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Joel Pelofsky

Lawrence H. Pelofsky

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EMPLOYEE'S RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT

JOEL PELOFSKY*
LAWRENCE H. PELOFSKY**

Benjamin Owens, Jr. worked for Swift & Company in Kansas City, Missouri, trimming loins and handling heavy halves and quarters of beef. In May of 1959 he felt badly and took sick leave to rest up. Owens had a congenital heart murmer, was troubled with high blood pressure, and by May had become overweight. He placed himself under a doctor's care, lost fifty pounds, and was given the doctor's approval to return to work in August. The company doctor refused to permit Owens to return because of the high blood pressure and cardiac condition. In January of 1960 Owens was examined by a third doctor who also approved his return to work. He was permitted to return by the company nurse but after three days was fired by the superintendent on the ground that he was not able to work.

After his discharge Owens went to his union, the National Brotherhood of Packinghouse Workers, and requested that it present a grievance based on his discharge. The collective bargaining agreement between Swift & Company and the union contained a five-step grievance procedure. Owens' grievance was processed through the first four steps to no avail. The fifth step was arbitration. At the conclusion of the fourth phase, the union and Swift agreed to hold the grievance open without proceeding to the fifth step. The union then suggested that Owens obtain another medical opinion. He did so and the doctor stated that he was not able to work because of the high blood pressure and some heart damage. At this point the union decided not to carry the grievance to arbitration because of the absence of compelling medical evidence to support its position.[1]

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*Lecturer in Law, University of Missouri; Attorney at Law, Kansas City, Missouri; A.B. 1959, LL.B. 1962, Harvard University.
**Law Clerk to United States District Judge, Western District of Missouri; A.B. 1963, J.D. 1965, University of Missouri.
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1. Sipes v. Vaca, 397 S.W.2d 658 (Mo. En Banc 1965), *rev'd,* 87 Sup. Ct. 903 (1967).

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The purpose of this article is to examine this fact situation in light of the existing state of labor law and to attempt to ascertain what courses of action and what remedies are available to the individual employee so or similarly situated.

I. The Collective Bargaining Agreement and its Enforcement

Traditionally, the rights of the employee were created by an oral contract of hire,[2] but the imbalance of bargaining power caused these rights to be few and their use restricted. The concept of the union was developed to redress this imbalance. After the advent of unions, the oral contract of hire was regarded as only the initiation of a relationship whose terms and limits were set out in the collective bargaining agreement. This agreement, negotiated by the union as majority representative of the employees in the bargaining unit and the employer, generally embodies provisions dealing with wages, rates of pay, hours, fringe benefits, union security, grievance procedures and arbitration, management rights, strikes and lockouts, seniority and discharge, vacations, health and safety, and various other "conditions of employment." Some agreements are more detailed than others, but each is designed to be a basic instrument establishing a system of industrial self-government with the intention of being a code governing rights and obligations for the present and the future.[3]

The nature of the industrial community governed by the collective bargaining agreement is such that the draftsmen of the agreement cannot anticipate all the factual disputes which might arise. This inability to predict all possible problems, together with the nature of the agreement as a basic document of government, causes the agreement to be drafted in general terms. In addition, the failure of the parties to reach settlements on specific issues will cause the inclusion, in the language of the agreement, of deliberate ambiguities. These factors give rise to continual rule making by the parties as a product of the grievance arbitration procedure. Thus, through the grievance procedure, the process of collective bargaining continues during the life of the agreement.

By virtue of section 8(a)(5) of the National Labor Relations Act,[4]

2. In Missouri, an oral contract of hire generally confers no rights upon the employee and his employment is terminable at will. Christy v. Petrus, 295 S.W.2d 122 (Mo. En Banc 1956); Maddock v. Lewis, 386 S.W.2d 406 (Mo. 1965).

