ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-525

TITLE CHARLES V. BOWEN, Petitioner,
v.
UNITED STATES POSTAL SERVICE, ET AL.

PLACE Washington, D. C.

DATE October 6, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES V. BOWEN, :

Petitioner, :

v. : No. 81-525

UNITED STATES POSTAL SERVICE, :

ET AL. :

- -x

Washington, D.C.

Wednesday, October 6, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:44 o'clock a.m.

APPEARANCES:

WILLIAM B. POFF, ESQ., Roanoke, Virginia; on behalf of the Petitioner.

BARBARA E. ETKIND, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the federal responding supporting Petitioner.

ASHER W. SCHWARTZ, ESQ., New York, New York; on behalf of the Respondent Union.

C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments next in Bowen against United States Postal Service et al.

Mr. Poff, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM B. POFF, ESQ.,

ON BEHALF OF THE PETITIONER

MR. POFF: Mr. Chief Justice, and may it please the Court, the Petitioner in this case urges this Court to hold that the American Postal Workers Union, which has been adjudicated in this case to have violated its duty of fair representation to the appellant, in fact in this case held to have done so maliciously, recklessly, and in callous disregard of his rights, be held responsible to Bowen for that portion of his increased wage loss which occurred while he was seeking the redress in the courts which the union has been found to have been responsible for seeking for him through the process of arbitration.

This case presents the Court with all the parties and with the necessary evidential underpinnning with which to refine the apportionment of damage test or principles which this Court has enuniciated in a long line of cases beginning with Vaca versus Sipes, extending down to Czosek versus O'Mara, and to Hines

versus Anchor Motor Freight, and at least by passing reference in two cases last year, the Clayton case and the Mitchell case, both being Section 301 cases.

We think that this Court has been consistent, although it has not met this issue squarely, in holding that the apportionment of responsibility in these cases between the employer and the union should be predicated upon relative fault. The Court in Vaca and I think the Court in subsequent decisions has indicated that the union should not be responsible for those damages that have been caused by the employer, nor should the employer be held responsible for those damages caused by the union.

The closest decision that this Court has had to the case immediately before you is the Hines versus Anchor Motor Freight case. There, the Court did not have to meet this issue head on, although it was clear that it was going to have to be met on remand, and you will recall that Justice Stewart in a concurring opinion which was not dissented from by any member of the Court, expressed his belief that the apportionment of loss of wages in that case should be made on the basis of fault, and that the employer who had achieved a successful arbitration award in that case should not be held responsible for any damages that had accrued subsequent

to the arbitration award and prior to the time that there would be a determination of -- an untainted determination of the employee's rights and his determination that he should return to work.

QUESTION: Mr. Poff, you referred to Justice Stewart's concurring opinion and commented that no one dissented from it. Do you ordinarily think you find dissents from concurring opinions?

MR. POFF: I would assume not, sir, though I would not think it unusual perhaps to find --

QUESTION: I don't ask you to predict the vagaries of the Court, sir.

(General laughter.)

MR. POFF: I would not think you reticent to do so if you saw fit, but in this instance, at least, I think it is fair to comment at least that that statement was made by Justice Stewart, and I have seen nothing to indicate disagreement with it.

I would suggest that the fact that you do have the National Labor Relations Board in this kind of setting, in unfair labor practice cases, 8B cases, assessing back wage responsibility against unions indicates that there is certainly nothing anathema as far as national labor policy is concerned against assessing back wages in these kinds of situations where

unions have failed to represent employees fairly. There is nothing wrong with the national labor policy in assessing back wages, because in fact Section 10(c) of the National Labor Relations Act expressly authorizes the National Labor Relations Board to remedy cases, discrimination cases in that fashion.

In order to adopt the position that the APWU asserts in this case would, we suggest, emasculate the very purpose of the duty of fair representation. There are in these cases, we suggest, only about three elements of damages that can ever be assessed against a union for a breach of its duty of fair representation. One would be the possibility of back pay. A second would be attorneys' fees. A third would be court costs and related items of damage.

If the union is successful in the position in this case that it is in no event liable for back pay responsibility, that only leaves attorneys' fees and court costs. Attorneys' fees, as was suggested no later than last term with the Summit Valley Industries case, a secondary boycott case in which this Court refused to impose attorneys' fees against unions, and reiterated the American rule, it is unlikely that you will ever have or that you will often have a situation such as this, where you do have a bad faith finding below which

would justify the imposition of even attorneys' fees against unions, and unless this Court is going to carve out an exception or unfair representation cases in the attorneys' fee area, another exception to the American rule, then attorneys' fees themselves would not in cases -- in most cases of unfair representation be an element of damage.

That would leave only a court cost type of figure, which in the present case might be indicative of what you could expect in other cases, $1,463 divided jointly, so a liability would be imposed upon the union which would be miniscule, which would in fact be less than the cost that they would incur to have processed the grievance properly to begin with.

So, we suggest that to accept the position of the American Postal Workers Union in this case is to render the duty of fair representation, a duty without any sanctions to enforce it, because --

QUESTION: Mr. Poff, don't you think that if there is any requirement of agregiousness in order to find that a union has breached the duty of fair representation, that many of those will be accompanied by a finding of malice or bad faith? I mean, negligence, I would think, wouldn't be sufficient to support a finding of liability againt the union.

MR. POFF: You will recall, sir, that in Vaca and Sipes, two tests are really stated. There is the arbitrary and perfunctory standard referred to on one occasion and the arbitrary bad faith and discriminatory language in another. I think it has generally been accepted that the appropriate rule is arbitrary bad faith or discriminatory conduct by unions to constitute unfair representation.

Certainly, if there is -- there have been cases, however, which have gone off on essentially a negligence standard, relying upon the Court's arbitrary and perfunctory language, and I would suggest that in those cases, that would not be a necessary finding of fault on the part of the union to justify the imposition of attorneys' fees. And therefore, if the result urged in this case by the appellee is successful, then the duty of fair representation which was judicially created to achieve some balance and responsibility in this area will be rendered of no effect.

There is also, of course, the national labor policy which is well recognized in support of the arbitral process, and we would submit that the -- that employers in this context submit to an arbitration agreement with the thought that they will act as they deem appropriate under the facts of an individual case,

that the union will, if it deems it necessary, grieve, and that this matter will then ultimately be settled by arbitration within a relatively and -- a time frame that can be relatively -- be ascertained and predicted with some degree of certainty.

