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Labor Law -- The Right to an Unbiased Tribunal in Union Disciplinary Proceedings

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policy does not contain the broad and ambiguous promise to defend, heavily relied upon by *Gray*, nor does the doctrine of contracts of adhesion apply without question to the lender's policy.

The ALTA has been aware of judicial criticisms of insurance policies, and the recently drafted ALTA Policies of 1970, the Owner's Policies (Forms A and B), the Loan Policy, and the new Single Form Policy reflect an attempt to anticipate these criticisms. The revisions attempt to clarify possible ambiguities in the form of the policies, rather than limit coverage. All the policies expand and make more conspicuous the insuring clauses to include immediately reference to the exclusions from coverage. The purpose behind this revision is to thwart the possible judicial ruling that the fine print of an exlusionary clause is inconsistent with the bold print promising to insure, with the result that the exclusionary clause is ignored.[36] The 1970 ALTA Loan Policy and the 1970 Single Form Policy continue to contain the provision terminating the insurer's liability when there is payment in full[37] but the provision is under the subheading "Reduction of Liability" rather than under the subheading found to be ambiguous in *Paramount*, "Payment of Loss."[38] The 1970 ALTA Policies generally define the purpose and the scope of the coverage with more exactness. At any rate, the scope of the coverage as well as the form of the policy of title insurance for the lender are not controlled by the individual title insurance companies to the extent that a court should mechanically resolve ambiguities it might find in even revised policies in favor of the lending institution.

CHRISTIAN NESS

Labor Law—The Right to an Unbiased Tribunal in Union Disciplinary Proceedings

A significant weakness in union disciplinary procedure has been the

[36] All of the 1970 ALTA Policies contain as the first sentence of the policy the following provision: "SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF . . . ."

[37] ALTA LOAN POLICY—1970 para. 8; ALTA SINGLE FORM POLICY—1970 para. 8.

[38] 1 Cal. 3d at 569-70, 363 P.2d at 571, 83 Cal. Rptr. at 399.

composition and operation of the "union tribunal."[1] At common law most courts required that a union member be given a "fair hearing" before serious disciplinary sanctions could be invoked,[2] with the majority rule being that a union member was entitled to a hearing whether provided for in the union's constitution or not.[3] By the enactment of the "Bill of Rights"[4] as part of the Labor-Management Reporting & Disclosure Act of 1959,[5] Congress codified the requirement of a "full and fair hearing," making it mandatory in all internal disciplinary procedures.[6] Choosing not to specify standards or even guidelines with respect to a full and fair hearing, Congress left it to the judiciary to hammer out the constituents.[7]

The "fair hearing" in labor law has generally embraced several elements closely resembling those of constitutional due process including full notice, the right to present evidence and to confront and cross examine witnesses. Another requisite of the full and fair hearing is that the accused be tried before an "impartial" tribunal.[8] For a variety of reasons the "unbiased" trial body has proved the most difficult of the due process requirements to attain. The failure stems both from dichotomous goals set by Congress and institutional peculiarities of labor unions themselves. While the "Bill of Rights" was envisioned as a body of law that would compel unions, when dealing with their own members, to follow democratic procedures, built into the legislation was the competing goal of developing

[1] Aaron, *The Labor-Management Reporting & Disclosure Act of 1959*, 73 HARV. L. REV. 851, 874 (1960).

[2] Parks v. International Bhd. of Elec. Workers, 314 F.2d 886 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963).

[3] Comment, *Substantive and Procedural Due Process in Union Disciplinary Proceedings*, 3 U. SAN FRAN. L. REV. 389, 400 (1969).

[4] The Bill of Rights of Members of Labor Organizations, 29 U.S.C. § 411 (1964).

[5] Labor-Management Reporting & Disclosure Act of 1959, 29 U.S.C. §§ 401-02, 411-15, 431-40, 461-66, 481-83, 501-04, 521-31 (1964) (hereinafter cited as LMRDA).