3. Shulman, *Reason, Contract, and Law in Labor Relations,* 68 Harv. L. Rev. 999 (1955).

4. National Labor Relations Act § 8(a)(5), 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(5) (1964).

the employer is under a duty to bargain with the employees' representatives as they are defined in section 9(a)[5] of the act. These representatives are accorded a status of exclusiveness; they pre-empt the rights of the employees to bargain individually with their employer.[6] By definition,[7] the union also exists for the purpose of dealing with the employer concerning grievances. Yet, although the collective agreement by its terms does not pertain to any particular employee, it is obvious that each employee is affected by the terms of the agreement and has, under some sort of contract analysis, the potential right to enforce them. The description of the employee's rights are deliberately obtuse because the nature of the collective agreement, in the sense of placing it within a legal category, is not clear.

In some ways the agreement is plainly a contract between the company and the union, with the employee standing in a relationship of agency or third party beneficiary. Yet, unlike the ordinary contract, it is not particularly a voluntary arrangement.[8] The duty to bargain is mandatory and, while there is no statutory duty to reach an agreement, the pressures of the system are designed to produce agreement. Further, the agreement is often binding even though one of the parties has ceased to exist[9] or the expiration date has passed.[10]

The collective agreement is best described as a code of government containing elements of contract. It contemplates a continuing relationship between management and labor, based upon an initial general agreement and buttressed by a developed body of rules called the "common law of the shop." In this context, the individual's grievance cannot be viewed in isolation from the other interests in the management-labor relationship. Each of these interests must be protected from pressures exerted by the others. Thus, the problem is not merely one of shielding the individual employee from abuse by the collective force, *i.e.,* the union. It is also one of protecting the interests of the union as an organization, the interests of the individual employees who may be in compe-

5. National Labor Relations Act § 9(a), 49 Stat. 453 (1935), 29 U.S.C. § 159 (1964).
6. Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944).
7. National Labor Relations Act § 2(5), 49 Stat. 450 (1935), 29 U.S.C. § 152(5) (1964).
8. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960). See also Ratner, *The Emergent Role of District Courts in National Labor Policy,* 38 F.R.D. 81 (1965).
9. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).
10. NLRB v. Knight Morley Corp., 251 F.2d 753 (1957), *enforcing* 116 N.L.R.B. 140 (1966).

tition with the grievant, the interests of the employees as a group, and the future interests which may be affected through application of the principle of stare decisis. Complete satisfaction of these interests will be the exception and compromise the rule.[11] The party most likely to bring about this compromise is the union.

Yet, even though the mechanics of negotiating the collective bargaining agreement cause the employer to look to the union as *the* party with which to deal, Congress has always described the rights of labor in terms of the rights of the individual employee, as distinguished from the rights of any collective group. The statutes clearly contemplate a sharing of the powers. This concept of shared powers is perhaps most noticeable in section 9(a) of the Labor-Management Relations Act,[12] which provides in part:

> 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 grievance 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.

The proviso to section 9(a) suggests that there is an exception to the union's status as exclusive representative and to the employer's duty to bargain only with the union.[13] The better view seems to be that it confers a privilege rather than a right and thus may be bargained away.[14] The mere existence of the proviso to section 9(a), however, forces consideration of the competing interests of the individual employee and the union and an attempt to strike a balance between them. This attempt has been channeled into three approaches to the problem.

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11. Ford Motor Co. v. Huffman, 345 U.S. 330 (1952); Cox, *Rights Under a Labor Agreement,* 69 HARV. L. REV. 601 (1956).

12. National Labor Relations Act § 9(a), 49 Stat. 453 (1935), 29 U.S.C. § 158(a)(5) (1964).

13. Hughes Tool Co. v. NLRB, 147 F.2d 69 (1945); Summers, *Individual Rights in Collective Agreements and Arbitration,* 37 N.Y.U.L. REV. 362 (1962).

14. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 n.7 (1965).

The first approach, relying on the proviso to 9(a) and on the decision of the Supreme Court in *Elgin, Joliet & Eastern Ry. v. Burley*,[15] suggests that the individual has an affirmative right to proceed and to control the settlement of his grievance.[16] Enforcement of collective rights, on the other hand, would be left to the union. Apparently this enforcement of collective rights would include not only claims arising out of those promises which run directly to the union, such as recognition or check-off of union dues, but also claims arising out of promises which run directly to the individual but breach of which cannot be shown to affect an identifiable person, as for example, the institution and maintenance of a pension plan.

