

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

[T]he 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.

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1. *Wallace Corp. v. NLRB*, 323 U.S. 248, 271 (1944) (Jackson, J., dissenting).
 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.⁷ The strength inherent in a cohesive labor group furthers its efforts to secure a greater distribution of the economic benefits produced by American labor.⁸ Additionally, by providing an institutional framework for employer-employee relations, unions promote the stabilization of industrial relations.⁹

When workers band together to form a collective bargaining unit¹⁰ or when an employee joins an existing unit, individual concerns must yield to the rule of the majority.¹¹ 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.¹² 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 HARV. 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.

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

9. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

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

11. See generally *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

12. National Labor Relations (Wagner) Act, § 9(a), 29 U.S.C. § 159(a) (1976):

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

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).

14. "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944). See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570 (1960). See generally Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 152 (1957); Dunau, *supra* note 7, at 732; Givens, *Federal Protection of Employee Rights Within Trade Unions*, 29 FORDHAM L. REV. 259, 273 (1960); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1002-04 (1955); Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 BUFFALO L. REV. 1, 24 (1952).

15. See *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976). "The union's broad authority in negotiating and administering effective agreements is 'undoubted.'" *Id.* at 564 (citing *Humphrey v. Moore*, 375 U.S. 335, 342 (1964)). See generally Weyand, *The Scope of Collective Bargaining Under the Taft-Hartley Act*, in PROCEEDINGS OF NEW YORK UNIVERSITY FIRST ANNUAL CONFERENCE ON LABOR LAW 257 (1948).

16. See Blumrosen, *Group Interests in Labor Law*, 13 RUTGERS L. REV. 432, 454 (1959).

focus for all employer-employee interchange is central to its ability to engage in concerted action.¹⁷ The assumption that the union's interests and those of its rank and file are roughly coexistent underlies the vesture of such extensive power in the unions.¹⁸ 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,¹⁹ unions grew into massive organizations.²⁰ 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.²¹ National unions conceive and coordinate broad administrative policies for their subordinate locals.²² 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.²³ Additionally, national union constitutions may

17. "The principle of exclusive union representation, which underlies the National Labor Relations Act as well as the Railway Labor Act, is a central element in the congressional structuring of industrial relations." *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 220 (1977). See generally *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62-63 (1975); *Virginia Ry. v. System Fed'n No. 40*, 300 U.S. 515, 545-49 (1937).

18. See Note, *The Duty of Fair Representation and Exclusive Representation in Grievance Administration: The Duty of Fair Representation*, 27 SYRACUSE L. REV. 1199, 1211 (1976).

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.

Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1464 (1963).

20. See B. MELTZER, *LABOR LAW, CASES, MATERIALS, AND PROBLEMS* 1-16 (2d ed. 1977). According to figures from the Bureau of Labor Statistics, roughly one-quarter of all nonagricultural employees in the United States are union members. U.S. BUREAU OF LABOR STATISTICS, DEPARTMENT OF LABOR, *EMPLOYMENT AND EARNINGS* (1976), reprinted in 96 LAB. REL. REP. (BNA) 34 (1977).

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.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.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.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.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); *id.* § 33 (proposed arbitration of grievances must be cleared through the international prior to processing).

24. Article 19, § 3 of the 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 apprenticeship 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. See Gardner v. Woodcock, 384 F. Supp. 239 (E.D. Mich. 1974).

25. See Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 U. CIN. L. REV. 55, 60 (1972). See generally Blumrosen, *supra* note 19, at 1465; Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy*, 13 RUTGERS L. REV. 631, 651-53 (1959).

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

26. 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). See generally R. GORMAN, *supra* note 7, at 374-94; THE LABOR LAW GROUP TRUST, *LABOR RELATIONS AND SOCIAL PROBLEMS* 115 (1971); Ratner, *Some Contemporary Observations on Section 301*, 52 GEO. L.J. 260, 265 (1963); notes 12-13 *supra*; text accompanying note 58 *infra*.

27. 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.²⁸ 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.²⁹ 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.³⁰ Exasperated, the employee may sometimes seek the aid of the courts.³¹

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.

Cox, *supra* note 13, at 630. See Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897, 911 (1975).

30. See THE LABOR LAW GROUP TRUST, *supra* note 26, at 103; Marchione, *A Case for Individual Rights Under Collective Agreements*, 27 LAB. L.J. 738, 739 (1976); *Symposium—Individual Rights in Industrial Self-Government—A "State Action" Analysis*, 63 Nw. U.L. REV. 4, 4 (1968).

