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Hines v. Anchor Motor Freight: Another Step in the Seemingly Inexorable March Toward Converting Federal Judges (and Juries) Into Labor Arbitrators of Last Resort

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HINES V. ANCHOR MOTOR FREIGHT: ANOTHER STEP IN THE SEEMINGLY INEXORABLE MARCH TOWARD CONVERTING FEDERAL JUDGES (AND JURIES) INTO LABOR ARBITRATORS OF LAST RESORT

by Peter Adomeit*

I. INTRODUCTION

This article, directed to the courts, and especially to the federal bench, carries this message: you are in danger of converting the federal judiciary into a panel of labor arbitrators.

The advance sheets of the federal courts are beginning to read like Labor Arbitration Reports. The kinds of disputes that in the past were resolved by private arbitration are beginning to appear at an increasing rate on the dockets of the federal courts: Did the company have just cause when it discharged the grievants for allegedly falsifying their expense accounts? Did the company violate the agreement with the union when it assigned the grievants to night work? Was the employer justified in discharging the grievant for allegedly striking her superior? Did the grievant place the meat on the loading dock, intending it to be picked up by accomplices, and did that constitute grounds for discharge? Was the company justified in discharging the grievant for possessing a bandsaw stolen from the company? Should the company have given credit to the grievant, who signed a confession admitting his theft, discharged for cause?

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grievant for seniority earned while working in South America? Was the grievant, a truck driver who admittedly sought pay for time not worked, guilty of theft of company time, and thus properly discharged? Was the grievant discharged for cause after he struck a bridge with his truck? Was the grievant’s alleged intoxication sufficient cause for his discharge? Did past practice justify paying the grievant a lower rate of pay for piloting a smaller boat? Is alcoholism an illness, entitling the grievant to sick leave under the contract? Was the grievant, who had only one good eye, properly laid off when his job was changed to require him to drive? Was the grievant’s job classification proper? Did the company assign the correct seniority date to the grievant? Was the grievant’s explanation of why he allowed an unauthorized female passenger on a charter bus believable, or was he discharged for cause? Should the grievant, who while off duty and away from the factory assaulted his foreman, be reinstated with back pay, or was discharge an appropriate penalty?

These cases, taken from the reports of the federal courts, involve issues no different from those in the hundreds of reported cases in the CCH Labor Arbitration Awards or in the BNA Labor Arbitration Reports, not to mention the thousands of arbitration decisions that go unreported. If the courts would prefer to handle more of these cases—and there are more where these came from, namely from the daily frictions of the working place—all they need do is give a broad reading to Hines v. Anchor Motor Freight.

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17. Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972). (This case resulted in a jury verdict for the grievant of $12,000.)
II. HINES V. ANCHOR MOTOR FREIGHT

Hines involved the nine year saga of eight truck drivers who were caught up in an alleged scheme to defraud their employer, Anchor Motor Freight. Anchor accused the drivers of falsifying their motel expense accounts and began dismissal proceedings. When the union took the case to the final grievance hearing, the only evidence it presented to the arbitrators was the drivers' protests of innocence. The company had the drivers' expense sheets and motel receipts, and affidavits from the motel clerk and the motel owner, both swearing that the receipts were accurate. The case was tried before a joint arbitration committee of six: three from the trucking industry and three from labor. The committee members were not persuaded by the drivers' claims of innocence. They upheld the discharges, the labor members voting with management. Although this proceeding was not before a neutral arbitrator, by agreement the decision was final and binding and therefore enforceable.

Having lost their case before the joint committee, the drivers retained an attorney. The attorney interviewed the motel owner and secured a written admission that he presumed the receipts were accurate, but had no direct personal knowledge of that fact. Armed with this new development, the attorney petitioned the joint arbitration committee to reopen the case. The committee, responding that the decision was not based on the affidavit of the owner, refused, whereupon the eight drivers sued the company and the union for one million dollars. Their claim against the company was the same as their case before the industry panel: they had falsified nothing and therefore the company had violated the agreement in the labor contract.


not to discharge except for cause. Their claim against the union was this: by failing to investigate the clerk, by telling the drivers not to worry, by failing to give the hearing panel any paper evidence to counter the company's paper, and by acting out of animosity, the union had violated its duty of fair representation. 22

During the pretrial stages, the drivers' attorney deposed the clerk, and the case took on a new twist. According to the clerk, what at first appeared to be a ploy by the drivers to cheat Anchor Motor Freight turned out to be something quite different. The most damning evidence against the drivers—the motel receipts—had shown quite clearly that they paid less for their lodgings than they claimed on their expense accounts. In the deposition taken three years after the discharge hearing, the motel clerk, who had sworn in the affidavit presented at the hearing that the receipts were accurate, decided to recant his story. He claimed in the deposition that the receipts were not accurate. In effect, he admitted that he was stealing from the motel.

The three courts that reviewed *Hines* all indicated that the company acted in good faith, without knowing that the clerk would recant. The union appears to have known nothing more about the matter than the company. Only the drivers and the clerk know for certain what really happened. The drivers' sworn denials were not believed by the company or the joint arbitration committee. The clerk made two conflicting statements under oath, but as of yet, no trier of fact has considered his testimony in the light of his recantation. Historically, the courts have reacted to recantations with suspicion. 23 The decision of the United States Supreme Court, however, did not reflect that suspicion. 24 But even if the recantation were true, 25 the drivers would still need to prove that the union had violated its duty of fair representation.

The drivers' allegations that the union acted out of spite and ill will and thus violated the duty of fair representation were crucial to

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24. "There were later indications that the motel clerk was in fact the culprit." 424 U.S. at 558.
25. The July 1977 issue of *Study Time*, distributed by the American Arbitration Association to labor arbitrators, describes a discharge case involving a hospital orderly. He
the success of their attempt to have the case reopened. The courts have set aside arbitration decisions only on the narrowest of grounds, and this case does not fit any of them. The arbitrators did not exceed their powers; they did not refuse to hear relevant testimony; they did not fail to grant a reasonable request for a continuance; their decision was not obtained by fraud or corruption; and their decision did not require the company to perform an illegal act. Courts have stated, in dicta, that an award based on evidence known by a prevailing party to have been false at the time it was used may be set aside. However, this principle would not govern the Hines case since there was no showing that Anchor Motor Freight manufactured, or knowingly relied on, false evidence. The company acted in good faith.

The drivers could have tried to have the arbitration reopened on the ground of newly discovered evidence, namely, the clerk's deposi-

was accused by a nurse of "amusing himself by pushing an elderly patient in a wheelchair at high speed." At the arbitration hearing, she changed her story. The arbitrator disbelieved her recantation, and credited her first story.

Occasionally, a witness who recants will recant the recantation. The Hartford Courant, Apr. 29, 1977, at 20, reported that "a 21 year-old Hartford man admitted Thursday that he retracted his statement to police implicating a woman friend in planning the robbery of a North End landlord, who was killed during the holdup. But [the man] said he gave the retraction to [her] defense attorney in his Hartford jail cell last December only because his family was threatened by the brother of the woman he accused."