[6] LMRDA § 101(a)(5), 29 U.S.C. § 411(a)(5) (1964) provides:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

[7] Specific provision for a union member's access to the courts was made in LMRDA § 102, 29 U.S.C. § 412 (1964):

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

[8] Parks v. International Bhd. of Elec. Workers, 314 F.2d 886, 912 (4th Cir. 1963).

strong, independent organs of self-government within unions so that governmental intervention would be minimal.[9] These worthy but sometimes conflicting objectives, combined with the institutional traits of the American union, have made it difficult for courts to delineate adequate standards for the unbiased trial.[10]

While there are a number of cases dealing with general due process standards as applied to disciplinary trials, very few deal directly with impartiality of the trial body per se. The Court of Appeals for the Third Circuit has recently decided an intra-union disciplinary case, *Falcone v. Dantinne*,[11] which bears directly on the "unbiased tribunal" issue. On Janaury 4, 1967, James Falcone, a member of the International Brotherhood of Boilermakers, Iron Ship Builders, Forgers & Helpers, Local Lodge 802, allegedly encouraged fellow members not to return to work at a dry dock company. He was also accused of harassing and physically threatening union officials.[12] Falcone was charged with violating three provisions of the union constitution[13] and then notified of the union's

[9] LMRDA § 101(a)(4), 29 U.S.C. § 411(a)(4) (1964) provides for exhaustion of internal remedies before a member may rely on the courts. It provides in part:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding . . . *Provided*, That any such member be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: . . . .

In a recent case the Third Circuit has described the objective of this section:

> The proviso . . . reflects an effort to encourage mature, democratic self government of labor organizations through the development of internal procedures for the correction of abuses by union officials and at the same time provide reasonably expeditious judicial relief to union members who have been denied the fundamental rights guaranteed by Title I of the LMRDA.

Harris v. International Longshoremen's Ass'n Local 1291, 321 F.2d 801 (3d Cir. 1963).

[10] *See, e.g.*, Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 200 (1960).

[11] 420 F.2d 1157 (3d Cir. 1969), *as amended on denial of rehearing* (1970).

[12] Falcone v. Dantinne, 288 F. Supp. 719, 722 (E.D. Pa. 1968), *rev'd*, 420 F.2d 1157 (3d Cir. 1970). These events took place after the union's officials had reached a "tentative" accord with management and had ordered the men to return to work. Falcone's defense was that the membership had mandated a strike unless a *firm* agreement was reached by January 4, 1967. *Id.* at 724-25.

[13] The specific provisions of art. XVII, § 1 of the constitution that Falcone was charged with violating are the following:

> (e) engaging in any activity or course of conduct detrimental to the welfare or best interest of the International Brotherhood or of a subordinate body;
>
> (k) engaging in or fomenting any acts or course of conduct which are inconsistent with the duties, obligations and fealty of the members of a trade

constitutionally required "informal hearing."[14] Attempts to reach agreement failed, necessitating a formal hearing before the trial body, a panel comprised of three officers, excluding charging or other directly involved parties, who were chosen by all of the elected officers.[15] All three of the members selected had attended and actively participated in the prior informal hearing.[16] The union's trial body heard the evidence, judged Falcone guilty and expelled him from the union for five years. On appeal to the international, the judgment was affirmed, but the punishment modified to five years suspension.[17]

Falcone sought an injunction in the district court[18] to prevent the union from depriving him of membership, the right to hold office or from any other union right. He argued that the union had violated the "fair hearing" provision of the LMRDA,[19] alleging that at least one of the members of the trial board had prejudged his guilt at the informal hearing.[20] He also asserted that the mere presence of the other two

union and which violate sound trade union principles or which constitute a breach of any existing collective bargaining agreement;

(m) threatening with violence or assaulting any union member or officer.

420 F.2d at 1159.

[14] A portion of art. XVII, § 2(b) provides:

After receiving . . . formal charges, the Local Lodge President or the International President, will within fourteen (14) days, set up an informal hearing between the parties directly involved and a sincere effort will be made to resolve the matter at this point.