A second approach seeks to balance the claim of the union as the exclusive bargaining representative against the claim of the individual to the protection of his rights by giving the individual control of the settlement of any claim involving certain recognized "critical job interests."[17] These critical job interests, which are reasoned to be basic to the individual employment relationship, include claims for discharge, for compensation for work already performed, and for seniority.[18] Judicial relief would be forthcoming only on a finding that the individual's claim has merit. The remedies available to the employee would be arbitration or damages. Damages, however, would be awarded only where it would be "manifestly unfair to compel the employee to remain in the job situation or lose the value of his job rights."[19] The employee must be able to establish extreme misconduct upon the part of the union or of the employer or both.

The third approach[20] has as its theme the idea that the intent of the parties to the collective agreement should govern. Rather than attempt to formulate and adopt a priori rules, as is suggested by the first two approaches, it is urged that the governing principles be drawn from the "institutions of labor relations and shaped to their needs."[21] Recognizing the several and diverse interests that may be affected by the settle-

15. 325 U.S. 711 (1945).
16. *Report of Committee on Improvement of Administration of Union-Management Agreements, 1954*, 50 Nw. U.L. REV. 143 (1955).
17. Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy*, 13 RUTGERS L. REV. 631 (1959).
18. *Id.* at 651-53. These are mere guidelines which the author has derived from earlier decisions and which, he asserts, are applicable to future cases. *Quaere*, if this rule does not ignore the implications of Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).
19. *Id.* at 663.
20. Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956).
21. *Id.* at 605.

ment of a dispute either by way of the grievance arbitration procedure or by way of litigation, the suggested approach is compromise. Initially, the employer and the union are free to determine who will have the right to enforce and to settle claims arising out of a breach of the collective agreement. Absent such a determination the union will have the sole right to enforce and to settle claims arising out of a breach of the collective agreement where the agreement contains a grievance arbitration procedure controlled by the union. Protection is afforded the individual employee in the form of a suit against the union to require it to enforce the collective agreement. Where the collective agreement contains no grievance arbitration procedure the agreement will be deemed to be incorporated into each individual contract of hire and enforceable by the individual, except that the union will enforce rights inuring to it as an organization.

This general bias in favor of a union-dominated pattern of enforcement of the collective agreement is emphasized by the exalted position given the grievance arbitration procedure, clearly union-controlled, by the Supreme Court in the *Steelworkers* trilogy. In those cases, the Court held that every deference must be paid to the agreed upon procedure for the settlement of disputes. The bias is further emphasized by a first glance at section 301 of the Labor-Management Relations Act[22] which provides in part:

> (a) 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.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

22. Labor-Management Relations Act § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1964).

On its face the statute seems to give the union, as opposed to the individual employee, a neat procedural device through which it could enforce the provisions of the collective agreement. That this portion of the statute has been developed into something more than a procedural tool is a reflection of the indefinite nature of the collective agreement and the recognition that it represents a system of government more than an all-inclusive code.

II. The Duty of Fair Representation

The obligation to fairly represent all of the members of the bargaining unit is implicit in the designation of the union as the *exclusive* bargaining representative.[23] Thus, the duty can be said to be statutory in its origin. Yet, at the same time, it could be considered contractual in a sense of agency with accompanying fiduciary overtones. This relationship can be said to grow out of the authorization card given the union by the employee.[24] On the other hand, it could be a duty which arises out of a course of dealing which suggests contract or even contract implied in fact or, to combine both statutory and contractual aspects, one which arises out of the contract which impliedly incorporates the statute. The true identity of the duty as statutory or contractual, if such a determination can be made, is important as the cases discussed later will indicate.

The first case which dealt with the duty of fair representation characterized it as statutory. This was *Steele v. Louisville & Nashville R.R.*,[25] arising under the Railway Labor Act and involving racial discrimination. The union excluded Negroes from membership and attempted to contract with the employer to deny them jobs. The Supreme Court formulated the question "whether the Railway Labor Act . . . imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all employees in the craft without discrimination."[26] It answered that question by holding that the act imposed on the bargaining representative the duty to exercise its powers on behalf of all the em-

23. Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 Mo. L. Rev. 373 (1965); Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957).