(a) If the award has been procured by corruption, fraud or undue means; (b) if there has been evident partiality or corruption on the part of the arbitrators or either of them; (c) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; (d) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

Nor may an arbitration decision be set aside simply because the court disagrees with the arbitrator's interpretation of a contract. The New York Court of Appeals has stated: "Those who have chosen arbitration as their forum should recognize that arbitration procedures and awards often differ from what may be expected in courts of law." Rochester School Dist. v. Teachers' Ass'n, [1977] 95 L.R.R.M. 2119, 2121 (Apr. 7, 1977).


tion, but that too would have been an uphill battle. Neither the statutes nor the court cases allow new arbitration hearings for newly discovered evidence,29 because to do so would destroy one of the major advantages of arbitration: finality.30 Even if the law were otherwise and arbitration decisions could be reopened for newly discovered evidence, the drivers still would have had to argue that the evidence could not have been discovered with reasonable diligence. When the losing side tries to reopen a court judgment, the law requires no less.31

But if the evidence could not have been discovered with reasonable diligence, how can it be alleged that the union violated its duty of fair representation by failing to discover the evidence in advance of trial? The two theories conflict. As it turned out, the Hines decision states that arbitration decisions cannot be reopened for newly discovered evidence.32

The drivers could have tried to have the case reopened on the ground that the arbitration panel relied upon hearsay evidence, namely, the motel receipts and the affidavits of the clerk and owner. This too probably would have failed. The receipts of the motel were prepared in the ordinary course of business and would have been admissible in court under the business records exception to the hearsay rule.33 The affidavits would not have been admissible in court,

29. "Petitioners are not entitled to relitigate their discharge merely because they offer newly discovered evidence that the charges against them were false and that in fact they were fired without cause." Hines v. Anchor Motor Freight, Inc., 424 U.S. at 571.

30. See Newspaper Guild Local 35 v. Washington Post Co., 442 F.2d 1234 (D.C. Cir. 1971). "To give appellant a rematch before the arbitrator, merely because a witness who refused to enter the original contest has now decided to participate . . . would undercut the finality and therefore the entire usefulness of arbitration as an expeditious and generally fair method of settling disputes." 442 F.2d at 1238.

31. See, e.g., Orso v. City and County of Honolulu, 56 Haw. 241, 534 P.2d 489 (1975); see also 7 Moore's Federal Practice ¶ 60.23[4], at 273 (2d ed. 1975).


33. See 28 U.S.C. § 1732 (1970); Fed. R. Evid. 803(6) (which states a qualification
but arbitrators are not bound by the rules of evidence and may rely upon technically inadmissible hearsay.\(^{34}\) One of arbitration's advantages is that it does not follow every technical rule of evidence. Therefore, although hearsay was presented, its use provides no ground for overturning an arbitration award.\(^{35}\)

The drivers could have attacked the rule of law allowing decisions of joint labor-industry panels to stand as arbitration awards. But that would have meant attempting to have a decision of the United States Supreme Court overruled.\(^{36}\)

Thus, the drivers picked the only argument that stood a chance of succeeding: that the union violated its duty of fair representation. This theory was not without its difficulties. The Supreme Court had never held that a union violated the duty of fair representation in the way it presented a grievance in arbitration. The nearest case, \textit{Vaca v. Sipes},\(^{37}\) involved a union that refused to arbitrate. Compromising between giving the union absolute power to refuse arbitration and giving the worker absolute power to force arbitration, \textit{Vaca v. Sipes} allowed the worker to sue the company for breach of contract if the

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34. See, e.g., \textit{Petroleum Separating Co. v. Interamerican Ref. Corp.}, 296 F.2d 124 (2d Cir. 1961) ("[T]he arbitrators appear to have accepted hearsay evidence from both parties, as they were entitled to do. If parties wish to rely on such technical objections they should not include arbitration clauses in their contracts. The appeal is quite insubstantial.") (footnote omitted); \textit{Pacific Vegetable Oil Corp. v. C.S.T., Ltd.}, 29 Cal. 2d 228, 241 (1946) ("[A]rbitrators are not bound by strict adherence to legal procedure and to the rules on the admission of evidence expected in judicial trials. Such a requirement would tend to defeat the object of the arbitration proceeding.") (citations omitted); \textit{Burchell v. Marsh}, 58 U.S. (17 How.) 96 (1853); \textit{American Almond Prods. Co. v. Consolidated Pecan Sales Co.}, 144 F.2d 448, 451 (2d Cir. 1944) (L. Hand) ("Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its irregularities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.").

35. Under rule 29 of the American Arbitration Association Labor Arbitration Rules, the arbitrator may rely upon affidavits but is not required to do so. Some arbitrators are reluctant to decide cases based on hearsay alone. But the matter is left to the discretion of the arbitrator. See F. \textit{ELKOURI} & E. \textit{ELKOURI}, \textit{HOW ARBITRATION WORKS} 280-81 (3d ed. 1973).


union refused to arbitrate out of spite or ill will, or arbitrarily, or in bad faith. Some lower courts had extended *Vaca* to include cases in which unions arbitrated and lost, on the theory that if the union undermined the integrity of the arbitration process by deliberately losing the case by not putting up much of a fight, the individual ought to have another chance to win.\(^{38}\) But in none of these cases did the main witness against the grievants recant his testimony one year after the hearing.

Because the duty of fair representation could mean that a union has a duty to investigate a grievance,\(^{39}\) and because the union in *Hines* did not interview the clerk or the motel owner, it arguably failed to investigate the case adequately. Had the only allegation been failure to investigate, the drivers would probably have lost. Failure to investigate may constitute malpractice. There are a few reported cases against unions alleging straight malpractice in the handling of grievances. Some cases have been successful in which the union has let slip a deadline.\(^{40}\) Others have not been successful because the courts have found no ill will or bad faith.\(^{41}\) Imposing mal-

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38. The clearest expression of this doctrine came down after the *Hines* lawsuit was filed. In *Margetta v. Pam Pam Corp.*, 501 F.2d 179, 180 (9th Cir. 1974), the court stated: To us, it makes little difference whether the union subverts the arbitration process by refusing to proceed as in *Vaca* or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to represent the employee. In neither case, does the employee receive fair representation. *Margetta* and other cases are cited in *Hines*, 424 U.S. at 571-72 n.11.

39. Before *Hines*, several Courts of Appeals had so stated. See *Turner v. Air Transp. Dispatchers' Ass'n*, 468 F.2d 297, 299 (5th Cir. 1972) ("It is beyond doubt that the duty of fair representation includes an obligation to investigate and to ascertain the merit of employee grievances."). *Turner* found this duty in *Vaca v. Sipes*, 386 U.S. at 191, wherein it was stated: "[W]e accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion. . . ." See also *De Arroyo v. Sindicato De Trabajadores Packing*, 425 F.2d 281, 284 (1st Cir. 1970) ("There was no evidence as to any plaintiff except [one] that the union ever investigated or made any judgment concerning the merits of her grievance.") (footnote omitted); *Minnis v. UAW*, 531 F.2d 850, 853 (8th Cir. 1975) ("Minnis presented testimony which, if believed, showed an utter failure by the unions to make even a minimal attempt to investigate or process his grievance.").