420 F.2d at 1160.

[15] *Id.*

[16] Art. XVII, § 3(a) states that

[The] trial body of the Local Lodge shall consist of a panel of three of the elected officers of such lodge as decided by the elected officers. No charging or other directly involved parties shall sit as a member of the trial body, and any member of a trial body may be challenged for cause, and, if the trial body finds cause to exist, such member shall fill such vacancy by appointment. In the event such vacancy cannot be filled by a Local Lodge officer, the Local Lodge shall elect from among the members of the Local Lodge to fill such vacancy.

420 F.2d at 1161.

[17] 288 F. Supp. at 724. "Suspension" results in a temporary release of benefits and rights while "expulsion" results in a total surrender of the member's status—a severing of all connections between the member and the union. 420 F.2d at 1159 n.2. It has been observed that loss of membership can have disastrous repercussions including loss of one's job as well as loss of benefits accruing from retirement and medical plans. Comment, *Substantive and Procedural Due Process in Union Disciplinary Proceedings*, 3 U. SAN FRAN. L. REV. 389 (1969).

[18] See note 7 *supra.*

[19] This section guarantees a "full and fair hearing." See note 6 *supra.*

[20] Philip News, the chairman of the Trial Body, and one of the officers who participated in the informal hearing, made the following statement in response to Falcone's counsel in the district court:

members of the trial board at the informal hearing constituted bias.[21] The district court, finding no bias, affirmed the holding of the trial body and dismissed the complaint.[22] The court of appeals reversed and held that since one member of the trial board had prejudged the case, Falcone was not afforded the "full and fair hearing" guaranteed by the LMRDA.[23]

Falcone demonstrates the difficulties that courts have experienced in trying to infuse due process principles into the union trial apparatus. The court suggested two standards for combatting bias in union tribunals. Judge Stahl, writing for the court, reiterated what is the most prevalent standard among the judiciary—that specific bias must be proven before a court will overturn a union tribunal.[24] In an opinion concurring with the court's result, Judge Freedman posited a second standard:

> The circumstances themselves create the inherent impropriety . . . [I] disagree with the view which would require of an aggrieved party concrete proof of bias or prejudgment, because I think there is inherent in any participation in the informal hearing a disqualification against acting as a member of the Trial Body.[25]

> [During the informal hearing] [w]e asked Mr. Falcone to simply admit his guilt because it was obvious that it appeared by the evidence that he was guilty by all evidence possible, and that if he were to admit his guilt and save us all the necessity of a trial, of a hearing, that the penalty in all likelihood would be much lighter than possibly what it might be if we went to trial, went to hearing.

420 F.2d at 1161.

[21] 288 F. Supp. at 727. Falcone argued further that all of the witnesses against him were either union officers or related to union officers who were "predisposed" to a finding of guilt. *Id.* at 725.

[22] *Id.* at 728.

[23] 420 F.2d at 1167.

[24] 420 F.2d at 1160-61. The judge also stated:

> Nor do we see any inherent impropriety in having a union officer who attends and participates in the informal meeting subsequently sit as a member of the Trial Body and as a finder of fact at a formal hearing provided there is no element of bias or prejudgment.

Id. Judge Stahl explicitly recognized that Congress had left a void and that standards would have to be supplied (if at all) by the courts. To emphasize its point the court quoted from Highway Truck Drivers & Helpers Local 107 v. Cohen, 182 F. Supp. 608, 617 (E.D. Pa.), *aff'd per curiam*, 284 F.2d 162 (3d Cir. 1960), *cert. denied*, 365 U.S. 833 (1961) which referred to another section, § 501, of the same act:

> Congress made no attempt to "codify" the law in this area. It appears evident to us that they intended the federal courts to fashion a new federal labor law in this area, in much the same way that the federal courts have fashioned a new substantive law of collective bargaining contracts under § 301(a) of the Taft-Hartley Act. In undertaking this task the federal courts will necessarily rely heavily on the common law of the various states.

