Banishment of Punitive Damages in Fair Representation Suits: Punishing the Wrong Party? - IBEW v. Foust

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Since the Supreme Court first articulated a union's duty of fair representation in 1944, courts have struggled to define not only the nature and extent of that duty but also the appropriate remedies in the case of a

1. See Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944). Both cases were brought under the Railway Labor Act of 1926, ch. 691, §§ 1-8, 48 Stat. 1185 (1934) (current version at 45 U.S.C. §§ 151-188 (1976)), and involved claims of racial discrimination brought by black railroad employees who had been systematically excluded from the union due to their race. In Steele, the Court held that as long as a union assumes to act as the exclusive bargaining representative of a craft or class of employees,

   the language of the Act . . . , read in the light of the purposes of the Act, expresses
   the aim of Congress to impose on the bargaining representative . . . the duty to
   exercise fairly the power conferred upon it in behalf of all those for whom it acts,
   without hostile discrimination against them.

323 U.S. at 202-03.

Tunstall addressed the further question of whether the federal courts have jurisdiction to entertain a non-diversity suit brought under the Railway Labor Act. The Court determined that the case would be one arising under a law regulating commerce and therefore would be within the jurisdiction of the federal courts. 323 U.S. at 213. See Conley v. Gibson, 355 U.S. 41, 44-47 (1957) (reaffirmed the jurisdiction of the federal courts in cases brought under the Railway Labor Act as well as the duty of unions to represent all unit members fairly and impartially).

2. The leading case on the nature of a breach of the duty of fair representation is Vaca v. Sipes, 386 U.S. 171 (1967), in which the Court stated that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Id. at 190. Although the Court acknowledged that an employee does not have an absolute right to have his or her grievance taken to arbitration, the Court warned that arbitrarily ignoring a grievance or processing it perfunctorily would qualify as a breach of the duty of fair representation. Id. at 191.

Other courts have readily adopted the Vaca standard, while recognizing that it resists precise formulation. See, e.g., Griffin v. UAW, 469 F.2d 181, 182-83 (4th Cir. 1972) (breach of duty by union for filing grievance with person antagonistic to employee's interests); Retana v. Apartment Operators Local 14, 453 F.2d 1018, 1023 (9th Cir. 1972) (breach of duty by union for failure to adequately represent Spanish-speaking employees); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 283-84 (1st Cir.), cert. denied, 400 U.S. 877 (1970) (breach of duty by union for arbitrary failure to press grievances based on violation of seniority provision in collective bargaining agreement). Determination of whether a breach has occurred depends on the facts of each case. Griffin v. UAW, 469 F.2d at 182; Trotter v. Motor Coach Employees, 309 F.2d 584, 586 (6th Cir. 1962). In Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), the Supreme Court attempted further to refine the standard, characterizing a breach as conduct that includes "evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Id. at 301. The distinction has also been made between "honest, mistaken conduct . . . and deliberate and severely hostile and irrational treatment." Id. In the Sixth Circuit, fraud, dishonesty of purpose, misrepresentation, or such gross mistake as to imply bad faith constitute a breach of the duty of fair representation. Bundy v. Penn Central Co., 455 F.2d 277, 279 (6th Cir. 1972) (withdrawal of meritless grievance not necessarily evidence of
breach. In the absence of specific statutory directives, the propriety of punitive damages in fair representation suits has been the object of considerable dispute among the federal courts. Not only has the appropriate standard to be followed been the subject of disagreement, but the fundamental propriety of punitive damages in fair representation suits has been questioned. Recently, in International Brotherhood of Electrical Workers v. Foust, the United States Supreme Court settled the question of punitive damages in fair representation suits brought under the Railway Labor Act by eliminating such damages as an appropriate remedy. Stating that punitive awards conflicted with "remedial" federal labor policies, the Court determined that the threat punitive damages posed to union financial stability and bargaining strength far outweighed any possible advantages of such a remedy. Consequently, even particularly outrageous union misconduct will no longer merit a punitive sanction.

This Note analyzes the Court's treatment of underlying precedent and its balancing of policy considerations in Foust. In addition, it is demonstrated that the concurring opinion reflects a more realistic attitude toward the competing interests of the individual and his or her union and the need for a punitive sanction in limited instances. Finally, Foust's impact on labor-management relations is evaluated.

3. See notes 38-39, infra, for a discussion of the disagreement among the circuit courts as to the type of union misconduct justifying punitive awards.
5. See note 38 infra.
9. 442 U.S. at 49-52.
10. Id. at 52-61 (Blackmun, J., concurring).
Factual Background

Leroy Foust, a radioman employed by the Union Pacific Railroad and a member of the International Brotherhood of Electrical Workers (IBEW), was injured while at work in March, 1970. Foust received a medical leave of absence after his injury, which he sought to renew shortly before it was to expire. Although the Union Pacific had not received a required medical statement supporting Foust's request for an extension, the Railroad assured Foust in writing on January 25, 1971, that review of his request would be delayed until the document arrived. Despite this assurance, Foust was discharged on February 3, 1971, for failing properly to request an extension.

When the Railroad refused to reconsider its decision, Foust's attorney wrote to the IBEW District Chairman and requested that grievance proceedings be instituted pursuant to the terms of the collective bargaining agreement. Although the sixty-day deadline was imminent, union officials delayed the filing of the action until after the deadline had expired. The Railroad denied the claim due to tardiness and, on appeal, the National Railroad Adjustment Board upheld the company's decision.

Foust sued the union and several of its officers in the District Court for Wyoming, alleging that the IBEW's failure to file a timely grievance constituted unfair representation under the Railway Labor Act. The jury awarded Foust $40,000 actual damages and $75,000 punitive damages. The Court

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11. Foust filed two claims against the railroad that were settled in 1973. Brought under the Federal Employer's Liability Act, the first claim for work-related personal injuries was settled by a $75,000 payment to Foust, less $2,600 he had received in sickness benefits. Foust's second claim arose as a result of the termination of his employment by the Railroad, but he released his claim and waived future right of employment upon receipt of the $75,000 settlement. Foust v. IBEW, 572 F.2d 710, 712 (10th Cir. 1978).
12. Id. This was in accordance with rule 23(b) of the collective bargaining agreement, which provides: "Failure to report for duty at the expiration of leave of absence shall terminate an employee's service and seniority, unless he presents a reasonable excuse for such failure not later than seven days after expiration of the leave of absence." Id.
13. 442 U.S. at 43-44.
14. Id. Rule 21(a)(1) of the collective bargaining agreement provides: "All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based." Id. at 44 n.2.
15. D.F. Jones, the District Chairman, received the attorney's letter fifty-two days after Foust's dismissal. Although the sixty-day deadline was imminent, Jones contacted the IBEW Chairman, Leo Wisniski, instead of instituting grievance proceedings. Wisniski then drafted a letter insisting that Foust submit a written request to the union to handle his claim. Wisniski's letter was sent to Jones, who then forwarded it to Foust. Foust received this letter sixty-one days after his discharge. Jones, however, proceeded to file Foust's claim before receiving Foust's written authorization. Wisniski prepared the claim form in Omaha and forwarded it to Jones in Rawlins, Wyo. Jones then mailed the claim to the Union Pacific Railroad in Omaha. This roundabout procedure resulted in the filing of Foust's claim two days after the expiration of the deadline. Id. at 44.
16. Id.
of Appeals for the Tenth Circuit affirmed the judgment except as to the amount of punitive damages. The United States Supreme Court granted certiorari and reversed the decision of the court of appeals, holding that punitive damages were impermissible per se in unfair representation suits brought under the Railway Labor Act.