If, as in this case, the union can by failing to take a case to arbitration expand indefinitely the period of lost wage exposure that an employer has, then the employer's intentions in entering into this collective bargaining agreement with a grievance and arbitration process will have been thwarted. He did not in essence bargain for an indefinite expansion of his liability, which brings us specifically to the facts of this case, which are unusual in the many district court, circuit court cases that have developed since Vaca versus Sipes.

This case does come to the Court with sound underpinning as to when an arbitration award would have been rendered that would have returned this employee to his employment, and the trial court below made the specific finding that the employer should bear the back wage responsibility, some $17,000, from the time of termination until the time that an arbitration award would have returned him to his employment, and that subsequent to that time, until there was a judicial

holding or until there was a jury finding that he should be returned to work, this period of time having occurred, and this loss of wage having occurred because of the union's reckless, as the jury found, malicious, callous disregard of Bowen's rights to take his case to arbitration, that that period of time was the union's responsibility, and some $30,000 in wages were assessed against the APWU on that basis.

We think --

QUESTION: This was an advisory jury, wasn't it?

MR. POFF: As to the Postal Service, Your Honor, it was an advisory jury. As to the union, it was not. It sat in a dual capacity because of the governmental character of the Postal Service.

And we think that the APWU and unions of like position should not be able to expand an employer's liability for back pay indefinitely by breaching this duty of fair representation. The appellee attempts to structure an argument in this case predicated upon a pure breach of contract analogy going back to the Smith and Evening News cases.

QUESTION: Mr. Poff, do you really care about the employer's expended liability so long as your client gets paid off?

MR. POFF: I suppose that at root we do not, Your Honor, despite our interest perhaps in the law in this area. However, we are, as you know, confronted with a Fourth Circuit holding that because we did not note cross appeal from the verdict below, which we deem to be totally favorable, and did not see any need to cross appeal from, because of that and because of a footnote that was added to this decision some four months after the initial decision was rendered in our favor, we did not think we would be here in this posture. The footnote brought us here because it took away the $30,000 of the Postal Workers Union's damages that would otherwise have been paid by the Postal Service by saying they would not disturb the trial court's apportionment of some $22,964.12 to the Postal Service because we had not noted an appeal as to that.

So, for that reason, it is a matter of some considerable concern to us.

QUESTION: This is your alternative argument.

MR. POFF: It is -- yes.

QUESTION: It may be your stronger one. I don't know.

MR. POFF: Well, sir, I think that our point with regard to the actions of the Fourth Circuit in belatedly amending its decision to take $30,000 away

from us is one that has been adequately briefed, and I do not desire to discuss that at any great length with the Court. We do, however, certainly take the position that if the APWU is excused from paying any share of lost wages suffered by Bowen, that he does remain entitled to a full compensatory award from the Postal Service.

The Smith versus Evening News analysis which the union engages in apparently in an effort to reach the result that no back wages should be awarded against the union in any unfair representation case except one perhaps where they conspire initially with the employer, it seems to us inapposite because, first of all, Smith was not an unfair representation case. It did not involve a case with a grievance and arbitration procedure, and as this Court suggested last term in United Parcel Service versus Mitchell, in which you held -- we are dealing with a statute of limitations question with a Section 301 case.

You in language in that case point out that it is not appropriate to analyze this kind of case on a pure breach of contract theory, because once you get the tripartite hybrid procedure of employer, employee, and union, in a Section 301 setting, with the threshold question being whether there has been a breach of the

duty of fair representation by the union, that it is not a true breach of contract case any longer, that it is a, I believe, in the words of this Court, a creature of labor law, and so we think that for these reasons, that the rationale of the APWU in its brief is fallacious and flawed.

I would like, if Your Honors please, to reserve the remainder of my time for rebuttal purposes.

CHIEF JUSTICE BURGER: Very well.

Ms. Etkind?

ORAL ARGUMENT OF BARBARA E. ETKIND, ESQ.,
ON BEHALF OF THE FEDERAL RESPONDENT SUPPORTING PETITIONER

MS. ETKIND: Thank you, Mr. Chief Justice, and may it please the Court, the right of an employer to rely on the union to bring any breach by it to its attention within the context of the grievance process so that the employer can rectify its wrong and prevent the accrual of additional damages is inherent in the collective bargaining system.

As this Court frequently has recognized, a collective bargaining agreement that contains a grievance arbitration provision is far more than an ordinary contract. The grievance process itself defines the rights under the collective bargaining agreement. It is the vehicle by which meaning and content are given

to that agreement. Indeed, the Court has described the grievance procedure as part of the ongoing collective bargaining process between the union and the employer.

Accordingly, an act that may be an apparent violation of the contractual provisions is not a breach of them until it is determined to be such within the context of the grievance machinery. If it is at that point liability will be assessed to the breaching party who took the action that it did with the full knowledge that its conduct might subsequently in the grievance process be found to constitute a breach.

QUESTION: Well, Ms. Etkind, do I gather from your statement that the government views the kind of liability that an employer and a union would incur in this situation as more or less a kind of joint liability for pretty much the same act?

MS. ETKIND: No. No, indeed. The employer would be liable for breach of the collective bargaining agreement, while the union is going to be liable for the breach of the duty of fair representation. Our argument is that at the point at which the -- if the union had not breached its duty, and the employer would have been reinstated, at that point his damages would cease accruing, so that if they continued to accrue --

QUESTION: Well, why should that be?

Supposing that I am employed by the United States, and I think the United States has fired me wrongly, and I hire a lawyer, and the lawyer eventually tries to get me reinstated but doesn't succeed, and then I go to another lawyer, and that lawyer succeeds in getting me reinstated three or four years later. Now, certainly the employer is liable all during that period. Now, I may have a claim against the first lawyer, but it is only for malpractice. He isn't obligated to pay me part of my wages.

MS. ETKIND: But the union is in a very different position than the attorney.

QUESTION: Well, why?