Id. at 1165 (citations omitted).

[25] 420 F.2d at 1168.

Freedman's opinion suggests that a showing of actual bias does not solve the fundamental problem of "inherent bias," a product of "the circumstances themselves." Implicit in his reasoning is the notion that unless courts can eradicate built-in, institutional bias, often hidden from view, it is a fallacy to believe that the judiciary can effect impartiality.

The fact that the court in *Falcone* decided such bias constituted a violation of the "fair hearing" right represents no departure in the law.[26] Nor is it startling that the disciplinary hearing should comport with rudimentary due process.[27] What is obvious in *Falcone* is that the court found a convenient flaw in the trial procedure—prejudgment—obviating the necessity of having to effect a change in the union's organic institutions.[28] Such circumvention seemingly forwards the policies of union self-development and governmental non-intervention as Congress intended, but because courts hold so narrowly on procedural points there is a dearth of procedural guidelines.[29] Also evident in *Falcone* and in most disciplinary cases having political overtones is the unwillingness of the courts to reach the subtler bias built into the procedure itself.[30]

An example of such illusory bias is the merging of prosecutorial and adjudicating functions which is common in many unions.[31] In *Parks v. International Brotherhood of Electrical Workers*[32] the international revoked a local's charter for having participated in a strike without its authorization. The union's constitution vested in the international's president combined prosecuting and judicial functions. In executing his duties the president ordered the charges to be brought, then conferred with the union's general counsel in the preparation of the revocation order, and ultimately ordered the local's charter revoked.[33] The court stated that while it might be desirable to adopt procedures that keep trial

[26] *See, e.g.*, Gulickson v. Forest, 290 F. Supp. 457 (E.D.N.Y. 1968); Local 7, Bricklayers, Masons and Plasterers v. Bowen, 278 F. 271 (S.D. Tex. 1922); Edrington v. Hall, 168 Ga. 484, 148 S.E. 403 (1929); Summers, *Part One: Internal Relations Between Unions & Their Members*, 18 RUTGERS U.L. REV. 236, 271 (1964).

[27] Parks v. International Bhd. of Elec. Workers, 314 F.2d 886 (4th Cir. 1963).

[28] Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 200 (1960). Professor Summers says that courts use such tactics in about two thirds of the discipline cases where they grant relief.

[29] *Id.*

[30] Aaron, *The Labor-Management Reporting & Disclosure Act of 1959*, 73 HARV. L. REV. 851, 873-74 (1960).

[31] The union constitution in Falcone specifically excluded charging parties from the union tribunal. 420 F.2d at 1161 n. 5.

[32] 314 F.2d 886 (4th Cir. 1963).

[33] *Id.* at 901.

functions separate, federal courts have not been authorized to restructure disciplinary procedures. It applied the same standard for eliminating bias that was used in *Falcone*:

> Courts, federal courts especially, are justified in ruling a union tribunal biased only upon a demonstration that it has been substantially actuated by improper motives—in other words, only upon a showing of specific prejudice.[34]

Unfairness related to merger of prosecutorial and adjudicative functions, however, could be easily corrected compared with the unfairness that arises from intra-political realities. *Falcone* is typical of cases involving political conflict between minority and "establishment" groups within the union,[35] and in these disputes, bias can be even more subtle than in cases dealing with the merger problem. Where relief has been given in such cases, courts have reversed the tribunals on substantive grounds[36] or at least given a close reading to the evidence.[37] In general they have not attacked the procedural mechanisms directly. In a recent case[38] a union member, convicted by the tribunal of making defamatory statements about union officials, claimed he was denied the right to a fair hearing under the LMRDA because his accusers were business agents having substantial power within the union. The court upheld the tribunal, pointing out that such officials were vested with the "responsibility for