24. A typical authorization card gives the union authority to represent the employee and on his behalf "to negotiate and conclude all agreements as to hours of labor, wages and other employment conditions."

25. 323 U.S. 192 (1944).

26. *Id.* at 193-94.

ployees of the class fairly. It further held that the courts could give relief where the union breached this duty.

Almost unnoticed in the glare of *Steele* was another decision rendered the same day,[27] which declared that this same duty was implicit in the National Labor Relations Act. In that case the Supreme Court held:

> The duties of a bargaining representative selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially.[28]

Most of the cases based upon breach of a duty of fair representation have arisen because of discrimination based on race. However, the most significant recent cases have involved questions of seniority. One of these decisions, *NLRB v. Miranda Fuel Co.*,[29] has resulted in the creation of an unfair labor practice denominated a breach of the duty of fair representation.

In that case, an employee left work April 12 on an authorized leave of absence. He was due to return October 12 but became ill and did not return until October 30. The company had a policy of permitting summer leaves without loss of seniority if the leave was taken between April 15 and October 15. When the union learned of this employee's deviations from the time schedules, it demanded his reduction in seniority. The company consented. The Board first found a per se violation of the act because the union had been given exclusive control over seniority status. The Second Circuit disagreed but enforced on the theory that the power granted the union "improperly encouraged union membership and discriminated against the employee." The union applied for certiorari. In the interval, the Supreme Court, in *Local 357, Int'l. Bhd. of Teamsters v. NLRB*,[30] had rejected the per se approach. The Board asked that the proceedings be vacated and the case remanded for further consideration.

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27. Wallace Corp. v. NLRB, 323 U.S. 248 (1944).
28. *Id.* at 255.
29. This case had a tortuous history. Originally decided in Miranda Fuel Co., 125 N.L.R.B. 454 (1959) and enforced in NLRB v. Miranda Fuel Co., 284 F.2d 861 (2d Cir. 1960), certiorari was sought and granted and the case remanded for reconsideration by the Board in Local 553, Int'l Bd. of Teamsters v. NLRB, 366 U.S. 763 (1961). The Board reconsidered in Miranda Fuel Co., 140 N.L.R.B. 181 (1962), and the Second Circuit denied enforcement in NLRB v. Miranda Fuel Co., 326 F.2d 172 (1963).
30. 365 U.S. 667 (1961).

On remand the Board made new findings based on the evidence obtained in the earlier hearing. This time the Board found violations of sections 8(b)(1)(A) and 8(b)(2) on the union's part and of sections 8(a)(1) and 8(a)(3) on the company's part. The evidence, said the Board, indicated that the only motive for the reduction was to encourage, illegally, union membership. The Board also stated, after citing *Steele* and *Wallace*:

> Viewing these mentioned obligations of a statutory representative in the context of the 'right' guaranteed employees by Section 7 of the Act 'to bargain collectively through representatives of their own choosing,' we are of the opinion that Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.[31]

The Second Circuit denied enforcement, generally on the ground that the Board's findings were not supported by substantial evidence. The three judges wrote three opinions. Two united to deny enforcement on evidentiary grounds. Both of these judges, Medina and Lombard, looked at the section 7 argument but only Medina took a position. He rejected its validity on the ground that discrimination, unrelated to union considerations, was not a per se violation of the act. Lombard declared it was unnecessary to reach the question. Friendly, dissenting, disagreed both with the majority's view of the evidence and with their interpretation of the impact of the decision in *Local 357* on this case. He thought that there was clearly a section 8(b)(2) violation and that the majority, in examining the question of illegal encouragement, took "too myopic" a view of the problem.

