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THE EXHAUSTION OF INTERNAL UNION REMEDIES AS A PREREQUISITE TO SECTION 301 ACTIONS AGAINST LABOR UNIONS AND EMPLOYERS

Federal courts[1] generally have required that a member of a labor union exhaust[2] internal union remedies[3] before suing a union for breaching its duty of fair representation.[4] They have not, however, articulated a clear standard for determining when exhaustion is unnecessary.[5] Further, the courts have not agreed whether an employer may be sued for violating a collective bargaining agreement before the employee has sought relief from within the union.[6]

All parties involved would benefit from a definite statement as to when exhaustion is required, although they probably would not agree on what this policy should be. Employers and labor unions generally would favor a rule requiring exhaustion when the complaint is against

1. *See, e.g.*, Winter v. Local 639, Int'l Bhd. of Teamsters, 569 F.2d 146 (D.C. Cir. 1977); Newgent v. Modine Mfg. Co., 495 F.2d 919 (7th Cir. 1974); Imel v. Zohn Mfg. Co., 481 F.2d 181 (10th Cir. 1973); Bsharah v. Eltra Corp., 394 F.2d 502 (6th Cir. 1968); Kowalski v. Wisconsin Steel Works, 433 F. Supp. 314 (N.D. Ill. 1977); Mims v. Capitol Printing Ink Co., 428 F. Supp. 12 (D.D.C. 1976); Brookins v. Chrysler Corp., 381 F. Supp. 563 (E.D. Mich. 1974). *But see* Chambers v. Local 639, Int'l Bhd. of Teamsters, 578 F.2d 375 (D.C. Cir. 1978); Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972).

2. Under the exhaustion doctrine, available non-judicial relief must be sought before a suit may be brought in the courts. Simmons v. Avisco, Local 713, 350 F.2d 1012, 1016 (4th Cir. 1965). Although the exhaustion requirement may apply to both administrative and collective bargaining remedies, for purposes of this note the word exhaustion refers only to use of internal union remedies.

3. Internal union remedies are those remedies available to members under the labor union's constitution and by-laws. Some unions have elaborate procedures culminating in review by impartial boards. *See* Note, *Public Review Boards: A Check on Union Disciplinary Powers*, 11 STAN. L. REV. 497 (1959).

4. A union which is an exclusive bargaining agent has a statutory duty to represent its members fairly both in collective bargaining with the employer and in enforcing the resulting collective bargaining agreement. Vaca v. Sipes, 386 U.S. 171, 177 (1967). This note will not consider the question of what constitutes a breach of the union's duty of fair representation, but will focus on when the alleged breach may be challenged in the courts. For a discussion of the duty of fair representation, *see* Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435 (1963); Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 645-52 (1956); Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 MO. L. REV. 373 (1965); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362, 399-404 (1962); Comment, *Federal Protection of Individual Rights Under Labor Contracts*, 73 YALE L.J. 1215, 1232-38 (1964).

5. *See* notes 45-48 *infra* and accompanying text.

6. *Compare* Winter v. Local 639, Int'l Bhd. of Teamsters, 569 F.2d 146 (D.C. Cir. 1977); Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977); Orphan v. Furnco Constr. Corp., 466 F.2d 795 (7th Cir. 1972); Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972) *with* Alridge v. Ludwig-Honold Mfg. Co., 385 F. Supp. 695 (E.D. Pa. 1974); Brookins v. Chrysler Corp., 381 F. Supp. 563 (E.D. Mich. 1974); Imbrunnone v. Chrysler Corp., 336 F. Supp. 1223 (E.D. Mich. 1971); Harrington v. Chrysler Corp., 303 F. Supp. 495 (E.D. Mich. 1969).

them since such an approach often would save the expense involved in a judicial proceeding. Union members, on the other hand, would prefer that there not be an exhaustion requirement. Instead, they would favor being allowed to decide whether to bring a court action or to seek relief from within the union.