[34] *Id.* at 913. The court in *Parks* alluded to the non-intervention policy which has proved powerful: "It may well be thought desirable for unions to adopt hearing procedures that keep trial functions separate, but the federal courts are not empowered so to restructure the disciplinary procedures of unions. *Id.* at 913. *Cf.* Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1083 (1951) (implied). In another case in which a union member had been charged with dereliction of his duties as shop steward, and later convicted, the district council was the charging body, serving also as the pool for members of the trial body. The court said that despite the fact that plaintiff claimed that members of the district council, who served as the trial committee, were "so personally embroiled in the bringing or prosecution of the charges as to render the trial unfair" there was no proof of actual bias and held for the union. Null v. Carpenters Dist. Council of Houston, 239 F. Supp. 809 (S.D. Tex. 1965).

[35] Political acts, in the broad sense, can include acts which in any way affect the legitimacy or influence of groups in power within the union at a particular time. Since Falcone threatened the will of the union leadership, his acts were "political" in nature.

[36] *See, e.g.*, Salzhandler v. Caputo, 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963).

[37] Vars v. International Bhd. of Boilermakers, 320 F.2d 576 (2d Cir. 1963).

[38] Cornelio v. Metropolitan Dist. Council, Bhd. of Carp. & Joiners, 243 F. Supp. 126 (E.D. Pa. 1965), *aff'd per curiam*, 358 F.2d 728 (3d Cir. 1966), *cert. denied*, 386 U.S. 975 (1967).

the proper administration of union affairs"[39] and thus could possess such power.

Institutional bias has been most pronounced, perhaps, in disputes concerning affiliation with subversive groups.[40] In *Anderson v. Brotherhood of Carpenters*[41] the accused had been acquitted of falsely answering questions concerning communist affiliation on his union membership application. Subsequently, however, the international found him guilty, suspending him from membership. At a second trial, ordered because of irregularities in the first,[42] the same chairman served as had served on the first convicting tribunal, and opposing witnesses were called "our witnesses" or the "committee's witnesses." Nevertheless, the court affirmed the second conviction saying, "A reasonable amount of tolerance must be accorded lay members of a Committee in conducting a hearing of this kind when they depart from the conventional standards usually recognized by a Committee of greater experience."[43]

It seems clear that the union tribunal is not and probably cannot be disinterested—the bias is an "inevitable product of the procedure itself."[44] The very *raison d'etre* of the typical union—economic action—decreases the likelihood of impartiality.[45] According to one source, twenty-six, out of seventy-two, unions designate their local executive boards as the trial bodies, and these unions represented over five and one-half million union members in 1959.[46] The same study showed that in eighteen unions, representing approximately four million members, the majority

[39] *Id.* at 129.

[40] Summers, *The Law of Union Discipline: What Courts Do in Fact*, 70 YALE L.J. 175, 199 (1960).

[41] 59 L.R.R.M. 2684 (D. Minn. 1965).

[42] The court found such glaring defects as the tribunal's refusal to allow the accused to confront or cross-examine either his accusers or adverse witnesses. *Id.* at 2685.

[43] *Id.* at 2688. In one recent case a union tribunal was found to have been biased in a disciplinary proceeding where four of the five members of the trial board (which consisted of the executive committee) had been political opponents of the accused. The bias found, however, was actual and not at all subtle. Gulickson v. Forest, 290 F. Supp. 457 (E.D.N.Y. 1968).

[44] Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1083 (1951).

[45] Dealing with a "defamation" case, one court explained:

> But the union is not a political unit to whose disinterested tribunals an alleged defamer can look for an impartial review of his "crime." It is an economic action group, the success of which depends in large measure on a unity of purpose and sense of solidarity among its members.

Salzhandler v. Caputo, 316 F.2d 445, 450 (2d Cir. 1963).