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,³² he may file suit in federal or state court under section 301(a) of the Labor-Management Relations Act.³³ 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.*,³⁴ the Supreme Court held that federal courts could not hear individual claims brought under section 301(a).³⁵ 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.³⁶ Soon afterward, in *Textile Workers Union v. Lincoln Mills*,³⁷ 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.

Initially, actions for breach of the collective bargaining agreement could not be brought in state courts. *Cf. Moore v. Illinois Cent. R.R.*, 312 U.S. 630 (1941) (employee could not maintain an action under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1970), in state court). In 1962, however, the Supreme Court indicated that since Congress intended to leave enforcement of collective bargaining agreements "to the usual process of the law," state courts retain concurrent jurisdiction over such claims. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 513 (1962). See also *Andrews v. Louisville & N. Ry.*, 406 U.S. 320, 324 (1972); *Amalgamated Ass'n of Street, Elec. Ry., & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 278 (1971); *Vaca v. Sipes*, 386 U.S. 171, 180 (1967); *Smith v. Evening News Ass'n*, 371 U.S. 195, 197 (1962); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 101 (1962). For a discussion of state court actions, see Note, *The Duty of Fair Representation in the Administration of Grievance Procedures Under Collective Bargaining Agreements*, 1968 WASH. U.L.Q. 437, 445-57.

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).

35. *Id.* at 451-53. For discussion of this strict contractual view of collective bargaining agreements, see Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 774 (1973); Hoegner, *The Individual Employment Contract Under the Wagner Act: I*, 10 FORDHAM L. REV. 14, 15 (1941); Comment, *The Individual Worker's Right To Sue in His Own Name in a Collective Bargaining Situation*, 17 S.D.L. REV. 217, 218 (1972).

36. 348 U.S. at 451.

37. 353 U.S. 448 (1957).

jurisdiction over claims, but only in cases where the union brings suit.³⁸ The Court finessed its earlier pronouncement in *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.³⁹ In state actions for breach of a collective bargaining agreement, the federal substantive law of section 301(a) would still apply.⁴⁰

In 1962 the Supreme Court relaxed the barrier to individual actions in *Smith v. Evening News Association*,⁴¹ ruling that an employee as well as a union could enforce a collective bargaining agreement.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.⁴³ The *Smith* decision, however, resurrected the barrier of *Humphrey v. Moore*,⁴⁴ holding personal claims of an employee justiciable only if he further alleges dishonest union representation.⁴⁵ Finally, in *Republic Steel Corp. v. Maddox*,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.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

38. *Id.* at 459 n.9.

39. *Id.* at 450-51.

40. *Id.* at 457. See also *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246 (1959).

41. 371 U.S. 195 (1962).

42. *Id.* at 200. See 35 *FORDHAM L. REV.* 517 (1967).

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.

371 U.S. at 200.

44. 375 U.S. 335 (1964).

45. *Id.* at 349.

46. 379 U.S. 650 (1965).

47. "As a general rule . . . , federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Id.* at 652 (footnotes omitted) (emphasis in original). Prior to *Maddox*, the Court had given its approval to the exhaustion doctrine where required by state law. See *Transcontinental & W. Air, Inc. v. Koppal*, 345 U.S. 653, 662 (1953). See also *Moore v. Illinois Cent. R.R.*, 312 U.S. 630 (1941).

for orderly settlement of employee grievances."⁴⁸ Subsequent decisions have consistently adopted the reasoning of *Maddox*, forcing the worker to place primary reliance on the contractual procedures of dispute resolution.⁴⁹

In justifying this limitation of employee suits, courts frequently assert

48. 379 U.S. at 653.

49. See, e.g., *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976); *Lomax v. Armstrong Cork Co.*, 433 F.2d 1277, 1280 (5th Cir. 1970). But see *Adams v. Rear*, 424 F. Supp. 1115, 1117 (W.D. Okla. 1976). See generally Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK L. REV. 1096, 1140 (1974); Simpson & Berwick, *Exhaustion of Grievance Procedures and the Individual Employee*, 51 TEX. L. REV. 1179, 1195 (1973).

There is substantial disagreement about what constitutes exhaustion. Some courts find exhaustion requirements fulfilled when the union will proceed no further. See *Law v. Joint Checkers Union*, 412 F.2d 795 (9th Cir.), cert. denied, 396 U.S. 596 (1969); *Tribbet v. Chicago Union Station Co.*, 352 F. Supp. 8 (N.D. Ill. 1972); *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. See *Ford v. General Elec. Co.*, 395 F.2d 157 (7th Cir. 1968); *Cady v. Twin Rivers Towing Co.*, 339 F. Supp. 885 (W.D. Pa. 1972); *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.