Convincing arguments exist that the courts have been correct in more often than not requiring exhaustion before an action can be brought against a union.[7] In contrast, their approach when an employer is being sued often has been less desirable.[8] The preferable policy is to apply the same requirement regardless of the identity of the defendant.[9]

This note will examine the question of when internal union remedies must be exhausted before an employee may bring an action under section 301 of the Taft-Hartley Act.[10] First, section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959,[11] which provides the statutory basis for an exhaustion requirement, will be discussed.[12] Second, a survey and analysis of how the federal courts have treated the exhaustion requirement in suits by a union member against the union for a breach of its duty of fair representation will be presented.[13] Third, decisions by the courts regarding an employee's need to exhaust internal union remedies before bringing a section 301 action against an employer for a breach of the collective bargaining

7. *See* text accompanying notes 37-41 *infra*.

8. *See* text accompanying notes 128-84 *infra*.

9. *See* text accompanying notes 132-40 *infra*.

10. Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185 (1976). This statute provides, in pertinent 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 citizenship of the parties.

Id. Suits brought in a United States district court pursuant to this statute are commonly referred to as section 301 actions.

This note will be limited to a discussion of the exhaustion of internal union remedies and section 301 actions. It will not consider the exhaustion of remedies provided by a collective bargaining agreement. For a discussion of the exhaustion requirement as it applies to collective bargaining remedies *see* Simpson & Berwick, *Exhaustion of Grievance Procedures and the Individual Employee*, 51 TEX. L. REV. 1179, 1185-1213 (1973). It also will not consider actions brought under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1970). Cases reaching the United States courts of appeals under the Railway Labor Act which have involved the exhaustion issue include Brady v. Trans World Airlines, Inc., 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969) and Fingar v. Seaboard Air Line R.R., 277 F.2d 698 (5th Cir. 1960).

11. Labor-Management Reporting & Disclosure Act of 1959, § 101(a)(4), 29 U.S.C. § 411(a)(4) (1976). *See* text accompanying note 18 *infra* for the relevant portion of this statute.

12. *See* text accompanying notes 16-36 *infra*.

13. *See* text accompanying notes 45-123 *infra*.

agreement will be surveyed.[14] Advantages of the various approaches also will be considered and recommendations will be offered.[15]

THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

The statutory basis for requiring a member of a labor union to exhaust internal union remedies before suing the union is found in the proviso[16] included in section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959.[17] That statute provides:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before an administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may 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 officers thereof. . . .[18]

Accordingly, a union cannot limit a member's access to administrative agencies or the courts with one very important exception—the member may be required to first seek relief from within the union.

The proviso that exhaustion may be required leaves some important issues unresolved. First, it does not specify whether it is the union or the judiciary which can establish the exhaustion requirement.[19] Second, it is unclear from the language of the statute what constitute "reasonable hearing procedures" and what circumstances will excuse the exhaustion of internal remedies. The statute states only that the internal review must be within four months of the alleged injury. Third, the proviso does not consider whether the member may be required to exhaust union procedures before bringing a court action against an employer.

The United States Supreme Court considered both the wording and purpose of section 101(a)(4) in *NLRB v. Industrial Union of Marine*

14. *See* text accompanying notes 128-31 & 143-94 *infra*.

15. *See* text accompanying notes 37-44, 124-27, 132-40 & 182-94 *infra*.

16. A proviso is an exception. Cox v. Hart, 260 U.S. 427, 435 (1922).

17. Labor-Management Reporting & Disclosure Act of 1959, § 101(a)(4), 29 U.S.C. § 411(a)(4) (1976) [hereinafter referred to in the text and footnotes as section 101(a)(4)].

18. *Id.* (emphasis added).

19. *See* text accompanying note 29 *infra* for United States Supreme Court dicta regarding this issue.

& Shipbuilding Workers.[20] That case originated because a union member, Edwin D. Holder, had filed a complaint with the National Labor Relations Board[21] alleging that his union[22] had discriminated against him. The union's constitution provided that a member could appeal an adverse decision of the local executive board at the regular meeting of the general membership of the local. If dissatisfied with the decision of the general membership, the member then could appeal to the general executive board and, finally, to the next national convention.[23] Holder brought his complaint to the NLRB without first exhausting these internal remedies.