THE DUTY OF FAIR REPRESENTATION

The duty of fair representation is a judicially evolved doctrine that protects individual employees from union abuses in the negotiation and administration of collective bargaining agreements. Once a union assumes to act as the exclusive bargaining representative of a craft or class of employees, it becomes their agent and must represent the interests of all such employees fairly and impartially. The union’s obligation, however, does not preclude it from entering into collective bargaining agreements that may be unfavorable to some members of the represented group. So long as a union’s actions are based on relevant, permissible factors, excluding

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18. Foust v. IBEW, 572 F.2d 710 (10th Cir. 1978).
19. Id. at 719. The court first determined that an award of punitive damages was justified on the facts of the case. The standard utilized by the Tenth Circuit to reach that conclusion was the Fourth Circuit’s “wanton and reckless disregard” test: “Wanton conduct or reckless disregard for the employee should suffice.” Id. The court specifically rejected the third circuit’s suggestion that punitive damages are perhaps impermissible in unfair representation suits, as well as the Eighth Circuit’s express malice requirement. Id.

While the court concluded that the IBEW’s reckless disregard justified a punitive damages award, it expressed some uncertainty as to the proper amount. Although the jury’s award of $75,000 in punitive damages appeared high to the court, it did not seem excessive. The court declined to rule on the point and instead remanded the case for reconsideration of the awarded amount, stating that the trial judge could better evaluate the matter as he had heard the evidence and would be more familiar with the facts. Id.

20. 439 U.S. 892 (1978). The majority specifically limited its grant of certiorari to the question of punitive damages, noting that the findings of the courts below as to the union’s actual breach of the duty of fair representation and the propriety of the compensatory damage award would be taken as correct. 442 U.S. at 45 n.4.

21. Id. at 52. Justice Marshall delivered the opinion of the Court, in which Justices Brennan, Stewart, White, and Powell joined.


any elements of personal animosity or discrimination, a union will not expose itself to liability for a breach of the duty of fair representation.

While a wide range of reasonableness is allowed a union in the exercise of its powers, its authority is necessarily limited. A union is bound to avoid the arbitrary, hostile, or discriminatory treatment of those employees it represents, and its conduct is subject to the test of good faith. Decisions regarding the merit of grievances must be made in a similarly non-arbitrary fashion, although a union is not required to exhaust every available procedure upon demand by an employee.

Once a breach by the union has been established, an appropriate remedy must be granted. Injunctions, damages, and an order compelling arbitration have been held permissible remedies. The damages assessed against a union may not include damages attributable solely to the employer's breach of contract. A union is therefore liable, according to the apportionment principle of Vaca v. Sipes, only for any increases in those damages directly caused by its refusal to process a grievance. While it is generally agreed

33. Id. at 197.
34. Id. at 197-98. The Court defined its principle as follows:

The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.

This sensible policy has been followed by numerous courts: Czosek v. O'Mara, 397 U.S. 25 (1970) (union and company pay portion of damages according to individual fault in wrongful discharge case); Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975) (union and company both contributed to employee's injuries in discharge case, so each must bear half of total damages); Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975), cert. denied, 425 U.S. 938 (1976) (union directly chargeable with damages for its own deliberately misleading conduct causing employee's loss of right to bring claim); Woods v. North Am. Rockwell Corp., 480 F.2d 644 (10th Cir. 1973) (union not chargeable with damages because no proof it engaged in racially discriminatory practice); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir.), cert. denied, 400 U.S. 877 (1970) (company chargeable with entire amount of damages where union's conduct did not increase or contribute to improper discharges).
that compensatory damages may be assessed against a union for its breach of the duty of fair representation,\(^{35}\) the availability of punitive damages has been the object of judicial disagreement. Further, if the particular labor statute under which a case is brought is ambiguous or silent as to the proper remedy, the matter of relief becomes more complicated.\(^{36}\) In such in-


36. The Railway Labor Act is silent on the question of remedies. Therefore, the duty of fair representation is necessarily inferred from the spirit and purpose of the entire Railway Labor Act. Steele v. Louisville & N.R.R., 323 U.S. at 204.

Remedial provisions in other labor statutes have led to differing interpretations by the courts. For example, the Taft-Hartley Act, which covers unlawful union activities and conduct, provides that recovery for an unfair labor practice shall be “the damages by him sustained.” Labor Management Relations (Taft-Hartley) Act § 303, 29 U.S.C. § 187 (1976). Although such language is ambiguous, it has been interpreted as limited to compensatory damages. Local 20, Teamsters v. Morton, 377 U.S. at 260-61. Section 301 of the Taft-Hartley Act, which covers suits by and against unions, contains no provision regarding appropriate damages. Although the availability of punitive damages under § 301 has been the subject of judicial disagreement, the recent trend supports the use of punitive awards in limited instances. See list of cases and discussion in Butler v. Yellow Freight System, Inc., 374 F. Supp. 747, 752-53 (W.D. Mo. 1974), aff’d in part and remanded in part sub nom. Butler v. Local 823, Int’l Bhd. of Teamsters, 514 F.2d 442 (8th Cir.), cert. denied, 423 U.S. 924 (1975).

The relevant provisions of the Labor Management Reporting and Disclosure (Landrum-Griffin) Act, 29 U.S.C. §§ 401-531 (1976), which was enacted to provide for the disclosure of certain financial transactions and administrative practices of labor organizations, furnish a further analogy. Section 101 of the Act contains a bill of rights for union members, while § 102 provides that a violation of the rights of a union member under the Act will justify “such relief (including injunctions) as may be appropriate.” The latter open-ended provision has also caused judicial dispute as to whether punitive damages are an appropriate remedy under § 102. The Courts of Appeals for the Second, Ninth, and Fifth Circuits agree that punitive damages are an appropriate remedy under § 102. Morrissey v. National Maritime Union, 544 F.2d 19 (2d Cir. 1976) (punitive damages available upon showing of malice or wanton indifference, though § 102 judgment reversed due to jury instruction violation); Cooke v. Orange Belt Dist. Council of Painters No. 48, 529 F.2d 815 (9th Cir. 1976) (punitive damage award probably justified by malice or reckless indifference to rights of union member in case of retaliatory job assignment, though case reversed and remanded due to inadequate record); International Bhd. of Boilermakers v. Braswell, 388 F.2d 193 (5th Cir.), cert. denied, 391 U.S. 935 (1968) (punitive damages properly awarded for malicious action in case of unlawful expulsion from union). Other lower courts, however, have refused to allow punitive damages. Magelssen v. Local 518, Plasterers & Cement Masons, 240 F. Supp. 259 (W.D. Mo. 1965) (punitive damages not recoverable in § 102 suit for employee’s expulsion from union); Keenan v. District Council of Carpenters & Jointers, 59 LRRM 2510 (E.D. Pa. 1965) (punitive damages not recoverable in § 102 suit for employee’s removal from office and suspension by union); Burris v. International Bhd. of Teamsters, 224 F. Supp. 277 (W.D.N.C. 1963) (punitive damages not recoverable in § 102 suit for expulsion from union and blacklisting).
stances, courts have attempted to fashion remedies to effectuate the purposes of the specific legislation. The unsettled state of labor law regarding the propriety of punitive damages in unfair representation cases therefore prompted the Court, in IBEW v. Foust, to resolve the issue in the context of Railway Labor Act suits.

THE MAJORITY'S ANALYSIS

Pre-Foust lower court decisions revealed disagreement as to the type of union misconduct justifying a punitive damage award in unfair representation suits. Standards such as wantonness and reckless disregard, willful or arbitrary abuse, and actual malice had been approved by the various circuit courts. Although no circuit court of appeals had totally barred punitive

37. A passage from Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), has been widely quoted by various courts faced with the lack of specific congressional directives as to remedies: "Some [problems] will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem." Id. at 457. See also Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 729 (1944).

Commenting upon appropriate remedies under the Railway Labor Act, the Court, in Steele v. Louisville & N.R.R., resolved that the Act "contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty." 323 U.S. at 207. Professor Cox contends that when sections of a statute contain ambiguities, emphasis should be placed on the underlying rationale of the statute rather than on a close construction of the statutory language. Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 MICH. L. REV. 819, 852 (1960) [hereinafter cited as Cox].