41. In *Balowski v. UAW*, 372 F.2d 829 (6th Cir. 1967) the grievant argued that the Union erred in submitting to an arbitrator in 1962 the question of the grievant's health as of 1958. The court found no evidence of bad faith and ordered the complaint dismissed. *Bazarte v. United Transp. Union*, 429 F.2d 868 (3d Cir. 1970) stated at 872 that "proof that the union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation." The district court stated that the
practice liability upon a union for the manner in which it handles grievances involves momentous questions of public policy. Might not such a policy require an unrealistic level of expertise? Should union stewards and business agents be held to the same standards as attorneys? Should the remedy for poor representation be political, that is, the election of better union leaders? Might not the cost of malpractice liability, or malpractice insurance (if it could be found), bankrupt weak or small unions? Is it fair to impose liability on the employer because it won a case in which the union erred? Should the decision to impose malpractice liability be made by Congress, after public hearings, rather than by the courts?

However, because it was alleged in Hines that the union failed to investigate out of spite or ill will, the case appeared to fit the theory that a union has a duty to represent its members fairly.\(^\text{42}\) One of the drivers had been fired before and this fact was alleged to be sufficient to indicate that the union had ill will towards him. In addition, some of the drivers had, in a direct challenge to the union leadership, led a wildcat strike. If a union contract contains a no-strike clause, a failure by the leadership to try to end a wildcat strike makes the union liable for strike-caused damages.\(^\text{43}\) Thus the strike was alleged to provide further evidence of ill will. The third piece of evidence presented on the issue of bad faith involved an earlier union merger. Some of the charges against the Union included failure to "adequately and fully prepare a paper defense for the plaintiff at the railroad hearing" and failure to become "fully acquainted with all the relevant facts of the plaintiff's case." 305 F. Supp. 443, 444 (E.D. Pa. 1969). For a discussion favoring malpractice liability, see Note, 34 WASH. & LEE L.R. 309 (1977).\(^\text{42}\) When Hines reached the court of appeals, the court stated that, in order to survive a motion for summary judgment in a breach of duty action, the plaintiff must allege perfunctory treatment by the union (here, that the union failed adequately to investigate the grievance), and that the union acted in bad faith. Hines v. Local 377, Int'l Bhd. of Teamsters, 506 F.2d at 1155 (1974). "The failure to investigate, by itself, is insufficient to fix liability on the union since 'proof that the union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation.'" 506 F.2d at 1156 (citation omitted). The court of appeals, quoting Balowski v. UAW, 372 F.2d 829, 833 (6th Cir. 1967) indicated that a "gross mistake or inaction" would be an indication of bad faith. 506 F.2d at 1157. The grant of certiorari did not include this portion of the case. See Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 551 (1976).

On the other hand, the Supreme Court of Michigan has held that a union may violate the duty of fair representation even though it has not acted in bad faith. See Lowe v. Hotel Employees Local 705, 389 Mich. 123, 148, 205 N.W.2d 167, 178 (1973). Some United States courts of appeals have agreed. See generally, Clark, The Duty of Fair Representation: A Theoretical Structure, 51 TEX. L. REV. 1119 (1973).\(^\text{43}\) See, e.g., Eazor Express, Inc. v. Teamsters, 520 F.2d 951 (3d Cir. 1975), cert. denied, 424 U.S. 935 (1976), in which the union's failure to control a wildcat strike resulted in a judgment against the union in excess of one million dollars.
drivers were members of a local that had merged with the union. The merger, which was not entirely smooth, resulted in some animosity between the two groups.

The union and Anchor moved for summary judgment. The trial court granted both motions, stating that although the union might have been careless or might have exercised bad judgment, it did not violate the duty of fair representation.\textsuperscript{44} The court of appeals ruled that whether or not the union acted out of animosity was a question of fact, and that on the facts presented, a jury could find that the union could have discovered the clerk's lie in advance of the arbitration.\textsuperscript{45} The case against the union was remanded for trial. The court of appeals, however, agreed with the trial court that Anchor should be dropped as a defendant, because Anchor was not shown to have acted in bad faith.\textsuperscript{46} Both courts indicated by their rulings that it would be unfair to impose a million dollar judgment on the company for relying upon the affidavits, the receipts, and the arbitration award. The drivers asked for a writ of certiorari;\textsuperscript{47} the union did not seek review. The drivers' request was granted.\textsuperscript{48}

The Supreme Court held that, assuming the union breached its duty of fair representation by failing to investigate, and assuming the drivers were innocent of the charges, then the company is liable for discharging them without cause, even though the company acted in good faith.\textsuperscript{49} Read narrowly, \textit{Hines} simply reaffirms the rule in \textit{Vaca} that a company may be sued for breach of contract, notwithstanding the arbitration clause, if the union has violated its duty of fair representation. The major difference between the two cases is, of course, the existence of the arbitration award in \textit{Hines}. In \textit{Vaca}, the union refused to arbitrate; in \textit{Hines}, they arbitrated and lost.

Technically, the Supreme Court in \textit{Hines} did not hold that a

\textsuperscript{45} 506 F.2d at 1157.
\textsuperscript{46} \textit{Id.} at 1157-58.
\textsuperscript{47} 424 U.S. at 561 n.7.
\textsuperscript{48} 421 U.S. 928 (1975). The question on which certiorari was granted reads as follows:

\textbf{Whether petitioners' claim under LMRA \S 301 for wrongful discharge is barred by the decision of a joint grievance committee upholding their discharge, notwithstanding that their union breached its duty of fair representation in processing their grievance so as to deprive them and the grievance committee of overwhelming evidence of their innocence of the alleged dishonesty for which they were discharged.}

\textsuperscript{49} 424 U.S. at 561, 570-72.
union violates the duty of fair representation by failing to investigate a grievance out of spite or ill will. That issue, decided by the court of appeals against the union, was not reviewed. But the majority opinion in Hines rests upon the presumption that the union violated its duty of fair representation. One can only conclude that the Supreme Court approved, tacitly, the holding of the court of appeals that a jury could infer from the drivers' evidence a violation of the duty of fair representation. The discussion that follows indicates why this decision is wrong.

III. AN EMERGING DOUBLE STANDARD?

While the decision below simply reversed a summary judgment, the court of appeals would allow a jury to infer that animosity caused the failure to investigate. Such failure appears to the author to be equally consistent with good trial strategy. While the drivers alleged that the union, out of bad faith, failed to produce paper evidence to counter the company's paper evidence, and failed to discover through investigation that the clerk was the culprit, the resulting reversal of summary judgment imposes a standard of preparation upon unions that is at once unreasonable and unworkable.