The union responded by expelling Holder from the union for ignoring the union's exhaustion requirement.[24] Holder appealed his expulsion to the union's general executive board. After the executive board affirmed the local's action, he filed a charge with the NLRB. The NLRB found against the union.[25] The matter then went before the United States Court of Appeals for the Third Circuit which reversed the Board's decision.[26] In reviewing this case, the United States Supreme Court[27] held that a union could not expel a member for filing a charge with the Board without first exhausting internal remedies if the complaint does not concern an internal union matter.[28]

The Supreme Court decision in *Marine & Shipbuilding Workers* has significance beyond answering the question of whether a union may expel a member for failing to exhaust internal union remedies. This case is important for its dicta that the courts, not the unions, have the power to determine if exhaustion will be required.[29] Prior to this decision some courts had stated that such power belonged to the un-

20. 391 U.S. 418 (1968).

21. Hereinafter referred to as the NLRB or the Board.

22. The Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, Local 22.

23. 391 U.S. at 422-23 n.4.

24. Article V, section 5 of the union's constitution provided that a member "shall exhaust all remedies and appeals within the Union, provided by this Constitution, before he shall resort to any court or other tribunal outside of the Union." 391 U.S. at 420-21.

25. 159 N.L.R.B. 1065 (1966). The Board found that the union had violated section 8(b)(1)(A) of the National Labor Relations Act. National Labor Relations Act § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1976). This section of the Act makes it an unfair labor practice for a union to restrain or coerce its employees in exercising their rights under the Act. The Board found that the union had caused Holder's employer to discriminate against him for his involvement in activities protected by the Act.

26. 379 F.2d 702 (3d Cir. 1967), *rev'd*, 391 U.S. 418 (1968).

27. 391 U.S. 418 (1968).

28. *Id.* at 428.

29. *Id.* at 426. The Court stated that the section 101(a)(4) proviso means that "the public tribunals whose aid is invoked *may in their discretion* stay their hands for four months, while the aggrieved party seeks relief within the union." *Id.* (emphasis added).

ions.[30]

Marine & Shipbuilding Workers did not, however, provide a clear guideline as to when courts should require exhaustion if internal union affairs are not involved. The Court implied that if strictly internal matters are in question the member must exhaust available internal procedures before bringing an administrative or court action against the union,[31] but where the issue "touches part of the public domain"[32] the Douglas majority was less explicit. It merely stated that "a court or agency might consider whether a particular [internal union] procedure was reasonable."[33] The Court did not include a clear answer to what constitute reasonable review procedures. Although it described the process available under the constitution of the Industrial Union of Marine and Shipbuilding Workers,[34] it did not explain what makes these procedures reasonable.[35] Further, the Court did not reach the issue of whether a member may be required to exhaust internal procedures before bringing a court action against the employer. Since this is the only United States Supreme Court decision concerning section 101(a)(4),[36] these questions remain without a definitive answer.

THE EXHAUSTION REQUIREMENT AND AN ACTION AGAINST A LABOR UNION

Several factors favor a policy requiring that a member of a labor union seek relief from within the union before bringing a court action against that organization if the complaint can be presented before an

30. *See, e.g.*, Industrial Union of Marine & Shipbuilding Workers v. NLRB, 379 F.2d 702, 708 (3d Cir. 1967), *rev'd*, 391 U.S. 418 (1968); Sheridan v. Carpenters Local 626, 306 F.2d 152, 159-60 (3d Cir. 1962).

31. *See* 391 U.S. at 424.

32. 391 U.S. at 428.

33. *Id.* Justice Harlan, in a concurring opinion agreed that the purpose of the proviso in section 101(a)(4) was to allow a court or administrative agency to decide if exhaustion should be required, but he did not agree that a union may punish a member for bringing a strictly internal question before an outside body. *Id.* at 428-29 (Harlan, J., concurring).

34. *See* text accompanying note 23 *supra*.

35. Similarly, in stating "[t]here cannot be any justification to make the public processes wait until the union member exhausts internal procedures plainly inadequate to deal with all phases of the complex problem concerning employer, union, and employee member," 391 U.S. at 425, the Court does not indicate what type of internal procedures are "plainly inadequate."

36. The year after deciding *Marine & Shipbuilding Workers* the Court considered a case involving exhaustion of contractual and administrative procedures that the complaining employees alleged would prove "absolutely futile." In Glover v. St. Louis-San Francisco Ry., 393 U.S. 324 (1969), the Court stated that "the *attempt* to exhaust contractual remedies . . . is easily satisfied by petitioners' repeated complaints to company and union officials, and no time-consuming formalities should be demanded of them." *Id.* at 331. Although the issue before the Court in *Glover* involved failure to exhaust remedies available under a collective bargaining agreement and through administrative channels, the Court's holding that exhaustion is not required where it would be futile arguably is applicable to exhaustion of internal union procedures by analogy.

impartial body[37] and the union's internal procedures are capable of providing relief.[38] First, if impartial internal review is available, a remedy may be obtained without the expense of court litigation.[39] Second, employing internal union review procedures is consistent with the national policy of encouraging parties to resolve their own disputes.[40] Third, if internal relief is available, further burdening the already overcrowded courts[41] will be avoided.