38. The Fourth Circuit has determined that wanton misconduct or reckless or callous disregard for the rights of another, without any proof of actual malice or personal animosity, is sufficient to justify an award of punitive damages. Harrison v. United Transp. Union, 530 F.2d 558, 563-64 (4th Cir. 1975), cert. denied, 425 U.S. 958 (1976). Proof of malice is required in the Eighth Circuit. See Emmanuel v. Omaha Carpenters Dist. Council, 560 F.2d 382 (8th Cir. 1977) (punitive damages unjustified in absence of showing that union acted maliciously in agreeing that it would not insist employer hire from union hall); Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442 (8th Cir.), cert. denied, 423 U.S. 924 (1975) (punitive damages inappropriate because union displayed no malice in favoring one group of employees over another in merger of two companies). Dill v. Greyhound Corp., 435 F.2d 231, 239 (6th Cir. 1970), cert. denied, 402 U.S. 952 (1971), required a finding of actual damage before punitive damages could be awarded. Willful abuse has been mentioned by the Second Circuit as the requisite element for an award of punitive damages. Holodnak v. Avco Corp., 514 F.2d 285, 292-93 (2d Cir.), cert. denied, 423 U.S. 892 (1975).

The handling of the remedies question in cases brought under the Labor Management Reporting and Disclosure (Landrum-Griffin) Act § 102, 29 U.S.C. § 412 (1976), is instructive by way of analogy. The element required for an award of punitive damages under § 102 is the reckless or wanton indifference to the rights of the plaintiff. See note 36 supra. In Morrissey v. National Maritime Union, 544 F.2d 19 (2d Cir. 1976), a § 102 case, the Second Circuit commented that "[i]f punitive damages can be awarded against other defendants, they can be awarded against unions as well." Id. at 25. In addition, punitive damages may be awarded even where only nominal compensatory damages have been awarded. RESTATEMENT (SECOND) OF TORTS § 908, Comment c (1979) [hereinafter cited as RESTATEMENT]; REYNOLDS v. PEGLER, 223 F.2d 429, 434 (2d Cir. 1955).
damages as an available remedy in unfair representation cases, the Supreme Court held that such awards were impermissible. The *Foust* majority, in fact, shifted its attention from the conflicting standards of the circuit courts to the overall propriety of punitive damages under the Railway Labor Act. Because the Act is silent as to appropriate remedies for a breach of the duty of fair representation, the Court undertook to implement a remedial scheme consistent with the Act's conciliatory objective of industrial peace. It concluded that punitive damages would be violative of the conciliatory purposes of the Railway Labor Act, viewing such damages solely in the aspect of an undeserved punishment on the union.

39. Although the Third Circuit had suggested that punitive damages were impermissible, the Third Circuit case that the Court found persuasive did not totally bar punitive damages as a possible remedy. In *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005 (3d Cir.), cert. denied, 434 U.S. 837 (1977), the court declined to decide whether punitive damages might be appropriate in certain instances. Instead, it merely held that punitive damages would not be allowed where no actual damages were shown. *Id.* at 1019. In *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3d Cir. 1962) (per curiam), however, the Third Circuit indicated that punitive damages were inappropriate under remedial labor statutes.

Two Ninth Circuit cases in which punitive damages were denied are similarly distinguishable. In *Dente v. International Organization of Masters, Mates & Pilots Local 90, 492 F.2d 10 (9th Cir. 1973), cert. denied, 417 U.S. 910 (1974)*, a damage award was rejected because there was evidence only of union negligence and not the kind of "arbitrary abuse" required for an award of damages. *Id.* at 12. In *Williams v. Pacific Maritime Ass'n, 421 F.2d 1287 (9th Cir. 1970)*, the court denied a punitive damage award because of the nature of the grievance alleged (conspiracy of personal defendants who were officers and executive officials of the defendant union). Nowhere was it claimed that punitive damages were otherwise totally unavailable as a possible remedy in unfair representation suits.

40. 442 U.S. at 47-48.


42. 442 U.S. at 47. The conciliatory purposes of the Railway Labor Act are set out in 45 U.S.C. § 151(a) (1976), which refers to the "prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements." See *International Ass'n of Machinists v. Street*, 367 U.S. 740, 758-61 (1961), and *Virginian Ry. v. Railway Employees*, 300 U.S. 515, 542-48 (1937), for brief discussions of the conciliatory purposes of the Railway Labor Act.

The remedial, conciliatory character of the Railway Labor Act is undisputed. See *Nashville, C. & St. L. Ry. v. Railway Employees*, 93 F.2d 340 (6th Cir. 1937): "The statute is in purpose, mechanism and effect, in the highest sense remedial." *Id.* at 342. The comments of Representative Denison during the debate over the Railway Labor Act are in agreement: "It is not a penal statute. It is remedial." 67 CONG. REC. 4652 (1926).

The propriety of judicial fashioning of remedies in the absence of specific statutory provisions is addressed in note 37 *supra*.

43. 442 U.S. at 48-51. The general availability of punitive damages in tort actions for the purposes of deterrence and/or punishment is not questioned. *Restatement, supra* note 38, at § 908(1). Their proper use and effectiveness, however, is debated. See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 219-21 (1973) [hereinafter cited as DOBBS]; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 11 (4th ed. 1971) [hereinafter cited as PROSSER]. These authorities recognize the necessary presence of particularly aggravated misconduct to justify punitive damage awards, emphasizing that the defendant's mental state is the crucial
The Court offered several arguments in support of its conclusion. First, the majority found it significant that no express provision for punitive damages or extraordinary sanctions had been included by Congress in the Railway Labor Act. This prompted the majority to conclude that such remedies were excluded from the purview of the Act. Second, the Court looked to the principle that a union and employer apportion damages in amounts attributable to each party's fault. Citing this principle as authority for the proposition that union liability should be severely restricted, the Court argued that windfall recoveries in the form of punitive damages could have the undesirable effect of depleting union treasuries and causing serious erosion of a union's broad discretion in handling subsequent grievances. The

factor in determining the propriety of the award. Restatement, supra note 38, at § 908(2); Dobbs, supra, at 204-05; Prosser, supra, at 9-11. The standards by which to judge an allegedly culpable frame of mind are abstract and therefore provide room for difference of opinion. Typically, such characteristics as maliciousness, recklessness, wanton misconduct, fraudulent or evil motives, and deliberate disregard for the interests of others are suggested as mental states justifying punitive damage awards. Dobbs, supra, at 205-06; Prosser, supra, at 9-10. Gross negligence and innocent mistake do not qualify as the sort of conduct calling for punitive damage. Prosser, supra, at 10.

Punitive damages are awarded apart from any compensatory or nominal damages. They are not, however, given as a matter of right. While such an award generally is made to punish the defendant and to deter others from pursuing similar conduct, the availability of punitive damages may encourage plaintiffs to sue in order to be reimbursed for elements of damage not otherwise legally compensable. Prosser, supra, at 9-11; Dobbs, supra, at 204-05.

Several courts have determined that a breach of the duty of fair representation is in the nature of a tort. Bond v. Local 823, Int'l Bhd. of Teamsters, 521 F.2d 5, 9 n.5 (8th Cir. 1975); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 285-87 (1st Cir.), cert. denied, 400 U.S. 877 (1970); Tippett v. Liggett & Myers Tobacco Co., 316 F. Supp. 292, 298 (M.D.N.C. 1970); Taylor v. Atchison, T. & S.F. Ry., 92 F. Supp. 968, 969 (W.D. Mo. 1950). In addition, the elements used to prove a breach of the duty (arbitrariness, discrimination, and bad faith) are highly suggestive of the characteristics used to justify awards of punitive damages in tort suits. Compare note 2 supra with Prosser, supra, at 9-10 and Dobbs, supra, at 205.