First of all, the union knew, in advance of the final hearing, that the clerk had signed the affidavit and had sworn to the accuracy of the receipts. A further interview with the clerk could have been unproductive and risky—unproductive because many witnesses, once interviewed, identify with the side that spoke to them first; and risky because the clerk could testify at the hearing that the union

50. Id. at 561, n.7. The court of appeals would require proof of ill will plus inadequate investigation. 506 F.2d at 1156-57.
51. Hines v. Local 377, Int'l Bhd. of Teamsters, [1973] 72 Lab. Cas. at ¶ 28,131. ("defendant Union presented not a single piece of paper in response to the charges against the plaintiffs at the grievance hearings").
52. Hines v. Teamsters, 506 F.2d at 1156.
53. However, the court added that "the failure to investigate, by itself, is insufficient to fix liability on the union. . . ." 506 F.2d at 1156. But if the plaintiffs could convince a jury that there was ill will between them and the union, the failure to investigate would violate the duty of fair representation.
54. The decision of the trial court reveals that the affidavits and receipts were used against the grievants as the case was processed through the grievance procedure. [1973] 72 Lab. Cas. at ¶ 28,130.
55. A. MORRILL, TRIAL DIPLOMACY 172 (2d ed. 1973) ("[W]itnesses have a tendency to remain loyal to the first person who interviewed them and they may regard the second investigator as a person 'the other side.' ").
tried to pressure him into changing his story. We know from hindsight that the clerk never testified, and, in fact, recanted his story. But to require the union to interview the clerk, who had already given a signed statement, prior to the hearing, is to substitute the judgment of the court for the judgment of the union on a matter of trial tactics and strategy.

Similarly, the union could have interviewed the clerk's employer. He claimed in the affidavit used in the grievance process that the receipts were accurate. Weighing the risk that he would change his story against the risk that he would claim the union had pressured him, the union could have reasonably concluded that the safer course would be to wait until the hearing and cross-examine the witnesses at that time.

There was no cross examination—neither the clerk nor the owner testified. We do not know whether they were available. We do know that later the owner admitted he did not know of his own knowledge whether the receipts were accurate.\(^{56}\) We also know that the panel that heard the grievance said they did not rely upon the owner's affidavit.\(^{57}\)

This case demonstrates the problems of using affidavits in a discharge case. It would have been better if the company had produced the witnesses. It might even make some sense to require live testimony in such cases.\(^{58}\) But to reverse the arbitration because the union failed to investigate makes little sense. Whether or not to interview adverse witnesses before trial is a matter of judgment. There is no tradition of formal discovery in arbitration cases. Usually, when a case goes to arbitration, it has been heard at the lower levels of the grievance process, and each side is aware of the other's claims. When a labor lawyer or a business agent defends a grievant in a discharge arbitration, the advocate usually has a file showing the company's case and may even have a transcript of prior testimony, or, as in *Hines*, affidavits from witnesses. But in the usual case, there simply is neither time nor money to hire investigators to do character checks of the witnesses against the grievant. Such a requirement would be unreasonable. A few examples illustrate this point.

In a recent case tried to the Connecticut Board of Mediation and

\(^{56}\) 506 F.2d at 1155.

\(^{57}\) Id.

\(^{58}\) Some arbitrators would require live testimony in a case like this. See note 35 supra.
Arbitration, the company, suspecting that the grievant charged auto parts to the company and installed them in his own car, showed an employee of the auto parts store photographs of suspects. He identified the grievant as the man who ordered the parts. The company then checked the grievant’s personal automobile and determined that its new parts corresponded to those charged to the company. The grievant was fired. He denied the charges. The union decided not to arbitrate. The grievant talked to the man who identified him, and following their conversation, the clerk changed his story and retracted the identification. The grievant then demanded that the union arbitrate the case. The company resisted arbitration, claiming the time limits had expired. The grievant claimed the union had violated the duty of fair representation, and therefore the time limits did not apply. Under the *Hines* rule, to get to the jury on this issue, the grievant would have to show only that the union bore him ill will.

In another case, a bus company suspected that a certain ticket clerk was shortchanging travelers, especially those who spoke poor English. After warning the clerk, the company hired a detective agency, which employed eight Spanish-speaking Americans to pose as travelers. Each purchased a ticket from the grievant, giving him marked bills. Each immediately delivered the ticket and the change to an official of the detective agency. According to their testimony, and that of the official, seven out of the eight travelers were shortchanged. The grievant protested his innocence and denied shortchanging anyone. He admitted he could have made a mistake in quoting the proper ticket price but claimed that all clerks make mistakes from time to time. Did the union have a duty to hire an investigator to check the character and background of each of the witnesses against the grievant? *Hines* would suggest that if any of them later recant, the answer is yes. Yet the cost of such an investigation could be hundreds of dollars, more than some unions can afford.

In a third case, a bus driver, while coming down a long mountain grade on a two-lane highway, turned a corner and discovered the traffic in front of him stopped dead. He applied the brakes, but

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59. The source of the case is the Connecticut Board of Mediation and Arbitration. The names of the union and company are protected by the privacy of arbitration.

60. 506 F.2d at 1153.

61. This is an actual case in which the author participated. The names of the union and company are protected by the privacy of arbitration.

62. This is an actual case in which the author participated. The names of the union and company are protected by the privacy of arbitration.
there was not enough room to stop. To avoid slamming into the bus directly in front of him, at the last moment he swerved his vehicle to the left, and struck a car in the oncoming lane, killing its occupant. At the arbitration hearing concerning his discharge, the company produced evidence in the form of a written report stating that the brakes were tested after the accident and were in excellent working order; that the company had a rule requiring drivers to maintain one-quarter of a mile between two company vehicles, a rule which the grievant violated; and that within the last year, the grievant had received a written warning when a company official saw him driving down the mountain road, following too closely the vehicle in front of him. The grievant denied following too closely and claimed the brakes failed. He produced a report of the highway patrol showing that the company had received a ticket after the accident for having brakes that were illegally adjusted. According to Hines, the union would have a duty to investigate whether the company official who tested the bus, and the one who saw the grievant following a vehicle too closely were telling the truth, presumably by hiring an investigator to do character checks.

This imposes upon a union a higher duty than the law imposes upon a trial lawyer who prepares a case for trial. There is no question that given enough time, and money, a trial lawyer or a union can do character checks on witnesses. But to require them to do so would go far beyond the way that most labor arbitrations, and most court trials, are prepared. Indeed, in hearings before the National Labor Relations Board, parties cannot discover the testimony against them until the hearing. 63

It is important to consider the economics of trying discharge cases. A discharge case may be worth more in attorneys' fees after it is lost than before it is tried. Suppose in Hines the union had hired an attorney to conduct the hearing. A busy labor attorney might spend one-half a day in preparation, and a day in arbitration, and bill the client five hundred dollars. Or the attorney may be on retainer with the union, and simply try the case as part of the normal fee. It

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63. There is no right to discovery in NLRB proceedings. The Interim Report and Recommendations of the Chairman's Task Force on the NLRB for 1976, at 56, reveals a deep division of opinion on whether this should continue. The courts are not allowing discovery under the Freedom of Information Act. See Au & Son v. NLRB, 538 F.2d 80 (3d Cir. 1976); Goodfriend W. Corp. v. Fuches, 535 F.2d 145 (1st Cir. 1976); cert. denied, ___ U.S. ___; Title Guarantee v. NLRB, 534 F.2d 484 (2d Cir. 1976), cert. denied, ___ U.S. ___.
is not the practice for lawyers to try such cases on contingent fees; most unions would not agree to such a proposal.

