**13.2 LMRA § 301—Damages (29 U.S.C. § 185)**

            If you find for the plaintiff, you must then consider the issue of damages.  The amount of your verdict should be a sum that you find will justly compensate the plaintiff for the damages the plaintiff has incurred.  The measure of such damages, if any, is the amount that the plaintiff would have earned from employment with the employer if the discharge had not occurred, reduced by any earnings that the plaintiff received, or could have reasonably received, from other employment.

            [*Insert type of damages recoverable.  See Instructions 5.1 (Damages–Proof) and 5.2 (Measures of Types of Damages), and if mitigation is at issue, see Instruction 5.3*(*Damages–Mitigation*)*.*]

            Once you have arrived at a figure for lost wages or damages, you must apportion those damages between the employer and the union.  In making the apportionment, you should follow this guideline:  The employer is liable for lost wages and benefits due solely to its breach of the collective bargaining agreement in discharging the plaintiff, up to the point in time that the employer’s action would have been reversed had the union timely processed a grievance against the employer.  The union is responsible for any lost wages and benefits after the point in time that the employer’s action would have been reversed had the union timely processed the grievance.

**Comment**

            In *Bowen v. U.S. Postal Serv.*, 459 U.S. 212 (1983), the Supreme Court held that “damages attributable *solely* to the employer’s breach of contract should not be charged to the union but *increases* if any in those damages caused by the union’s refusal to process the grievance should not be charged to the employer.” 459 U.S. at 223-24 (quoting *Vaca v. Sipes*, 386 U.S. 171, 197-98 (1967)). *Bowen* does not indicate exactly how damages are to be apportioned between the employer and union. *See* Murray, Steven L., *Apportionment of Damages in Section 301 Duty of Fair Representation Actions: The Impact of Bowen v. United States Postal Service*, 32 DePaul L. Rev. 743, 767 (1983) (noting that Supreme Court’s decision in *Bowen* could be interpreted to support three different apportionment rules).  For example, *Bowen* could be read to hold that the employer and union are liable on the basis of relative degrees of fault. *See id*. at 767.  *Bowen* could also be interpreted to stand for the more concrete, bright line rule that employers are liable for damages suffered up until the hypothetical date upon which an arbitration award would have issued had the union processed the grievance, and the union is liable for all damages incurred thereafter.  *See id.*

            The district court in *Bowen* had instructed the jury that apportionment between the employer and union could be based on the hypothetical arbitration date at which the employer would have reinstated the plaintiff if the union had fulfilled its duty. *See Bowen*, 459 U.S. at 215. The district court suggested that the employer was liable for damages before that date and the union for damages thereafter. *Bowen* was explicit, however, in leaving undecided “whether the District Court’s instructions on apportionment of damages were proper.” *Id.* at 230 n.19.

            Some courts have held that *Bowen* does not mandate the hypothetical date method. *See Aguinaga v. United Food & Com. Workers Int’l*, 993 F.2d 1463, 1475 (10th Cir. 1993) (“We do not agree that *Bowen* requires that damages be apportioned based on chronology using the hypothetical arbitration date.”). What is clear from *Bowen* and its progeny is that union liability is not limited to the litigation expenses and fees incurred by the employee-plaintiff as a result of the union’s breach of the duty of fair representation. *See Bowen*, 459 U.S. at 220–25 (rejecting union’s argument that its liability was limited to litigation expenses resulting from its breach of duty).  Implicit (if not explicit) in *Bowen* is that a union may be held liable for a portion of the back pay owed to the employee.  The Court held that if the plaintiff is unable to collect against the union, the employer “remains secondarily liable for the full loss of back pay.” *Id.* at 223 n.12.  Inherent in this statement is that a union may be primarily liable for a percentage of the employee’s back pay. Numerous courts addressing this issue after *Bowen* have held that a union may be liable for back pay when it breaches the duty of fair representation. *See, e.g., Aguinaga*, 993 F.2d at 1475 (“[I]n *Bowen*, the Supreme Court held that a union can be liable for back pay and benefits.”).