Simpson & Berwick, supra, at 1198.

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

Under the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, §§ 1-611, 29 U.S.C. §§ 401-531 (1976), a similar exhaustion requirement does not limit employee suits. Some cases seem to allow the judge discretion in determining if exhaustion of internal remedies is necessary. See, e.g., *NLRB v. Industrial Union of Marine Workers*, 391 U.S. 418, 426 (1967) (dictum); *Verville v. International Ass'n of Mach. & Aerospace Workers*, 520 F.2d 615, 620 (6th Cir. 1975); *Simmons v. Avisco*, 350 F.2d 1012, 1016-17 (4th Cir. 1965). See generally Blumrosen, *supra* note 19, at 1460; Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251 (1977).

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. See generally Kratzke,

that Congress designated the arbitration and grievance mechanisms as the most desirable means of conflict resolution.⁵⁰ As the Court said in *Maddox*, this congressional mandate would be subverted if employees were allowed immediate access to the courts.⁵¹

Courts further explain the exhaustion doctrine by reasoning that the parties have "agreed" to resort to internal procedures.⁵² When labor and management include a grievance mechanism in their collective bargaining agreement,⁵³ the union and employer have assumed that it will be the exclusive means of conflict resolution.⁵⁴ Use of the grievance procedure allows courts to defer to the unique expertise of arbitrators experienced in labor matters.⁵⁵ Staying the hand of judicial review encourages employers and employees to place their house in order⁵⁶ without taxing judicial resources.⁵⁷

Fiduciary Obligations in the Internal Political Affairs of Labor Unions Under Section 501(a) of the Labor-Management Reporting and Disclosure Act, 18 B.C. INDUS. & COM. L. REV. 1019 (1977).

50. Section 203 of the Labor-Management Relations (Taft-Hartley) Act, 29 U.S.C. § 173(d) (1976), provides:

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.

See, e.g., *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 407 (1976); *Gateway Coal Co. v. UMW*, 414 U.S. 368, 377 (1974); *UMW v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096 (3d Cir. 1977).

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).

53. *See Simpson & Berwick, supra* note 49, at 1199.

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.

55. *See Ruzicka v. General Motors Corp.*, 523 F.2d 306, 312 (6th Cir. 1975); *Ruggirello v. Ford Motor Co.*, 411 F. Supp. 758, 762 (E.D. Mich. 1976).

56. *See Local 657, United Bhd. of Carpenters and Joiners v. Sidell*, 552 F.2d 1250, 1254 (7th Cir. 1977); *Ruzicka v. General Motors Corp.*, 523 F.2d 306, 311 (6th Cir. 1975); *Imel v. Zohn Mfg. Co.*, 481 F.2d 181, 183 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974). *See generally Summers, The Law of Union Discipline: What Courts Do In Fact*, 70 YALE L.J. 175, 207 (1960).

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.⁵⁸ The contractual grievance procedure's effectiveness thus becomes a function of how well the union represents an employee.⁵⁹ 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.⁶⁰ In most cases, the employee will be

Duty of Fair Representation, 5 U. Tol. L. Rev. 514, 531 (1974). See generally *Buzzard v. International Ass'n of Mach. & Aerospace Workers*, 480 F.2d 35, 42 (9th Cir. 1973).

58. See *Black-Clawson Co. v. International Ass'n of Machinists Lodge 55*, 313 F.2d 179 (2d Cir. 1962); *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 312 F.2d 181 (2d Cir. 1962); *Woody v. Sterling Alum. Prods., Inc.*, 243 F. Supp. 755 (E.D. Mo. 1965), *aff'd*, 365 F.2d 448 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967); *Ostrofsky v. United Steelworkers*, 171 F. Supp. 782 (D. Md. 1959), *aff'd per curiam*, 273 F.2d 614 (4th Cir.), *cert. denied*, 363 U.S. 849 (1960). See generally *Tobias*, *supra* note 57, at 529.

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 arbitration 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 arbitrator 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 employee, courts will typically refuse review and consider it a final adjudication 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 discretion 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 U.S. 987 (1968). See generally Tobias, *supra* note 57, at 527.