However, if the grievants lose the arbitration, and if they then hire their own lawyer to sue the union for violation of the duty of fair representation, they may well have to agree to a contingency fee of thirty percent or more. In a case like *Hines*, involving eight truck drivers, nine years of back pay, and a claim for one million dollars, suddenly the case acquires real value. The lawyer now has an incentive to spend days on such a case. We therefore have a system that encourages the first lawyer to spend perhaps a day or two to arbitrate the case, and the second lawyer to spend many days trying to discover whether the arbitration was imperfect.

It is certainly true that union and management advocates make mistakes in arbitration. Advocates, like some trial lawyers, occasionally cross-examine witnesses when they should remain silent, remain silent when they should cross-examine, fail to see an argument, or fail to fully develop the facts. Unprepared witnesses testify in ways that surprise everyone. Yet if a company representative makes a mistake, and the company loses, the company cannot appeal to a court to overturn the award. The company advocate is under no duty of fair representation. But if the union advocate performs poorly, and the union loses, the grievants can appeal to a court. And if they can convince a jury that the union leaders do not like them, because they are troublemakers, or because they were fired before, or because they once led a wildcat strike, they can win in court, even though they lost in arbitration. In other words, malpractice plus ill will equals an overturned arbitration decision.

In fact, the union error need not amount to malpractice. If a trial lawyer had done what the union did in *Hines*, there would have been no malpractice. Another example is *Holodnak v. Avco Corp., Avco-Lycoming Div.*, which involved a man who was fired for

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64. The author could find no case in which a lawyer was held guilty of malpractice for failure to interview a witness who had already signed a statement. The failure to take a deposition was claimed to be malpractice in one case, but the question was not decided. See *Talbot v. Schroeder*, 13 Ariz. App. 230, 231, 475 P.2d 520 (1970). An attorney is expected to exercise "that degree of care, skill and diligence which is commonly possessed and exercised by attorneys in practice in the jurisdiction." Annot., *Attorney's Liability for Negligence in Preparing or Conducting Litigation*, 45 A.L.R.2d 5, 12 (1956). See also W. PROSSER, TORTS § 32, at 161-62 (3d ed. 1964). The author's experience in preparing and presenting over two hundred arbitration cases is that an adverse witness who has signed a statement is rarely interviewed again.

65. 381 F. Supp. 191, 193-94 (D. Conn. 1974), which was affirmed in part and re-
criticizing his company in a newspaper article. The discharge went to arbitration. The union's lawyer, representing Holodnak, failed to argue that the first amendment applied to Avco. That failure, among others, was held to be a violation of the duty of fair representation.66

Avco was a private corporation which manufactured many products, both civilian and military. The government owned the land on which the factory was located and some of the buildings and equipment. Government officials inspected the quality of the products. The trial court67 found that the company and the government were effectively "one"; that Avco could not constitutionally discharge Holodnak for writing the newspaper article; and that the union, failing to assert the first amendment argument to the arbitrator, violated the duty of fair representation. The court of appeals affirmed these findings.68

Were this an action against a lawyer for malpractice, the lawyer would have won. Numerous courts have ruled that a lawyer is not liable for taking a position on a legal question which is uncertain. If reasonable lawyers may differ over a legal proposition, failing to assert it, or asserting it one way and not the other, is not malpractice.69 Reasonable lawyers could well differ over whether the first amend-


66. 381 F. Supp. at 200. Failure to argue the first amendment was an alternative holding. The trial court also found that the union violated the duty of fair representation because its lawyer, who met Holodnak for the first time shortly before the arbitration, adopted an inferior trial strategy by arguing that Holodnak did not fully understand what he was doing. (According to the company's appellate brief, the attorney, who was replacing a colleague who died before the hearing, had reviewed the file and was familiar with the case.) The lower court also indicated that the arbitrator was biased against the grievant. 385 F. Supp. 191, 195-200. The court of appeals expressed general agreement with the trial court's findings but did not specifically address the issue of union representation. 514 F.2d at 287.

Holodnak's article criticized the union, the permanent arbitrator (who sustained the discharge) and the company.


68. 514 F.2d at 287.

69. "[I]t has frequently been held that a lawyer is not liable for lack of knowledge as to the true state of the law where a doubtful or debatable point is involved." Annot., 45 A.L.R.2d 5, 15 (1956). See, e.g., Martin v. Burns, 102 Ariz. 341, 343, 429 P.2d 660, 662 (1967) (refusing to hold an attorney liable "for a mistake in a point of law that has not been settled by the highest court of the jurisdiction and upon which reasonable lawyers may differ"); Lucas v. Hamm, 56 Cal. 2d 583, 587, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825; Banerian v. O'Malley, 42 Cal. App. 3d 604, 613, 116 Cal. Rptr. 919, 925 (1974); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954); Collins v. Wanner, 382 F.2d 105 (Okla. 1963).
ment applied to Avco Corporation. Before Holodnak no case had held that defense contractors were limited by the first amendment. But the Holodnak case was brought against a union for violation of the duty of fair representation, and a higher standard than that set for attorneys prevailed.

Griffin v. UAW is another case involving a union "error" which would not amount to malpractice. Mr. Griffin's foreman disciplined him for a rules infraction. Later, at a hockey game, they fought, the foreman sustaining facial lacerations and cracked ribs, Mr. Griffin sustaining a fifty dollar fine on a charge of criminal assault. The company

70. The closest case, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) involved racial discrimination by a restaurant, a lessee of the government. Not only was Burton distinguishable on its facts, but the Supreme Court was not overly interested in expanding its holding. The Court in Burton warned that the decision rested upon the peculiar facts of the case. "Owing to the very 'largeness' of government a multitude of relationships might appear to some to fall within the Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present." 365 U.S. at 725-26. Later, the Court refused to extend Burton to private clubs holding state liquor licenses. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Indeed, after the Holodnak arbitration hearing, the Supreme Court refused to apply the due process clause of the fourteenth amendment to a public utility that cut off service, even though the utility was closely regulated by government. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). The Second Circuit refused to extend the first amendment to a university research project funded by the federal government. Wahba v. New York Univ., 492 F.2d 96 (2d Cir. 1974).


