to press to arbitration all manner of frivolous complaints. If the grievance brought by an employee is indeed frivolous, then it will fail in arbitration, and the union will escape untaxed. Moreover, the union's credibility will be enhanced—not impaired—where it demonstrates the worth of its judgment by refusing to process a grievance subsequently determined to be frivolous. Finally, if there is still a fear that petty grievances will be taken to arbitration despite these cost controls, provision could be made that only serious claims, such as those stemming from discharges, could be taken by the employee to arbitration.

Thus, it should be possible to reduce the costs of allowing the individual to handle his grievance independently sufficiently to prevent the grievance machinery from being endangered. Indeed, it can even be argued with considerable force that the cost of resolving all grievances may actually be increased by the rule in *Vaca v. Sipes*. Although the individual employee cannot now take his case to arbitration without union assistance, he need not remain inactive when the union abandons his claim, for he may take both the union and the employer into either state or federal court under Section 301(a). To institute such an action, an allegation of the union's bad faith is sufficient. The union or the employer may seek dismissal of the action by summary judgment before trial, but they have little prospect of success under the federal rules and since these cases are governed by federal law, the employee can always choose the federal forum.[26] Given the complexity of the question of good faith, it is doubtful that either the employer or the union could get a summary judgment on the strength of supporting affidavits alone, because the employee can claim in reply that the hostility of the union raises genuine doubt concerning its good faith.[27] More-

26. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

27. *See generally* 6 J. MOORE, FEDERAL PRACTICE ¶ 56-17[27], at 2553-56. (2d ed. 1966). Since the question of whether to grant summary judgment is so highly factual, no uniform rule can be laid in advance that covers all cases.

over, the employee could institute discovery proceedings against the union or employer, thus at least delaying summary judgment, and even appeal summary judgment if granted. Even if such a case never gets to trial, the costs of litigation will far exceed those of arbitration. Of course it must on the other hand be admitted that employees will to a degree be deterred from instituting such litigation when their eventual chances of success are small.

The hostility of the Supreme Court towards frivolous grievances brought by individual employees is somewhat puzzling.[28] Where an allegedly frivolous grievance is brought by the union, the employer cannot resist a court order to arbitrate on the ground that the union claim is patently unfounded.[29] This conclusion is justified on two grounds: first, that the arbitration of employer-union disputes without the interference of the courts helps further industrial peace through the development of self-government within the plant;[30] and, second, that the processing of all grievances, even those seemingly frivolous, has a "therapeutic" effect upon all concerned.[31] These two rationales apply with equal force to those cases in which the arbitration of a grievance is sought by an individual employee. But once he, and not the union, desires the arbitration of the grievance the entire perspective shifts: arbitration is not encouraged, but forbidden; only litigation is permitted, and even that is discouraged.

2. *Union Rivalry and the Right to Process Grievances*

A rule enabling an individual to press his claim to arbitration supposedly endangers industrial peace because it allows rival unions and dissenting groups within the unit to

28. The fear of the frivolous grievance parallels the fear, once widely held, of the flood of speculative lawsuits that would overwhelm the courts if actions for nervous shock in the absence of physical impact were permitted. The rule has been changed in many states in recent years and the dreaded flood of groundless cases has not materialized. *See, e.g.*, Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965), *overruling* Ward v. West Jersey & S.R.R., 65 N.J.L. 383, 47 A. 561 (1900).

29 United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). The decision of the Supreme Court in *American Manufacturing* rejected the older rule in Association of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317, *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947). "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate, and the contract cannot be said to provide for arbitration." *Id.* at 918, 67 N.Y.S.2d at 318.

30. "A collective bargaining agreement is an effort to erect a system of self-government." United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580 (1960). *See generally* Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1002-09 (1955).

31. Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247, 261 (1958), *cited in* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

> press aggressively all manner of grievances, regardless of their merit, in an effort to squeeze the last drop of competitive advantage out of each grievance and to use the settlement of even the most trivial grievance as a vehicle to build up their own prestige. Imaginary grievances could be conjured up and others which, under ordinary circumstances, would be dropped at the first step could be magnified out of all proportion to their importance. The settlement of grievances could become an endless source of friction and competition and a means for creating and perpetuating employee dissatisfaction instead of a method of eliminating it.[32]

This argument fails. It is based on the assumption that rival unions will actively intervene in the settlement procedure and disrupt the orderly course of negotiation between the established union and the employer, to the detriment of all the parties governed by the collective agreement. In practice, however, such intervention will rarely occur; and even where such situations seem likely to arise, they can be prevented without sacrificing the individual employee's right to control his personal grievance.