MS. ETKIND: Because the union is part -- there is a tripartite relationship among the union and the employer and the employee, and the union itself owes a duty to prevent the continuation of this wrong. It is because the union and the employer are parties to the contract. They are the only parties to the contract. They are the ones that define what the contract means. So that if the union, because of its breach, because of its breach of the duty of fair representation, is in effect saying there is no breach of this agreement, then the employer is entitled to rely on that, and to go on from there.

QUESTION: Your suggestion is that the union owes a duty to the employer?

MS. ETKIND: No, no --

QUESTION: Well, it sounds like it. The union owes a duty to the employer to utilize the grievance and arbitration procedure so that the employer's liability won't continue.

MS. ETKIND: It is -- it isn't --

QUESTION: If the employer is at fault.

MS. ETKIND: It is first and foremost a duty to the employee to represent him fairly, and really the question in this case is what damages can the employee collect from the union for its breach of the duty to represent.

QUESTION: It would be logical in your submission, I take it, that the employer, if it was held liable for all the back wages, would have a claim over against the union.

MS. ETKIND: As to those damages that accrue subsequent to what I have been calling the hypothetical reinstatement date?

QUESTION: Yes.

MS. ETKIND: Yes, that's right.

QUESTION: Why should the employee not be able to have a judgment against the employer for the entire

amount?

MS. ETKIND: Because in our view once the decision is made in the grievance --

QUESTION: Well, let the union and the employer fight it out.

MS. ETKIND: But the employer really should not be subject to that sort of fighting, because it is acting in accordance with the collective bargaining agreement. Once either it has gotten an arbitral decision in its favor or the time for --

QUESTION: So you think the union does owe a duty to the employer?

MS. ETKIND: To the employer in the sense of cutting off its liability.

QUESTION: A duty that means that such a duty that the union has to pick up the back wages for a period of time.

MS. ETKIND: Well, that's right. I might have misunderstood you. I don't mean a duty arising out of the collective bargaining agreement as much as a duty --

QUESTION: Just a duty to pay.

MS. ETKIND: That's what it is going to have to do, we believe.

As Justice Stewart stated in his concurring opinion in Hines --

QUESTION: Before you leave that, the allocation was based on the fact that there was a shared fault here, was it not? That the union's conduct had enlarged the total injury.

MS. ETKIND: Oh, exactly. Yes, that's completely true.

QUESTION: Is that not the case?

MS. ETKIND: I'm sorry?

QUESTION: Is there any question about that?

MS. ETKIND: No, no question about that at all. In his concurring opinion in Hines, Justice --

QUESTION: But the employer remains liable.

MS. ETKIND: I'm sorry?

QUESTION: I say, but the employer remains liable to the employee.

MS. ETKIND: But the employer remains liable? No, the employer does not remain liable.

QUESTION: On your theory, no.

MS. ETKIND: Right. I'm sorry, I didn't understand your question, Justice.

QUESTION: I am just following up on Justice White's inquiry.

QUESTION: But if you -- I take it if the employee just sues the employer.

MS. ETKIND: The employer.

QUESTION: And doesn't join the union, what if the employee just sued the employer? Could he get a judgment against the employer for the entire amount?

MS. ETKIND: Well, no, because he would have to -- the union -- the employer would have a defense based on his failure to exhaust his remedies against the union.

QUESTION: Well, he comes back and says, I asked the union and the union breached his duty, and --

MS. ETKIND: He would have to prove that the union breached his duty.

QUESTION: Well, he proves it.

MS. ETKIND: In that case, the employer should -- the employee should be able to collect from the employer up until the point when he would have been reinstated.

QUESTION: So you say he could never get a judgment against the employer for the entire amount.

MS. ETKIND: No, he could not get a -- unless, unless it could be shown that the employer cooperated in the union's ongoing breach, but that certainly is not the case here.

QUESTION: Even though the original fault was that of the employer.

MS. ETKIND: That's right. The original

fault --

QUESTION: You are really speaking of an intervening cause.

MS. ETKIND: In the language of torts, it would be a superseding cause, I believe. That's right. And that is because -- and that is because it doesn't arise out of tort. It arises out of the national labor policy, which is that rights are only defined within the grievance procedure. A collective bargaining agreement itself may be violated, but the breach itself isn't determined until it is within -- within the grievance process.

In Hines, Justice Stewart stated in his concurring opinion that once a grievance process is exhausted, the employer's failure to reinstate discharged employees cannot be anything but rightful until there is a contrary determination. There is no difference in result whether, as in Hines, an abrital award is rendered in favor of the employer, or until the time for processing the grievance has expired.

So the point is that there is no breach of the collective bargaining agreement unless such a breach is found in the context of the grievance process. In other words, the unique feature of the grievance arbitration process, the fact that it is the vehicle for the

determination of the substantive rights under the collective bargaining agreement distinguishes an action on a collective bargaining agreement containing such a provision from suit on an ordinary contract.

In the latter case, damages continue to accrue up to the time of trial, because it is only at trial that the rights of the parties are determined. By contrast, where a grievance procedure is available to the parties, their rights can be determined substantially earlier, so that all parties can conform their conduct to that determination.

Accordingly, where because of the union's wrongs the employer's breach is not brought to its attention in the context of the grievance procedure, it is only fair that the union bear those additional damages that flow from the malfunctioning of the grievance machinery which it caused. Therefore, in Hines versus Anchor Motor Freight, Justice Stewart explained that the union, not the employer, would be liable for back wages accruing subsequent to an arbitral award that was erroneously rendered in favor of the employer because of the union's breach of its duty of fair representation.

There is no reason for a different result here.

QUESTION: How many joined Justice Stewart in his observations?

MS. ETKIND: Justice Stewart was alone.

The union argues that imposing liability on it for lost wages will have a chilling effect on the exercise of its discretion to settle employee grievances short of arbitration. In the first place, a rule that imposes liability on an employer for these damages may chill its right to discharge employees whom the collective bargaining agreement would entitle it to dismiss, thus modifying the parties' rights under the collective bargaining agreement.

In any event, the union's contention that the apportionment rule we urge would force it to arbitrate even frivolous grievances for fear that if it did not, it might be assessed back wages, is unfounded. In Vaca, the Court made clear that a union can breach its duty of fair representation only by conduct that is arbitrary, discriminatory, or in bad faith.

