Individual Actions for Breach of a Collective Bargaining Agreement: Judicial Alternatives to the Grievance Procedure

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INDIVIDUAL ACTIONS FOR BREACH OF A COLLECTIVE BARGAINING AGREEMENT:
JUDICIAL ALTERNATIVES TO THE GRIEVANCE PROCEDURE

The labor movement in the United States is passing into a new phase. The struggle of the unions for recognition and rights to bargain, and of workmen for the right to join without interference, seems to be culminating in a victory for labor forces. We appear now to be entering the phase of struggle to reconcile the rights of individuals and minorities with the power of those who control collective bargaining groups.1

I. INTRODUCTION

In exchange for the benefits that collective bargaining has secured for the individual employee,2 he has relinquished important rights that antedate contemporary labor-management relations law.3 The worker has exchanged his interests in direct dealings with the employer for the privilege of representation by the collective bargaining agent.4 Union vitality relies on this subordination of the individual for the benefit of the group.5 Unfortunately, this yielding of individual employee concerns sometimes may result in their total suppression. When an employee is wrongfully discharged or deprived of other rights granted by a collective bargaining agreement, he is often left remediless because the structure of collective bargaining and union participation therein may constrict his access to the courts.6

This Note examines the parameters of an employee’s right to sue his employer for breach of the collective bargaining agreement without, or in spite of, union involvement. It suggests expanded judicial review of the union-maintained grievance process to minimize circumscription of individual rights.

2. See notes 7-9 infra and accompanying text.
3. See notes 14-15 infra and accompanying text.
4. See notes 12-13 infra and accompanying text.
5. See notes 14-15 infra and accompanying text.
6. See notes 58-72 infra and accompanying text.
II. THE UNION, THE INDIVIDUAL, AND THE LOSS OF SYMBIOSIS

As a collective bargaining unit, the union seeks to provide a rough equivalence of economic and organizational power between labor and management. The strength inherent in a cohesive labor group furthers its efforts to secure a greater distribution of the economic benefits produced by American labor. Additionally, by providing an institutional framework for employer-employee relations, unions promote the stabilization of industrial relations.

When workers band together to form a collective bargaining unit or when an employee joins an existing unit, individual concerns must yield to the rule of the majority. Section 9(a) of the National Labor Relations Act provides that the bargaining unit shall select a representative to undertake the negotiation and administration of the employment agreement on behalf of all employees within the unit. The

7. "The economic power that the worker faced in the sale of his labor—the competition of many sellers dealing with few buyers—made it necessary that he organize for his own protection. There were rewards ... which, when he had successfully developed countervailing power, he could share." J. GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 115 (1956). See generally R. GORMAN, BASIC TEXT ON LABOR LAW 296 (1976); Cox, The Duty to Bargain in Good Faith, 71 HARY. L. REV. 1401, 1407 (1958); Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 COLUM. L. REV. 731, 735 (1950); Wellington, The Constitution, The Labor Union, and "Governmental Action," 70 YALE L.J. 345, 364 (1961).

8. The Supreme Court has voiced similar sentiments:

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.


10. Section 7 of the National Labor Relations (Wagner) Act, 29 U.S.C. § 157 (1976), sets forth the basic organizational rights:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .


Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right, at any time to present grievances to their employer and to have such grievances
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representative’s capacity as the sole bargaining agent for the members of the unit is commonly termed the principle of exclusivity. 13 When the bargaining agent undertakes employment contract negotiations, the nature of the employment agreement changes from a private instrument between the employee and employer to a charter setting forth the basic rules for management dealings with all employees. 14 The employees’ former right to contract individually with the employer thus becomes merged and vested exclusively in the bargaining agent. 15

Although granting the union such considerable power gives rise to corresponding opportunities for capricious action, 16 its role as the sole

adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

A cursory examination of the first proviso to § 9(a) suggests that an individual may adjust his grievance without the aid of his union as long as such adjustment is not inconsistent with the collective bargaining agreement. However, “the proviso to section 9(a) merely gives the employer a defense to a charge of refusal to bargain with the majority union . . . when it adjusts a grievance with an individual employee or group of employees; it does not impose an affirmative duty to do so.” R. GORMAN, supra note 7, at 392. See generally Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975).

13. For an excellent discussion of the exclusivity doctrine, see R. GORMAN, supra note 7, at 374-81; Dunau, supra note 7, at 734-35. The doctrine has been the subject of heated criticism. See Petro, Civil Liberty, Syndicalism, and the NLRA, 5 U. Tol. L. Rev. 447, 498-523 (1974). “W]ith the best will in the world unions cannot help being unfair to individual employees, for there is no way to reconcile the ‘exclusive-bargaining majority-rule’ principle with the principles of personal freedom and personal autonomy.” Id. at 465. Professor Petro goes on to call the NLRA a “‘collectivist-fascist-syndicalist’ measure, profoundly anti-libertarian and dehumanizing in its operation.” Id. at 466. For a more restrained view of possible individual rights infringement through use of the exclusivity doctrine, see Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 630-34 (1956).


focus for all employer-employee interchange is central to its ability to engage in concerted action. The assumption that the union's interests and those of its rank and file are roughly coexistent underlies the vestiture of such extensive power in the unions. When this assumption is valid, the union's power of exclusivity does not impinge upon the concerns of the individual employee.

As workers recognized the benefits of collective bargaining, unions grew into massive organizations. Along with this expansive development, unions began to take on institutional concerns that often were not directed to the structuring of employer-employee relations at the shop level. National unions conceive and coordinate broad administrative policies for their subordinate locals. In the interest of promoting their policy concerns or some particular political cause, the nationals often bargain directly with large employers, thus preempting their local units. Additionally, national union constitutions may


19. Unions have checked the arbitrary will of the employer, and substituted a rough rule of law governing employment activities; they have improved the economic position of the employees they represent both in direct wage increases and in an impressive array of fringe benefits and devices to protect the jobs of the workers.


21. In recent years unions have moved with increasing confidence between the bargaining table and the legislative halls. Their lobbying activities on almost all legislative matters are well known. When legislation concerning the permissible scope of union economic power comes before Congress, unions mass their political strength to preserve and expand their freedom to use economic pressure in collective bargaining. The interrelationship between union economic activity and union political action is obvious and intense.

Blumrosen, supra note 19, at 1438. See generally Developments in the Law—Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 989 (1963); Note, supra note 18, at 1208.

22. See Cohn & Lubell, Control of a Labor Union—By Whom, Over What?, 22 Ohio St. L.J. 163, 163-64 (1961); Note, supra note 18, at 1210-11.

23. Mayer, A House Divided—The Schism Doctrine, 22 Ohio St. L.J. 154, 154 (1961) ("Serenity and harmony are hardly the hallmark of parent-local union relationship."). Cf. e.g.,
favor one group of employees over another.\textsuperscript{24}

At the local level, similar institutional concerns may fail to correspond to the desires of the rank and file. The interests of some particular minority faction within the local or an individual grievance may be sacrificed by the union in the interest of maintaining an amicable relationship with management.\textsuperscript{25} The individual employee, however, stands at the foundation of this structure and, after having been denied a promotion or terminated wrongfully, must usually look exclusively to the union-administered grievance procedure for satisfaction.\textsuperscript{26}

The development of institutional union goals distinct from rank and file goals has frequently led to grievance disposition on terms compatible with the union's internal needs irrespective of the complaint's underlying merits.\textsuperscript{27} If the union fails to bring an employee's grievance to

Gordon v. Laborers' Int'l, 490 F.2d 133, 138-39 (1974) (international sought to invalidate local's collective bargaining agreement through imposition of trusteeship); Local 90, Am. Flint Glass Workers v. American Flint Glass Workers, 374 F. Supp. 600, 601 (D. Md. 1974) (local's wage scale agreement superseded by nationwide agreement); BOOK OF LAWS OF THE INTERNATIONAL TYPOGRAPHICAL UNION art. 7, § 3 (1974) (international must give prior approval of contract terms); \textit{id}. § 33 (proposed arbitration of grievances must be cleared through the international prior to processing).