44. 442 U.S. at 52. While the Court assumed the power to fashion a remedy in the absence of an explicit congressional directive, the lack of a provision for damages is not necessarily indicative of an intent to exclude damages. Note, Punitive Damages Under Section 102 of the Labor-Management Reporting and Disclosure Act, 10 U. Mich. J. L. Ref. 529, 530 (1977) [hereinafter cited as Section 102 Punitive Damages]. See United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 665 (1954) (absence of a statutory provision in the Taft-Hartley Act regarding the consequences of tortious conduct already committed does not necessarily indicate that existing criminal penalties or liabilities have been eliminated); Butler v. Yellow Freight System, 374 F. Supp. 747, 753 (W.D. Mo. 1974) (silence of an act as to proper remedies actually lends support to argument that punitive damages are permissible), aff'd in part and remanded in part sub nom. Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442 (8th Cir.), cert. denied, 423 U.S. 924 (1975).


46. 442 U.S. at 49-51. The windfall recovery argument has also been offered in the context of punitive damages in tort actions. Viewed as compensation beyond a plaintiff's due, punitive damages are criticized as invitations to capricious, prejudiced juries to make outlandishly large awards, imposed without criminal safeguards such as the right to invoke the fifth amend-
Court further reasoned that the entire collective bargaining system might be disrupted if unions were compelled to process all grievances, no matter how frivolous.\footnote{47} Therefore, according to the majority, any deterrent effect that punitive damages might have upon future union misconduct would be outweighed by the risk to employees if their union's collective bargaining strength were impaired through discretionary encroachments or financial assessments.\footnote{48}

**The Concurring Opinion: Appropriate Criticism**

Justice Blackmun, who concurred only in the result of the *Foust* decision,\footnote{49} highlighted the salient points of the majority opinion by presenting a step-by-step response to its reasoning. He agreed that, because the IBEW's conduct toward Foust amounted to little more than negligence, punitive damages were inappropriate on the facts of the case.\footnote{50} He therefore contended that the majority easily could have held that the trial judge erred as a matter of law in submitting the issue of punitive damages to the jury.\footnote{51} Because an unnecessarily sweeping rule was announced instead, Justice Blackmun took issue with the majority, criticizing not only their rule but their reasons.

*Misapplication of Precedent*

Justice Blackmun first noted that the majority had misapplied *Steele v. Louisville & Nashville Railroad*\footnote{52} and *Vaca v. Sipes*\footnote{53} as authority for its contention that punitive damages are an impermissible remedy in Railway Labor Act suits.\footnote{54} As he observed, however, neither case expressly prohibited punitive awards. For example, he noted that in *Steele* the Court had approved “resort to the usual judicial remedies of injunction and award of damages when appropriate.”\footnote{55} Although such language is seemingly suggestive...
of a wide range of remedies, the Foust majority chose to view it in a narrow, restrictive sense, emphasizing the implications of the word "usual." Focusing on the "unusual" aspect of punitive damage awards, the majority justified their exclusion by concluding that such awards were not within the scope of the Steele court's supposed approval of only "usual" remedies. As Justice Blackmun observed, however, the majority apparently ignored the language in Steele that discussed the crucial importance of providing, in the absence of an administrative remedy, a judicial remedy for victims of unfair representation. Therefore, Justice Blackmun inferred that if any emphasis is to be placed on a specific word from the Steele opinion, it should be on the word "judicial" rather than "usual."

Justice Blackmun also criticized the majority's narrow interpretation of the dictates of Vaca v. Sipes. Vaca involved a union's refusal to process an employee's grievance through the fifth and final step of the grievance procedure after an unfavorable medical report convinced the union that the grievance undoubtedly would be unsuccessful. The Vaca court did reverse a jury's award of punitive damages, but only because punitive damages would have been unjustified on the particular facts of the case. Not only did the union fail to act arbitrarily, discriminatorily, or in bad faith, but most or all of the employee's damages were attributable to the employer, not to the union. Vaca was cited by the majority as authority for its position that union liability should be reduced whenever possible to avoid imposing a "real hardship" on a union. However, the "real hardship" that the Vaca court determined to avoid was the union's payment of the employer's share

56. 442 U.S. at 49. As Justice Blackmun commented: "The Court's italics may make its point clear, but they do not make its argument correct, and they provide no substitute for a fairminded appraisal of what Steele says." Id. at 55 (Blackmun, J., concurring).
57. Id. at 49 (majority opinion).
58. Id. at 55 (Blackmun, J., concurring). As Justice Blackmun noted, the pertinent language in Steele regarding remedies is actually expansive. Id. According to the Steele court:
In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of the craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. . . . For the present command there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected.
323 U.S. at 207 (citations omitted).
59. 442 U.S. at 55 (Blackmun, J., concurring).
60. 386 U.S. at 175, 175 n.3, 176.
61. Id. at 193, 195-98.
62. Id. at 193-94.
63. Id. at 195-98.
64. 442 U.S. at 50.
of damages, not the payment of damages itself.\textsuperscript{65} Justice Blackmun therefore expressed skepticism at the majority’s interpretation of \textit{Vaca} as a broad or general prohibition of punitive awards in unfair representation cases,\textsuperscript{66} especially because the Court itself emphasized in \textit{Vaca} that appropriate remedial schemes would vary with the facts of each case.\textsuperscript{67}

Furthermore, the \textit{Foust} majority utilized the compensation principle articulated in \textit{Vaca} as authority for the position that while a damage award should make an employee “whole,” it should do no more.\textsuperscript{68} As Justice Blackmun contended, however, a closer reading of both \textit{Vaca} and \textit{Steele} reveals that an employee’s remedies must include damages to compensate him or her fully.\textsuperscript{69} Neither case stands for the principle that damages should be excluded if they rise above the level of actual compensation.\textsuperscript{70} Justice Blackmun therefore criticized the majority for transforming \textit{Vaca}’s “liberal ‘compensation principle’ into a parsimonious limiting rule,” and for “convert[ing] the floor beneath the injured employee’s remedies into a ceiling on top of them.”\textsuperscript{71} Clearly, Justice Blackmun was unconvinced as to the accuracy and wisdom of the majority’s narrow interpretations of \textit{Vaca} and \textit{Steele}’s expansive remedial suggestions.

\textsuperscript{65} 386 U.S. at 197 (1967):
Though the union has violated a statutory duty in failing to press the grievance, it is the employer’s unrelated breach of contract which triggered the controversy and which caused this portion of the employee’s damages. . . . It could be a real hardship on the union to pay these damages. . . . [W]e see no merit in requiring the union to pay the employer’s share of the damages.

\textbf{Id.}

\textsuperscript{66} 442 U.S. at 55-57 (Blackmun, J., concurring).

\textsuperscript{67} 386 U.S. at 195. As Justice Blackmun noted, \textit{Steele} and \textit{Vaca} agree that the “full panoply of tools traditionally used by courts to do justice between the parties” is available in unfair representation cases, with the specific remedy applied according to the circumstances of the particular breach. 442 U.S. at 53 (Blackmun, J., concurring). He further commented that punitive damages therefore would be “presumptively available” unless Congress specifically directed otherwise. \textbf{Id.}

\textsuperscript{68} \textit{Id.} at 49 (majority opinion).

\textsuperscript{69} \textit{Id.} at 54 (Blackmun, J., concurring). The \textit{Vaca} court, fearing that an arbitrator might lack the authority to award damages against the union, held that a “court should be free to decide the contractual claim and to award the employee appropriate damages or equitable relief.” 386 U.S. at 196. \textit{Steele}’s approval of the “usual judicial remedies of injunction and award of damages” in the absence of an administrative remedy similarly indicates that judicial damages are appropriate relief for an injured employee. 323 U.S. at 207.

\textsuperscript{70} 442 U.S. at 54 (Blackmun, J., concurring). Arguably, if a union is not chargeable with compensatory damages, punitive damages would be inappropriate, but that is a very different proposition from the viewpoint advanced by the majority. In any event, the Court expressed no disapproval of the jury’s award of compensatory damages in \textit{Foust}. \textbf{Id.} at 45 n.4 (majority opinion).