For example, here the jury found that the union had acted maliciously, recklessly, or in callous disregard of petitioner's rights. In our view, that sort of conduct should be chilled, and moreover, whatever --

QUESTION: This is certainly not the

prototypical case that the union is going to face if your view prevails, that a guy coming back from Las Vegas and turning down 12 arbitrations in one day, I mean, that is a -- I would have liked to argue that case to the jury myself, I think. You are going to get some much grayer shadings, aren't you?

MS. ETKIND: Well, that is true, but of course this Court is faced with the facts of this case, and with the jury and the district court's findings that here the union acted callously and maliciously.

I see my time has expired.

CHIEF JUSTICE BURGER: Mr. Schwartz.

ORAL ARGUMENT OF ASHER W. SCHWARTZ, ESQ.,
ON BEHALF OF THE RESPONDENT UNION

MR. SCHWARTZ: Mr. Chief Justice, and may it please the Court, I have heard a few remarks here which I would like to reply to, but before I do, I would like to urge upon the Court my original presentation, namely that the only violation upon which the claimant, the grievant rests his claim for back wages is the violation of the employment contract, and the only party that violated that contract was the employer, not the union. The union committed no violation of the contract in any respect. The only violation that we are confronted with with respect to the union is that it violated its duty

to the employee in its requirement that it represent him fairly.

QUESTION: In the whole scheme of things, do you think that an employer has no interest in whether a union carries out its obligations to employees who are members of that union?

MR. SCHWARTZ: Oh, I think an employer does have an interest, yes, sir. I agree. And that interest should have been --

QUESTION: That is the whole scheme of the system of labor relations, is it not?

MR. SCHWARTZ: Yes, sir, and that employer in this particular case and in every case makes a decision to discharge an employee for just cause, and through three steps of the grievance machinery, the employer persists in that decision. Then the union in this particular case agrees with the employer. He says, you have convinced us that this employee has violated his duty to the employer, and he is subject to discharge.

Now, the employer and the union in that case have applied the grievance machinery, have decided in their judgment, which turns out to have been a wrong judgment, decided later on by a jury, that the employee was justly discharged. Now the question is, shall the union be held liable because it agreed with the employer

that the employee was justly discharged, a decision which they did not come to until a jury later on determined that there was a breach of the duty of fair representation.

Now, I think that the union does have an interest -- the employer does have an interest, and that the interest of the employer is at all times, especially since Vaca, to make sure that it has discharged the employee if it is a discharge only for just cause. I do not think that the intervening damage or the intervening act or wrongdoing of the union, a wrong committed against the employee, not against the employer, should in any way absolve the employer from his wrongdoing.

It is just as if a culprit who was slashing away at his victim states that but for the failure of the police to intervene in a timely manner, his knife would not have reached the throat of the victim, and therefore the police are responsible for any of the responsibility beyond the time when they should have been there and the culprit is liable only for mayhem.

Now, that principle is clear in the law of torts, and there is no reason -- and the law of trusts, and there is no reason why it shouldn't be applicable here. As Prosser stated it, where one tort feasor by his act or conduct has created a danger to the

plaintiffs and the other has merely failed to discover or to remedy it, indemnity will lie in favor of the second tort feasor.

QUESTION: Counsel, in view of the fact that the employer's breach is a contractual one, do you think a tort doctrine is necessarily applicable?

MR. SCHWARTZ: I do in this case, because what we are talking about is a classification of the union's wrong as a tort. Some people treat that as a tort. Some treat it as a breach of trust. Some treat it as malpractice. And that is what we are talking about. We are talking about the wrong of the union. Now, the employer has violated the contract, and caused damage to the employee.

QUESTION: I thought Prosser's example dealt with two tort feasors and the allocation of liability between them. Certainly the employer here is not a tort feasor.

MR. SCHWARTZ: No, the employer breached the contract and caused the damage by that breach, and it is the only party that broke the contract, but I don't think that there should be any distinction in logic between the two situations. Why should the wrongdoing of the union to the employee be a benefit to the employer and not to the employee?

QUESTION: Traditionally, your rules of damages under contract law, I think, are quite different than under tort law. For instance, in contract law, you have got the doctors, like Hadley against Vacksendale, that restrict rather significantly the kind of damages you can ordinarily recover in a tort action under your doctrine of proximate cause. I think you have to analyze it as one being a contract violator or breacher, and the other being a tort feasor.

MR. SCHWARTZ: Well, I do, and I think that as a contract violation, the damages to the employee is that he has been out of a job from the date of his discharge until the date of his reinstatement, and that is caused by the breach of contract, and only by the breach of contract. The only reason I bring the tort analogy in is because the employer in this case is attempting to relieve himself of some of those damages by resorting to a tort or a breach of duty by the union to the employee, and there is no reason for doing so.

Now, in Lincoln Wilson --

QUESTION: Isn't it true that if the union had not breached its duty, those damages would not have accrued?

MR. SCHWARTZ: That's not -- I don't know whether that would be true or not, Your Honor. We don't

know what --

QUESTION: Well, isn't that the way the case comes to us?

MR. SCHWARTZ: We don't know what an arbitrator would have decided. We know that a jury decided some -- a year later, but we don't know what an arbitrator decided, but the only obligation of the union was to take the case to arbitration.

QUESTION: Well, wait a minute. Wait a minute. Doesn't the jury determination mean that as a part of the record in this case, we must assume that the employer breached his contract?

MR. SCHWARTZ: That's right.

QUESTION: And should we not presume that an arbitrator would have reached the same conclusion?

MR. SCHWARTZ: I don't necessarily agree with that. I agree that we must presume that the union breached its duty of fair representation.

QUESTION: Well, but if the employer breached his contract, and we assume the arbitration process works, the arbitrator surely would have come to the same conclusion. I think we have to assume that.

MR. SCHWARTZ: Well --

QUESTION: If you assume the other, then maybe nobody should be liable after the date of the

arbitration.

MR. SCHWARTZ: No, I don't assume that the arbitrator would rule otherwise. I assume that the employee was improperly represented by the union, and therefore there should have been an arbitration on the case, yes.

QUESTION: And if there had been, and if there had been no breach of the duty of fair representation, the damages would have been cut off as of the date of the arbitration.

MR. SCHWARTZ: That's right.

QUESTION: So that both wrongs contributed to the damages post that date.