\textsuperscript{24} Article 19, § 3 of the \textit{CONSTITUTION OF THE UNITED AUTOMOBILE, AEROSPACE, & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA} (1974) provides:

Upon application to and approval of the International Executive Board, a ratification procedure may be adopted wherein apprenticable skilled trades and related workers, production workers, office workers, engineers, and technicians would vote separately on contractual matters common to all and, in the same vote, on those matters which relate exclusively to their group.

Under such a provision, a measure that has received majority approval by the aggregate local membership would still not pass if certain skilled workers, voting as a subgroup, did not also grant the measure majority approval. \textit{See} Gardner v. Woodcock, 384 F. Supp. 239 (E.D. Mich. 1974).


For purposes of this Note, a grievance is defined as an assertion of a claim arising under the collective bargaining agreement. \textit{See} Gray, \textit{The Individual Worker and the Right to Arbitrate}, 12 LAB. L.J. 816, 817 (1961).

\textsuperscript{26} \textit{See} Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 70 (1975) (minority group employees may not bypass union grievance procedures and bargain directly with employer); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 687 (1944) (employees may not consent to an employer ignoring their designated bargaining agent and dealing with them directly). \textit{See generally} R. GORMAN, \textit{ supra} note 7, at 374-94; \textit{THE LABOR LAW GROUP TRUST, LABOR RELATIONS AND SOCIAL PROBLEMS} 115 (1971); Ratner, \textit{Some Contemporary Observations on Section 301}, 52 GEO. L.J. 260, 265 (1963); notes 12-13 \textit{ supra}; text accompanying note 58 \textit{infra}.

\textsuperscript{27} \textit{See}, e.g., Encina v. Tony Lama Boot Co., 448 F.2d 1264, 1265 (5th Cir. 1971) (union's fiscal policies restricted pursuit of grievance); Richardson v. Communications Workers, 443 F.2d
arbitration, it can usually justify the inaction by relying on its broad discretion to pursue a particular employee's rights. The exclusivity doctrine and the attendant administrative discretion of the union leadership provide the union with a subtle means of favoring one individual over another or of sanctioning the recalcitrant member. A paradox is thus presented: When the union becomes a new source of employee frustration, it contradicts its raison d'être as a champion of employee rights. Exasperated, the employee may sometimes seek the aid of the courts.

III. THE DOCTRINE OF EXHAUSTION OF CONTRACTUAL REMEDIES AS A LIMITATION ON INDIVIDUAL EMPLOYEE SUITS

If an individual asserts that he has been wrongfully discharged or

974 (8th Cir. 1971) (union refusal to process employee's grievance on the ground that he was a "troublemaker"), cert. denied, 414 U.S. 818 (1972); Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966) (union refusal to process back wage grievances for a period during which petitioners were unemployed due to a racially discriminatory seniority system). On the impact of union inaction or ineptitude, see text accompanying notes 59-61 infra.

28. In Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), the Supreme Court recognized: "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents." Id. at 338.

29. Grievance handling offers the union opportunities for subtle discriminations which do not exist in the negotiation of general rules for the future. Loyal unionists may have their grievances pressed promptly to a successful conclusion while workers who have not joined the union or who opposed the business agent in the last union election find it harder to obtain favorable adjustments. The temptation to engage in "horse trading" is not inconsiderable.


31. If the employee can establish that the union breached its duty of fair representation toward him, see text accompanying notes 109-49 infra, he may obtain some measure of relief from the National Labor Relations Board. There have been a limited number of cases holding that a breach of this duty is an unfair labor practice. See, e.g., NLRB v. Local 1367, Longshoremens' Ass'n, 368 F.2d 1010 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967); Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967); NLRB v. Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963). The remedial power of the Board, however, is generally limited to compensating the employee for damage caused by the union's failure to adequately represent him. Accordingly, the Board is usually unable to provide relief for the employee vis à vis his employer. See generally Note, Unreviewability of General Counsel's Discretion: Proposed Amendments for a Private Cause of Action for Unfair Labor Practices, 82 DICK. L. REV. 409 (1978); Comment, Unfair Representation and the National Labor Relations Board: A Functional Analysis, 37 J. AIR L. & COM. 89 (1971).
that his employer has breached the collective bargaining agreement, he may file suit in federal or state court under section 301(a) of the Labor-Management Relations Act. Originally, courts did not construe section 301(a) as giving rise to a cause of action for an employee suing in an individual capacity. For example, in Association of Salaried Employees v. Westinghouse Electric Corp., the Supreme Court held that federal courts could not hear individual claims brought under section 301(a). The Court reasoned that because the action was in the nature of a breach of contract, it was within the sole province of state courts, and federal courts lacked jurisdiction. Soon afterward, in Textile Workers Union v. Lincoln Mills, the Court said it would assume

32. See, e.g., cases cited in note 142 infra.

33. Labor-Management Relations (Taft-Hartley) Act, § 301(a), 29 U.S.C. § 185(a) (1976). Section 301(a) provides:

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


Similar concerns arose about whether violations of the collective agreement that were also unfair labor practices fell within the exclusive jurisdiction of the National Labor Relations Board. In Smith v. Evening News Ass'n, 371 U.S. 195 (1962), the Court confronted this problem and held: "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." Id. at 197.

34. 348 U.S. 437 (1955).


36. 348 U.S. at 451.

jurisdiction over claims, but only in cases where the union brings suit.\textsuperscript{38} The Court finessed its earlier pronouncement in \textit{Westinghouse} by holding that Congress intended section 301(a) to provide federal substantive remedies for breaches of collective bargaining agreements, thus serving to preempt state contract law.\textsuperscript{39} In state actions for breach of a collective bargaining agreement, the federal substantive law of section 301(a) would still apply.\textsuperscript{40}

In 1962 the Supreme Court relaxed the barrier to individual actions in \textit{Smith v. Evening News Association},\textsuperscript{41} ruling that an employee as well as a union could enforce a collective bargaining agreement.\textsuperscript{42} The Court said that the denial of a judicial hearing on such actions would have a disruptive influence on the effective enforcement of collective bargaining agreements.\textsuperscript{43} The \textit{Smith} decision, however, resurrected the barrier of \textit{Humphrey v. Moore},\textsuperscript{44} holding personal claims of an employee justiciable only if he further alleges dishonest union representation.\textsuperscript{45} Finally, in \textit{Republic Steel Corp. v. Maddox},\textsuperscript{46} the Court indicated that if a collective bargaining agreement provides for a grievance procedure, the employee must exhaust this mechanism as a precondition to judicial access.\textsuperscript{47} The Court asserted that allowing an employee to sidestep the grievance procedure "would deprive employer and union of the ability to establish a uniform and exclusive method

\textsuperscript{38} \textit{Id.} at 459 n.9.  
\textsuperscript{39} \textit{Id.} at 450-51.  
\textsuperscript{40} \textit{Id.} at 457. \textit{See also} San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959).  
\textsuperscript{41} 371 U.S. 195 (1962).  
\textsuperscript{43} Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests, and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do.  
\textsuperscript{44} 375 U.S. 335 (1964).  
\textsuperscript{45} \textit{Id.} at 349.  
\textsuperscript{46} 379 U.S. 650 (1965).  
\textsuperscript{47} "As a general rule . . . , federal labor policy requires that individual employees wishing to assert contract grievances must \textit{attempt} use of the contract grievance procedure agreed upon by employer and union as the mode of redress." \textit{Id.} at 652 (footnotes omitted) (emphasis in original). Prior to \textit{Maddox}, the Court had given its approval to the exhaustion doctrine where required by state law. \textit{See} Transcontinental & W. Air, Inc. v. Koppal, 345 U.S. 653, 662 (1953). \textit{See also} Moore v. Illinois Cent. R.R., 312 U.S. 630 (1941).
for orderly settlement of employee grievances.\textsuperscript{48} Subsequent decisions have consistently adopted the reasoning of \textit{Maddox}, forcing the worker to place primary reliance on the contractual procedures of dispute resolution.\textsuperscript{49}

In justifying this limitation of employee suits, courts frequently assert

\textsuperscript{48} 379 U.S. at 653.