\textsuperscript{71} \textit{Id.} at 54 (Blackmun, J., concurring).
The Implications of "Remedial" Labor Statutes

A second flaw in the majority's reasoning noted by Justice Blackmun was the contention that because federal labor policy is "essentially remedial," punitive damages would be an inappropriate remedy. He reasoned that labelling federal acts as "remedial" does not necessarily mean that they are inhospitable to punitive damages. Rather, the propriety of punitive awards depends upon the specific provisions of the particular statute. Although the Railway Labor Act is silent on the matter of authorized remedies, the majority nevertheless cited two previous Supreme Court decisions, both clearly based on express statutory language from other labor acts, as authority for its position that punitive damages are an impermissible remedy under remedial labor statutes.

Justice Blackmun contended that both cases cited by the Court were inapposite to a discussion of remedies appropriate under a statute lacking in specific remedial directives. In Republic Steel Corp. v. NLRB, the Court held that the NLRB is powerless to order punitive sanctions. The decision, however, as Justice Blackmun pointed out, was strictly confined to the statutory competence of the Board as authorized by the National Labor Relations Act. Therefore, the Justice contended that Republic Steel is not pertinent to the question of judicial approval of punitive awards because the federal courts have both the authority and the jurisdiction to impose punitive sanctions. In Local 20, Teamsters v. Morton, the reversal

72. Id. at 52 (majority opinion).
73. Id. at 55-56 (Blackmun, J., concurring).
74. Id.
75. Id.
76. 311 U.S. 7 (1940). The Board had ordered the reinstatement with back pay of employees who had been discharged in violation of the National Labor Relations Act. Id. at 8. However, the employer was further ordered to deduct from back pay the money the employees received for work performed for government agencies while they were on work relief projects. Id. The Court determined that the NLRB lacked the statutory authority to order the employer to pay the deducted amounts to the government agencies. Id. at 9, 12.
77. 442 U.S. at 55-56 (Blackmun, J., concurring).
78. 311 U.S. at 10-12. As the Court noted: "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the [National Labor Relations] Act." Id. at 11. The Board's lack of punitive powers was reiterated in Local 60, United Bhd. of Carpenters & Joiners v. NLRB, 365 U.S. 651, 655 (1961), another case cited by the majority. 442 U.S. at 52. See UAW v. Russell, 356 U.S. 634, 646 (1958); NLRB v. United States Steel Corp., 278 F.2d 896, 900 (3d Cir. 1960), cert. denied, 366 U.S. 908 (1961).
79. 442 U.S. at 56.
80. 377 U.S. 252 (1964). Morton concerned an action brought under § 303 of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 187 (1976). During a strike, the union had encouraged customers and suppliers of the employer to cease dealing with the employer. 377 U.S. at 253. There was no violence. Id. at 260. The Court interpreted the language of the Act, with references to its legislative history, as excluding punitive damages in instances that involve only peaceful secondary activities. Id. Compensatory damages, however, were allowed. Id. at 256.
of a punitive damage award was based upon a close reading of the statutory language of section 303 of the Labor Management Relations Act\textsuperscript{81} in conjunction with pertinent passages from the Act's legislative history.\textsuperscript{82} The language of the statute and its legislative history clearly limit recovery to actual, compensatory damages.\textsuperscript{83} Noting that Congress had expressed no similar restriction on damages in fair representation suits, Justice Blackmun asserted that Morton therefore was clearly inapposite.\textsuperscript{84} He concluded that neither Republic Steel nor Morton supported the Court's argument that punitive damages are impermissible under "remedial" labor statutes.\textsuperscript{85}

**Effect on Union Treasuries and Discretionary Power**

The Foust majority acknowledged that punitive damages serve both as a useful incentive for bringing unfair representation suits and as a means of encouraging union willingness to pursue employee grievances.\textsuperscript{86} The Court determined, however, that such advantages were outweighed by the possibility that union financial stability and discretion in processing grievances might be severely impaired by punitive damage awards.\textsuperscript{87}

Although the majority concluded that compensatory damages alone would be sufficient to remedy a breach of the fair representation duty,\textsuperscript{88} Justice Blackmun disagreed. He observed that a union's liability for such damages is frequently de minimis because the bulk of damages is generally assessed against the employer.\textsuperscript{89} Therefore, compensatory damages would have little impact on a union, and union treasuries would "emerge unscathed."\textsuperscript{90}

\textsuperscript{81} Labor Management Relations (Taft-Hartley) Act § 303, 29 U.S.C. § 187 (1976). Section 303 of the Act provides for recovery of "the damages by him sustained." Id.

\textsuperscript{82} Local 20, Teamsters v. Morton, 377 U.S. at 260 n.16. The comments of Senator Taft clearly indicate that recovery was intended to be limited to actual damages. 93 CONG. REC. 4872-73 (1947) (remarks of Sen. Taft). He referred to restoration of lost money and subsequently commented that § 303 "simply provide[s] for the amount of actual damages." Id. at 4858, 4872-73.

\textsuperscript{83} See Local 20, Teamsters v. Morton, 377 U.S. at 260, 260 n.16.

\textsuperscript{84} 442 U.S. at 56 (Blackmun, J., concurring).

\textsuperscript{85} Id.

\textsuperscript{86} Id. at 48 (majority opinion).

\textsuperscript{87} Id. at 48-52.

\textsuperscript{88} Id. at 48-50.

\textsuperscript{89} Id. at 57 (Blackmun, J., concurring). See Harrison v. United Transp. Union, 530 F.2d 558, 563 (4th Cir. 1975), cert. denied, 425 U.S. 958 (1976) (union's liability for compensatory damages in fair representation suit usually de minimis, so employee requires stronger legal remedy); Richardson v. Communications Workers, 443 F.2d 974, 981-82 (8th Cir. 1971), cert. denied, 414 U.S. 818 (1973) (union's liability for failure to process an employee's grievance usually de minimis); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476, 491 (7th Cir.), cert. denied, 400 U.S. 911 (1970) (union's liability for failure to timely assert an employee's grievance generally limited to compensatory damages); St. Clair v. Local 515, Int'l Bhd. of Teamsters, 422 F.2d 128, 132 (6th Cir. 1969) (union's liability for damages de minimis for merely failing to take all available steps to remedy employee's grievance). The point is also illustrated in Vaca v. Sipes, where the Court recognized that all or most of the employee's damages were attributable to his allegedly wrongful discharge by the company. 386 U.S. at 198.
Justice Blackmun also found unpersuasive the Court's warning that the constant threat of punitive damages could curtail a union's exercise of discretion in handling grievances. The majority contended that broad union supervision over employee complaints not only encourages settlements but also permits the refusal to process frivolous grievances. According to the Court, if punitive damages were allowed for mishandling claims, unions might feel compelled to process all grievances, no matter how frivolous, with the ultimate result that employer confidence in the union would be eroded and union decision-making disrupted. Justice Blackmun responded to the Court's assertion by commenting that some "chilling of union 'discretion'" in instances of notorious union misconduct is not an undesirable goal, as injurious conduct should not be permitted to continue unchecked. While he directed less of his criticism at the matter of union discretion, implicit in Justice Blackmun's concurrence is the conviction that union interests are being protected and promoted at the expense of the individual employee who has been injured by his or her union's misconduct. The concurrence did not advocate the awarding of punitive damages in all instances of union misconduct, but compellingly argued that the remedy should be available to protect an employee in limited instances of particularly egregious union misconduct.

**IMPACT OF THE FOUST DECISION**

By prohibiting punitive damages as an available remedy in fair representation suits, the Court has effectively immunized unions from liability for their actions. Compensatory damages rarely inflict much hardship on a union because damages will be assessed against it for fault stemming from the employer's actions are groundless. Czosek v. O'Mara, 397 U.S. 25, 29 (1970). In De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir.), cert. denied, 400 U.S. 877 (1970), for example, damages were entirely charged to the company because the union's conduct neither increased nor contributed to the damages arising from the improper discharges. Id. at 289-90.