MR. SCHWARTZ: Well, the only wrong contributed by the union was the wrong in not presenting the case to arbitration.

QUESTION: Right.

MR. SCHWARTZ: And that is a damage which I think the union is liable for under Vaca against Sipes, but the wrong that arose out of the breach of contract is entirely the responsibility of the employer, because the employer alone broke the contract. I don't think that we can say that there was a divided liability as to the breach of contract. What is really being said here is that the union should in some way indemnify the

employer for the period of time when the union might have taken the case to arbitration, and didn't in breach of its duty to fair representation, but there is no agreement in the contract that there should be an indemnification. There is no agreement in the contract that the union will take the case to arbitration.

QUESTION: May I ask this question? Justice White asked earlier if the union has any duty to the employer to be diligent and faithful in its obligation of fair representation of the employee. Do you say it has no duty to the employer?

MR. SCHWARTZ: Well, I don't say that it has no duty, Your Honor, but I say that the only duty it has is to make a decision as to whether or not it will or will not take the case to arbitration. Now, that --

QUESTION: Does it have a duty to act in good faith, and does that duty run to the employer?

MR. SCHWARTZ: I think it does have a duty to act in good faith, but it is not a duty to the employer. It is a duty to the employee.

QUESTION: But does not the employer have an interest in having that duty performed properly? It would seem to me that if you say there is no obligation at all to the employer, that then in subsequent litigation the union would always come in and say, well,

we acted in bad faith, we were careless, we were negligent, but we can't be liable, we don't owe you any responsibility?

MR. SCHWARTZ: Well, I don't think it would say that, as long as there is a duty of fair representation, but --

QUESTION: That would always help the employee, if it took that position in litigation, because then it would pave the way for a bigger recovery against the employer.

MR. SCWHARTZ: But it would also be -- create a liability of the union for -- damages.

QUESTION: For fees. For fees. That would be all.

MR. SCHWARTZ: Well, yes, and those can be very severe, and we have, as a matter of fact, in practice, we have had very severe expenses in representing -- in defending cases of breach of duty of fair representation. These cases are proliferating almost to the extent of personal injury actions at the present moment.

QUESTION: Mr. Schwartz, do you agree with the suggestion from the bench that the proper procedure here would have been for the employer after this litigation to institute a suit against the union itself in separate

litigation?

MR. SCHWARTZ: No, I don't think so. Vaca against Sipes indicated that it all ought to be dealt with as one ball of wax, and I would agree with that.

QUESTION: Well, if it is dealt with in one ball of wax, how are you going to give the employer an opportunity to recover, ever recover from the union?

MR. SCHWARTZ: I don't think it should.

QUESTION: You don't think it ever should?

MR. SCHWARTZ: Not for back wages.

QUESTION: So you would relegate it exclusively to possibly attorney's fees and costs?

MR. SCHWARTZ: That and whatever other expenses are involved to the employee.

QUESTION: Such as?

MR. SCHWARTZ: There are discovery, litigation expenses.

QUESTION: Such as what?

MR. SCHWARTZ: Such as litigation expenses, discovery expenses, the counsel fees, of course, which are the major cost, and in that respect, I would like to make a remark about the suggestion of Mr. Poff that Summit Valley indicates that there would be no counsel fees as damages. Well, that isn't true. In that case, there was a claim of counsel fees from the defendant,

from the plaintiff against the defendant in their lawsuit between each other, but that did not indicate that there would not be damages if the lawsuit for which counsel fees were being asked was a lawsuit against a third party, which --

QUESTION: If the union --

QUESTION: Mr. Schwartz, would you please stay near the microphones?

MR. SCHWARTZ: Excuse me, sir.

QUESTION: Mr. Schwartz, if the union deliberately, as somebody has suggested, in bad faith prolonged the arbitration proceedings, say, for five years, are you suggesting the responsibility would be on the employer to pay the back wages for the entire period with no responsibility on the union? That is your position?

MR. SCHWARTZ: No, I would say that if the union deliberately in bad faith extended the -- affirmatively took action which extended the period of time during which the employee is out of work, that --

QUESTION: But I thought you said, responding to Justice Stevens, that there was no duty on the part of the union to exercise good faith with respect to the employer. Did you say that?

MR. SCHWARTZ: I think that its duty is to the

employee, but I don't consider that, Your Honor, to be an exercise of bad faith to the employer necessarily.

QUESTION: Even if he extended it for five years?

MR. SCWHARTZ: Well, if it is only doing it for the purpose of extending the liability of the employer, I suppose you could consider it that, but I consider that to be a very rare and very hypothetical situation which I can hardly contemplate. I should think the employer could find relief against that in some other way.

QUESTION: For example?

MR. SCWHARTZ: Well, it could go into court and say, look, this union is not acting in good faith, and for that reason I want this proceeding to be halted, to obtain a restraining order, at least to show that there is a violation of the union's duty to proceed with the arbitration. There is a duty under the contract to proceed with the arbitration machinery.

QUESTION: Is that duty breached in this case?

MR. SCHWARTZ: No -- well, the duty here was the duty not to initiate the grievance machinery, which is no different -- I wouldn't say it was no different, but it is equivalent to the duty of the employer not to

discharge the employee without just cause. The employer discharged the employee without just cause. The union decided that the employee was discharged for just cause, and consequently it did not take the case to arbitration. That is the situation that we have here, too.

Now, it turns out that the judgment of the union in deciding not to take the case to arbitration was wrong in the view of the jury.

QUESTION: And the court found, and the court of appeals accepted it, that both the union and employer acted maliciously and arbitrarily, so that you have the malice or -- founds the fact in this case with respect to both parties. And why shouldn't the liabilities of the parties be resolved in a single litigation? It is in every other context with which I am familiar.

MR. SCHWARTZ: It should be resolved, I say, in a single bit of litigation. Is that what you suggest, Your Honor?

QUESTION: Yes.

MR. SCHWARTZ: I would say that, but nevertheless, the obligations and the liabilities are nevertheless separate liabilities, and they are treated as such, and the jury is instructed to treat them as separate liabilities.