There is substantial disagreement about what constitutes exhaustion. Some courts find exhaustion requirements fulfilled when the union will proceed no further. \textit{See Law v. Joint Checkers Union}, 412 F.2d 795 (9th Cir.), \textit{cert. denied}, 396 U.S. 596 (1969); \textit{Tribbet v. Chicago Union Station Co.}, 352 F. Supp. 8 (N.D. Ill. 1972); \textit{Fulson v. United-Buckingham Freight Lines, Inc.}, 324 F. Supp. 135 (W.D. Mo. 1970). Other jurisdictions have held that even though the employee has pursued a procedure as far as he can, there is no exhaustion because the union has yet to pursue all steps at its disposal. \textit{See Ford v. General Elec. Co.}, 395 F.2d 157 (7th Cir. 1968); \textit{Cady v. Twin Rivers Towing Co.}, 339 F. Supp. 885 (W.D. Pa. 1972); \textit{Sedlarik v. General Motors Corp.}, 54 F.R.D. 230 (W.D. Mich. 1971).

The only lesson to be drawn from this chaos is that the courts are woefully imprecise in their use of exhaustion terminology. Examining what courts do, not what they say, indicates that they are simply deciding whether plaintiffs seeking judicial redress have offered sufficient justification for not continuing with private procedures.

\textit{Simpson \\& Berwick, supra}, at 1198.

For discussions of the common law basis of this requirement in other organizational contexts, see \textit{Chafee, The Internal Affairs of Associations Not for Profits}, \textit{43 HARV. L. REV.} 993 (1930); \textit{Summers, Legal Limitations on Union Discipline}, \textit{64 HARV. L. REV.} 1049, 1086-92 (1951); Note, \textit{Exhaustion of Remedies in Private Voluntary Associations}, \textit{65 YALE L.J.} 369 (1956).


The specific standing provision under the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act is found at § 102, 29 U.S.C. § 412 (1976):

Any person whose rights secured by the provisions of [Title I] have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Courts, however, have not used the Landrum-Griffin Act to enforce collective bargaining agreements, and accordingly, it will probably be of little use to individuals. \textit{See generally Kratzke, Washington University Open Scholarship
that Congress designated the arbitration and grievance mechanisms as the most desirable means of conflict resolution. As the Court said in Maddox, this congressional mandate would be subverted if employees were allowed immediate access to the courts.

Courts further explain the exhaustion doctrine by reasoning that the parties have "agreed" to resort to internal procedures. When labor and management include a grievance mechanism in their collective bargaining agreement, the union and employer have assumed that it will be the exclusive means of conflict resolution. Use of the grievance procedure allows courts to defer to the unique expertise of arbitrators experienced in labor matters. Staying the hand of judicial review encourages employers and employees to place their house in order without taxing judicial resources.


Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.


51. 379 U.S. at 652-53.

52. See Orphan v. Furnco Constr. Corp., 466 F.2d 795, 800-01 (7th Cir. 1972). See also Neal v. System Bd. of Adjustment, 348 F.2d 722, 726 (8th Cir. 1965).


Some unions include an exhaustion requirement in their constitutions. Article 32 of the Constitution of the United Automobile, Aerospace, & Agricultural Implement Workers of America sets forth such a requirement in § 13, providing: "It shall be the duty of any member . . . who feels aggrieved by any action, decision, or penalty imposed upon him . . . , to exhaust his . . . remedy and all appeals therefrom under the laws of this International Union prior to appealing to a civil court or governmental agency for redress." See Newgent v. Modine Mfg. Co., 495 F.2d 919, 927 (7th Cir. 1974).

54. See Blumrosen, supra note 19, at 1457. For further elaboration of a worker's "choice" of the stated grievance procedure, see notes 186-88 infra and accompanying text.


57. See Tobias, Individual Employee Suits for Breach of the Labor Agreement and the Union's
The employee usually does not have a right to personally process a grievance or to invoke arbitration without union assistance. The contractual grievance procedure's effectiveness thus becomes a function of how well the union represents an employee. Unfortunately, the union may not always give a particular grievance the requisite attention, which may result in an unfavorable disposition of a claim for reasons unrelated to its validity. In most cases, the employee will be


Even if the contract allows an employee to process the grievance, Tobias suggests:

[A]ny right to proceed alone, without union help, is meaningless. Grievances do not often succeed without the full support of the union. Normally employees do not have the knowledge, experience, or ability to process and present their own cases. Frequently, employees do not possess copies of the labor agreement. In any event, the individual dischargee is rarely able to interpret correctly the applicable substantive and procedural provisions.

Tobias, supra note 25, at 568.

On its face, § 9(a) of the National Labor Relations (Wagner) Act, 29 U.S.C. §159(a) (1976), seems to confer a limited right to pursue an action against one's employee. Section 9(a) reads in pertinent part:

Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Preferring to place greater credence in the latter proviso, courts still interpret most collective bargaining agreements as granting the union exclusive power to process grievances. See Malone v. United States Postal Serv., 526 F.2d 1099, 1106-07 (6th Cir. 1975); Harris v. Chemical Leaman Tank Lines, Inc., 437 F.2d 167, 170 (5th Cir. 1971); Black-Clawson Co. v. International Ass’n of Machinists Lodge 355, 313 F.2d 179, 185-86 (2d Cir. 1962). But see NLRB v. Tanner Motor Livery, Ltd., 419 F.2d 216, 218 (9th Cir. 1969); note 12 supra. See also Summers, supra note 49, at 251.

59. See Harrison v. Chrysler Corp., 558 F.2d 1273, 1276 (7th Cir. 1977). At least one court has implicitly recognized this fact by compelling a union, in the face of its unfair representation, to bear the expense of a member's independent legal representation secured to process his grievance. NLRB v. Teamsters Local 396, 509 F.2d 1075, 1079 n.3 (9th Cir.), cert. denied, 421 U.S. 976 (1975).

60. "[T]he union in processing grievances may have an interest in the compromise or settlement of a complaint without regard to its particular merits . . . ." Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L.J. 1327, 1336 (1958); see Tobias, supra note 57, at 527.
bound by this unfavorable disposition unless he can demonstrate that
the union acted in bad faith.61

If an employee is fortunate enough to have his claim reach the arbi-
tration stage,62 the structure of the arbitration system may pose another
obstacle.63 Employers and unions usually hire and pay for the services
of the arbitrators.64 Their tenure lasts only as long as they continue to
satisfy the interests of management and the union.65 Accordingly, the
arbiter will find himself hard-pressed to pursue vigorously the cause
of an employee if it does not coincide with the interests of either the
union, the employer, or both.66 Consistent with the judicial preference
for arbitration, if the arbitrator returns a ruling unfavorable to the em-
ployee, courts will typically refuse review and consider it a final adjudi-
cation of the employee's claim regardless of its merits.67

This deference to the arbitrator's decision, known as the doctrine of
finality, is part of the continuing judicial preference for the contractual
dispute settlement process.68 If the agreement calls for a mechanism
other than arbitration as the terminal step in the grievance procedure, it

61. See notes 138-42 infra and accompanying text.
62. Lewis v. Greyhound Lines-East, 555 F.2d 1053, 1055 (D.C. Cir. 1977) (union has discre-
tion to pursue only meritorious grievances); Acuff v. United Papermakers, 404 F.2d 169, 171 (5th
Cir.) (union has discretion to process member's grievance to arbitration stage), cert. denied, 394
63. For discussion of the difficulty in attacking arbitration awards generally, see Markham,
Judicial Review of an Arbitrator's Award Under § 301(a) of the Labor-Management Relations Act,
39 TENN. L. REV. 613, 631-45 (1972); Summers, Individual Rights in Collective Agreements and
REV. 38, 112-13 (1968).
64. See Shulman, supra note 14, at 1016.
65. See Simpson & Berwick, supra note 49, at 1168-69; Note, The NLRB and Deference to
66. See Note, supra note 65, at 1195.
68. See, e.g., Piper v. Meco, Inc., 412 F.2d 752, 752 (6th Cir. 1969) (per curiam); Boone v.
will be treated as a similarly binding disposition of employee claims. Generally, if an employee brings an action against his employer or seeks to have a settlement judicially reviewed, the employer merely sets up the final award as a defense and is accorded a summary judgment in his favor.