Although a rival union might intervene actively in the grievance procedure if the individual could process his grievance independently, the number of instances in which there are union rivalries within the unit is probably small. At best, then, the rule in *Vaca* takes a condition admittedly infrequent and treats it as the norm for determining rules to govern the processing of grievances under all circumstances. Moreover, one could prevent the disruption of settled grievance procedures by more selective means than denying all individual relief in cases in which the union has acted in good faith. First, the employee could be granted the right to litigate but denied the right to arbitrate. By requiring the employee to litigate his claim in court, the law could preserve the grievance machinery for use solely in those cases in which the claim was brought by the representative union.[33] Alternatively, if it is thought to be desirable to preserve the individual's access to arbitration, any rival unions could be forbidden to give either financial or legal assistance to any aggrieved employee. Indeed, such a rule could easily be inferred from the right of the representative union to be the exclusive bargaining agent within the unit.

Thus, individual control over personal grievances need not lead to

32. Douglas Aircraft Co., 25 War Lab. Rep. 57, 64-65 (1945), cited in Cox, *supra* note 15, at 626. The Supreme Court, which relies on Professor Cox's article, 386 U.S. at 191, does not rely on this particular argument.

33. The Court misses the point when it speaks of the absolute right to arbitrate as though it were the only alternative to the rule it laid down. 386 U.S. at 191-93.

an intensification or creation of union rivalry. Indeed, there are grounds for believing that statutory rules guaranteeing such a right may actually reduce the intensity of such rivalry by eliminating a potentially burning issue from inter-union competition. The recognition of an individual's right to process grievances may also lessen rivalry by reducing the individual's dependence on his bargaining representative, and concomitantly his concern over the representative selected.

B. *Competing Private Interests*

However, it may still be argued that the recognition of such a right would endanger one or more private interests significantly. But when these supposed competing private interests are examined in detail, the danger to them proves small or nugatory.

1. *The Union Interest*

Individual control over personal grievances would affect union interests in two ways. First, it would reduce the power of the union over the employees it represents by diminishing their dependence on the union. Second, it could create situations in which the employer and the employee could engage in conduct inimical to the interests of the union.

As we have already seen, the smaller the control of the union over the grievance, the less dependent upon its services are its men. Although the union thus has an interest in controlling the grievance machinery, this fact does not imply that it should have that control as a matter of right, even if it acts in good faith.[34] A union is a means and not an end in the scheme of labor relations. It should control the grievance machinery only so long as it provides its members with benefits which they could not achieve through individual efforts. In short, the test is not good faith, but performance, and there is no reason to believe that union members should not be allowed to judge that performance themselves. Where the union handles the grievance machinery properly, its members will rarely assume the extra hazards and costs of

34. In *Vaca* the Court does not address itself to the question of the legitimacy of the union's interest, when it says: "the settlement process [in which the union has control over the grievance machinery] furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of the agreement." 386 U.S. at 191. Mr. Justice Black makes this point in his dissent: "I simply fail to see how the union's *legitimate* role as statutory agent is undermined by requiring it to prosecute all serious grievances to a conclusion or by allowing the injured employee to sue his employer after he has given the union a chance to act on his behalf." 386 U.S. at 209-10 (emphasis added).

exercising their individual right to act independently of the union. Only those unions of questionable competence, and therefore of questionable worth, need fear the recognition of this individual right.

Admittedly, however, in the determination of grievances brought by individual employees, questions which affect the legitimate interests of the union may arise. Since the union may have to bear costs if the individual successfully processes his grievance over its refusal, it has a financial stake in its resolution. Indeed, absent the union, the employer might even offer the employee favorable terms of settlement on condition that he agree to oppose the union. Alternatively, the employee may seek to defend himself by alleging that his union told him that his conduct was proper under the terms of the collective agreement. In all such cases, the union should be permitted to be present during settlement. The need for the union to be present may only arise infrequently, yet no harm is done in permitting the union to be present at the settlement, arbitration, or litigation to guard its interests if it so chooses. But, although the union's interest in the grievance procedure appears to warrant its right to be present in settlement meetings between the employer and the employee, these interests do not justify a grant of exclusive control, limited only by the requirements of good faith.