QUESTION: Going back to this matter of duty, I think there is a certain ambiguity in some of the responses. I understood you to say in response to one question earlier that you could not say -- you could not say there was no duty by the union to the employer. Is that your --

MR. SCHWARTZ: I would say, Your Honor, there is a duty of the union to participate in good faith in accordance with the procedures of the contract. It is a procedural type of obligation to the employer.

QUESTION: But that includes arbitration.

MR. SCHWARTZ: And that includes to go to arbitration provided that the union believes that the case warrants arbitration.

QUESTION: Does that not mean that the employer has a very real interest in the arbitration process, to preserve labor harmony and peace?

MR. SCHWARTZ: I think it does.

QUESTION: So there is a duty of some kind.

MR. SCHWARTZ: Well, whether you would call it a duty or interest, I don't know, but it has a definite interest in it, but I don't think that that duty to the employer, if broken, and we will assume a breach, means that the union now has to pay the damages for which the employer is responsible because he discharged the

employee without just cause.

I say that there are other damages that it will have to bear, but not that.

QUESTION: Well, do you think that when the union decides not to go to arbitration, and let's assume that that is an arbitrary decision, and it is a breach of duty to the employee, do you think when the union acts in that way, that at the very same time it is breaching a duty to the employer?

MR. SCHWARTZ: No, I do not.

QUESTION: He hasn't got any duty to the employer to take the case to arbitration.

MR. SCHWARTZ: Exactly. That's right. I say that, yes. He does not have that obligation.

QUESTION: So the breach of duty to the employee is not necessarily a breach of duty to the employer.

MR. SCHWARTZ: That's right. The only thing is that I agree with the Chief Justice.

QUESTION: That if you do take it to arbitration, you have a duty to do so in good faith.

MR. SCHWARTZ: That you have to act in accordance with the machinery that is provided for in the contract, in good faith, but there is no duty to take the -- any case, so far as the employer is

concerned, to arbitration.

QUESTION: Then you are bifurcating this duty, however you define it. You are now saying that there is no duty to go to arbitration, but there is a duty that if they go to arbitration, it must be conducted in good faith. How do you really separate those two things?

MR. SCWHARTZ: Well --

QUESTION: The one is just -- it is a continuous stream, is it not?

MR. SCHWARTZ: No, sir. I think that I can --

QUESTION: To preserve labor harmony. That is the purpose of the arbitration clause, isn't it?

MR. SCHWARTZ: That's right. Yes. I think I can differentiate it, Your Honor. I think that when a union considers an action taken by the employer which it believes to be a violation of the contract, it has to make a decision, shall it take that case to arbitration or not, and it has to make that decision in the manner provided for in the agreement. Now, the agreement doesn't say that the union must take it to arbitration. There is no agreement that I know of that indicates anything of that sort. All it says is that if the union is not satisfied with the resolution of the dispute in the grievance machinery, it may appeal to an arbitrator.

Now, its consideration of the case, its

investigation of the case ought to be done fairly. Whether that is an obligation to the employer or not, I am not so sure. I think that those things are basically obligations to the employee whom the union represents. The only obligation which I, in response to your question, will admit to so far as the employer is concerned is that it use -- it apply the administrative machinery procedurally in a proper way, and not take advantage of failings by the employer in procedure or anything of that sort. That is what I would mean by acting in good faith in connection with the grievance procedure.

QUESTION: Did you try the case?

MR. SCHWARTZ: No, sir, I did not.

QUESTION: I just wondered about the instructions to the jury.

MR. SCHWARTZ: The jury was instructed, as I recall it -- I don't have them before me -- that it would first have to determine whether there was a breach of the duty of fair representation.

QUESTION: Yes, yes.

MR. SCHWARTZ: And then, if it found that, then it would then determine whether there was a violation of the agreement, and of course the court used the usual language that has become prevalent in these

duty of fair representation cases, callous, reckless, discriminatory, arbitrary.

QUESTION: How about the relative fault business?

MR. SCHWARTZ: There was no -- there was no instruction as far as I can judge from reading the record that the union was -- that the jury was asked to find any relative fault.

QUESTION: What about the recovery, though? What kind of a recovery was it authorized to make under the instructions against the union?

MR. SCHWARTZ: It was authorized to determine what damages were caused by the employer and the union, and the employer, and in doing so, it apportioned some of the damages for back pay to the union and some to the employer.

QUESTION: Did the instructions authorize it to do that?

MR. SCHWARTZ: I do not recall, Your Honor.

QUESTION: I beg your pardon?

MR. SCHWARTZ: I do not recall. I do not recall whether --

QUESTION: Well, it seems to me that if a union is trying a lawsuit and it has got a -- and it is being charged with duty of representation, I would think

it would watch out for itself in the instructions to the jury as to what kind of damages the jury is authorized to find. If the jury is -- If the court had expressly authorized the jury to divide up the liability for back pay, which apparently it did, it seems to me the union would -- you, certainly, based on what you say here, would be up on your hind legs immediately.

MR. SCHWARTZ: I should think so, Your Honor. As a matter of fact, our brief shows that the trial court instructed the jury "to break the damages down by determining a hyptothetical date when an arbitration of the grievance would supposedly have been" --

QUESTION: Now, that is just absolutely contrary to your argument.

MR. SCHWARTZ: That's right.

QUESTION: Now, did you object to that instruction?

MR. SCHWARTZ: I don't recall. I wasn't there, Your Honor.

QUESTION: Well, was there an objection to the instruction?

MR. SCHWARTZ: I don't know. There should have been, I agree. There shouldn't have been liability in this case.

QUESTION: Well, that point isn't preserved

here. We didn't grant the jury to hear that.

MR. SCHWARTZ: It is not preserved. I wish I could argue this case right -- could treat this case right from the beginning. The only finding -- There were no findings of fact -- findings or facts or --

QUESTION: Well, counsel, why don't you limit yourself to the issues that are presented here unless you are responding to questions?

MR. SCHWARTZ: No -- well, I am responding to the question, but I do want to --

QUESTION: I was interested because the union is the one that took the case up to the court of appeals, isn't it?

MR. SCHWARTZ: The union and the employer jointly, Your Honor.

QUESTION: Yes, and you got relieved of liability.

MR. SCHWARTZ: That's right.

QUESTION: On the grounds that you weren't liable for back pay.

MR. SCHWARTZ: That's right. And we think that --

QUESTION: Which means that really the instructions were wrong.