Although courts are clearly not capable of being the primary source of employee-management dispute resolution, complete abdication yields harsh results. A strict application of the exhaustion doctrine may place an employee abandoned by his union in an onerous position. If an employee sues an employer without resorting to the contractual grievance procedure, the exhaustion doctrine will operate as an effective defense. And if submission to the procedure yields an unfavorable resolution, the employee similarly will be left remediless.

IV. EXCEPTIONS TO THE EXHAUSTION RULE

As with any "absolute" rule, there are statutory and judicial exceptions to the exhaustion doctrine. If an aggrieved employee can fashion


69. It is not arbitration per se that federal policy favors, but rather final adjustment of differences by means selected by the parties. If the parties agree that a procedure other than arbitration shall provide a conclusive resolution of their differences, federal labor policy encourages that procedure no less than arbitration.

UMW v. Barnes & Tucker Co., 561 F.2d 1093, 1096 (3d Cir. 1977); see General Drivers Local 89 v. Riss & Co., 372 U.S. 517, 519 (1963) (per curiam) (if the collective bargaining agreement made the decision of a joint committee "final and binding" it would be judicially enforceable like an arbitration award). See generally Simpson & Berwick, supra note 49, at 1196.

70. See Tobias, supra note 25, at 67. But cf. Longshoremen's Local 13 v. Pacific Maritime Ass'n, 441 F.2d 1061, 1067-69 (9th Cir.) (matter of "good faith" in Vaca-type cases, see text accompanying notes 123-30 infra, is a question of fact that should not be decided on summary judgment), cert. denied, 404 U.S. 1016 (1971). Strict application of the contractual rationale for binding arbitration has resulted in an interesting corollary in at least one jurisdiction. In United Steelworkers v. Mesker Bros. Indus., 457 F.2d 91, 95 (8th Cir. 1972), the court held that if both employer and employee agree to waive their contractual grievance mechanisms, they may proceed directly to court.

71. If every employee is to be free to institute suits directly against his employer for every incident which he claims to be a violation of some right under the collective bargaining agreement, little benefit is to be gained by any of the parties either from union representation or arbitration clauses.


72. See Simpson & Berwick, supra note 49, at 1199. See generally Note, supra note 63, at 112-13. "[T]he most frequent result of this additional exhaustion requirement may unfortunately be the 'exhaustion' of deserving employees before they are able to obtain judicial relief for their wrongful discharge." Dorn v. Meyer Parking Sys., 395 F. Supp. 779, 783 (E.D. Pa. 1975).
his pleadings in terms of one of the established exceptions, he can ei-
ther bypass the contractual grievance procedure or treat it as an op-
tional avenue of redress. In such a situation, he can sue his employer 
under section 301(a) for breach of the collective bargaining 
agreement.73

A. **Statutory Exceptions**

Unions may relinquish many individual rights in the collective bar-
gaining process.74 Congress, however, has deemed some employee in-
terests so critical that they require separate statutes for their 
protection.75 As a corollary to their favored status, courts will protect 
these rights without first requiring exhaustion of the contractual 
procedures.

In *Alexander v. Gardner-Denver Co.*,76 the Supreme Court held that 
an employee’s Title VII77 rights could not be compromised in a collec-
tive bargaining agreement. Accordingly, the Court indicated that if an 
employer violates Title VII, the employee need not resort to the griev-
ance process before seeking relief in the district courts.78 The Court 
also noted that despite the general rule of finality, a “binding” arbitra-
tion award will not bar a victim of employment discrimination from 
obtaining judicial redress.79

73. For an early discussion of employee suits without exhausting contractual remedies, see 
Blumrosen, *supra* note 19, at 1460-64.
against employment discrimination); Fair Labor Standards Act, §§ 1-19, 29 U.S.C. §§ 201-219 
(1976) (protection for employee wage and hour claims).
78. 415 U.S. at 59-60.
79. *Id.* Early cases recognized that Title VII would aid those employees whose interests were 
frequently not served by arbitration. *See* Hutchings v. United States Indus., Inc., 428 F.2d 303, 
311 (5th Cir. 1970) (“[a]n arbitration award, whether adverse or favorable to the employee, is not 
per se conclusive of the determination of Title VII rights”); Bowe v. Colgate-Palmolive Co., 416 
F.2d 711, 714-15 (7th Cir. 1969) (employee may elect to use Title VII in lieu of arbitration pro-
ceeding). *See generally Developments in the Law—Employment Discrimination and Title VII of the 
istrative proceedings, they must be exhausted before a Title VII action will be entertained in 
federal court).

The principle of *Gardner-Denver* can be used to overturn a “binding” arbitration if a Title VII 
claim is involved. *See* Oppenheim, Gateway, & Alexander—*Whither Arbitration?*, 48 TUL. L. 

The courts have found in the Fair Labor Standards Act (FLSA) another statutorily derived interest that need not initially be pursued through the grievance procedure. In *Leone v. Mobil Oil Corp.*, the D.C. Circuit held that since the FLSA antedated section 301(a) and contained jurisdictional and remedial provisions, an employee with a wage and hour claim need only submit to the grievance procedure as an optional remedy. Subsequent cases, however, have not always allowed the employee to waive his internal remedies. The possibility of obtaining immediate judicial redress of wage and hour disputes will be slight if the complaint requires the resolution of numerous factual issues.

Courts have occasionally used two other labor statutes as exceptions to the exhaustion doctrine. In *United States Bulk Carriers, Inc. v. Arguelles*, the Court allowed a maritime employee to supersede his union's arbitration procedures and to sue his employer directly under a

Title VII, however, does not supersede the collective bargaining process. *See Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975). In *Emporium Capwell*, plaintiffs charged they were the victims of employment discrimination and began to picket in violation of the collective agreement. The Court upheld their subsequent discharge because they were interfering with their bargaining agent's role as exclusive representative.


81. This exception developed in a series of wage and hour disputes in the early 1940's. Ballard v. Consolidated Steel Corp., 61 F. Supp. 996, 997-98 (S.D. Cal. 1945) (agreement to arbitrate void because of conflict with rights under FLSA); Bailey v. Karolyina Co., 50 F. Supp. 142, 144 (S.D.N.Y. 1943) (arbitration clause under collective bargaining agreement has no relation to plaintiff's claim, which arises under FLSA); Garrity v. Bagold Corp., 180 Misc. 120, 121, 42 N.Y.S.2d 257, 258 (Sup. Ct. 1943) (FLSA claim beyond scope of arbitration clause); City Bank Farmers Trust Co. v. O'Donnell, 179 Misc. 770, 771, 39 N.Y.S.2d 842, 843 (Sup. Ct. 1943) (same); City Serv. Cleaning Contractors, Inc. v. Vanzo, 179 Misc. 368, 368, 39 N.Y.S.2d 24, 24 (Sup. Ct. 1942) (arbitration is a remedial right; right to sue under FLSA is a substantive right).