90. 442 U.S. at 57 (Blackmun, J., concurring).
91. Id. at 57-58.
92. Id. at 51 (majority opinion).
93. Id. at 51-52. As Justice Blackmun commented:

The Court's theory seems to be that a union, fearing punitive damages, might become more vigilant in processing workers' grievances; that this vigilance might lead unions to process frivolous grievances; that this frivolity might antagonize the employer; and that this antagonism might beget disharmony at the bargaining table. This reasoning seems tenuous to me. Surely, the Court cannot believe that such airy speculations will induce union shop stewards to abandon all vestiges of common sense as they go about their diurnal chores.

Id. at 57 (Blackmun, J., concurring).
94. Id. at 58.
95. Id. at 59-60. See Swedo, Ruzicka v. General Motors Corporation: Negligence, Exhaustion of Remedies, and Relief in Duty of Fair Representation Cases, ABB. J., June, 1978, at 15.
cause the bulk of such damages is usually assessed against the employer. An employee therefore is left without recourse to a strong legal remedy in the face of particularly outrageous misconduct by his or her union. An employee may obtain some relief in a proceeding before the NLRB, of course, but the power of the Board to fashion remedies is more limited than that of the courts. Further, the NLRB is primarily concerned with effectuating broad federal labor law policies, and is less concerned with the wrongs committed against an individual. While the duty of fair representation was created to protect such individual interests, its enforcement

96. See note 89 supra. The majority appeared to recognize that union immunity might result, but argued that the Vaca court found that the risk of depleting union treasuries outweighed considerations of deterrence. 442 U.S. at 50-51. The argument has also been advanced that compensatory damages sufficiently deter union conduct that violates its members' rights. Section 102 Punitive Damages, supra note 44, at 537, 537 n.58. Cf. Brandwen, Punitive-Exemplary Damages in Labor Relations Litigation, 29 U. CHI. L. REV. 460, 465-66 (1962) [hereinafter cited as Brandwen] (compensatory damages have deterrent effect, but degree uncertain). In Brady v. Trans World Airlines, Inc., 196 F. Supp. 504 (D. Del. 1961), the court suggested that relief should be limited to compensatory damages and equitable remedies. Id. at 506.


Unless punitive damages are available, an employee may lack the strong legal remedy necessary to protect his right against a union which has either maliciously or in utter disregard of his rights denied him fair representation. The situation is analogous to that present in civil rights actions where the plaintiff's rights are equally important and often equally difficult to enforce without the threat to defendants of liability for punitive damages in an aggravated case.

Id. at 563.

98. Local 60, United Bhd. of Carpenters & Joiners v. NLRB, 365 U.S. 651, 655 (1961). The NLRB's remedial actions are limited to cease and desist orders, reinstatement with full back pay and seniority, requiring a union to process a grievance, ordering representation elections, or revocation of a union's certification. National Labor Relations (Wagner) Act §§ 9(e)(1), 9(e), 10(c), 29 U.S.C. §§ 159(c)(1), 159(e), 160(c) (1976). See GORMAN, supra note 35, at 725-28. Even if damages are appropriate, the NLRB is powerless to award them. Local 60, United Bhd. of Carpenters & Joiners v. NLRB, 365 U.S. at 653-56 (NLRB's remedial powers do not include authority to require union to refund dues and fees to members); Republic Steel Corp. v. NLRB, 311 U.S. 7, 11-12 (1940) (NLRB's affirmative powers do not authorize imposition of punitive measures, such as requiring payments to government); NLRB v. United States Steel Corp., 278 F.2d 896, 900 (3d Cir. 1960), cert. denied, 366 U.S. 908 (1961) (NLRB not authorized to impose penalties or fines, such as reimbursement of dues). The courts are also preferred as a forum because the NLRB adheres to a six-month statute of limitations for unfair labor practice cases. National Labor Relations (Wagner) Act § 10(b), 29 U.S.C. § 160(b) (1976). In addition, an employee runs the risk that his or her grievance will never be heard because the Board's General Counsel has the discretion to decide whether to issue a complaint. Vaca v. Sipes, 386 U.S. 171, 182 (1967); GORMAN, supra note 35, at 701.


100. As the Vaca court observed, the duty of fair representation serves as "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." Id. at 182. See notes 11-30 and accompanying text supra.
will lack impact in instances of egregious union misconduct if a punitive sanction is unavailable.

In addition, an employee will lack the incentive to sue his or her union if punitive damages are no longer an available remedy in fair representation cases. Because an employee assumes serious risks by suing the more powerful union, providing such an incentive is an important function of punitive awards. 101 Because an employee must trust the union to represent his or her interests vigorously and fairly, 102 a severe sanction must be available when a union violates its solemn responsibility. The Court in Foust, therefore, eliminated a necessary and desirable employee remedy by prohibiting damages in the fair representation context.

Further, the possible imposition of a punitive award will no longer be available in Railway Labor Act suits to deter unions from acting injuriously toward employees. The majority, downplaying the deterrent effect of punitive damages, argued that such damages are a form of punishment 103 and are therefore inappropriate under remedial labor statutes. Punishment is one purpose of punitive awards, 104 but deterrence is also an acknowledged objective. 105 Significantly, the propriety of deterrence as an objective in labor

Although the Foust majority acknowledged the importance of the personal compensation afforded individual employees through the vehicle of fair representation suits, its opinion favored the "larger" interests of federal labor law policies at the expense of individual protection. 442 U.S. at 49 n.12. For example, see the Court's balancing of the collective interests of union members in protecting union funds and union bargaining strength as against an individual's interest in redress for injuries suffered at the hands of the union. Id. at 50-51.

101. Archibald Cox aptly described the plight of a resourceless union employee, faced with the prospect of suing his or her union for a breach of the duty of fair representation:

Workers are unfamiliar with the law and hesitate to become involved in legal proceedings. The cost is likely to be heavy, and they have little money with which to post bonds, pay lawyer's fees and print voluminous records. Time is always on the side of the defendant. Even if the suit is successful, there are relatively few situations in which the plaintiff or his attorney can reap financial advantage. Most men are reluctant to incur financial cost in order to vindicate intangible rights. Individual workers who sue union officers run enormous risks, for there are many ways, legal as well as illegal, by which entrenched officials can "take care of" recalcitrant members.

Cox, supra note 37, at 853. The value of having punitive damages available in such instances was echoed in Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U.L. REV. 1158, 1162-63 (1966).

102. An employee's need to have the full backing of his or her union in processing a grievance was dealt with at length in Schum v. South Buffalo Ry., 496 F.2d 328 (2d Cir. 1974). The court recognized that an employee lacks the knowledge, expertise, and experience in interpreting the complicated provisions of a labor agreement and wants skill in preparing a well-organized, persuasive grievance campaign. Id. at 331.

103. 442 U.S. at 50-51. See notes 42-43 supra.

104. See note 43 supra.

cases has received judicial support. As a deterrent, punitive damages are an especially effective device for correcting persistent patterns of union misconduct. Furthermore, such awards serve to deter repetition of the prohibited behavior in the future. While a punitive sanction should be utilized sparingly, it should remain available to deter and correct instances of union misconduct that cannot be better cured by other remedies. For example, conduct calculated to thwart national labor policies, such as discrimination based on race or non-union status, would be a particularly appropriate target for a punitive sanction. Because punitive damages no

106. Vaca v. Sipes 386 U.S. at 187; Cooke v. Orange Belt Dist. Council of Painters No. 48, 529 F.2d 815, 820 (9th Cir. 1976) (deterrence a proper objective in case of retaliation against union official for intraunion political activity); International Bhd. of Boilermakers v. Braswell, 388 F.2d 193, 200 (5th Cir.), cert. denied, 391 U.S. 935 (1968) (deterrence a proper objective in case of employee’s expulsion from union). The propriety of deterrence as an objective in labor suits was also generally acknowledged in Emmanuel v. Omaha Carpenters Dist. Council, 560 F.2d 382, 386 (8th Cir. 1977), and in Butler v. Local 823, Int’l Bhd. of Teamsters, 514 F.2d 442, 454, 454 n.20 (8th Cir.), cert. denied, 423 U.S. 924 (1975).