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 Arbitration*, 37 N.Y.U. L. REV. 362, 396-410 (1962); Note, *A Survey of Labor Remedies*, 54 VA. L. 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 Arbitration*, 77 YALE L.J. 1191, 1195 (1968).

66. See Note, *supra* note 65, at 1195.

67. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976); *Provenzano v. Merchants' Forwarding*, 363 F. Supp. 168, 174 (E.D. Mich. 1973). See also *Boys Mkts., Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1973).

The most authoritative statements requiring judicial deferral to arbitration are contained in three labor cases referred to collectively as the *Steelworkers Trilogy*. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). See generally Simpson & Berwick, *supra* note 49, at 1187. There are, however, exceptions to this deferral. If an employee can show a breach of the duty of fair representation, an arbitrator's award will be subject to judicial review. See notes 123-30 *infra* and accompanying text. See also Levy, *The Collective Bargaining Agreement as a Limitation on Union Control of Employee Grievances*, 118 U. PA. L. REV. 1036, 1048 (1970).

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.⁶⁹ 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.⁷⁰

Although courts are clearly not capable of being the primary source of employee-management dispute resolution,⁷¹ 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.⁷²

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

Armstrong Cork Co., 384 F.2d 285, 289, 291 (5th Cir. 1967); *Hill v. Aro Corp.*, 275 F. Supp. 482, 488 (N.D. Ohio 1967).

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.

Belk v. Allied Aviation Serv. Co., 315 F.2d 513, 516 (1963).

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 either bypass the contractual grievance procedure or treat it as an optional 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 bargaining process.⁷⁴ Congress, however, has deemed some employee interests 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 collective bargaining agreement. Accordingly, the Court indicated that if an employer violates Title VII, the employee need not resort to the grievance process before seeking relief in the district courts.⁷⁸ The Court also noted that despite the general rule of finality, a "binding" arbitration 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.

74. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

75. See Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e-2000e-15 (1976) (protection against employment discrimination); Fair Labor Standards Act, §§ 1-19, 29 U.S.C. §§ 201-219 (1976) (protection for employee wage and hour claims).

76. 415 U.S. 36 (1974).

77. Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e-2000e-15 (1976).

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 proceeding). See generally *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971); 10 HOUS. L. REV. 750 (1973). *But cf.* *Shultz v. Dean Witter & Co., Inc.*, 418 F. Supp. 14 (S.D.N.Y. 1976) (if employee institutes administrative 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. REV. 973 (1974).

The courts have found in the Fair Labor Standards Act (FLSA)⁸⁰ another statutorily derived interest that need not initially be pursued through the grievance procedure.⁸¹ In *Leone v. Mobil Oil Corp.*,⁸² 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.⁸³ Subsequent cases, however, have not always allowed the employee to waive his internal remedies.⁸⁴ 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.⁸⁵

Courts have occasionally used two other labor statutes as exceptions to the exhaustion doctrine. In *United States Bulk Carriers, Inc. v. Arguelles*,⁸⁶ 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.

80. 29 U.S.C. §§ 201-229 (1976).

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. Karolyna 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).

83. *Id.* at 1157-58. See also *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228, 229-30 (1972) (per curiam); *Phillips v. Carborundum Co.*, 361 F. Supp. 1016, 1021 (W.D.N.Y. 1973). See generally 18 WAYNE L. REV. 1465 (1972).

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.⁸⁷ 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."⁸⁸ 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*,⁸⁹ 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.⁹⁰

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.⁹¹

87. Act of July 20, 1790, § 6, 46 U.S.C. § 596 (1970), provides in pertinent part:

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

91. *Cf. McKinney v. Missouri-Kan.-Tex. R.R.*, 357 U.S. 265, 268 (1958) (returning serviceman not required to pursue grievance procedure when asserting veterans' reemployment rights). *But see Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974) (collective bargaining agreement required arbitration of disputes over violations of the Federal Coal Mine Health & Safety Act, § 303, 30 U.S.C. § 863 (1976)).

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 procedure⁹² or has lapsed.⁹³ Most collective bargaining contracts, however, contain internal dispute mechanisms;⁹⁴ 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 remedy⁹⁵ or when the contract or procedure is inapplicable to the kind of dispute in issue.⁹⁶

In *Vaca v. Sipes*,⁹⁷ the Supreme Court recognized the right of an employee to bypass the grievance procedure when the employer repudiates the collective bargaining agreement.⁹⁸ The exception is a limited one, however; mere breach of the collective bargaining contract, said the Court, did not amount to its repudiation.⁹⁹ *Vaca* seems applicable, therefore, only when the employer egregiously violates the employment

92. See *Local 103, IBEW v. RCA Corp.*, 516 F.2d 1336, 1339 (3d Cir. 1975); *Atlantic Steel Co. v. Kitchens*, 79 L.R.R.M. 2620 (Ga. 1970); *Barr v. Formosa Prods., Inc.*, 76 L.R.R.M. 2743 (N.Y. Sup. Ct. 1971).