82. 523 F.2d 1153 (D.C. Cir. 1975).


84. *See* Beckley v. Teyssier, 332 F.2d 495, 496-97 (9th Cir. 1964) (FLSA does not preclude arbitration of claims arising under it); Donahue v. Susquehanna Collieries Co., 160 F.2d 661, 664 (3d Cir. 1947) (second appeal, issue properly referable to arbitration); Watkins v. Hudson Coal Co., 151 F.2d 311, 320 (3d Cir. 1945) (although the sufficiency of the wage scale formula is a question for the court, other questions, such as hours worked, status as employee, and amount due, are referable to arbitration). *But cf.* Gateway Coal Co. v. UMW, 414 U.S. 368, 376 (1974) (contract arbitration procedures are not preempted by the independent operation of the Federal Coal Mine Health and Safety Act, § 303, 30 U.S.C. § 863 (1976)). *See also* 10 GA. L. REV. 843, 855 (1976).

85. *See* note 84 *supra.*

86. 400 U.S. 351 (1971).
statute that granted exclusive federal jurisdiction to decide maritime wage controversies. The Supreme Court held that since section 301 "is silent on the abrogation of existing statutory remedies of seamen . . . , we construe it to provide only an optional remedy to them." The Court has carved out an additional bypass mechanism for post-merger railroad employees whose wage benefits have been infringed by corporate restructuring. In *Norfolk & Western Railway v. Nemitz*, the Court decided that in these circumstances an employee could sue to protect his interests under section 5(2)(f) of the Interstate Commerce Act.

The Leone, Arguelles, and Nemitz statutory exceptions may provide an option for the employee who fails to resort to the contractual grievance procedure. If an employee can fashion his claim under a labor statute that antedates section 301(a) and contains broad jurisdictional provisions, he may gain a judicial forum. Further, by captioning his pleadings in terms of a denial of a wages and hours claim under FLSA, the employee may also find the courts sympathetic to his direct action.


The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens . . . . Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court . . . .

400 U.S. at 353 (emphasis added by Court).

88. 400 U.S. at 357-58.

89. 404 U.S. 37 (1971).

90. Id. at 40-43. Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f) (1970), provides:

As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment . . . .

B. Judicial Exceptions

Without the aid of labor statutes, courts have found in other contexts that litigants need not submit to contractual grievance procedures. There is, of course, no exhaustion requirement when the collective bargaining agreement fails to stipulate a grievance procedure or has lapsed. Most collective bargaining contracts, however, contain internal dispute mechanisms; therefore the former is not a frequently used exception. There appears to be no need to submit to a contractual grievance procedure if, by its terms, it is not an exclusive remedy or when the contract or procedure is inapplicable to the kind of dispute in issue.

In Vaca v. Sipes, the Supreme Court recognized the right of an employee to bypass the grievance procedure when the employer repudiates the collective bargaining agreement. The exception is a limited one, however; mere breach of the collective bargaining contract, said the Court, did not amount to its repudiation. Vaca seems applicable, therefore, only when the employer egregiously violates the employment agreements.


94. See B. MELTZER, supra note 20, at 758.


96. See Harrison v. Chrysler Corp., 558 F.2d 1273, 1276-77 (7th Cir. 1977) (where back wages claim would not be granted under the terms of the collective agreement, employee need not resort to grievance procedures). See also Frederickson v. Systems Fed'n of Ry. Employees, 436 F.2d 764, 768 (9th Cir. 1970). At least one court has dispensed with the exhaustion requirement when "unreasonable" delay will result. See Local 28, IBEW v. IBEW, 197 F. Supp. 99, 107 (D. Md. 1961).

It is logical to assume that the employee who may avail himself of a contract grievance procedure possesses more job protection than his unorganized counterpart; however "in [the] absence of an arbitration clause in the labor-management contract, an individual grievant has the right to judicial remedy without proving union bad faith." Marchione, supra note 31, at 745.


98. Id. at 185. See also Chapman v. United Aircraft Co., 67 Lab. Cas. (CCH) ¶ 12338 (E.D. Pa. 1971).

99. 386 U.S. at 185. In defining the repudiation doctrine, the Vaca Court cited only Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. 254, 260-63 (1962) (one-day strike is not a repudiation justifying employer's refusal to arbitrate), and 6A A. CORBIN, CONTRACTS § 1443 (1962). Both of these authorities indicate that mere breach of the agreement does not amount to
agreement. Paralleling the logic of Vaca, in Glover v. St. Louis-San Francisco Railway, the Court noted that where the union and the employer agree to discriminate against the employee, there is an "obvious" exception to the exhaustion requirement because its pursuit will be "wholly futile." This exception, however, will not find a receptive judicial response if the employee merely alleges that union-employer collusion has rendered submission to the grievance process useless. Courts require specific factual allegations accompanied by supporting affidavits before a litigant may bring himself within the ambit of Glover.

The Glover and Vaca decisions constitute an eminently sensible approach and have been followed by a few perceptive lower courts. These decisions embrace the manifest notion that a worker victimized by employer or union malfeasance should not have to submit to a futile grievance procedure.

A few courts have carved out an additional exception to the exhaustion doctrine by applying estoppel principles. Thus, if an employer


100. See Simpson & Berwick, supra note 49, at 1203.
102. Id. at 330 (citing Vaca v. Sipes, 386 U.S. 171, 184-85 (1967)). Although suggested exceptions, such as futility or repudiation, are related to the duty of fair representation, see Simpson & Berwick, supra note 49, at 1212, it is helpful to treat them as separate exceptions for analytical clarity and to suggest alternative means to fashion pleading counts. A few courts have derived a more limited holding from Glover by restricting the futility exception to race discrimination cases. See Fulson v. United-Buckingham Freight Lines, Inc., 324 F. Supp. 135, 137 n.1 (W.D. Mo. 1970) (alternative holding); Bower v. Lockheed-Georgia Co., 309 F. Supp. 1210, 1215 (N.D. Ga. 1970).
106. "An employer may be estopped from a defense that an employee in a collective bargaining agreement has not exhausted his administrative remedies." Day v. UAW Local 36, 466 F.2d

incorrectly instructs an employee about how to process a grievance, or indicates that he will satisfy the claim without formal proceedings, such actions will bar a subsequent defense of failure to exhaust contractual remedies. Courts reason that although the employer is not obligated to aid the grievant in his action, any assistance it provides must not be misleading.

Another doctrine that aids aggrieved employees is the union's duty of fair representation. If a worker can demonstrate that the union has breached its duty of fair representation in handling his complaint, he need not submit to the grievance procedure and risk the subsequent bar of an adverse arbitration decision. In such circumstances, some courts will allow the employee to pursue his cause of action against a recalcitrant employer.

In 1944, in Steele v. Louisville & Nashville Railroad, the Court enunciated the duty of fair representation to counter racial discrimination within unions. In Steele, a railway union attempted to negotiate a contract with the employer railroad that would have effectively pre-

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83, 93 (6th Cir.1972) (employer cannot claim that employee had filed grievance with an unauthorized representative after holding him out as authorized); Ruggirello v. Ford Motor Co., 411 F. Supp. 758, 762 (E.D. Mich. 1976) (union estopped from asserting employee's failure to exhaust internal remedies when failure was due to union's misrepresentation). See also Steinman v. Spector Freight Sys., Inc., 441 F.2d 599, 603 (2d Cir. 1971).


By becoming a member of the union Newgent was contractually obligated to . . . become aware of the nature and availability of union remedies. Newgent was not justified in remaining in ignorance of the provisions governing his own or, in fact, of relying on a statement by an officer that there was nothing he could do.

Id.