QUESTION: Mr. Schwartz, this case really

boils down, I gather, to a question of the law of damages, and it is your position, as I understand it, that the union can never be liable, just focusing on its liability to the employee alone, can never be liable for a loss of pay. Is that your position?

MR. SCHWARTZ: No, Your Honor. If the union itself was responsible in any way for the discharge of the employee, or if it --

QUESTION: Well, let's suppose the fact finder determined that the employer initially made a wrongful discharge, but that if the union had exercised its right to compel arbitration, that the employee would have gone back to work on Date X, and that as a result, the employee has been damaged thereafter to the extent of his loss of wages, and you are saying under those circumstances the union may not be held liable as a matter of the law of damages?

MR. SCHWARTZ: Yes. Yes, Your Honor, and that is this case. This is a case just like that.

QUESTION: It certainly is. I find it hard to understand why applying normal damages principles you can take that view, assuming the fact-finder makes the appropriate determination.

MR. SCHWARTZ: Because I don't think that the action of the union, albeit a wrongful act, should inure

to the benefit of the employer who committed the violation of the contract.

QUESTION: We are only talking now about an employee. It is the employee who is the plaintiff.

MR. SCHWARTZ: Yes, but the employee under the principle I espouse will recover all his back wages.

QUESTION: Well, not under the present posture of the case. Is there anything wrong in the trial court seeing to it that in the overall scheme of things, where the employee is suing both the employer and the union, and where both are liable for damages, that the employee doesn't make a double recovery, and that there is an apportionment?

MR. SCHWARTZ: Well, I think that we do have a --

QUESTION: Is there anything wrong with that under the law of damages?

MR. SCHWARTZ: That they recover double? Yes, I do, unless the court is going to impose punitive damages, which this Court has already decided are not appropriate, but the employee, so far as the breach of contract is concerned, is entitled to be made whole under the law of contract damages, and he is made whole if the employer pays his back pay in full.

The only thing that results from assessing the

union with any part of the liability is that it doesn't help him at all. It is the employer who then gets a contribution from the union to the payment of those damages.

QUESTION: Well, isn't it just windfall to the union to be let off --

MR. SCWARTZ: It is a windfall to the employer, it's a windfall to the employer if it now obtains part of the damages which it causes from the union instead of paying them in whole.

QUESTION: What if the employer before trial has gone bankrupt, and so that it is insolvent and can't respond to a judgment of damages. Could the court impose at least secondary liability on the union for the loss of that employer's payment?

QUESTION: -- For the loss of back pay that the employer can't pay?

MR. SCHWARTZ: Well, I think that's possible. I don't know the answer to that, but I think it is possible. If in that case the employee cannot be made whole by an action against the employer, then I think we would have to consider whether or not the damages have thus been changed, and the damages to the employee from the failure to perform the duty of representation has not in fact brought that about.

QUESTION: Oh, no. Why shouldn't the employee be able to sue the union for its breach of duty, not join the employer at all and say look, if you'd have done what you're supposed to, take this case to arbitration, I would have been reinstated. And I have now proved breach of duty, and I have proved a breach of contract, and part of my damages are that I've been out of work for longer than I should have been, and you're at fault. That's part of my damages for your tort.

It's true the employer's been breaching his duty to me all the time, but nevertheless, it's part of my damages, and I don't want to have to -- I can't even join the employer. He's gone somewhere else.

MR. SCHWARTZ: That's Vaca against Sipes. The union was sued individually by -- alone, and the Court

said that there's no reason why it can't be because the union would only be liable for the damages that it caused by its breach of duty of fair representation and not by the damages caused by the violation of the contract.

QUESTION: Early in your argument, Mr. Schwartz, I understood you to say that it was proper to have -- I think you used the phrase something like "all one ball of wax," that both these parties should be sued in one suit and that there should be allocation.

Now, did I misunderstand you?

MR. SCHWARTZ: No. And I think Vaca against Sipes said that. But what I'm talking about is what should the allocation be. I think that it's proper for the two claims to be brought in one suit rather than to have two separate suits. But the allocation is the question that's before this Court, and I don't think that the union -- the allocation should be to require the union to pay for the wrong done by the employer by its violation of contract, and that's all.

The union did cause some damage to the employee by requiring him to go to court, retain counsel and suffer whatever costs there were in pursuing his claim; but those are the only damages for which the union should be held responsible.

Now, I'd like to before -- I only have a minute, but I'd like to point out that holding the union back pay will be a considerable hardship to the union. This Court has considered that in previous cases. And that the result may well be that a union would prefer and would find it more economical to take all cases to arbitration rather than risk the possibility that some jury is going to second guess it and decide that it breached its duty of fair representation. And that is not what the grievance machinery is supposed to accomplish.

Finally, these cases have so proliferated already that insurance companies are approaching us. I've received since my name appeared on the brief, I've received several brochures from insurance companies on duty of fair representation which may be a message to me as to what the outcome is going to be.

QUESTION: You're just joining the doctors and the lawyers.

MR. SCHWARTZ: That's what it amounts to, yes, Your Honor. And that I think would be quite regrettable. I think that the duty of the union should be severely restricted, as Vaca did, and I think that the principles of Vaca and Czosek against O'Mara, as stated in those decisions, ought to be followed; that

there is no reason for overruling those decisions because of the peculiar posture of this case.

QUESTION: Of course, you could restrict the contours of the union's liability substantially, have a much higher standard that the jury had to find, or a worse conduct and still have a different result than you suggest on the allocation of damages. I mean the union's problems could be cured in more than one way.

MR. SCHWARTZ: Well, the best way and the way that in fact is that the union membership isn't going to stand for the union officers not representing its employees fairly. The worst thing that can happen to a union official is to find that a lawyer can accomplish something that a union representative couldn't accomplish. So union officials are very sensitive to their duty of fair representation.

The cases that come before this Court or the courts generally are the odd cases, and in most cases are situations in which there's been a hindsight judgment made by a jury that's sympathetic in almost all cases to the plight of the employee, and in order to give that employee relief, it has to find that the union violated its duty of fair representation. That's the way the instruction goes to the jury, and that's the kind of situation that we're confronted with in most of

these cases.