2. *The Employer Interest*

It may be assumed that the number of cases in which an employee recovers against his employer would be increased where the right in question is recognized. Clearly, however, the employer has no right to be released from the duty of paying damages for his breaches of contract. The only increases in cost in which the employer has a legitimate interest are the legal and administrative expenses he will have to bear if any alternative to *Vaca v. Sipes* were adopted. As we have seen, there is good reason to believe that such costs would not be substantial, particularly when compared with the costs the employer may incur in litigation under the rule of *Vaca v. Sipes*. Moreover, the employer's costs under the right to arbitration alternative to *Vaca* will be reduced by the amount that the arbitrator taxes employees who bring frivolous grievances. Finally, to the extent the employer controls the negotiation of the collective agreement, he will be able to pass some of the remaining costs on to his employees by reducing the value of the package offered. It seems fair, then, to conclude that the employer has at most only a modest legitimate financial interest in the decision to grant the individual employee control over his own grievance.

The employer interest in the form of the remedy is more substantial. In his relations with the union, the employer is treated in accordance with the traditional law of private contracts to the extent that he is not required to arbitrate unless he has so agreed. Admittedly, the presumption in favor of arbitration that usually holds in labor cases runs contrary to the general rule on arbitrability,[35] but even that presumption will not serve to create an agreement to arbitrate out of whole cloth. Hence it may well be that the employer should not be required to arbitrate in the absence of his promise to do so.

3. *The Interest of Other Employees in a Personal Grievance*

Where there is a personal grievance of a single employee, no other employee has a substantial financial interest in the resolution of that grievance, regardless of whether a personal remedy is provided by arbitration or litigation. Where the employee processes his own grievance, the costs to the other employees in the unit promises to be less than those involved in those cases in which the union itself processes the grievance. If the grievance is brought without a request for the assistance of the union, the union and the employees it represents will at most bear the costs of observation if it chooses to be present during the adjustment of the grievance. Where the union chooses not to process the grievance, the other employees will only bear the costs of the aggrieved employee if he is successful. By contrast, the employees of the unit will always bear all the costs when the union itself processes the grievance, regardless of its merit. Moreover, under a system which permitted individual control over grievances, the incidence of fair representation suits against the union would doubtless drop, given the comparative attractiveness of the contractual remedy against the employer, and hence the costs to other employees in the defense of these suits could be passed back to the members of the unit either in the form of reduced dues or increased benefits.

Accordingly, if there is a substantial financial burden to other employees in the personal control of grievances, it must stem from the ability of the employer to pass on his increased costs—either of settlement or administration—by reducing their benefits under the collective agreement. Since the employer does not unilaterally dictate the terms of the agreement, he will be able to pass these costs on only in part. Moreover, the costs in question must be measured against the

35. *See* United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

costs which the employer could pass on when the aggrieved employee litigates under the rule in *Vaca v. Sipes.*

Finally, even if there were increased costs to the other employees in the unit, these would be offset by the value to them of the contingent right to pursue their individual grievances independently should they ever wish to do so.

III. The Resolution of the Conflicting Interests

On the basis of this analysis, the interest of the aggrieved employee in the control of his personal grievance remains the only interest that is both legitimate and substantial. Therefore the individual employee should be provided with a remedy in every case in which his contractual interests are invaded. The Supreme Court itself seems to recognize implicitly the force of this conclusion. Thus, it wrote in *Vaca*:

> [T]he employer has committed a wrongful discharge in breach of [the collective] agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances would, in our opinion, be a great injustice. We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements.[36]

Measured against its own standards, the result reached in *Vaca v. Sipes* is defective. Is there not an injustice in leaving an employee remediless against his employer when there has been a breach of contract merely because there has been no breach of the duty of fair representation by the union? The union may have been mistaken in its evaluation of the grievance, but that is no reason to immunize the employer from liability for his admitted breach. Worse still the union could have negligently evaluated the individual claim. To deny the employee under such circumstances would be precisely to "shield employers from the natural consequences of their breaches . . . by the

36. 386 U.S. at 185-86. *See also* Cox, *supra* note 15, at 652.

wrongful union conduct in the enforcement of [the collective] agreement,"[37] unless one chooses not to regard negligent conduct as wrongful because it is not willfully so.

Again, the rule in *Vaca v. Sipes* appears to deny an employee his just remedy where the union decides that it will not process the individual grievance because it is in conflict with other interests of the union.[38] Thus the union may decide that it does not wish to take the grievance further because it has reasonable doubts as to its ultimate success and does not wish to incur the expense of arbitration. Or the union may choose to yield on one grievance in order to encourage the settlement of others.[39] Alternatively, the union may choose not to process the grievance for fear that it will jeopardize its position on some matter of greater union concern. In all of these cases the union has weighed one interest against another, only to reject the individual claim.