109. The duty of fair representation should remain distinct from issues of exhaustion of contractual remedies. “However, failure to exhaust such remedies is a defense available to the union because of considerations unrelated to the question of whether a wrong has been committed by it.” Harrison v. Chrysler Corp., 558 F.2d 1273, 1277 (7th Cir. 1977) (citing Brady v. Trans World Airlines, Inc., 401 F.2d 87 (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969)).


111. For contemporary discussions of the duty of fair representation, see Clark, The Duty of Fair Representation: A Theoretical Structure, 51 Tex. L. Rev. 1119 (1973); Flynn & Higgins, supra note 49, at 1099-1131; Tobias, supra note 57; Tobias, supra note 25; 19 Vill. L. Rev. 885 (1974).

112. 323 U.S. 192 (1944).

cluded all blacks from union membership. The Court noted that the principle of exclusivity in a collective bargaining context allowed the union representatives broad opportunities to discriminate within its rank and file. The Court went on to hold that in the administration of a collective bargaining agreement, the union must "exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."116

Although the Court decided Steele under the Railway Labor Act,117 the duty of fair representation applies to all workers covered by the National Labor Relations Act.118 Further, the fair representation duty is not limited to race;119 the union must fairly represent all its members.120 The Court later broadened its theme of fairness, holding, in Humphrey v. Moore,121 that the union must act with good faith and avoid dealing arbitrarily with its members.122

These principles were left relatively unchanged until 1967. In Vaca v. Sipes,123 the Court noted: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."124 When the union acts in bad faith, the employee need not rely

114. 323 U.S. at 195.
115. Id. at 201.
116. Id. at 203.
121. 375 U.S. 335 (1964).
122. Id. at 342. The international or national union organization may also owe a duty to its local members. See, e.g., Parmer v. National Cash Register Co., 503 F.2d 275, 276 (6th Cir. 1974) (per curiam); Local 90, Am. Flint Glass Workers v. American Flint Glass Workers, 374 F. Supp. 600, 606-08 (D. Md. 1974).
123. 386 U.S. 171 (1967).
124. Id. at 190. The Court further noted that this duty protects the employee who has relinquished the ability to sue his employer. Id. at 182. See generally Clark, supra note 111, at 1131; Cox, supra note 13, at 632; Summers, supra note 49, at 256.

The effect of the contractual provisions giving the union exclusive control over the grievance procedure is to deprive the individual of his ability to enforce the contract on his own behalf. The union, having deprived the individual of his ability to enforce his rights, has a special obligation to act on his behalf.

Id.
upon the grievance procedure and can proceed directly to the courts.\textsuperscript{125}

The Court described the nature of fair representation as placing a continuing obligation on the union: "[A]s the exclusive bargaining representative of the employees . . ., the Union had a statutory duty to fairly represent all of those employees, both in its collective bargaining . . . and in its enforcement of the resulting collective bargaining agreement . . . ."\textsuperscript{126} Union officials owe this duty of fair representation to all those within the collective bargaining unit\textsuperscript{127} without regard to union membership.\textsuperscript{128}

\textsuperscript{125} 386 U.S. at 184-87.

\textsuperscript{126} Id. at 177 (citations omitted). The Court's reference in \textit{Vaca} to the "statutory" duty of fair representation was figurative. "Federal labor policy does not 'necessarily' require the recognition of a duty of fair representation at all. But federal common law implied from the statutory authority conferred upon collective bargaining representatives has recognized the need to place limitations upon the power of the recognized bargaining representative to injure minorities . . . ."


\textsuperscript{127} Under this [fair representation] doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

\textsuperscript{128} 386 U.S. at 177.

The ability of the employee to refuse to join the union depends on the contractual union security agreement. Section 8(a)(3) of the National Labor Relations (Wagner) Act, 29 U.S.C. § 158(a)(3) (1976), provides in pertinent part: "\textit{Provided}, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . . ."

The agency shop . . . removes that choice from the union and places the option of membership in the employee while still requiring the same monetary support as does the union shop. Such a difference between the union and agency shop may be of great importance in some contexts, but for present purposes it is more formal than real.

\textbf{NLRB v. General Motors Corp., 373 U.S. 734, 744 (1963).}

The most common forms of union security agreements are the agency shop, the union shop, the maintenance of membership agreement, the dues checkoff system, and the closed shop. The agency shop arrangement generally makes union membership optional, but imposes a financial obligation on nonmembers to support the union as their bargaining agent. This financial obligation, however, is often equivalent to the amount members pay. See R. Gorman, \textit{supra} note 7, at 642. In a union shop, the employee is required to join the union within a specified number of days as a condition to his continued employment. See Oil, Chemical, & Atomic Workers v. Mobil Oil Corp., 426 U.S. 407, 409 n.1 (1976). A maintenance of membership agreement "imposes no obligation to join a union but merely an obligation to remain a member once having voluntarily become one." R. Gorman, \textit{supra} note 7, at 642. The dues checkoff arrangement does not require union membership, but the employer automatically deducts union dues from the employee's earnings and remits it to the designated bargaining representative. See \textit{id.} at 642-43. The closed shop requires the employer to hire only those workers who have already joined the union. Closed shop arrangements are prohibited by the National Labor Relations (Wagner) Act, § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976): "It shall be an unfair labor practice for an employer . . . by discrimination in
Although the existence of a fair representation duty is beyond dispute, judicially formulated standards defining a breach crippled its usefulness as a mechanism for circumventing the contractual grievance procedure. In *Vaca*,129 the Supreme Court took its most definitive stance on the duty, noting that a meritorious grievance and a union failure to take the claim to arbitration did not constitute a breach unless the union acted arbitrarily or in bad faith.130

Since *Vaca*, the Supreme Court has had two opportunities to explicate the elements of a breach of the fair representation duty. In *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*,131 an employee sought recovery for back wages allegedly due because of his union's failure to pursue his wrongful discharge action.132 After quoting the *Vaca* language concerning the necessity of showing bad faith or arbitrary action,133 the Court went on to require the worker to show "substantial evidence of fraud, deceitful action or dishonest conduct."134 In *Hines v. Anchor Motor Freight, Inc.*,135 an employee sought to maintain a similar wrongful discharge

regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . . ." *Id.* This portion of § 8(a)(3) does not protect preconditioning security agreements. The preceding security agreements, however, may be prohibited if the state in which they are to operate has passed "right-to-work" legislation pursuant to *id.* § 164(b) ("[n]othing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law").

Since the employee will usually bear his fair share of the costs of union representation regardless of formal union membership, he should be entitled to full and active representation. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220-22 (1977). In some circumstances, the union must act fairly toward workers who are not within the bargaining unit. *See* Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952) (union may not discriminate against workers outside their bargaining unit); O'Neill v. Public Law Bd., 581 F.2d 692 (7th Cir. 1978) (union duty to fairly represent its members does not terminate upon their dismissal); Need v. UMW, 556 F.2d 190 (3d Cir. 1977) (although no duty of fair representation is owed to retirees in resolving pension difficulties, if union undertakes to secure remedies, it must not discriminate against them), *cert. denied*, 434 U.S. 1013 (1978). *See generally* Goetz, *Developing Federal Labor Law of Welfare and Pension Plans*, 55 CORNELL L. REV. 911, 913-14 (1970).

129. 386 U.S. at 171.
132. *Id.* at 277.
133. 386 U.S. at 193-95.
134. 403 U.S. at 299 (quoting Humphrey v. Moore, 375 U.S. 335, 348 (1964)).
In reversing the appellate court’s summary award in favor of the employer, Justice White said that a union fulfills its fair representation duty by acting honestly. He also added that judgment errors would not be sufficient to show breach of the duty.