93. Cf. *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 312 F.2d 181 (2d Cir. 1962) (union cannot force employer to arbitrate dispute when collective bargaining agreement has expired).

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

95. See *Vaca v. Sipes*, 386 U.S. 171, 184 n.9 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657-58 (1965). But see *Desrosiers v. American Cyanamid Co.*, 377 F.2d 864, 870 (2d Cir. 1967).

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.

97. 386 U.S. 171 (1967).

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.¹⁰⁰ Paralleling the logic of *Vaca*, in *Glover v. St. Louis-San Francisco Railway*,¹⁰¹ 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."¹⁰² 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.¹⁰³ Courts require specific factual allegations accompanied by supporting affidavits before a litigant may bring himself within the ambit of *Glover*.¹⁰⁴

The *Glover* and *Vaca* decisions constitute an eminently sensible approach and have been followed by a few perceptive lower courts.¹⁰⁵ 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.¹⁰⁶ Thus, if an employer

its repudiation. *See generally* *Neider v. J.G. Van Holton & Son, Inc.*, 41 Wis. 2d 602, 165 N.W.2d 113 (1969).

100. *See* *Simpson & Berwick*, *supra* note 49, at 1203.

101. 393 U.S. 324 (1969).

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).

103. *See* *Aldridge v. Ludwig-Honold Mfg. Co.*, 385 F. Supp. 695, 699 (E.D. Pa. 1974) (allegations of conspiracy do not mitigate duty to exhaust contractual remedies); *Long Island City Lodge 2147 v. Railway Express Agency*, 217 F. Supp. 907, 910 (S.D.N.Y. 1963) (mere claim of futility insufficient); *Durandetti v. Chrysler Corp.*, 195 F. Supp. 653, 656 (E.D. Mich. 1961) (allegations of futility or hostility do not mitigate duty to exhaust contractual remedies).

104. *See, e.g.*, *Lusk v. Eastern Prods. Corp.*, 427 F.2d 705, 708 (4th Cir. 1970); *Hardcastle v. Western Greyhound Lines*, 303 F.2d 182, 186 (9th Cir.), *cert. denied*, 371 U.S. 920 (1962).

105. *See generally* *Imel v. Zohn Mfg. Co.*, 481 F.2d 181, 184 (10th Cir. 1973) (*per curiam*), *cert. denied*, 415 U.S. 915 (1974); *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870 (3d Cir. 1972); *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1245 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971); *Price v. International Bhd. of Teamsters*, 46 F.R.D. 18 (E.D. Pa. 1969). *See also* *Flynn & Higgins*, *supra* note 49, at 1140-41.

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.¹⁰⁷ Courts reason that although the employer is not obligated to aid the grievant in his action, any assistance it provides must not be misleading.¹⁰⁸

Another doctrine that aids aggrieved employees is the union's duty of fair representation.¹⁰⁹ 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.¹¹⁰ In such circumstances, some courts will allow the employee to pursue his cause of action against a recalcitrant employer.¹¹¹

In 1944, in *Steele v. Louisville & Nashville Railroad*,¹¹² the Court enunciated the duty of fair representation to counter racial discrimination within unions.¹¹³ In *Steele*, a railway union attempted to negotiate a contract with the employer railroad that would have effectively pre-

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).

107. See *Day v. UAW Local 36*, 466 F.2d 83, 93-94 (6th Cir. 1972). But see *Newgent v. Modine Mfg. Co.*, 495 F.2d 919, 927-28 (7th Cir. 1974).

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.

108. *Stroman v. Santa Fe Ry.*, 161 Cal. App. 2d 151, 166, 326 P.2d 155, 164 (1958).

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)).

110. See *Summers*, *supra* note 49, at 1086-92. See generally *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567-69 (1976).

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).

113. See generally *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); *Tunstall v. Brotherhood of Locomotive Fireman*, 323 U.S. 210 (1944). For a developmental history of the duty of fair representation, see Comment, *supra* note 31, at 89.

cluded all blacks from union membership.¹¹⁴ 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.¹¹⁵ 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.