Even if the employee believes that he is entitled to a remedy under the rigid limitations of *Vaca,* he must still overcome difficult problems of proof in order to prevail. Under the law prior to *Vaca v. Sipes,* an employee could not maintain his action for breach of contract against the employer unless he could show that he had attempted to process his claim under the grievance machinery established by the collective agreement.[40] But in *Vaca* the crucial condition for the contractual remedy is no longer the attempt by the employee to use the grievance machinery but the union's bad faith in deciding not to process the grievance. Although the employee can easily prove that he has attempted to utilize the grievance machinery, proof of bad faith involves a demonstration of the purpose and intent underlying the union's decision about which reliable information is notoriously difficult to obtain.

Thus it appears that the rule in *Vaca v. Sipes* does not afford adequate protection to the individual employee, particularly in light of the weakness of the competing private claims for protection. Nor can the rule of the Court be justified on the ground that under the collective agreement the individual employee has delegated all of his reme-

37. 386 U.S. at 186. Mr. Justice Black, in dissent, makes precisely this point. 386 U.S. at 205.

38. *See* Donnelly v. United Fruit Co., 40 N.J. 61, 80-81, 190 A.2d 825, 835-36 (1963), where the conflict of interest is made the test of fair representation, unless the union fairly prosecutes the grievance at the request of the employee.

39. The attitude is "give a little, take a little." Wellington, *Union Democracy and Fair Representation: Federal Responsibility In a Federal System,* 67 YALE L.J. 1327, 1336 (1958).

40. Republic Steel Co. v. Maddox, 379 U.S. 650 (1965).

dial rights to his union as his sole agent, and thus has no ground to complain unless that agent, the union, has acted in bad faith. If the union is to be the employee's agent in processing his individual grievances, some particular designation of agency should be required. Since a collective agreement may bind a worker in the unit even though he did not support its adoption, it cannot be said to constitute an appointment of the union as general agent, much less a specific appointment for the purpose of processing grievances. Once the union has decided not to take the grievance further, it cannot be regarded as an agent of the employee since it is acting contrary to his interests and instructions. At this point, the union is a mere stranger to the contract, whose compliance with the duty of fair representation is immaterial to the employee's action on the contract.[41] A system, then, which permits the union as the recipient of monopoly power to conclude agreements which make it the exclusive custodian of individual remedies is open to serious challenge. The grant of monopoly power to the union can only be justified to the extent that it serves the need to preserve industrial peace. Since, as we have seen, industrial peace is not furthered by an extension of monopoly power from the negotiation of the collective agreement to its enforcement, the union should not be permitted to acquire through contract exclusive control over employee grievances.

Nor, as the Supreme Court suggested, can *Vaca v. Sipes* be justified by the fact that collective agreements usually give unions control over the grievance machinery as a matter of right.[42] According to the Court, this industrial practice is relevant under Section 203(d) of the Labor Management Relations Act, which provides: "Final adjustment by a method agreed upon by the parties themselves is . . . the desirable method for settlement of grievance disputes arising out of the application of the collective agreement."[43]

Admittedly, collective agreements are a source of law for labor relations, but they are not the only source. Such agreements are solely the products of bargaining between the employer and the union, and, in the absence of public control, will reflect only their combined interests. Both the union and the employer have an interest, if not one worthy of protection, in preventing the employee from pressing his grievance independently, and will protect that interest by providing

41. Mr. Justice Black clearly regards this characterization of the union as a stranger to the contract of hire as both proper and final, and appears to find no justification even for union presence at settlement. Thus he speaks of the individual employee's suit as a suit "for the *simple* breach of *his* employment contract." 386 U.S. at 203 (emphasis added).
42. *See* Cox, *supra* note 15, at 631.
43. L.M.R.A. § 203(d), 29 U.S.C. § 173(d) (1964).

for exclusive union control over the grievance machinery in their collective agreement. They cannot be expected to yield gratuitously to a third party not present in their negotiations, even where that third party has a direct and legitimate interest in the outcome. Since the forces of self-interest, imperfectly mirrored in the negotiation of the collective agreement, do not adequately protect the interests of the individual employee, the union and employer must be prevented from denying the employee access to the grievance machinery by statutory intervention.

This conclusion is not inconsistent with Section 203(d), which is but one of a series of provisions dealing with the role of the Federal Mediation and Conciliation Service.[44] This context indicates that Congress was concerned in this provision only with the massive social disruptions that could occur when the union stands pitted en masse against the employer. Thus Section 203(c) provides that "If the Director [of the Service] is not able to bring the parties to agreement by the conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lockout or other coercion . . . ."[45] Since the parties referred to throughout are the union and the employer alone, the provision has no application to tripartite problems where personal rights which do not endanger industrial peace are at stake.