The procedures contained in the constitution of the United Auto Workers[42] are an example of impartial review provided by internal union regulations. Under the UAW constitution[43] a dissatisfied member ultimately may appeal to a public review board consisting of "impartial persons of good public repute, not working under the jurisdiction of the UAW or employed by the International Union or any of its subordinate bodies."[44]

Typically federal courts have refused to hear breach of fair representation cases unless the member had exhausted available intra-union remedies.[45] However, as will be shown in the discussion that follows, the courts rarely have clearly stated the criteria for determining if exhaustion is required and often have not explained the rationale behind

37. A four-month maximum for hearing such complaints is set by statute. *See* section 101(a)(4) in text accompanying note 18 *supra*.

38. *See* text accompanying notes 42-44 *infra*.

39. Obviously it is less costly to pursue an internal review than engage in a court contest.

40. *See generally* Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 HARV. L. REV. 727, 755-56 (1969); Simpson & Berwick, *Exhaustion of Grievance Procedures and the Individual Employee*, 51 TEX. L. REV. 1179, 1217-18 (1973); Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1086-92 (1951). *See also* Simmons v. Avisco, Local 713, 350 F.2d 1012, 1016 (4th Cir. 1965); Harris v. Int'l Longshoremen's Ass'n, 321 F.2d 801, 805 (3d Cir. 1963); Jenkins v. General Motors Corp., 364 F. Supp. 302, 306 (D. Del. 1973); Hart v. Local 1292, United Bhd. of Carpenters & Joiners, 341 F. Supp. 1266, 1270 (D.N.Y. 1972), *aff'd*, 497 F.2d 401 (2d Cir. 1974); McGraw v. United Ass'n of Journeymen & Apprentices, 216 F. Supp. 655, 660 (D. Tenn. 1963), *aff'd*, 341 F.2d 705 (6th Cir. 1965).

41. For a discussion of the judicial caseload *see* ANNUAL REPORTS OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS. *See also* Lasker, *The Court Crunch: A View from the Bench*, 76 F.R.D. 245 (1978).

42. Hereinafter referred to as the UAW.

43. UNITED AUTO WORKERS CONSTITUTION, art. 32, as cited in Newgent v. Modine Mfg. Co., 495 F.2d 919, 927 (7th Cir. 1974).

44. *See* Parks v. IBEW, 314 F.2d 886 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963). *See also* Note, *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1035 (1963); Note, *Impartial Public Review of Internal Union Disputes: Experiment in Democratic Self-Discipline*, 22 OHIO ST. L.J. 64 (1961).

45. *See, e.g.*, Winter v. Local 639, Int'l Bhd. of Teamsters, 569 F.2d 146 (D.C. Cir. 1977); Newgent v. Modine Mfg. Co., 495 F.2d 919 (7th Cir. 1974); Imel v. Zohn Mfg. Co., 481 F.2d 181 (10th Cir. 1973); Bsharah v. Eltra Corp., 394 F.2d 502 (6th Cir. 1968); Kowalski v. Wisconsin Steel Works, 433 F. Supp. 314 (N.D. Ill. 1977); Mims v. Capitol Printing Ink Co., 428 F. Supp. 12 (D.D.C. 1976); Brookins v. Chrysler Corp., 381 F. Supp. 563 (E.D. Mich. 1974). *But see* Chambers v. Local 639, Int'l Bhd. of Teamsters, 578 F.2d 375 (D.C. Cir. 1978); Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972).

their decisions. The typical opinion has relied on words like "adequate,"[46] "not futile,"[47] and "reasonable"[48] to describe the types of internal union procedures which must be exhausted. Nonetheless, close examination of past decisions reveals that despite the vague language,[49] the courts usually have reached the desirable result.[50] Typically, the federal courts have forestalled action if internal procedures could provide an impartial review of the member's complaint within four months of the alleged injury.