117. *Id.* at 193-94; 45 U.S.C. §§ 151-163 (1970).

118. Judicial interpretations of the National Labor Relations (Wagner) Act, §§ 1-19, 29 U.S.C. §§ 151-168 (1976), attributed the duty of fair representation to the Act because the principle of exclusivity, found in both statutes, is the duty's source. *See Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

119. *See Alabaugh v. Baltimore & O.R.R.*, 222 F.2d 861 (4th Cir.), *cert. denied*, 350 U.S. 839 (1959).

120. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953).

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., Farmer 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.

upon the grievance procedure and can proceed directly to the courts.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”¹²⁶ Union officials owe this duty of fair representation to all those within the collective bargaining unit¹²⁷ without regard to union membership.¹²⁸

125. 386 U.S. at 184-87.

126. *Id.* at 177 (citations omitted). The Court’s reference in *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” *Need v. UMW*, 556 F.2d 190, 200 (3d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

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. 386 U.S. at 177.

128. 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: “*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.

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, *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, *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 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.

130. *Id.* at 193-95. See Feller, *Vaca v. Sipes: One Year Later*, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-FIRST ANNUAL CONFERENCE ON LABOR LAW 141, 160-80 (1968).

131. 403 U.S. 274 (1971).

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)).

135. 424 U.S. 554 (1976).

claim.¹³⁶ In reversing the appellate court's summary award in favor of the employer,¹³⁷ Justice White said that a union fulfills its fair representation duty by acting honestly.¹³⁸ He also added that judgment errors would not be sufficient to show breach of the duty.¹³⁹

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.¹⁴⁰ 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.¹⁴¹ The remainder of the circuits, however, continue to require a showing of bad faith.¹⁴²

136. *Id.* at 556-57.

137. *Id.*

138. *Id.* at 564.

139. *Id.* at 571.

140. *Ruzicka v. General Motors Corp.*, 528 F.2d 912, 913 (6th Cir. 1975) (unexplained union conduct held to be a fair representation breach); *Duggan v. International Ass'n of Machinists*, 510 F.2d 1086, 1088 (9th Cir. 1975) (showing of bad faith not required); *Beriaculo v. International Longshoremen's Union*, 501 F.2d 258, 264 (9th Cir. 1974) (union must balance its interests on the facts of each case); *Johnson v. General Drivers, Warehousemen and Helpers, Local 89*, 488 F.2d 250, 252 (6th Cir. 1973) (interpreted *Vaca* as requiring union good faith); *Kesinger v. Universal Airlines, Inc.*, 474 F.2d 1127, 1131 (6th Cir. 1973) (objective criteria used to analyze union's diligence of representation); *Dill v. Greyhound Corp.*, 435 F.2d 231, 238 (6th Cir. 1970) (reckless union conduct sufficient to show breach); *Hershman v. Sierra Pac. Power Co.*, 434 F. Supp. 46, 49 (D. Nev. 1977) (showing of bad faith not required); *Ruggirello v. Ford Motor Co.*, 411 F. Supp. 758, 760 (E.D. Mich. 1976) (union's negligence is breach of fair representation duty). *But see* *Thomas v. Ford Motor Co.*, 396 F. Supp. 52, 57 (E.D. Mich. 1973) (union's conduct need only be rational); *Provenzano v. Merchants' Forwarding*, 363 F. Supp. 168, 175 (E.D. Mich. 1973) (negligence insufficient to show breach).

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).

For representative Third Circuit cases, see *Bazarte v. United Transp. Union*, 429 F.2d 868, 872 (3d Cir. 1970) (negligence or poor judgment insufficient); *Brady v. Trans World Airlines, Inc.*, 401 F.2d 87, 104 (3d Cir. 1968) (malice and bad faith), *cert. denied*, 393 U.S. 1048 (1969); *Dorn v. Meyers Parking Sys.*, 395 F. Supp. 779, 782 (E.D. Pa. 1975) (arbitrary and capricious conduct); *Marsullo v. General Motors Corp.*, 393 F. Supp. 188, 195 (D.N.J. 1975) (negligence insufficient);

The bad faith or arbitrary treatment standard offers a means to attack blatant union misconduct such as employer-union collusion¹⁴³ or overt union hostility.¹⁴⁴ Judicial implementation, however, has placed this standard beyond the reach of many employee allegations.¹⁴⁵ Most courts require a claimant to demonstrate the subjective motive or intent of the union representative in the handling of his grievance.¹⁴⁶ 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.¹⁴⁷ The difficulty establishing bad faith is further compounded by the frequent presumption of union rectitude¹⁴⁸ and the broad standard

Luca v. Philco-Ford Corp., 380 F. Supp. 139, 145 (E.D. Pa. 1974) (fraud, deceit, or dishonest conduct).