The Second Circuit's rejection of the result in *Miranda Fuel* did not constitute a rejection of the Board's doctrine therein enunciated for the first time. The Board persisted in its *Miranda Fuel* approach in later cases, and in *United Rubber Workers v. NLRB*[32] the Fifth Circuit granted enforcement. Factually, the case was an easy one. The local represented Goodyear employees in the company's Alabama plant which operated

31. Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962).
32. Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966).

along racially segregated lines. The contract was silent on the point. Various Negro employees were laid off while white employees with less seniority were kept on. The laid-off employees requested that the union process a grievance concerning the company's actions. The local refused and continued to refuse even after the international president indicated that he thought the grievance should be processed. The court stated:

> [W]e must determine whether a breach of the duty of fair representation in itself constitutes an unfair labor practice within contemplation of the National Labor Relations Act, as amended. We are convinced that the duty of fair representation implicit in the exclusive-representative requirement in section 9(a) of the act comprises an indispensable element of the right of employees "to bargain collectively through representatives of their own choosing" as guaranteed in section 7. We therefore conclude that by summarily refusing to process the complainants' grievances concerning back wages and segregated plant facilities, petitioner thereby violated Section 8(b)(1)(A) of the act by restraining those employees in the exercise of their section 7 rights.[33]

The court went on to express its disagreement with Judge Medina's opinion in *Miranda Fuel*:

> To adopt a narrow interpretation of Section 8(b)(1)(A) which would only protect the comprehensive section 7 right of employees to bargain collectively in those cases involving union conduct which encourages or discourages union membership would to a large degree render such right meaningless in the area of union administration of the bargaining agreement. Indeed, it is only through the day-to-day administration of individual grievances that employee rights achieved in the negotiated bargaining contract are placed in a definitive context, and through which specific individual claims find a vital means of protection.[34]

III. Development of Actions Available to the Individual

In *Rubber Workers,* the Board's *Miranda Fuel* policy was approved. A breach of the duty of fair representation could be an unfair labor practice. Does this mean, therefore, that there could never be a suit for breach of the duty of fair representation, the court's jurisdiction always being pre-empted by the Board? The answer lies in an analysis of a section 301 suit and the determination of the nature of the duty of fair representation.

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33. *Id.* at 17.
34. *Id.* at 20-21.

On its face section 301 seems merely procedural. In the days following its enactment the various federal courts divided as to the scope of the provision. Some held it to be merely jurisdictional, providing a forum wherein unions could sue or be sued for breach of the collective agreement under state law.[35] Others held that the provision was intended to authorize the creation of a body of federal substantive law in the field of labor management relations.[36]

The Supreme Court's decision in *Textile Workers v. Lincoln Mills*[37] ended the dispute. This was a suit to compel arbitration. The Court examined the legislative history and concluded not only that the district court had jurisdiction to entertain the action and grant relief but also that the law to be applied was federal law. The Court stated:

> The question then is, what is the substantive law to be applied in suits under §301(a)? We conclude that the substantive law to apply in suits under §301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.[38]

The decision in *Lincoln Mills* resolved the problem raised by Justice Frankfurter in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*[39] In that case, the majority of the Court, although writing in separate opinions, concluded that section 301 was merely procedural and gave no cause of action to a union to recover wages for

35. International Longshoremen's Union v. Juneau Spruce Corp., 342 U.S. 237 (1952); Mercury Oil Ref. Co. v. Oil Workers, 187 F.2d 980 (10th Cir. 1951); Amazon Cotton Mill Co. v. Textile Workers, 167 F.2d 183 (4th Cir. 1948); Bethlehem Steel Co. v. Industrial Union of Marine Workers, 115 F. Supp. 231 (E.D.N.Y. 1953); John Hancock Mut. Life Ins. Co. v. United Office Workers, 93 F. Supp. 296 (D.N.J. 1950).

36. Schatte v. International Alliance of Theatrical Stage Employees, 182 F.2d 158 (9th Cir. 1950) (dictum); Waialua Agr. Co. v. United Sugar Workers, 114 F. Supp. 243 (D. Hawaii 1953); Textile Workers v. American Thread Co., 113 F. Supp. 137 (D. Mass. 1953); Textile Workers v. Aleo Mfg. Co., 94 F. Supp. 626 (M.D.N.C. 1950); Wilson & Co. v. United Packinghouse Workers, 83 F. Supp. 162 (S.D.N.Y. 1949).

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

38. *Id.* at 456-57.

39. 348 U.S. 437 (1955).

employees who had lost a day's wages due to an unauthorized walkout. In a lengthy analysis of the statute Frankfurter determined that, in the absence of a clear congressional mandate, there were no substantive rights created by section 301 running in favor of the enforcement of individual rights and that, therefore, the Congress could not confer jurisdiction upon the federal courts in the absence of diversity. To do so, said Frankfurter, would raise a grave constitutional problem which he avoided by coming down in favor of a procedural analysis.