[46] L. BROMWICH, UNION CONSTITUTIONS 33 (1959).

elected tribunals, while in nine, representing approximately three million, trial board arrangements were left to the discretion of the locals.[47] Control in most unions remains with the dominant political faction, dealing a blow to the possibility of an unbiased tribunal or internal democracy.[48]

Institutional factors have weighed heavily on intra-union trials and on the degree of success which the judiciary has had in ferreting out bias. However, the record in some branches of administrative law suggests that courts have not been as reluctant to act as they have been in the intra-union setting. A brief survey of cases in administrative law demonstrates the greater impact which judicial review has had in that field.

The legislatures in most states delegate to an administrative tribunal the power to hear and resolve charges against physicians as well as to revoke licenses.[49] In an Illinois case,[50] a doctor charged with malpractice for having used a controversial treatment of cancer was tried before a trial committee comprised of physicians belonging to the American Medical Association, a group long criticizing the accused and the treatment he prescribed. The accused argued that since all five members of the committee belonged to the AMA, he could not receive a fair trial. Although there was no evidence of any specific bias by any member of the tribunal, the court held for the physician. In another licensing case, *State Board of Chiropractic Examiners v. Hobson*,[51] the doctor who served as board chairman in hearings resulting in the revocation of the defendant's license was disqualified because he was married to the licensee's former wife. The court reasoned, by analogizing to the relationship a juror would have to a litigant, that members of administrative tribunals have just as high a duty to insure against bias as jurors.[52]

In a case involving the disciplining of a cadet for having led an unauthorized "mass movement" at a merchant marine academy, the student asserted that members of the panel awarding the demerits had participated in the initial investigation.[53] He argued that because the

[47] *Id.* The study showed that eight unions allowed the president of the local to select the trial board, six provided that the local meeting was the trial board, and three had no formal provisions.

[48] *Id.* at 35.

[49] 41 AM. JUR. *Physicians & Surgeons* § 58 (1942).

[50] Smith v. Department of Reg. & Educ., 412 Ill. 332, 106 N.E.2d 722 (1952).

[51] 71 Dauphin County 234 (1958), *cited in* Annot., 97 A.L.R.2d 1210, 1218 (1964).

[52] *Id.*

[53] Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967).

authorities merged the functions of policeman and judge, he was deprived of an unbiased tribunal and fair hearing. The court agreed and added, "It is too clear to require argument or citation that a fair hearing presupposes an impartial trier of fact and that *prior official involvement in a case renders impartiality most difficult to maintain.*"[54]

Similarly, courts have moved with dispatch to eradicate bias in labor-management disputes. In one NLRB case the respondents opposed a petition to enforce certain orders because the trial was conducted by a "biased and partisan examiner who started out with a fell and partisan purpose to convict."[55] The court, in vacating the order, enunciated a rigorous standard for impartiality:

> [A] fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed.[56]

The judiciary has attempted to transport administrative standards into union disciplinary situations, but this has been notably unsuccessful, partly because the average union member is not experienced, as are many administrative officers, in trial procedure.[57] Furthermore, Congress'

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[54] *Id.* at 813 (emphasis added).

[55] NLRB v. Phelps, 136 F.2d 562 (5th Cir. 1943).

[56] *Id.* at 563. *See* Long Beach Federal Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 189 F. Supp. 589 (S.D. Cal. 1960) for a more recent case which follows the quoted standard. In that decision the court relied on constitutional precepts:

> It may be said . . . that the right to an impartial judge or quasi-judicial officer, free from bias, prejudice, interest or other ground of disqualification, is a fundamental right, protected by the due process clause of the Fifth Amendment . . . .

Id. at 610.

[57] According to Professor Summers, courts, in trying to eliminate bias, have instead compounded the problems by importing administrative law standards into the labor law. He has noted the difficulties encountered because courts have relied on administrative law precepts:

> [T]he union tribunal is always composed of members who are . . . interested, if not prejudiced, parties. They have no independence, no expertise, and no restraining tradition. To this type of tribunal the courts have attempted to apply standards designed to govern administrative agencies composed of experienced and impartial triers of fact . . . . The presumption of regularity

mandate that unions be free of excessive government intervention as well as the peculiarities of unions as economic units in a highly competitive society have made it unlikely that the judiciary will solve the problem of union bias. It is evident that the standard subscribed to by the *Falcone* court—demanding a demonstration of actual bias—is wholly ineffectual. The higher standard implicit in Judge Freedman's concurring opinion would involve more intensive judicial surveillance and participation in union affairs because the court would virtually serve as a reforming agent. Since Congress has negated any kind of judicial intervention that would reshape institutions, and has instead encouraged a *laissez-faire* approach, it is doubtful that Judge Freedman's more exacting standard could be achieved.