The final irony of *Vaca v. Sipes* is that a desirable solution to the question of individual rights probably could have been reached through the words of Section 9(a) of the Labor Management Relations Act, which was completely ignored by the Court:

> Representatives designated or elected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or group of employees shall have the right at any time to present such grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, so long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided* further, That the bargaining representative has been given the opportunity to be present at such adjustment.[46]

44. L.M.R.A. § 203, 29 U.S.C. § 173 (1964).
45. L.M.R.A. § 203(c), 29 U.S.C. § 173(c) (1964).
46. L.M.R.A. § 9(a), 29 U.S.C. § 159(a) (1964).

The provision can be read, according to its plain meaning,[47] to provide a solution consistent with the results of interest analysis made in this note. Section 9(a) accepts the distinction between the negotiation of the collective agreement and the settlement of grievances arising under that agreement consistent with its terms. It gives the employee the right to take his grievance to his employer "at any time" and "without the intervention" of his union. The union, for its part, is granted the limited right—consistent with its limited interest—to be present at the resolution of employee grievances. The direct relief afforded an employee against his employer is not only consistent with this section but indeed may be required by it, and if so the bad faith of the union is immaterial to the determination of rights between the employee and his employer. On the other hand, the statute is less clear on the form than on the nature of the remedy to be afforded to the individual employee in those cases in which informal adjustment fails. Indeed, even if arbitration is regarded as preferable in cases of individual grievances for those same reasons which give it preferred status in disputes between the union and the employer, it does not appear to be the remedy envisoned by Section 9(a).[48] One could attempt to read into the words "have such grievances adjusted" a requirement that the adjustment be by arbitration where the grievance machinery provides for it at the option of the union.[49] On the other hand, such a requirement would make the employer settle a grievance through a procedure to which he had not agreed in the contract. It could hardly

47. *See* Cox, *supra* note 15, at 624, where Hohfeld's theory of rights is invoked in an attempt to undermine the plain meaning of the first proviso to Section 9(a). Hohfeld's distinction between a strict right on the one hand and a privilege on the other, W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, 36-50 (1923), is seized upon by Professor Cox, who argues that the statute uses the term "right" in a loose, non-technical sense of "privilege." Such an interpretation, he claims, is consistent with the purpose of the proviso, which was designed to permit the employer to deal directly with an aggrieved employee without fear of committing an unfair labor practice under Section 8(a)5. *See* General Electric Co., 150 N.L.R.B. 192, 200 (1964) (concurring opinion). But the construction of this proviso turns on more than the distinction between a "right" and a "privilege." The crucial question must be whose rights and whose privileges are at stake. Even if the term "right" is taken to mean Hohfeldian "privilege," the privilege must still be that of the employee, and not his employer. The force of Professor Cox's argument thus is that the "employee has the [privilege] at any time . . . ," which is hardly language that supports the conclusion that individual remedies for breach of contract by the employer are conditioned upon a breach of the duty of fair representation by his union. It matters not that the proviso may have been passed to protect employer interests, for such an interest could be served by a grant of rights to the employee. *See* Summers, *supra* note 24, at 362, 376-85, for a more generous and more literal reading of Section 9(a).

48. *See* p. 568 *supra*; Hughes Tool Co., 56 N.L.R.B. 981, 982-83 (1944); *enforced as modified*, Hughes Tool Co. v. N.L.R.B. 147 F.2d 69, 73 (5th Cir. 1945).

49. *See also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), where the Court with less apparent justification read a preference for arbitration into the text of Section 301(a).

be expected that an individual employee should be granted the right to arbitrate when he would not have that privilege if the union processed his grievance on his behalf. Absent specific language in the statute, therefore, it seems that the employee should be returned to the position he would have enjoyed had there been no union and no grievance machinery. Unless he can obtain a specific agreement from the employer to arbitrate, he will be thrown back upon his judicial remedy.

But disagreements on the proper form of the remedy do not weaken the criticisms of the substantive rule in *Vaca v. Sipes*, for in that case the employee demonstrated his willingness to pursue judicial remedies against both his employer and his union. Had the Court properly assessed the weight of the competing interests involved, it would not have presumptively vested the union with exclusive control over the grievance machinery. Rather it would have recognized, at the very least, the right of the employee to gain judicial redress, unimpeded by requirements of the proof of bad faith, of contractual wrongs suffered by him.