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).

145. Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 73-74 (Douglas, J., dissenting). See generally Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations: Union Officials and the Worker in Collective Bargaining*, 15 HASTINGS L.J. 391, 399 (1962).

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

149. "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents . . ." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). See generally *Rosen*, *supra* note 145, at 402-09; *Summers*, *supra* note 49, at 1052.

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*.

151. See generally *Citron, Deferral of Employee Rights to Arbitration: An Evolving Dichotomy by the Burger Court*, 27 *HASTINGS L.J.* 369, 385 (1976).

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

153. *Id.* at 197.

154. *Leskiw v. Local 1470, IBEW*, 464 F.2d 721 (3d Cir.), *cert. denied*, 409 U.S. 1041 (1972); *Nix v. Spector Freight Sys., Inc.*, 264 F.2d 875 (3d Cir. 1959). See generally *Note, The Duty of Fair Representation and Its Applicability When a Union Refuses to Process an Individual's Grievance*, 20 *S.C.L. REV.* 253, 266 (1968).

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.

156. See 125 *U. PA. L. REV.* 1310 (1977).

Procedural technicalities also frequently frustrate employee suits. Some courts impose stricter pleading requirements¹⁵⁷ than those ordinarily recognized under the federal rules.¹⁵⁸ Courts require employee-plaintiffs to state full factual pleadings with supporting affidavits before their suits may progress.¹⁵⁹ Additionally, some courts apply the shorter tort action statute of limitations.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.¹⁶¹ A desire to keep such disputes in the hands of arbitrators also suggests that direct suits are

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).

158. FED. R. CIV. P. 8(a) provides:

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.

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.

Czosek v. O'Mara, 397 U.S. 25, 27 (1970). *See also CSC Oil Co. v. NLRB*, 549 F.2d 399, 400 (6th Cir. 1977).

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, *Statute of Limitations Governing Fair Representation Action Against Union When Brought with Section 301 Action Against Employer*, 44 GEO. WASH. L. REV. 418 (1976).

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.¹⁶² Finally, allowing disputes to proceed outside the contractual procedure may have an adverse impact on the stability of labor-management relations.¹⁶³

VI. SUGGESTED ALTERNATIVES

In most instances, implementation of the exhaustion doctrine is a sound judicial policy. Its use promotes bilateral communication between labor and management¹⁶⁴ and encourages private resolution of industrial tension.¹⁶⁵ 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.¹⁶⁶ 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 progeny¹⁶⁷ with a more equitable approach to fair representation. The bad faith test mistakenly focuses on the subjective motivation for the union agent's conduct. 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.¹⁶⁸

The duty of fair representation could become the safeguard it was originally intended to be¹⁶⁹ 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.*,¹⁷⁰ 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.

167. *Vaca v. Sipes*, 386 U.S. 171 (1967). See text accompanying notes 123-39 *supra*.

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.¹⁷¹ The district court, though labeling the union's behavior negligent,¹⁷² found it free from bad faith and thus upheld the denial of arbitration.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.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.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.¹⁷⁶ The employee might also benefit from a more conveniently located forum.¹⁷⁷

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).