QUESTION: Well, you'd -- I supposed you'd rather -- I'm not sure whether you'd rather have it that way, or would you like the employer's defense sustained, namely when he's sued, he says well, you didn't follow the contract procedure; your agent didn't take the case to arbitration, and hence, the grievance ended the whole matter. The case should be dismissed.

Which way would you rather have it?

MR. SCHWARTZ: I'm not sure that I understand your question.

QUESTION: Well, normally an employer when he's sued can say I move to dismiss on the ground that you didn't follow the available remedies under the contract. Vaca relieved the union of that defense, relieved the employee of that defense.

MR. SCHWARTZ: That's right.

QUESTION: By saying that the employer cannot rely on that defense if the union has breached its duty.

MR. SCHWARTZ: That's right, and I don't think it should be relieved of that defense.

QUESTION: Well, so you would rather have to face the charge of unfair representation than to have the defense sustained.

MR. SCHWARTZ: That's right. I would rather

find that to be true.

CHIEF JUSTICE BURGER: Your time has expired now, Mr. Schwartz. Thank you.

Do you have anything further, Mr. Poff?

ORAL ARGUMENT OF WILLIAM B. POFF, ESQ.,
ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. POFF: Yes, Your Honor.

I understood Mr. Schwartz to concede in response to questions that if this employer had been bankrupt that the employee would be entitled to recover his back wages from the union in this situation. I think if that be the result, and I think it should be the -- it certainly should be an admission that the union is responsible for back wages in this situation and should be dispositive of the case.

There was some suggestion of hardship that this case might impose upon --

QUESTION: Why would that be dispositive of the case? It seems to be consistent with the position that they are liable for the damages that can only be remedied by their own -- for what they caused, but they can't --

MR. POFF: Well, they have taken the position, sir, that they're not responsible at all, not that they're secondarily liable; and I took that to be an

admission that they were at least secondarily liable.

QUESTION: Well, I suppose they're not responsible at all if recovery can be had from the employer. They are not responsible for the consequences of the employer's wrong to the extent that the employer can be compelled to pay damages. That's -- I understand their position.

MR. POFF: It seems to me, however, that while it's appealing to think of these cases in terms of simple contract or tort terms that the law of the duty of fair representation is more complex than that and cannot be considered in those terms. You are dealing here not with one wrong, as they would suggest -- the wrong by the employer -- but with two wrongs. And is there any more equitable way in a fault system of justice that we have to apportion fault and liability between these two wrongdoers -- in this case malicious, reckless wrongdoers -- than the trial court did in this case.

The jury was, in response to Justice White's question, properly or --

QUESTION: Well, Mr. Poff, according to the union, the union's position was quite inconsistent with the instructions. I mean the union's position voiced here was inconsistent with the instructions.

MR. POFF: It is, yes, sir.

QUESTION: And the Court of Appeals agreed with the union that it was not liable. Isn't it -- wouldn't it have been possible for the Court of Appeals when it decided there was error in entering the judgment against the union, which was certainly consistent with the instructions, couldn't it have ordered a new trial?

MR. POFF: I think it could certainly have remanded it, Your Honor.

QUESTION: For a new trial.

MR. POFF: It could indeed, sir.

QUESTION: Because the net effect of its holding was that the instructions were wrong.

MR. POFF: That is correct, sir.

And the union -- the -- in answer to your question to Mr. Schwartz, there were special interrogatories --

QUESTION: Yes.

MR. POFF: -- Submitted to the jury which are part of the appendix in this case. The jury was asked to make the apportionment of damages.

QUESTION: Exactly.

MR. POFF: And it did so pursuant to an instruction of the court.

QUESTION: But those instructions then were

wholly inconsistent with the view of the Court of Appeals as to the union's liability.

MR. POFF: That is correct, sir. And instead of remanding it for a reallocation of damages, which I think would have been appropriate perhaps instead of retrial --

QUESTION: Well, there'd have to be a new trial because it was a jury case.

MR. POFF: That is correct.

QUESTION: And the stated remedy is still available, is it not?

MR. POFF: I beg your pardon, sir.

QUESTION: That remedy is still available as a result of this case.

MR. POFF: Yes, I think it would be.

QUESTION: I suppose we would have the authority --

MR. POFF: That's our second point.

QUESTION: -- To say that the Court of Appeals was wrong in what it did, that it should have ordered a new trial.

MR. POFF: Yes, sir.

QUESTION: Mr. Poff, do you think the union is obliged to go to arbitration?

MR. POFF: Do I think it is obliged to go to

arbitration?

QUESTION: Yes, sir.

MR. POFF: I think that in this case it most -- it was held by the trial court and jury to have been obliged.

QUESTION: But it depends on each case.

MR. POFF: It does indeed, sir. Whether they need to go in order to fulfill their duty of fair representation.

QUESTION: Yes, yes.

MR. POFF: And I -- in this case it was held that they did have that obligation. I don't think there is any -- I think they have --

QUESTION: So you don't have to go to the general one at all.

MR. POFF: Do not have to go to what, sir?

QUESTION: You don't have to go to the general, that in all cases they have to go to arbitration.

MR. POFF: Oh, no. No, no, no, indeed, sir. And I think, in fact, that the place to -- as has been suggested by Justice Rehnquist, the place to police the duty of unfair representation, which is going to be a very fragile duty indeed if you accept the union's position in this case because there's no sanction.

There's nothing that -- the union just breaches it with impunity. But it --

QUESTION: Well, it suffers a substantial burden on these cases, I must say. Even if it doesn't have liability for back pay, there's certainly --

MR. POFF: Well, I would think, sir, that in this --

QUESTION: -- Certainly some financial outlays in defending the case and in paying your fees.

MR. POFF: They haven't paid them yet, sir.

(Laughter.)

QUESTION: Well, part of the judgment -- part of the judgment is that they must pay part of them.

MR. POFF: Part of them at least.

I would suggest, though, that a proper policing of the arbitrary bad faith standard is the place to control the unfair representation cases, not in the -- and to end the area of an appropriate allocation of damages. Because here we have a union that concededly is responsible for $30,000 worth of Mr. Bowen's lost wages and the union contending that it has no responsibility for those.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:47 a.m., the case in the

above-entitled matter was submitted.)

CERTIFICATION

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BY Pirre Hammond

(REPORTER)