Perhaps the most encouraging alternative for realizing the truly unbiased tribunal lies outside of the court system in the concept of independent, public review. Initially used by the Upholsterer's International Union, this procedure was adopted by the constitutional convention of the United Auto Workers' Union in 1957.[58] The UAW Public Review Board is made of seven "impartial persons of good public repute,"[59] appointed by the UAW president, subject to the approval of both the executive board and the convention.[60] In disciplinary cases the member must first exhaust the internal remedies of the union, including appeal to the international executive board. If he is dissatisfied, he may then appeal either to the Public Review Board or to the UAW convention, but not to both.

What is significant is not the specific procedure followed by the UAW but the wide ramifications this system holds for unions, individual members and for society. The review board is neither an instrument of the union administration nor of the government—it is public. Moreover, it is voluntary. Independent review separates the executive power and the

applicable to administrative bodies cannot safely be applied to a union trial committee . . . .

Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1083 (1951).

[58] See Oberer, *Voluntary Impartial Review of Labor: Some Reflections*, 58 MICH. L. REV. 55, 56 (1959).

[59] UAW CONST., art. 31, §§ 1, 2.

[60] J. STIEBER, W. OBERER, M. HARRINGTON, DEMOCRACY & PUBLIC REVIEW 10-11 (1960). Senator McClellan, chairman of the Select Committee to Investigate Improper Activities in Labor-Management Relations, proposed independent final review during debate on the labor legislation in 1959, but his proposal was rejected. *See, e.g.*, Rothman, *Legislative History of the "Bill of Rights" for Union Members*, 45 MINN. L. REV. 199, 216 (1960).

ultimate judicial power within the union, making the dominant faction in the union subject to some superior law. It also eliminates the need for judicial review insofar as detecting bias is concerned since such review bodies act not only as arbiters of unresolved disputes but also as watchdogs over the union's internal disciplinary mechanisms. The attributes of public review would appear to best circumvent the institutional peculiarities of the union.

Dr. Clark Kerr, one of the original members of the UAW's Public Review Board, summarized the broader problem succinctly:

> The union, like every other major institution in an increasingly industrialized nation, has become more distant from its members. In the process of centralization the union administration has tended to take on a life and power of its own. The individual member remains the theoretical source of authority within the organization, but in a struggle with his own officers he is, more often than not, unable to muster the resources to make his sovereignty meaningful. The odds are with the administration.[61]

While independent judiciaries would not totally eliminate bias from union proceedings, they would help reverse the odds. Independent review would remind union leadership of the importance of due process principles as applied to internal institutions, and in this respect would strengthen existing disciplinary apparatus. It would also make evident to all members the close relationship that exists between the ends of justice and the means by which they are attained.[62] The correlation between union democracy and union strength is obvious, and only when more union leaders demonstrate the courage and wisdom to abdicate some of their own power to independent review bodies will union members receive the "full and fair hearing" guaranteed by the LMRDA.

GARBER A. DAVIDSON, JR.

Landlord and Tenant—Recent Erosions of Caveat Emptor in the Leasing of Residential Housing

The maxim caveat emptor has threaded a path through many areas of the law. While major modifications have occurred in some areas,[1] this

[61] DEMOCRACY & PUBLIC REVIEW, *supra* note 60, at 3.
[62] *Id.* at 30-31.

[1] UNIFORM COMMERCIAL CODE §§ 2-314, -315; *see* 8 S. WILLISTON, CONTRACTS