The Supreme Court’s somewhat vague articulations of the proof required to demonstrate a breach of the fair representation duty have produced two disparate applications in the lower courts. The prevailing decisions in the Sixth and Ninth Circuits have taken a liberal approach, repudiating the bad faith requirement and using a more objective focus to assess the union’s treatment of a grievance. These courts do not require the employee to demonstrate the union’s subjective bad faith, or allow the union to assert that they have fulfilled their duty to a member in the face of their negligent representation. The remainder of the circuits, however, continue to require a showing of bad faith.

136. Id. at 556-57.
137. Id.
138. Id. at 564.
139. Id. at 571.
141. See cases cited in note 140 supra.
142. For an overview of the Second Circuit approach, see Jackson v. Trans World Airlines, Inc., 457 F.2d 202, 204 (2d Cir. 1972) (hostile discrimination or factual malice must be shown to find a breach of the duty of fair representation); Hiatt v. New York Cent. R.R., 444 F.2d 1397, 1398 (2d Cir. 1971) (same); Simberlund v. Long Island R.R., 421 F.2d 1219, 1225 (2d Cir. 1970) (bad faith); Nagel v. International Bhd. of Teamsters, 396 F. Supp. 391, 394 (E.D.N.Y. 1975) (negligence insufficient).
The bad faith or arbitrary treatment standard offers a means to attack blatant union misconduct such as employer-union collusion or overt union hostility. Judicial implementation, however, has placed this standard beyond the reach of many employee allegations. Most courts require a claimant to demonstrate the subjective motive or intent of the union representative in the handling of his grievance. As long as the union can show its action or inaction was free from obvious impropriety, the employee, in all likelihood, will be unable to prove bad faith. The difficulty establishing bad faith is further compounded by the frequent presumption of union rectitude and the broad standard.


The Fourth Circuit seems to require arbitrary union conduct. See, e.g., Harrison v. United Transp. Union, 530 F.2d 558, 561 (4th Cir. 1975); Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972).

For Fifth Circuit views, see Coe v. United Rubber Workers, 571 F.2d 1349, 1350 (5th Cir. 1978) (per curiam) (union did not breach duty of fair representation despite "careless" error in improperly filing employee's arbitration appeal); Sanderson v. Ford Motor Co., 483 F.2d 102, 110 (5th Cir. 1973) (arbitrary action, absent showing of bad faith, is sufficient); Encina v. Tony Lama Boot Co., 448 F.2d 1264, 1264-65 (5th Cir. 1971) (per curiam) (bad faith); Freeman v. Grand Int'l Bhd., 375 F. Supp. 81, 93 (S.D. Ga.) (breach depends on intent), aff'd, 493 F.2d 628 (5th Cir. 1974).

For the Seventh Circuit approach, see Dwyer v. Climatrol Indus., Inc., 544 F.2d 307, 311 (7th Cir. 1976) (negligence insufficient), cert. denied, 429 U.S. 1099 (1977); Canna v. Consolidated Freightways Corp., 524 F.2d 290, 293 (7th Cir. 1975) (negligence or poor judgment insufficient); Williams v. General Foods Corp., 492 F.2d 399, 405 (7th Cir. 1974) (discriminatory intent required).

For the Eighth Circuit approach, see Russom v. Sears, Roebuck & Co., 558 F.2d 439, 442 (8th Cir. 1977) (errors in judgment or negligence insufficient), cert. denied, 434 U.S. 955 (1978); Bond v. International Bhd. of Teamsters, 521 F.2d 5, 9 (8th Cir. 1975) (union's poor judgment in not filing grievance); Augspurger v. Brotherhood of Locomotive Eng'rs, 510 F.2d 853, 859 (8th Cir. 1975) (open hostility).

For the Tenth Circuit approach, see Woods v. North Am. Rockwell Corp., 480 F.2d 644, 648 (10th Cir. 1973) (arbitrary action); Reid v. UAW, 479 F.2d 517, 520 (10th Cir. 1973) (deceit, dishonesty, or intentional and severe discrimination).

143. See Hotel & Restaurant Employees v. Michelson's Food Servs., Inc., 545 F.2d 1248 (9th Cir. 1976); Balowski v. UAW, 372 F.2d 829 (6th Cir. 1967); Clark, supra note 111, at 1132.

144. See Augspurger v. Brotherhood of Locomotive Eng'rs, 510 F.2d 853 (8th Cir. 1975).


146. See note 140 supra.

147. See Tobias, supra note 57, at 528. See generally Note, supra note 18, at 1200.

148. See Comment, supra note 35, at 232. See also Local 12, United Rubber Workers v. NLRB, 368 F.2d 12, 23 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967).
of reasonableness allowed to justify union actions. 149

If the bad faith standard involves a subjective determination of intent, the union representative may claim that he has fairly assisted the worker despite his gross negligence. 150 Continued adherence to this subjective approach substantially contributes to the employee's inability to demonstrate a breach of the duty of fair representation. 151

V. OTHER IMPEDIMENTS TO AN EMPLOYEE'S JUDICIAL ACCESS

Assuming he has brought himself within one of the previously mentioned exceptions, or has been able to demonstrate that his union has breached its duty of fair representation, the employee suing outside the grievance procedure frequently confronts other obstacles. Vaca v. Sipes 152 intimated that if an employee seeks judicial access by alleging a breach of the fair representation duty, he must join both the employer and the union. 153 Some courts have held that under such circumstances both parties are indispensable. 154 Unfortunately, joinder of the union may only serve to strain further the employee's relations with it. 155 In addition, when the employee pursues the action with the union joined as a defendant, he faces the combined legal resources of both the union and the employer. 156


When the parties have negotiated a collective bargaining agreement, a codified instrument exists that usually stipulates the respective parties' rights in the agreement's administration. Accordingly, it has been argued that at the administration stage, there is no need to allow the union the same amount of discretion afforded them in executing the agreement. See Clark, supra note 111, at 1155-74; Rosen, supra note 145, at 405; Summers, supra note 49, at 254.

150. Cf., e.g., Brough v. United Steelworkers, 437 F.2d 748 (1st Cir. 1971) (negligence insufficient); Bazarte v. United Transp. Union, 429 F.2d 868 (3d Cir. 1970) (same). See also note 144 supra.


152. 386 U.S. 171 (1967).

153. Id. at 197.


The employee must name both union and employer when alleging a conspiracy between the union and the employer. See Chasis v. Progress Mfg. Co., 382 F.2d 773 (3d Cir. 1967).

155. See Tobias, supra note 57, at 516 n.9.

Procedural technicalities also frequently frustrate employee suits. Some courts impose stricter pleading requirements\textsuperscript{157} than those ordinarily recognized under the federal rules.\textsuperscript{158} Courts require employee-plaintiffs to state full factual pleadings with supporting affidavits before their suits may progress.\textsuperscript{159} Additionally, some courts apply the shorter tort action statute of limitations.\textsuperscript{160}

Many courts are predisposed against a union member who fails to resort to the contractual grievance procedure. Judges fear that by encouraging individual actions their dockets will swell with trivial complaints of discontented union members.\textsuperscript{161} A desire to keep such disputes in the hands of arbitrators also suggests that direct suits are

\textsuperscript{157} See, e.g., Williams v. General Foods Corp., 492 F.2d 399, 407 (7th Cir. 1974) (must state supporting facts alleging discriminatory intent); Hardcastle v. Western Greyhound Lines, 303 F.2d 182, 186 (9th Cir.) (complaint alleging arbitrary, capricious, and unreasonable union action held defective because of failure to allege bad faith), cert. denied, 371 U.S. 920 (1962).