72. Avco's brief in the court of appeals states: "To suggest that Avco's military contracts alone constitute a significant governmental presence is to say that any private corporation which sells a substantial portion of its output at a single plant to the government is a party coming within the ambit of the First Amendment. This standard ... would bring under the umbrella of the 'governmental action' the majority of major manufacturing corporations in the United States." Brief for Petitioner, Holodnak v. Avco Corp., 514 F.2d 285 (2d Cir. 1975). Others have argued that the Supreme Court should extend the Bill of Rights to control corporations. See A. S. MILLER, THE MODERN CORPORATE STATE, 182-87 (1976). However, this step remains to be taken by the United States Supreme Court.

73. 469 F.2d 181 (4th Cir. 1972).
fired Mr. Griffin, no doubt to protect the foreman from further assaults and to deter others from attacking their foremen. Mr. Griffin's union prepared a grievance and filed it at the first level. The union, faced with the choice of filing the grievance with the man who fired the grievant or with the man who fought him, chose the latter. When the case finally went to arbitration, the discharge was sustained. Mr. Griffin then sued the union for violation of the duty of fair representation and won a $12,000 verdict. The court of appeals affirmed. The court nullified the arbitration decision, not because of what the union did at the arbitration hearing but because the court thought the original grievance should have been filed with the man who fired Griffin—not because the contract required it, but for psychological reasons. The court speculated that although the foreman could not be expected to overturn the discharge, perhaps the foreman's superior might, especially because the foreman was unpopular.

Had this been a case against a lawyer for malpractice, for filing the grievance with the foreman, the lawyer would have won. The courts do not second-guess a lawyer's choice of strategy and tactics. Choices of forum, remedies, arguments, and witnesses are within the attorney's discretion.

74. Id. at 182-84. The court drew a distinction between negligence and handling a grievance in a perfunctory manner. Only the latter is a violation of the duty of fair representation. How the two concepts differ, the court never explained. See 469 F.2d at 183.

75. 469 F.2d at 184-85. The court also said that had the matter been appealed to the manager sooner, the manager might have reversed the discharge. With all due respect, we believe the court engaged in pure speculation which ignores the industrial facts of life: companies do not like to see their foremen assaulted and tend to discharge those who engage in the practice. The numerous assault cases are cited in F. Elkouri & E. Elkouri, How Arbitration Works 656 (3d ed. 1973).

76. See Stricklan v. Koella, 546 S.W.2d 810, 813 (Tenn. App. 1976) (choice of tactics will rarely, if ever, support a malpractice claim); Oda v. Highway Ins. Co., 44 Ill. App. 2d 235, 259, 194 N.E.2d 489, 498 (1963) (failure to call corroboration witness is not malpractice); Lynn v. Lynn, 4 Wash. App. 171, 175, 480 P.2d 789, 792 (1971) (a difference of opinion over trial tactics is not malpractice); Baker v. Beal, 225 N.W.2d 106, 112-13 (Iowa 1975) (election to sue under one dram shop act and not the other is not malpractice; neither is the decision to ask for $35,000 damages and no more. In the course of the opinion, the court reviewed the authorities and concluded: "It is the generally accepted rule that mere errors of judgment by a lawyer are not grounds for negligence, at least where the lawyer acts in good faith and exercises a reasonable degree of care, skill and diligence." 225 N.W.2d at 112.). A review of the California decisions concludes: "In view of the complexity of the law and circumstances which call for difficult choices among possible courses of action, the attorney cannot be held legally responsible for an honest and reasonable mistake of law or an unfortunate selection of remedy or other procedural step." 1 B. Witkin, California Procedure § 150, at 161.
and loses the case, the courts will not call the decision malpractice. If every choice of strategy were later reviewed in a second lawsuit for malpractice, the trial of cases would become impossible.\textsuperscript{77}

These cases illustrate the developing double standard, one for unions representing members in discharge cases before arbitrators, another for lawyers representing clients in court. The lawyer is held to the lower standard.\textsuperscript{78} The reason for this difference in treatment is not readily apparent. It may be grounded in a judicial distrust of unions in discharge cases. For example, the employer in \textit{Hines v. Anchor Motor Freight}\textsuperscript{79} knew no more about the facts than the union. Both sides had the same evidence. The court of appeals\textsuperscript{80} and the Supreme Court\textsuperscript{81} stated that the company acted in good faith; yet both courts were willing to allow a jury to conclude that the union did not. In fact, the court of appeals in \textit{Hines} indicated that the issue of fair representation would be allowed to go to a jury even if the proof of bad faith were "minimal."\textsuperscript{82} For that proposition the court relied upon \textit{St. Clair v. Local 515},\textsuperscript{83} a discharge case. There, the union contract had no arbitration clause. The union protested Mr. St. Clair's discharge, but unsuccessfully. It failed to strike over the discharge, or to threaten to strike, or to file a second protest.\textsuperscript{84} Those facts were enough to create a jury question of whether the union violated the duty of fair representation. Other cases have dispensed

\textsuperscript{77} The English rule is even stronger than the general rule in this country: a trial attorney may not be sued for the manner in which a case is tried. The immunity is absolute. There are no exceptions. See \textit{Rondel v. W.}, [1966] 1 All E.R. 457, 480, and the same case on appeal, [1966] 3 All E.R. 657, 667 (C.A.), Rondel v. Worsley, [1967] 3 All E.R. 993 (H.L.).

\textsuperscript{78} See notes 76 and 77 supra.

\textsuperscript{79} 424 U.S. 554 (1976).

\textsuperscript{80} 506 F.2d at 1157.

\textsuperscript{81} 424 U.S. at 569.

\textsuperscript{82} 506 F.2d at 1157.

\textsuperscript{83} 422 F.2d 128, 131 (6th Cir. 1969) ("In considering the issue of good faith representation, the jury must of course consider the union's duty to represent all of its members. It might conclude that the union was acting in good faith in refusing to strike and thereby jeopardizing many members' livelihoods over a grievance which either it or the employer in good faith considered frivolous. Although we think that the evidence of bad faith is minimal, there is enough to present a jury question.").

\textsuperscript{84} The court of appeals stated that the inaction of the union president, to whom the grievant was referred after the union's assistant business agent lodged the initial protest with the company, might have supported a charge of bad faith since there was a union election in progress in which the grievant was vocally opposing the incumbents, including the president. 422 F.2d at 131.
entirely with the notion that plaintiff must prove the union acted in bad faith. One commentator has written that the duty of fair representation is violated by proof of union "carelessness" plus "animosity" and that the courts should not require proof of "negligence."

Should the courts pursue their present course, and give Hines an expansive interpretation, they will find themselves labor arbitrators of last resort. Some of the same personality traits that can lead to discharge may not endear the grievant to labor any more than management. Couple such a grievant with an accusation that the union failed to investigate the discharge adequately, and you have created a technique to retry arbitration cases in court.