The Language Used by the Courts

No Standard Articulated

The first federal appellate case to consider whether an employee must exhaust internal union remedies before bringing a section 301 action against the union for a breach of its duty of fair representation was *Bsharah v. Eltra Corp.*[51] That case involved the Eltra Corporation's refusal to transfer Jennie Bsharah, an employee, to the factory where all of the company's operations had been moved. At the time the request for a transfer was made Bsharah was physically incapacitated and could not perform her duties.[52] Bsharah responded to the company's refusal to transfer her by bringing a court action against the company and the union. The district court granted the company's and

46. *See, e.g.*, Newgent v. Modine Mfg. Co., 495 F.2d 919 (7th Cir. 1974); Retana v. Apartment, Motel, Hotel & Elevator Operators Union, 453 F.2d 1018 (9th Cir. 1972); Mims v. Capitol Printing Ink Co., 428 F. Supp. 12 (D.D.C. 1976); Brookins v. Chrysler Corp., 381 F. Supp. 563 (E.D. Mich. 1974).

47. *See, e.g.*, Winter v. Local 639, Int'l Bhd. of Teamsters, 569 F.2d 146 (D.C. Cir. 1977); Imel v. Zohn Mfg. Co., 481 F.2d 181 (10th Cir. 1973); Retana v. Apartment, Motel, Hotel & Elevator Operators Union, 453 F.2d 1018 (9th Cir. 1972); Savel v. Detroit News, 435 F. Supp. 329 (E.D. Mich. 1977); Kowalski v. Wisconsin Steel Works, 433 F. Supp. 314 (N.D. Ill. 1977); Mims v. Capitol Printing Ink Co., 428 F. Supp. 12 (D.D.C. 1976); Brookins v. Chrysler Corp., 381 F. Supp. 563 (E.D. Mich. 1974).

48. *See, e.g.*, Chambers v. Local 639, Int'l Bhd. of Teamsters, 578 F.2d 375 (D.C. Cir. 1978).

49. *See, e.g.*, Winter v. Local 639, Int'l Bhd. of Teamsters, 569 F.2d 146 (D.C. Cir. 1977); Newgent v. Modine Mfg. Co., 495 F.2d 919 (7th Cir. 1974); Imel v. Zohn Mfg. Co., 481 F.2d 181 (10th Cir. 1973); Bsharah v. Eltra Corp., 394 F.2d 502 (6th Cir. 1968); Kowalski v. Wisconsin Steel Works, 433 F. Supp. 314 (N.D. Ill. 1977); Mims v. Capitol Printing Ink Co., 428 F. Supp. 12 (D.D.C. 1976); Brookins v. Chrysler Corp., 381 F. Supp. 563 (E.D. Mich. 1974). *But see* Chambers v. Local 639, Int'l Bhd. of Teamsters, 578 F.2d 375 (D.C. Cir. 1978); Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972).

50. *See* text accompanying notes 56, 70-71, 82, 98-100 & 120-25 *infra*.

51. 394 F.2d 502 (6th Cir. 1968). In *Bsharah* both the company and the union were sued, the company for allegedly breaching the collective bargaining agreement and the union for allegedly breaching its duty of fair representation. Naming both the employer and labor union as defendants is typical of most actions of this type. In fact, in Vaca v. Sipes, 386 U.S. 171 (1967), the United States Supreme Court indicated that an action against an employer could not succeed unless the complaining member established that the union had breached its duty of fair representation. *See* 386 U.S. at 186. *See also* 386 U.S. at 203 (Black, J., dissenting); Comment, *Individual Control over Personal Grievances Under Vaca v. Sipes*, 77 YALE L.J. 559 (1968).

52. 394 F.2d at 503.

union's motions for a summary judgment on the grounds that Bsharah did not follow the contractual grievance procedures and that she did not attempt to initiate the internal union review procedures provided by the union's constitution and by-laws.[53]

The United States Court of Appeals for the Sixth Circuit affirmed the district court decision without any explanation.[54] With regard to the exhaustion of internal union procedures issue, the court merely stated, "In sustaining the union's motion for summary judgment, the [trial] court held that, assuming the International Union owed a duty to protect appellant, she failed to allege or show any attempt to inititate her intra-union remedies prescribed by the constitution and by-laws of the International Union and, in this holding, we concur."[55] This statement offered no indication of when exhaustion should be required and why.