\textsuperscript{158} FED. R. CIV. P. 8(a) provides:

\textit{Claims for Relief.} A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

\textsuperscript{159} Lusk v. Eastern Prods. Corp., 427 F.2d 705, 708 (4th Cir. 1970) (allegations of breach of fair representation duty must contain more than conclusory statements); Foy v. Norfolk & W. Ry., 377 F.2d 243, 247 (4th Cir. 1967) (plaintiff must attach affidavits explaining and attesting to pleadings). In at least one decision the Supreme Court did not share this view of the pleading requirements:

Although the complaint was not as specific with regard to union discrimination as might have been desirable, we deem the complaint against the union sufficient to survive a motion to dismiss. As the Court of Appeals indicated, “where the courts are called upon to fulfill their role as the primary guardians of the duty of fair representation,” complaints should be construed to avoid dismissals.


\textsuperscript{160} See DeArroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 287 (1st Cir.) (court characterized plaintiff's suit against union for breach of fair representation duty as tort action, thus invoking one-year tort statute of limitations rather than five-year contract action statute), cert. denied, 400 U.S. 877 (1970). Other courts have noted that when the union fails to administer the collective bargaining agreement in good faith, the duty of fair representation action is more closely related to a contract action. See, e.g., Butler v. Teamsters Local 823, 514 F.2d 442, 447-48 (8th Cir.), cert. denied, 423 U.S. 924 (1975); Abrams v. Carrier Corp., 434 F.2d 1234, 1252 (2d Cir. 1970), cert. denied, 401 U.S. 1009 (1971). See generally Note, \textit{Statute of Limitations Governing Fair Representation Action Against Union When Brought with Section 301 Action Against Employer}, 44 GEO. WASH. L. REV. 418 (1976).

\textsuperscript{161} See generally Tobias, supra note 57, at 520. See also Encina v. Tony Lama Boot Co., 448 F.2d 1264 (5th Cir. 1971).
not favored. Finally, allowing disputes to proceed outside the contractual procedure may have an adverse impact on the stability of labor-management relations.

VI. SUGGESTED ALTERNATIVES

In most instances, implementation of the exhaustion doctrine is a sound judicial policy. Its use promotes bilateral communication between labor and management and encourages private resolution of industrial tension. The tenet of union exclusivity in the processing of employee grievances is equally sound. The diversity of interests that abound in any labor organization requires that the power to make compromises and adjustments be vested in a single union representative. The policy of union exclusivity, however, would impinge less frequently upon individual employee interests if it were tempered by a revitalization of the duty of fair representation. Foremost in such an endeavor would be the replacement of the bad faith standard spawned by Vaca and its progeny with a more equitable approach to fair representation. A better focus for the courts’ scrutiny is the adequacy of the remedy afforded the employee and the degree of diligence the union exercised in securing it.

The duty of fair representation could become the safeguard it was originally intended to be if courts would review a union’s treatment of unsatisfied claims more objectively. The use of an objective standard would continue to satisfy the labor policy preference for private settlements because the employee still would have to initially submit to the grievance process.

The few courts that have used a more objective analysis demonstrate the soundness of this approach. In Ruzicka v. General Motors Corp., an employee was unable to arbitrate his discharge because the union failed to file the appropriate request statements for the proceeding even

162. See text accompanying notes 55-57 supra.
163. See Ratner, supra note 26, at 261.
164. See text accompanying notes 50-59 supra.
165. See text accompanying notes 56-57 supra.
166. See Summers, supra note 49, at 253-54.
168. 386 U.S. at 179. See also Note, supra note 63, at 112.
169. See text accompanying notes 112-22 supra.
170. 523 F.2d 306 (6th Cir. 1975).
after it had been given two opportunities to do so.\textsuperscript{171} The district court, though labeling the union's behavior negligent,\textsuperscript{172} found it free from bad faith and thus upheld the denial of arbitration.\textsuperscript{173} The Sixth Circuit reversed and held:

[W]hen a union makes no decision as to the merit of an individual's grievance but merely allows it to expire by negligently failing to take a basic and required step towards resolving it, the union has acted arbitrarily and is liable for a breach of its duty of fair representation.\textsuperscript{174}

Perhaps it is time for a reaffirmation of state court jurisdiction over these suits. The employee unable to gain the assistance of his union might wish to sue in a local jurisdiction with more favorable attitudes toward individual suits.\textsuperscript{175} Although most cases in which an employee brings an action against his employer under section 301(a) are brought in federal court, state courts retain concurrent jurisdiction.\textsuperscript{176} The employee might also benefit from a more conveniently located forum.\textsuperscript{177}

\begin{flushright}
\parbox{.9\textwidth}{\footnotesize 171. Id. at 308-09.  \\
172. Id. at 309.  \\
173. Id.  \\
174. Id. at 310. In concurrence, Judge McCree said: "I believe that the incidence of an injury of this magnitude should be shifted from the innocent employee to the union whose flagrant negligence was responsible for it." Id. at 316 (McCree, J., concurring).  \\
177. See Note, supra note 31, at 440.}
\end{flushright}
The frustrations of remediless employees possessing meritorious claims off-sets the risk of inconsistent rulings and forum shopping. Moreover, since *Teamsters Local 174 v. Lucas Flour Co.* held that state law must yield to conflicting federal labor law, the litigant will not be seeking a divergent substantive forum, only a more sympathetic judicial interpretation.

If the union refuses to aid a worker who has been disserved by his employer, perhaps the worker should have personal access to the grievance and arbitration mechanisms. In the face of union obstinance, such a procedure would allow the employee to assume the role of personal advocate. Under this approach, the worker would first file the grievance with the union and await its action on his behalf. If unsatisfied with the treatment of his complaint, the employee would then proceed through the normal grievance steps as stipulated in the collective bargaining agreement. The disruption of labor-management relations would thus be minimal because the aggrieved individual would be required to follow the normal procedural steps. Fears of a deluge of spurious claims could be dissipated by requiring the employee to assume the costs of such an action if its merits proved to be nugatory.

**VII. Conclusion**

One of the primary purposes in promulgating the Labor-Manage-
ment Relations Act was to safeguard individual rights from union domination.\footnote{184} Subsequent legislation reaffirmed the congressional desire to protect the employee whose interests are no longer consistent with those of his union.\footnote{185} Although initial deference to the contractual grievance procedure will ordinarily foster equitable resolution of labor-management disputes,\footnote{186} reliance on this process in the face of union negligence leads to inequitable results. Justification of this deference, judicially expressed by continued faith in the arbitration process\footnote{187} and by viewing the grievance procedure as "chosen"\footnote{188} by an employee as his sole remedy, does not mitigate these results. When an employee has no choice but to join a collective bargaining unit\footnote{189} or is unable to reach the arbitration stage due to perfunctory union representation,\footnote{190} the traditional rationales lose much of their validity.

Courts should note that the employee-plaintiff does not seek to supersede or preempt federal labor policy, but is merely searching for a substitute corrective measure. Judicial refusal to hear meritorious employee claims can only promote dissatisfaction with the courts as well as with unions. When this occurs, the violence of wildcat strikes or the depletion of union membership due to organizational indifference may

\footnote{184}{Section 1(a) of the Labor-Management Relations (Taft-Hartley) Act, 29 U.S.C. § 141(b) (1976), provides:}

\begin{quote}
It is the purpose and policy of this Chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, [and] to protect the rights of individual employees in their relations with labor organizations . . . .
\end{quote}

\footnote{185}{Any person whose rights secured by the provisions of this subchapter have been infringed . . . may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.}

\footnote{186}{See ABA Section of Labor Relations Law, Report of the Committee on Labor Arbitration 55, 75-76 (1957).}

\footnote{187}{See text accompanying notes 50-61 supra.}

\footnote{188}{"We are not compelling any party to agree to arbitrate disputes arising during a contract term, but are merely giving full effect to their own voluntary agreement to submit all such disputes to arbitration." Collyer Insulated Wire Co. v. Local 1098, IBEW, 192 N.L.R.B. 837, 841 (1971).}

\footnote{189}{See note 128 supra.}

\footnote{190}{See note 62 supra.}

result in the disruption of the very industrial order judicial deference has sought to protect.

John L. Sullivan