The courts have never come to grips with labor's power to invoke arbitration. The present compromise—give the union the power to arbitrate unless the union refuses, out of spite or ill will—has led

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85. Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975); see also Beriault v. Local 40, Super Cargoes & Checkers, 501 F.2d 258, 264 (9th Cir. 1974); Pompey v. General Motors Corp., 385 Mich. 537, 189 N.W.2d 243 (1971). "An allegation that plaintiff's attempt to remedy his grievance was thwarted by lack of response and interest on the part of union officials was a sufficient allegation that the union acted arbitrarily and with bad faith." Lowe v. Hotel Employees Local 705, 389 Mich. 123, 146, 205 N.W.2d 167, 178 (1973), stating the holding of Pompey, supra. Perhaps the strongest statement found in any case minimizing or dispensing with the bad faith requirement is found in Lowe:

Every man's employment is of utmost importance to him. It occupies his time, his talents, and his thoughts. It controls his economic destiny. It is the means by which he feeds his family and provides for his security. It bears upon his personal well-being, . . . and physical health.

. . .

It is no solace to a man fired from his job that his union acted without spite, animosity, ill will, and hostility toward him. If he has been wrongfully discharged by his employer, in violation of his contract of employment, a collective bargaining agreement made for his benefit and protection, it is unthinkable that he should be denied relief—denied justice—by the courts.


87. There is no requirement that unions have to like a grievant before they defend the person, any more than criminal lawyers need to like the accused. I have seen union representatives fight vigorously to save the jobs of miscreants not because they liked the people, but because it was their job.

to a new doctrine: if the union arbitrates poorly, and loses, the case will be retried if the grievant can show some evidence of animosity.

This doctrine means that arbitration is less binding than court litigation. Consider the outcome if the discharge hearing in the *Hines* case had been tried in court. Assume the jury believed the drivers were lying, and sustained the discharge. And assume that one year later, the clerk recanted. The drivers could not have won a retrial on the theory that they were not represented adequately. If a lawyer makes an error, the remedy is a malpractice suit against the lawyer, but not a new trial against the original defendant. Arbitration, intended to be more binding than litigation, ends up being less binding.

If a witness in a criminal trial recants, the defendant is not entitled automatically to a new trial. Recantations are looked upon with suspicion. The federal rule requires the judge who presided over the trial to hold a hearing to hear the recantation before deciding whether to grant a new trial. The trial judge is in a better position to determine whether justice requires a new trial. *Hines* did not explore the possibility of an initial hearing to determine the truth of the recantation, yet the outcome will turn on whether the clerk's affidavit was true or false. The Court did not mention the usual cautions about recantations; nor did it remand the case to the arbitrators for them to hear the recantation. Instead, it appeared willing to allow a jury to speculate over whether the union could have discovered that the clerk would recant his testimony, and to speculate over whether, by failing so to discover, the union violated its duty of fair representation.

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89. See, e.g., *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962). Dismissing an action for failure to prosecute, the Court stated: "Petitioner voluntarily chose this attorney . . . , and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." 370 U.S. at 633-34.

"In civil cases the rule is practically universal that a new trial will not be granted on the ground of the negligence or incompetence of the attorney for the party applying for such new trial." 58 AM. JUR. 2d New Trial § 160 (1971). But see In re Cremidas' Estate, 14 F.R.D. 15 (D. Alaska 1953) (attorney's intoxication during trial grounds for retrial).

90. See, e.g., *United States v. Troche*, 213 F.2d 401, 403 (2d Cir. 1954).

The fact that a witness for the prosecution has recanted does not automatically entitle the defendant to a new trial. The courts are suspicious of such a change in the testimony of a witness, and they are entitled to weigh the changed testimony carefully to determine which version of the story told by the witness is the one that should be believed.

58 AM. JUR. 2d New Trial § 175 at 391.


92. *Id.* at 866; *United States v. Johnson*, 327 U.S. 106, 111-12 (1946).
The price of perfect justice\textsuperscript{93} is high, and if the courts want to redetermine the guilt of persons discharged for alleged wrongdoing and found to be in the wrong by arbitrators, then discharge arbitration will no longer be final and binding.

IV. THE TRANSFER OF POWER FROM ARBITRATORS TO COURTS

The fair representation doctrine transfers the power to interpret and apply labor contracts from the arbitrator, the person most desired by labor and management, to a judge and jury. As a result, both labor and management lose control over what their contract means, and lose the kind of predictability that comes with experienced labor arbitrators. For example, in \textit{Barrett v. Safeway Stores, Inc.},\textsuperscript{94} the company refused to assign two stock room clerks to the day shift. The clerks complained to the union. The union told them that the contract, as interpreted and applied for twenty-two years, allowed the company to assign them to the night shift. The two workers disagreed with the union's interpretation of the contract. The union refused to spend the money to arbitrate their case. They sued, claiming the company had violated the contract, won a jury verdict of over three thousand dollars, but lost in the court of appeals by one vote.\textsuperscript{95} An experienced labor arbitrator would have taken ten minutes in deciding this case for the company: both union and company agreed to the interpretation of the contract and the past practice was long standing, well-known, accepted, and clear. In such cases, the past practice will invariably prevail.\textsuperscript{96}

This is not the only case in which the trial court submitted to the jury the question of the meaning of a labor contract, despite the existence of an arbitration clause in the agreement.\textsuperscript{97} The majority rule is that questions of contract construction are for the judge.\textsuperscript{98} Whether it

\textsuperscript{93} The phrase is from the title of the 1974 book by Judge Macklin Fleming, \textit{The Price of Perfect Justice.}

\textsuperscript{94} 538 F.2d 1311 (8th Cir. 1976).

\textsuperscript{95} Id. The dissenting judge would have allowed the jury to decide what the contract meant, but because the jury rendered two inconsistent verdicts, he would have remanded for a new trial. 538 F.2d at 1315.

\textsuperscript{96} \textit{See} F. ELKOURI & E. ELKOURI, \textit{HOW ARBITRATION WORKS} 406 (3d ed. 1973).

\textsuperscript{97} Some courts have upheld the practice. \textit{See}, e.g., Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442, 452 (8th Cir. 1975) (the question of the meaning of the terms of the contract had not been submitted to the jury because the court had found its terms to be unambiguous). \textit{See also} Scott v. Anchor Motor Freight, Inc., 496 F.2d 276, 280 (6th Cir. 1974) and cases cited therein.

\textsuperscript{98} \textit{See} Barrett v. Safeway Stores, Inc., 538 F.2d 1311, 1313 (8th Cir. 1976) and cases cited therein.
is judge or jury, the procedure clearly violates federal labor policy. If the parties have bargained for an arbitrator's construction of the contract, they are entitled to it. This has been recognized in at least one action, which was brought against a railway union. If the union violates the duty of fair representation, the remedy is not a court trial over the meaning of the contract; the remedy is an arbitration before the National Railroad Adjustment Board. 99 It has exclusive jurisdiction of the interpretation and application of railway contracts. 100 The Sixth Circuit has recognized the force of this argument. It was willing to permit a trial court to refer the underlying claim of breach of contract to arbitration, assuming that the member could first prove in court that the union violated the duty of fair representation. 101 But this case is clearly the exception.