Despite this silence, examination of the facts in *Bsharah* indicates that the court was requiring exhaustion under circumstances which would allow Bsharah to present her case to an impartial tribunal. Bsharah's union, the UAW, provided a review procedure which could culminate in a hearing before prominent citizens having no connection with either the union or company.[56]

Must Exhaust Where Internal Remedies Are "Adequate"

The United States Court of Appeals for the Seventh Circuit decided the exhaustion issue presented in *Newgent v. Modine Manufacturing Co.*[57] by looking to whether the available union procedures were adequate.[58] In that case suit was brought by Donald Newgent, an em-

53. *Id.*
54. *Id.* The entire appellate court opinion was only six paragraphs.
55. *Id.*
56. *See* text accompanying notes 42-44 *supra*.
57. 495 F.2d 919 (7th Cir. 1974).
58. *Accord*, Mims v. Capitol Printing Ink Co., 428 F. Supp. 12, 13 (D.D.C. 1976); Brookins v. Chrysler Corp., 381 F. Supp. 563, 565 (E.D. Mich. 1974).

In Retana v. Apartment, Motel, Hotel & Elevator Operators Union, 453 F.2d 1018 (9th Cir. 1972), the United States Court of Appeals for the Ninth Circuit also indicated that the adequacy of available remedies should be considered in deciding if exhaustion is required. *Id.* at 1027-28. In *Retana* an action had been brought by a hotel maid who alleged that she had been wrongfully dismissed from her job. The district court dismissed the action for wrongful discharge on the ground that remedies under the collective bargaining agreement had not been exhausted. The action for breach of the duty of fair representation was dismissed for want of jurisdiction. *Id.* at 1021.

The United States Court of Appeals for the Ninth Circuit reversed the district court on these points, but remanded the case for a determination of whether the suit should have been dismissed because the fired employee had not first exhausted internal union remedies. Specifically, the trial court was to determine whether the internal remedies were adequate to provide the relief requested and whether there had been a justifiable reason for failing to exhaust. *Id.* at 1027-28. The court, in doing so, gave no indication of what makes a procedure adequate.

ployee who was dismissed from his position at Modine Manufacturing Company for failing to report to work.[59] Newgent's union, United Auto Workers Local 530, filed a grievance on Newgent's behalf, but company officials refused to hear it and would not submit the matter to arbitration on the grounds that the grievance was untimely.[60] The union president, Robert Hluchan, then told Newgent that further pursuit of the grievance would require a lawsuit and that approval of union membership was necessary if the union were to bring an action on Newgent's behalf.

According to Newgent, Hluchan advised him that to seek approval of union members he would have to post a $50,000 bond and that to take any further internal union steps would be " 'senseless and fruitless.' "[61] Newgent said Hluchan gave him the union's file of his grievance and advised him to file suit against the union and Modine.[62] Newgent admittedly failed to exhaust available internal union remedies before beginning the court action,[63] but he defended this failure on the grounds that he was unaware of the details of the internal appellate procedures regarding grievances and that he was relying on Hluchan's directives.[64] Both the district and appellate courts rejected this argument.[65]

In holding that exhaustion was required, the United States Court of Appeals for the Seventh Circuit employed a two-prong test saying, in effect, that exhaustion is required if use of internal remedies is mandatory and the available procedures are adequate.[66] The constitution of the UAW clearly made exhaustion of internal remedies mandatory before a member could seek judicial or administrative relief.[67] With regard to whether the internal procedures were adequate,

59. 495 F.2d at 920-21.
60. *Id.* at 921-22.
61. *Id.* at 922.
62. *Id.*
63. *Id.* at 927.
64. *Id.* The court rejected the argument that lack of awareness of internal procedures or reliance on the statement of a union official excuses failure to resort to the internal review process before bringing a court action. *Id.* at 928 (citing Donahue v. Acme Markets, Inc., 54 Lab. Cas. 17,388 (E.D. Pa. 1966)).
65. 495 F.2d at 920.
66. *See* 495 F.2d at 927. The court stated, "Where . . . there is no question as to the adequacy and mandatory nature of the intra-union remedies it is well settled that an exhaustion of the remedies is an indispensable prerequisite to the institution of a civil action against a union." *Id.*
67. Article 32, section 13 of the UAW constitution provides:

> 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.