            Generally, damages are apportioned between the employer and union according to the damage caused by each.  However, joint and several liability may be appropriate where the employer and union actively participated in each other’s breach.  *Lewis v. Tuscan Dairy Farms, Inc.,* 25 F.3d 1138, 1145-46 (2d Cir. 1994); *Aguinaga*, 993 F.2d at 1474-75. For example, when a union affirmatively causes the employer to breach the collective bargaining agreement, or when the union and employer actively participate in each other’s breach, joint and several liability, as opposed to apportionment, may be appropriate. *See Aguinaga*, 993 F.2d at 1475; *Bennett v. Local Union No. 66*, 958 F.2d 1429, 1440–41 (7th Cir. 1992).

            *See* 5.1 (Damages—Proof) regarding causation.

            Attorneys’ fees and awards for costs incurred in suing the union may be awarded as compensatory damages for a breach of the duty to represent.  *Vaca v. Sipes*, 386 U.S. 171, 195-96 (1967) (explaining that “[t]he appropriate remedy for a breach of a union’s duty of fair representation must vary with the circumstances of the particular breach”); *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983) (holding employee may recover from union attorneys’ fees expended in pursuing his employer for breach of contract). When an employee proves both a breach of the duty of fair representation and a violation of the collective bargaining agreement, the union must pay attorneys’ fees incurred by the employee in his suit against the employer and the union.  *See, e.g., Zuniga v. United Can Co.*, 812 F.2d 443, 451-52, 455 (9th Cir. 1987) (attributing wrongfully-denied sick leave benefits to employer, and attorneys’ fees to union).  Compensatory damages “may include lost wages and fringe benefits,” but lost wages should be “offset by wages earned at other employment.” *Galindo v. Stoody Co.*, 793 F.2d 1502, 1516 (9th Cir. 1986).

 As of February 2023, the Ninth Circuit has not decided whether punitive and extra-contractual damages are recoverable in an action under the Labor Management Relations Act for breach of a collective bargaining agreement. *Alday v. Raytheon Co.*, 693 F.3d 772, 795 (9th Cir. 2012) (declining to decide whether court may award punitive damages “if it would deter persistent misconduct” or award extra-contractual damages if “defendant’s conduct was particularly likely to result in serious emotional distress”); *see also Bloom v. Int’l Bhd. of Teamsters Loc. 468*, 752 F.2d 1312, 1315 (9th Cir. 1984) (reversing emotional distress damages because “[t]he minimum level of outrageous conduct was not shown in this case,” without deciding whether remedy for breach of duty of fair representation under Labor Management Relations Act might include damages for emotional distress).

            For an example of a suggested verdict form, see below:

**SUGGESTED VERDICT FORM**

1.         Do you find from a preponderance of the evidence that the plaintiff was discharged from employment by the defendant employer?

                                    \_\_\_\_\_\_\_\_        \_\_\_\_\_\_\_\_

                                    Yes                  No

If your answer to Question No. 1 is “no,” do not answer the remaining questions. Sign and date the verdict form and notify the bailiff.  If your answer to Question No. 1 is “yes,” proceed to Question No. 2.

2.         Do you find from a preponderance of the evidence that such discharge was without “just cause” (as defined in the Court’s instructions)?

                                    \_\_\_\_\_\_\_\_        \_\_\_\_\_\_\_\_

                                    Yes                  No

If your answer to Question No. 2 is “no,” do not answer the remaining questions. Sign and date the verdict form and notify the bailiff.  If your answer to Question No. 2 is “yes,” proceed to Question No. 3.

3.         Do you find from a preponderance of the evidence that the defendant union breached its duty of fair representation owed to the plaintiff as one of its members by handling the grievance proceedings arbitrarily, discriminatorily, or in bad faith?

                                    \_\_\_\_\_\_\_\_        \_\_\_\_\_\_\_\_

                                    Yes                  No

If your answer to Question No. 3 is “no,” do not answer the remaining questions. Sign and date the verdict form and notify the bailiff.  If your answer to Question No. 3 is “yes,” proceed to Question No. 4.

4.         Do you find from a preponderance of the evidence that the plaintiff suffered damages from the above actions of [[the union] [the employer] [both the union and the employer]] in the amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_?

[Proceed to Question No. 5 only if you found that the plaintiff suffered damages from the actions of both the union and the employer.]

5.         Do you find from a preponderance of the evidence that the plaintiff’s damages should be apportioned between the defendants, $\_\_\_\_\_\_\_\_\_\_\_\_\_ to the defendant employer, and $\_\_\_\_\_\_\_\_\_\_\_\_\_\_ to the defendant union?

DATED:

                                                                        PRESIDING JUROR

*Revised Mar. 2023*