Lincoln Mills was taken to end the procedural-substantive dispute concerning section 301. *Smith v. Evening News Ass'n*[40] ended the question as to the status of the individual to sue under section 301. In that case the employee, a union member, was denied the right to work during a strike of another union against the employer while non-union employees were permitted to go to work. Suit was brought in state court and the court dismissed for want of jurisdiction on the ground that the allegations, if true, would make out an unfair labor practice under the National Labor Relations Act and the court's jurisdiction was therefore pre-empted. The Michigan Supreme Court affirmed and, on certiorari, the United States Supreme Court reversed. The Court first reiterated its holding that even though the facts underlying a section 301 suit also arguably constituted an unfair labor practice, the jurisdiction of the court would not be pre-empted.

The Court then dealt with the question of the individual's rights under section 301, rejecting the rest of the *Westinghouse* rule by stating:

> The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of §301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. 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.[41]

40. 371 U.S. 195 (1962), *reversing* 362 Mich. 350, 106 N.W.2d 785 (1961).
41. *Id.* at 200.

Smith was followed, in time, by *Humphrey v. Moore.*[42] That case involved a complicated fact situation, the gist of which was that the same union represented two separate bargaining units whose members were employed by two new car transportation companies. One of the companies absorbed the other because of a reduction in business. The absorption was to result in the discharge of a number of employees, and the crucial question was whether the seniority lists were to be sandwiched or "dovetailed" or whether the employees of the absorbing company were to be kept on without regard to the comparative seniority of the two groups of employees. There was a contract provision on the point. At first the union indicated to plaintiff's group that, even though generally junior to the other group, there was no question but that they would keep their jobs. As the facts became clearer, the union reversed itself. The senior employees of the company absorbed filed a grievance concerning proper administration of the contract. The grievance was submitted directly to the local joint committee and referred, as deadlocked, to the Joint Conference Committee whose decision was final. That Committee held in favor of dovetailing.

The laid-off employees then sued in the Kentucky court to enjoin the carrying out of the Committee decision. The complaint generally alleged that the union misrepresented the situation, deceived plaintiffs as to their position, and conspired with the senior group to deprive plaintiffs of their jobs. The complaint also charged that the decision of the Committee was arbitrary and violated the collective agreement. The trial court denied relief but the state court of appeals reversed and granted a permanent injunction.

On certiorari the Supreme Court reversed. Accepting the state court's definition of the suit as one to enforce a collective bargaining agreement, the Court determined, first, that there was an absorption here within the meaning of the contract provision and that the Committee had authority to give meaning to the provision in relation to this problem and, second, that plaintiffs had not proven that the union had breached its duty of fair representation. The Court noted that the settlement of disputes so that one group of employees is favored over another is not, of itself, a violation of the duty.

Goldberg and Brennan concurred in the result. They argued, however, that this was not an action under section 301 but merely an individual's suit for breach of the duty of fair representation. The majority

42. 375 U.S. 335 (1964), *reversing* 356 S.W.2d 241 (Ky. 1962).

had accepted, without independent examination, the state court's categorization of the suit. Actually, the essence of the complaint was that the Joint Conference Committee had exceeded its authority in making the decision it did. The breach of contract was to occur when Moore was discharged in accordance with the decision, an event which had not yet happened. There was no question but that the Joint Conference Committee had the authority, under the collective agreement, to resolve the problem. And the teachings of the *Steelworkers'* cases[43] are to the effect that the question raised concerning the meaning of the agreement is not for the courts. Goldberg pointed out that the parties to the agreement were free to bargain for solutions to problems, which in essence was what had occurred through the use of the grievance procedure in this case. He went on to say that the employee was protected in this situation by the right to sue for breach of the duty of fair representation, which duty was implied from the statutes rather than derived from the agreement. Moore had simply not made a case.