National labor policy favors the submission of grievances to arbitrators, not courts. 102 Nevertheless, the practice of allowing judges


101. Ruzicka v. General Motors Corp., 523 F.2d 306, 312-15 (6th Cir. 1975). See also Hotel Employees v. Michelson's Food Serv., 545 F.2d 1248 (9th Cir. 1976). The trial court in Ruzicka at first ordered all issues to arbitration, including the issue of fair representation, but then changed its mind. See 523 F.2d at 313-14.

102. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 569 (1960) ("When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal.").
and juries to interpret labor contracts has been resurrected by the
document of fair representation. Indeed, the Second Circuit has al­
lowed individual union members to avoid arbitration by merely alleg­
ing a conspiracy between labor and management. Not only have
the courts interpreted labor contracts under the fair representation
document, they have actually nullified agreements by depriving employ­
ers of the benefit of perfectly valid contract clauses requiring that a
discharge be grieved or arbitrated within a certain time period or be
lost forever. When the union fails to file the grievance or ask for
arbitration within the contractual time period, the employee may sue
the union for inadequate representation and the employer for wrong­
ful discharge. In some jurisdictions, the employee has prevailed.
Thus, the time limits bargained for by the principals are nullified.

V. SUMMARY

1. The duty of fair representation now applies to the manner in
which unions prepare and present arbitration cases.
2. There is no corresponding duty for company advocates.
3. In effect, the courts appear to be in the process of creating a
docline of union malpractice.
4. It is possible that malpractice by itself will constitute a vio­
lation of the duty of fair representation. Proof of bad faith, or ill will,
may become unnecessary.
5. The union "carelessness" standard is unrealistically high. Ar­
bitration cannot function under a rule requiring the union to inves­
tigate all adverse witnesses. Indeed, the emerging rule requires a
higher standard for nonlawyer advocates in arbitration than for lawyer
advocates in civil trials. It is unfair to hold the union advocate, who

103. See Desrosiers v. American Cyanamid Co., 377 F.2d 865, 870 (2d Cir. 1967);
Hiller v. Liquor Salesmen's Local 2, 338 F.2d 778, 779 (2d Cir. 1964). The Ninth Circuit
disagrees. Hotel Employees v. Michelson's Food Serv., 545 F.2d 1248, 1254 (9th Cir.
1976).
Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975); Ruggirello v. Ford
different result in a railroad case, indicating that if the time limits for appeal expire
because of the failure of the union to press the appeal, the employee's claim against the
employer is extinguished, but the union should be held responsible to the employee for
the value of the right lost. Harrison v. United Transp. Union, 530 F.2d 558, 562 (4th Cir.
1975) (dicta). Professor Feller would waive the time limits. See Feller, note 102 supra
at 826.
may not be an attorney, to the same standard as a trial attorney. It is worse to hold that same lay advocate to a higher standard. Yet, that is what occurred in *Hines*.

6. The rule only allows one side to appeal to the courts. If a company loses an arbitration, it cannot retry the case in court, even if its advocate did a poor job.

7. The rule means that arbitration decisions are less final and binding than court trials; if a plaintiff loses a court trial because of inadequate counsel, the remedy is not a second lawsuit against the defendant.

8. The rule transfers the power to interpret the labor contract from arbitrators selected by the parties to the crowded dockets of state and federal courts.

9. The rule allows an individual to escape the arbitration clause of an agreement.

10. The rule gives the grievant the psychological advantage of coming before the jury as the victim of alleged union malpractice, rather than a person who was allegedly discharged for cause.  

11. The rule exposes companies to liabilities against which there is no protection. The company cannot buy insurance against the union’s losing an arbitration decision.

12. The present rule, by requiring ill will, favors the troublemaker. A grievant who never did anything to offend the union leadership cannot use it.

The *Hines* decision, by permitting a jury to infer, from evidence of animosity, that the union’s alleged carelessness was deliberate, could well convert the courts into labor arbitrators of last resort. Whether any particular arbitration is final and binding will hereinafter turn on the particular facts of the case and the predilection of the jury. And in time, the proof of animosity may become a fiction. That is because the moral judgment that a union ought not to make a deliberate error out of spite, when converted into a rule of law, leads to unequal results. Two discharges, two errors, two arbitrations, and two lawsuits to overturn them, will produce two different results, if one union member can prove animosity and the other cannot. By allow-

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105. Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972) (worker who assaulted foreman awarded twelve thousand dollar verdict).


ing a jury to infer that animosity caused the error, the law, in time, may come to regard that inference as a fiction and will drop the animosity requirement. That development, which is already occurring, could seriously impair arbitration. Even without that development, creates serious practical problems, best illustrated by an analogy to litigation. Applied to lawyers, would mean this: if a lawyer makes an error, not amounting to malpractice, and if the lawyer had shown some animosity towards the client, the jury would be allowed to infer that the animosity caused the error. The lawyer would be liable for an error of judgment, rather than for malpractice. Such a result, unworkable in the rough and tumble of litigation, is equally unrealistic in the rough and tumble of labor relations.

109. See note 85 supra. For a view favoring this development, see Clark, supra note 86.
110. See Feller, supra note 102 at 812. For an opposing view favoring the individual, see Flynn & Higgins, Fair Representation, 8 SUFFOLK L. REV. 1096, 1119 (1974).
111. In time, unions, to protect against liability, may require unpopular grievants to hire their own counsel, so that if errors are made, the union will not be responsible. Discharge is said to be the industrial equivalent of capital punishment. The loss of a job and income can be devastating. If the law fears giving unions the power to say "no" to an individual who has been fired and who wants to arbitrate, or if the law wants higher standards of advocacy, then perhaps the law ought to allow that individual to invoke arbitration, at his or her expense. This is not because the individual ought to have that power over all grievances, but because "death is different." (The phrase "death is different" is from Arguments before the Supreme Court, 44 U.S.L.W. at 3554, 3558 (Apr. 6, 1976). This alternative would be far less costly than the solution of years of litigation, and a potential recovery in seven figures. Employees of railroads or airlines have this right, see Czosek v. O'Mara, 397 U.S. 25, 28 n.1 (1970), but those workers who come under the National Labor Relations Act do not. Vaca v. Sipes, 386 U.S. 171, 182 (1967). See generally Feller, supra note 102; Marchione, A Case of Individual Rights Under Collective Agreements, 27 LAB. L. J. 738 (1976); Rabin & Koretz, Arbitration and Individual Rights, The Future of Labor Arbitration in America (1976); Simpson & Berwick, Exhaustion of Grievance Procedures and the Individual Employee, 51 TEX. L. REV. 1179, 1227 (1973); Summers, Collective Power and Individual Rights in the Collective Agreement, 72 YALE L.J. 421-55 (1963); Tobias, A Plea For the Wrongfully Discharged Employee Abandoned by His Union, 41 U. CIN. L. REV. 55, 59-61 (1972).