175. An extensive line of state court decisions requires only a good faith effort to exhaust grievance procedures. *See, e.g.,* *Andrews v. Victor Metal Prods. Corp.*, 239 Ark. 763, 394 S.W.2d 123 (1965); *Harrison v. Arrow Metal Prods. Corp.*, 20 Mich. App. 590, 174 N.W.2d 875 (1969); *Jones v. Operating Eng'rs*, 72 N.M. 322, 383 P.2d 571 (1963); *Addeo v. Dairymen's League Coop. Ass'n*, 47 Misc. 2d 426, 262 N.Y.S.2d 771 (Sup. Ct. 1965); *Gillam v. Roadway Express, Inc.*, 1 Ohio App. 2d 548, 206 N.E.2d 34 (1965); *Gilstrap v. Mitchell Bros. Truck Lines*, 270 Ore. 599, 529 P.2d 370 (1974); *Wagner v. Columbia Hosp. Dist.*, 259 Ore. 15, 485 P.2d 421 (1971). In addition, state courts have found a breach of the fair representation duty where there is a showing of negligence. *See, e.g.,* *Zdero v. Briggs Mfg. Co.*, 338 Mich. 549, 61 N.W.2d 615 (1953); *Handwerk v. United Steelworkers*, 67 Mich. App. 747, 242 N.W.2d 514 (1976); *Marchitto v. Central R.R.*, 9 N.J. 456, 88 A.2d 851 (1952); *DeMarco v. Thatcher Furnace Co.*, 102 N.J. Super. 258, 245 A.2d 773 (1968); *Donnelly v. United Fruit Co.*, 75 N.J. Super. 383, 183 A.2d 415 (1962); *Wheeler v. International Woodworkers*, 274 Ore. 373, 547 P.2d 106 (1976); *Falsetti v. Local 2026, UMW*, 400 Pa. 145, 161 A.2d 882 (1960); *O'Donnell v. Pabst Brewing Co.*, 12 Wis. 2d 491, 107 N.W.2d 484 (1961). *But see* *Sims v. Rex Paper Co.*, 26 Mich. App. 129, 182 N.W.2d 90 (1970).

176. *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 620-21 (1958).

[T]o preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act.

Id. at 620. *See also* notes 37-40 *supra* and accompanying text.

177. *See* Note, *supra* note 31, at 440.

The frustrations of remediless employees possessing meritorious claims offsets the risk of inconsistent rulings and forum shopping.¹⁷⁸ Moreover, since *Teamsters Local 174 v. Lucas Flour Co.*¹⁷⁹ held that state law must yield to conflicting federal labor law,¹⁸⁰ the litigant will not be seeking a divergent substantive forum, only a more sympathetic judicial interpretation.¹⁸¹

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.¹⁸² 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.¹⁸³

VII. CONCLUSION

One of the primary purposes in promulgating the Labor-Manage-

178. *Id.*

179. 369 U.S. 95 (1962).

180. *Id.* at 104. See also *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 199 (1962). *But cf. Rehmar v. Smith*, 555 F.2d 1362, 1368 (9th Cir. 1976) (compatible state law may be applied).

181. For a discussion of individual arbitration rights under state law, see Rosen, *The Individual Worker in Grievance Arbitration: Still Another Look at the Problem*, 24 MD. L. REV. 233 (1964).

182. In prior decisions, this Court has observed that the Labor Act recognizes the existence of private rights within the statutory scheme. These cases have, to be sure, emphasized the "public interest" factor. To employ the rhetoric of "public interest," however, is not to imply that the public right excludes recognition of parochial private interests. *Local 283, UAW v. Scofield*, 382 U.S. 205, 218 (1965). It has been suggested that private access to the grievance and arbitration procedures could be attained through a revitalization of § 9(a) of the National Labor Relations (Wagner) Act, 29 U.S.C. § 159(a) (1976). See *Mitchell v. Hercules, Inc.*, 410 F. Supp. 560, 565 (S.D. Ga. 1976); Tobias, *supra* note 57, at 558; note 58 *supra* and accompanying text. One should be mindful that "the Labor Act was not intended to relegate workers with lawsuits to the status of wards either of companies or of unions." *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 205 (1962) (Black, J., dissenting).

183. See *Encina v. Tony Lama Boot Co.*, 448 F.2d 1264, 1265 (5th Cir. 1971); *Donnelly v. United Fruit Co.*, 40 N.J. 61, 92-93, 190 A.2d 825, 842 (1963). See generally Rosen, *supra* note 181, at 302.

ment Relations Act was to safeguard individual rights from union domination.¹⁸⁴ Subsequent legislation reaffirmed the congressional desire to protect the employee whose interests are no longer consistent with those of his union.¹⁸⁵ Although initial deference to the contractual grievance procedure will ordinarily foster equitable resolution of labor-management disputes,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 process¹⁸⁷ and by viewing the grievance procedure as "chosen"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 unit¹⁸⁹ or is unable to reach the arbitration stage due to perfunctory union representation,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

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

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

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.

Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, § 102, 29 U.S.C. § 412 (1976).

186. See ABA SECTION OF LABOR RELATIONS LAW, REPORT OF THE COMMITTEE ON LABOR ARBITRATION 55, 75-76 (1957).

187. See text accompanying notes 50-61 *supra*.

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). See note 128 *supra*.

189. See note 128 *supra*.

190. See note 62 *supra*.

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

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