In Foust, the trial court instructed the jury that punitive damages could be awarded to punish extraordinary misconduct that was malicious, wanton, or oppressive. Brief for Respondent at 16-17. Deterrence was also mentioned as a basis for a punitive award. Id.

107. As the court noted in Sidney Wanzer & Sons, Inc. v. Milk Drivers Local 753, 249 F. Supp. 664 (N.D. Ill. 1966): "[W]here the award is a uniquely effective device for changing a specific pattern of illegal conduct by a party before the court, it comes within the remedial purpose of the labor laws, even though the defendant may suffer as if he had been 'punished' for other reasons." Id. at 671. See Butler v. Yellow Freight System, Inc., 374 F. Supp. 747 (W.D. Mo. 1974), aff’d in part and remanded in part sub nom. Butler v. Local 823, Int’l Bhd. of Teamsters, 514 F.2d 442 (8th Cir.), cert. denied, 423 U.S. 924 (1974).


109. The remedy fashioned by a court should be carefully tailored to meet a specific problem. Punitive damages, as an extraordinary form of relief, will therefore be appropriate in only certain instances. Butler v. Yellow Freight System, Inc., 374 F. Supp. at 753-54. The Wanzer court similarly commented: "Federal labor laws are strictly 'remedial' in the sense that they are to be applied only to redress particular acts of misconduct. . . . [T]he labor laws do not contemplate awards which do not cure a specific problem." 249 F. Supp. at 670 (citations omitted). The Wanzer court’s approach was cited with approval by the Court of Appeals for the Eighth Circuit in Richardson v. Communications Workers, 443 F.2d 974, 979-80 (8th Cir. 1971), cert. denied, 414 U.S. 818 (1973).

110. As the Fourth Circuit stated in Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191 (4th Cir. 1963): "A union has no more justification to discriminate injuriously in its representation on the ground of non-membership, or instability of membership, . . . than it has to discriminate on account of skin pigmentation." Id. at 199.

An employer’s practices in violation of labor policies were suggested as appropriate targets for punitive damages in Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F. 2d 277, 280-83 (3d Cir. 1962) (per curiam) (Staley, J., concurring in part and dissenting in part). The theoretical basis of the judge’s argument is persuasive, although an award of punitive damages probably was unjustified on the facts of the case, as the plant had already closed and such an award would not have promoted the goal of industrial peace. See College Hall Fashions, Inc. v. Philadelphia Joint Bd., Clothing Workers, 408 F. Supp. 722, 727 n.3 (E.D. Pa. 1976) (punitive
longer pose a threat, however, a union will not be deterred from pursuing such a course of injurious conduct. Compensatory damages are an insufficient alternative as a deterrent because they infrequently have a burdensome effect on a union. Therefore, in the absence of a punitive threat, a union essentially will be free to conduct its affairs without regard for civil consequences.

In addition, a contrary holding in *Foust* would not have had the serious impact upon union financial stability predicted by the Court. Adequate safeguards exist to protect against excessive and undeserved punitive awards. For example, an appellate court has the power to remand a case to the trial court for reconsideration of the awarded amount. Because the trend is toward high punitive awards, it has been suggested that both trial and appellate courts subject punitive awards to much closer scrutiny than is usually accorded compensatory damage awards. Trial courts could also

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sanctions against employer would not have directly advanced the goal of industrial peace as plant operations had ceased and employees were no longer working for the company).

111. Justice Blackmun suggested that deliberate personal animus, the conscious infringement of speech or associational freedoms, or intentional racial discrimination would be instances of union misconduct justifying a punitive award. 442 U.S. at 60 (Blackmun, J., concurring). The need for an effective sanction in cases of flagrant union misconduct was underscored by the court in *Fittipaldi v. Legassie*, 18 App. Div. 2d 331, 239 N.Y.S. 2d 792 (1963): "The right of the working man to the benefits of collective bargaining is too essential and valuable to be hindered, impeded and seriously damaged by irresponsible and dictatorial leaders whose dominance in any given situation does great disservice to the purpose and principles of unionism. When that right of free association is usurped by a concerted, malicious effort to deprive the individual of the safeguards built into the association, it cannot be condoned. . . . Imposition of exemplary damages, when the requisite elements of malice, gross fraud, wanton or wicked conduct, violence or oppression are present, serves to achieve the deterrence they were designed to effect."

*Id.* at 334-35, 239 N.Y.S. 2d at 796.

112. See notes 89 and 96 supra for differing views as to the sufficiency of compensatory damages as deterrents.

113. But see Section 102 Punitive Damages, supra note 44, at 539-40, where the argument is advanced that union resources would be wasted and that some unions might be crippled financially by punitive award. See UAW v. Russell, 356 U.S. 634 (1958), where the dissenting justice, referring to union liability for unfair labor practices committed by its members, warned against the "very real prospect of staggering punitive damages. . . . " *Id.* at 652 (Warren, C.J., dissenting).

114. This was done by the Tenth Circuit in *Foust* because the court thought the punitive damage award was high, although not excessive. 572 F.2d at 719. As the Tenth Circuit noted, the trial court, having heard the evidence, is best suited to review the awarded amount. *Id.*

The trial court may order a remittitur if upon reconsideration it concludes that the amount awarded was indeed excessive. *Id.* A new trial may also be granted. *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 47 (5th Cir. 1972); *Pruchot v. Drew*, 283 F.2d 904, 905 (7th Cir. 1960).

115. This point was made in dicta in *Morrissey v. National Maritime Union*, 544 F.2d 19, 34 (2d Cir. 1976). One commentator proposes that observance of discretionary limitations on amounts of punitive damage awards could minimize the effect upon union coffers. *Section 102 Punitive Damages*, supra note 44, at 540. Cf. *Hall v. Cole*, 412 U.S. 1, 9 n.13 (1973) (Court suggested that limitations on the size of attorney's fees awards could avoid financial difficulty).
frame their instructions to the jury in order to emphasize that punitive damages are proper only in limited instances and that a particular defendant's likelihood of repeating the alleged misconduct should be used as a test for punitive awards.\textsuperscript{116} Procedural safeguards, such as proof beyond a reasonable doubt and the right to invoke the fifth amendment, could perhaps be utilized.\textsuperscript{117} Punitive damage awards are, of course, subject to abuse by capricious or prejudiced juries.\textsuperscript{118} Although some poorly instructed juries might make inflated awards,\textsuperscript{119} a properly instructed jury should be able to arrive at a sensible and fair result, assessing punitive damages against a union where its misconduct merits a more severe and memorable sanction than compensatory damages alone.\textsuperscript{120}

Similarly, a drastic reduction in union discretionary power would not necessarily result if punitive damages remained an available remedy in fair representation suits. Union discretion is an undoubtedly essential element in employer-employee-union relations,\textsuperscript{121} but union authority is not an absolute power.\textsuperscript{122} The fiduciary duty of fair representation is an obligation cor-

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116. Morrissey v. National Maritime Union, 544 F.2d at 34-35. The trial court's instructions to the jury in \textit{Foust} illustrate the type of well-phrased, careful admonishment that should contribute to reasonable punitive awards:

\textit{[T]he jury should also bear in mind, not only the conditions under which, and the purpose for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any part of the case.}

Brief for Respondent at 17-18. \textit{But see} Brandwen, supra note 96, at 468: "It is urged that a judge can, by his charge to the jury, effectively check a jury's prejudices or abuses. That is expecting too much. The charge generally tends to be an arid abstract proposition of law. Its objectivity—however profuse—rarely illuminates or guides juries." In \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 232 (1974), the Court warned that the "gentle rule" that punitive damages not be excessive was inadequate to prevent juries from awarding "punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." \textit{Id.} at 350.