The decision in *Humphrey v. Moore,* by dealing with the breach of the duty of fair representation as a section 301 suit, *i.e.,* growing out of a breach of contract, provided an answer to the *Miranda Fuel* pre-emption question because *Smith v. Evening News* holds that a suit for breach of contract brought under section 301 is not pre-empted even though the operative facts "arguably" constitute an unfair labor practice. As has been suggested above, however, the majority's analysis is *Humphrey v. Moore* was not sound. As Justice Goldberg pointed out, their analysis, to some degree, ran contrary to the realities of the collective bargaining environment. Valid resolution of the pre-emption problem posed by *Miranda Fuel* was yet to come.

After *Humphrey v. Moore* the Supreme Court decided one other case which had an impact on the individual's right to bring a suit under section 301. In *Republic Steel Corp. v. Maddox*[44] the laid off employee sued for severance pay in the state court. Judgment for the employee was affirmed by the highest state court. The Supreme Court reversed, saying that "unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf."[45] Thus, ignoring the grievance procedure was fatal to plaintiff's cause. The

43. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).
44. 379 U.S. 650 (1965).
45. *Id.* at 653.

Court further stated that union participation in the settlement of the grievance was vital, both to the development of a uniform application of the collective agreement and because, in most if not all of these cases, the issues went beyond the interests of the one employee involved and affected all of the employees. Resort to the court was left open if the grievance procedure was not the exclusive remedy.

IV. The Status of the Individual's Remedies

What, then, were the remedies available to the individual in the fact situation originally considered? Although not all these cases had been decided when Owens' union refused to process his grievance against Swift any further, the outlines of the two available theories were clear. He could sue the company for breach of the collective agreement based on unlawful discharge; he could sue the union for breach of its duty of fair representation. The first suit, according to *Maddox,* could only be brought after the grievance procedure was exhausted while the second would be based on the fact that the grievance procedure was not exhausted.

Owens chose to sue the union in state court for breach of its duty of fair representation.[46] A jury found for plaintiff in the sum of $10,300. The trial court set aside the verdict and entered judgment for the union on grounds of pre-emption. The Missouri Supreme Court reinstated the jury's verdict, and the Supreme Court of the United States granted certiorari. During the course of the appeal Owens died and his administrator was substituted as a party. The United States Supreme Court held that state courts have jurisdiction in this type of case but that the state court here had not applied the governing federal law and that therefore the judgment must be reversed. It was not enough, said the Court, that the jury found that the grievance had merit. The jury must also find that the union's handling of the grievance and their refusal to process it was not in good faith and was arbitrary and capricious. Since there was no such finding, the judgment could not stand.

Addressing itself to the pre-emption problem posed by *Miranda Fuel,* the Court held that the doctrine of the duty of fair representation was one developed by the courts and that there was no compelling reason why the Board should have exclusive jurisdiction. In so holding it stated:

> This pre-emption doctrine, however, has never been rigidly applied to cases where it could not fairly be inferred that Con-

46. The first reported opinion in this case appears in Sipes v. Vaca, 397 S.W.2d 658 (Mo. En Banc 1965).

> gress intended exclusive jurisdiction to lie with the NLRB. Congress itself has carved out exceptions to the Board's exclusive jurisdiction. . . .
>
> In addition to these congressional exceptions, this Court has refused to hold state remedies pre-empted "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional directions, we could not infer that Congress has deprived the States of the power to act." . . .
>
> A primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union duty of fair representation. The doctrine was judicially developed . . . and suits alleging breach of the duty remained judicially cognizable long after the NLRB was given unfair labor practice jurisdiction . . . . Moreover when the Board declared [its rule] in *Miranda Fuel* . . . [it] adopted and applied the doctrine as it had been developed by the federal courts.[47]

The Court also noted that the Board was no more expert than the courts in this area, because of the substantive nature of the analysis required to reach decisions. Further, certain characteristics of unfair labor practice procedures, such as the General Counsel's unreviewable discretion to refuse to issue a complaint, were alien to the purportedly soothing effects of a suit for breach of the duty. While the Court generally discredited the usefulness of the remedy established by *Miranda Fuel, i.e.*, that the breach of the duty of fair representation is an unfair labor practice which may be processed by the Board, it is interesting to note that the Court did not reject the *Miranda Fuel* approach.

Following the *Vaca* case, what can be said concerning the rights of individuals under the National Labor Relations Act? The Court speculated at some length as to various courses of action, in an attempt to illustrate the point that some remedy at law remained for the individual employee. The Court recognized the hard problem presented by the fact that in the union-employee relationship the employee has surrendered many of his rights to the union. Nonetheless, the Court was of the opinion that some avenues of litigation should be left open. As will be seen, however, their efficacy is severely limited.

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47. Vaca v. Sipes, 87 Sup. Ct. 903, 911-12 (1967).

In a situation where the collective agreement contains a grievance procedure concluding with arbitration, the employee must exhaust the remedies contained in the agreement before resorting to a suit for breach of contract under section 301.[48] A failure to exhaust is a defense to such a suit. Since arbitration is generally considered final and binding, the employee dissatisfied with an award might not be able to obtain judicial consideration of the merits of his case. His suit would be confined to challenging the award as arbitrary or beyond the scope of the submission, elements difficult to prove. Only in a situation where the collective agreement does not contain a grievance procedure will the section 301 suit be of particular value to an employee, and this is itself a rare thing. Thus, as a practical matter, there will hardly ever be a section 301 suit brought by an employee that will involve a decision on the merits. Instead, judicial review will look to the procedural fairness, the existence of evidence supporting the arbitrator's decision, and an absence of arbitrary and discriminatory conduct.

Where the grievance procedure exists, and is not exhausted, the employee may sue for breach of the duty of fair representation and for breach of contract. Again, failure to exhaust, as in the *Vaca* case, would be a defense to the suit for breach of contract unless the employee can show a breach of the union's duty. But the Court would require proof that the failure to exhaust resulted from the union's wrongful conduct before it would reach the merits of the suit. It does not seem that the employee need also prove that he was correct in his grievance, but this may well be the only way he could illustrate the union's wrongful conduct in the absence of blatant acts. And, while the Court suggests that where the grievance procedure has not been exhausted and an action is brought the breach of contract suit depends on the outcome of the suit for breach of the duty, it does not seem necessary to sue both the union and the employer in the same action. The theories and the proofs applicable to the two suits are different. But the joinder may be made as a matter of convenience and there would be some elements of damages which are interdependent.[49]

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48. Republic Steel Corp. v. Maddox, *supra* note 44.

49. The Board's place in this scheme is not clear from the opinion in *Vaca*. The majority seemed to favor judicial resolutions because of the court's ability to award suitable remedies. Yet the Board can grant back pay and assess the cost against both employer and union. See the first *Miranda* decision at 125 N.L.R.B. 454 (1959). The difficulties of bringing suit may make the Board's remedies more attractive, even though the amount of damages will be limited. The employee will be limited to back pay, whereas the court could grant punitive damages in addi-

The Court in the *Vaca* case devoted part of its opinion to considerations of the damages, pointing out that damages must be apportioned between the employer and the union according to fault. Most if not all of the damages will flow directly from the employer's alleged breach of the contract. The union's refusal to proceed could cause some injury, but the precise amount would be difficult to show.

Of course, there is some rationale for these rather severe limitations on the employee's rights, independent of his union, to sue. The act is intended to achieve industrial peace which in turn contemplates the participation of responsible parties. A union cannot be very responsible if its decision not to prosecute a grievance to arbitration can be overturned at the whim of the grievant who often has no perspective of the problem. Yet who will protect the employee against the failings of a well-meaning but somewhat incapable union? Or, against a union-management coalition?[50] The decision in *Vaca* can only have the result of projecting the courts more and more into examining the substance of grievance proceedings and drawing even finer lines as to what constitutes arbitrary and capricious and discriminatory conduct on the part of unions and arbitrators. Otherwise, the availability of remedies outside the collective agreement will have little practical meaning to the individual.

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tion. The employee will have the advantage of trying his case in a forum well acquainted with the labor field.

There are some interesting problems. If an employee files a charge and wins, is this conclusive in the arbitration or litigation which follows? Or, if he loses before the Board, what result in the courts? If the employee chooses to sue, is there a problem of primary jurisdiction because of the expertise of the Board?

50. See, for example Black's dissent to a denial of certiorari in Simmons v. Union News Co., 382 U.S. 884 (1965).