117. \textit{Section 102 Punitive Damages}, supra note 44, at 541.

118. 442 U.S. at 50-51, 50 n.14. As the Court observed in \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. at 350, some juries may use punitive damages as a means of punishing an unpopular defendant.

119. See Brandwen, supra note 96, at 466-67, where the author contends that a jury's hostility or even sympathy toward the defendant, as well as local prejudice, can lead to haphazard punitive damage awards. As the author argues, "[a] defendant can become a helpless prey and a sport of prejudice." \textit{Id.} at 481. Even if clear instructions are given by the court, "[t]he principle—sufficient to deter but not to oppress—is too shadowy a measure to effect a rational determination of punitive-exemplary damages." \textit{Id.} at 466.

120. In tort actions, the defendant's wealth may be considered in determining the size of a punitive damage award. \textit{Dobbs, supra} note 43, at 210. So that the sanction against a union will be effective in deterring future misconduct, the size of a union's treasury should similarly be considered before fixing the amount of the punitive award.

121. See Fanning, supra note 22, at 813-14, 817.

relative to the right of a union to represent the bargaining unit.\textsuperscript{123} The discretion exercised by a union is therefore necessarily subject to the tests of good faith and honesty of purpose\textsuperscript{124} in order to protect against arbitrary abuses of power. In addition, \textit{Vaca} afforded a crucial protection for union discretion in instances where a union’s representation is questioned. In \textit{Vaca}, the Court declared that even a claim later shown to be meritorious would not necessarily prove a union’s breach of the duty of fair representation.\textsuperscript{125} This is a significant safeguard apparently overlooked by the majority in \textit{Foust}. It guarantees that a union retains the discretionary power to determine that a particular grievance is hopeless or without merit, so long as arbitrariness and bad faith play no part in the union’s decision.\textsuperscript{126}

Furthermore, the majority’s contention that the threat of punitive damages might compel unions to process frivolous grievances, thereby undermining the union’s collective bargaining position, is an unwarranted conjecture.\textsuperscript{127} The sensible dictates of \textit{Vaca} clearly allow a union to exercise discretion in separating frivolous claims from justified grievances.\textsuperscript{128} A union would not be subjected to vexatious litigation over every arguable decision because the threshold standard for a breach of the fair representa-


\textsuperscript{124} Ford Motor Co. v. Huffman, 345 U.S. at 338. Three circuits have agreed in theory that unions are afforded a reasonable range of discretion so long as their conduct remains non-arbitrary and non-discriminatory: Tedford v. Peabody Coal Co., 533 F.2d 952, 957 (5th Cir. 1976); Bond v. Local 823, Int'l Bhd. of Teamsters, 521 F.2d 5, 9 (8th Cir. 1975); Trotter v. Motor Coach Employees, 309 F.2d 584, 586 (6th Cir. 1962), cert. denied, 372 U.S. 943 (1963). As the Court noted in Humphrey v. Moore, 375 U.S. 335 (1964), so long as a union acts upon "wholly relevant considerations, not upon capricious or arbitrary factors," it will not be held liable for a breach of the duty of fair representation. Id. at 350. Even a good faith position contrary to that of some individuals the union represents will not constitute a breach. Id. at 349. The complete satisfaction of all members in the unit is not expected. Ford Motor Co. v. Huffman, 345 U.S. at 338. See note 2 supra.


\textsuperscript{126} See Harris v. Chemical Leaman Tank Lines, Inc., 437 F.2d 167, 171 (5th Cir. 1971) (union has authority to abandon a grievance it considers meritless); Bazarte v. United Transp. Union, 429 F.2d at 872 (union has right to consider grievance hopeless).

\textsuperscript{127} According to one commentator, frivolous grievances are of little advantage to the employees bringing them:

\begin{quote}
[Employees do not regard it in their own interest to press forward grievances that are without merit. . . . [T]here 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.\end{quote}


\textsuperscript{128} Vaca v. Sipes, 386 U.S. at 190-95. A union’s power to sift out “wholly frivolous grievances which would only clog the grievance process” has been acknowledged by the courts. Humphrey v. Moore, 375 U.S. at 349-50. Accord, Harris v. Chemical Leaman Tank Lines, Inc., 437 F.2d at 171; Local 12, United Rubber Workers v. NLRB, 368 F.2d 12, 17 (5th Cir. 1966), cert. denied, 380 U.S. 837 (1967).
tion duty requires a high degree of union culpability. In any event, if a union and employer make a good faith effort to settle grievances, even marginally frivolous claims would be concluded prior to the more time-consuming and costly steps in the grievance procedure. In addition, it is doubtful that unions would be blackmailed by undeserving plaintiffs. A properly functioning judicial system or grievance procedure ensures that harassing, meritless suits will be disposed of summarily. To expect any less betrays an unwarranted mistrust and lack of confidence in both systems.

CONCLUSION

Although the Foust holding is restricted to Railway Labor Act suits, its prohibition of punitive damages in the context of fair representation suits could be an indication that the Court will attempt to extend the reach of its ruling to other labor statutes. Specific statutory language regarding remedies may present an obstacle, but none of the remedial provisions in re-

129. By requiring that bad faith, hostile discrimination, or arbitrariness be shown, a union will be insulated from a barrage of harassing litigation by dissident or disgruntled members. See Retana v. Apartment Operators Local 14, 453 F.2d 1018, 1024-25 (9th Cir. 1972).
130. Vaca v. Sipes, 386 U.S. at 191. An interesting proposition regarding the processing of grievances was advanced in Control Over Personal Grievances, supra note 127. Frivolous claims would be discouraged and union responsibility encouraged, according to the author’s plan, if an arbitrator were 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 assessed 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.

. . . 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.

Id. at 567.
132. The judicial system, after all, protects unions as well as employees. Id. But see Section 102 Punitive Damages, supra note 44, at 539. The author contends that punitive damages will encourage suits based on private feuding, forcing courts to wage intraunion battles. According to the author, ordinary union activities will be hampered and union resources wasted by frivolous claims. In addition, inviting additional suits will place an unwarranted burden on already overburdened courts. Id.
133. The majority in Foust specifically excluded the reach of its holding from claims brought under §§ 101-102 of the Labor Management Reporting and Disclosure (Landrum-Griffin) Act, 29 U.S.C. §§ 411-412 (1976), because such suits involve the interpretation of express statutory language. 442 U.S. at 47 n.9. However, because some judicial disagreement exists at the district and circuit court levels as to the propriety of punitive damages in Landrum-Griffin suits, see note 36 supra, it is conceivable that the Supreme Court might choose to extend its per se prohibition to Landrum-Griffin suits.

Further, the principles articulated in Foust regarding the impropriety of punitive damages in fair representation suits might well be adopted in suits brought under the Taft-Hartley Act. The
lated labor statutes expressly authorizes punitive damages.\footnote{See note 36 supra.} Therefore, it is not inconceivable that a court determined to eliminate punitive damages will discover a way to justify their exclusion. The \textit{Foust} holding is evidence of such judicial willpower because the Court's per se prohibition of punitive awards was manifestly unnecessary on the facts of the case.

Because union immunity from liability for serious violations of its members' rights has effectively received the approval of the Supreme Court in \textit{Foust}, some measure of protection must be afforded employees. The Railway Labor Act therefore should be amended to include a provision for punitive damages in specifically restricted instances of notorious union misbehavior. Accordingly, the burden is now on Congress to provide a suitable civil remedy for employees injured by their union's flagrant breach of the duty of fair representation. As the complete lack of congressional directives in the Railway Labor Act permitted the Court in \textit{Foust} to fashion its own labor policy, an expressly worded provision for specific remedies in the Railway Labor Act would resolve the uncertainty regarding proper remedial measures. Such an amendment to the Act would also serve to warn the Court that the balancing of policy considerations, which is the province of Congress, should not necessarily result in a tilt in favor of unions.

\textit{Mary Currie}