495 F.2d at 927.

the court gave a fairly detailed description of the review procedures provided under the 1966 UAW constitution. It noted that this constitution allowed a dissatisfied member to appeal an adverse decision in the following order: to the membership of the local; to the international executive board; to the constitutional convention of the international union; and, finally, in cases where it is alleged that the grievance was improperly processed because of fraud, discrimination or collusion with management, to a public review board.[68] The court stated that it had been judicially recognized that these procedures were "adequate, fair and reasonable,"[69] but it failed to explain what makes them so. Thus, the court did not articulate a meaningful standard for when exhaustion is required.

Nonetheless, a careful examination of this case indicates that the court was, in fact, requiring exhaustion where internal procedures provided for an appeal to an impartial party. As in *Bsharah v. Eltra Corp.*,[70] the action in *Newgent* was against the UAW, a union affording dissatisfied members review by an impartial panel.[71]

Must Exhaust Where Internal Remedies Are "Not Futile"

Some courts have looked to whether appeal through internal procedures would be futile when confronted with the question of whether exhaustion of internal union remedies was required.[72] One case decided by the United States Court of Appeals for the Tenth Circuit, *Imel v. Zohn Manufacturing Co.*,[73] involved employees who claimed that they were being underpaid by the company.[74] These employees al-

68. 495 F.2d at 927.

69. *Id.*

70. 394 F.2d 502 (6th Cir. 1968). *See* text accompanying notes 51-56 *supra*.

71. *See* text accompanying notes 42-44 *supra*.

72. In addition to the cases discussed herein, *see* Retana v. Apartment, Motel, Hotel & Elevator Operators Union, 453 F.2d 1018 (9th Cir. 1972); Savel v. Detroit News, 435 F. Supp. 329, 333 (E.D. Mich. 1977); Kowalski v. Wisconsin Steel Works, 433 F. Supp. 314 (N.D. Ill. 1977); Mims v. Capitol Printing Ink Co., 428 F. Supp. 12, 13 (D.D.C. 1976); Brookins v. Chrysler Corp., 381 F. Supp. 563 (E.D. Mich. 1974).

Arguably in dicta in Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972), the United States Court of Appeals for the Eighth Circuit also used the approach that exhaustion will be excused if resort to internal remedies would be futile. In that case, the court denied union reliance on an exhaustion defense stating:

> Resort to the rank and file under the intra-union appeal procedure presented an unlikely relief for the plaintiffs. The numerical superiority of men over women at the plant (1,958 to 482), the fact that the issue raised the vulnerability of the men in the "A" jobs and the opposition of the Union's higher echelon to the women employees' request all demonstrate that placing the question before the rank and file would have been a losing gesture.

Id. at 316 (citations omitted). *See* note 144 *infra* for a more complete discussion of the facts of this case.

73. 481 F.2d 181 (10th Cir. 1973).

74. *Id.* at 182.

leged that they had sought to file a grievance through procedures established by the collective bargaining agreement but that the union and employer improperly and unlawfully refused to process it.[75] The trial court granted the union's motion for a summary judgment on the ground that the employees had failed to exhaust their internal union remedies.[76]

The United States Court of Appeals for the Tenth Circuit affirmed the district court's summary judgment in favor of the union stating, "The by-passing of the carefully enunciated review measures, absent a clear and positive showing of *futility*, can only promote disharmony in the field of labor-management relations."[77] Like the United States Court of Appeals for the Seventh Circuit in *Newgent v. Modine Manufacturing Co.*,[78] the court described the internal review system. The court noted that a dissatisfied member could appeal first to the local union, then to a joint board of the region and finally to the national union. In addition, a member could appeal to the general executive board of the national without following the intermediate procedures.[79] Use of these internal appeals was required before a member could bring a court action against the union.[80]

Imel sought to excuse his failure to follow these procedures on the ground that the local and joint board had prior knowledge of the complaint.[81] The court rejected this excuse because no allegations were made that the officers of the national had such knowledge and no proof had been introduced that resort to the national would have been futile.[82] This decision would have presented a clear standard for determining when exhaustion is required if the court had gone on to state that the availability of review by an impartial panel was the deciding factor.

The United States Court of Appeals for the District of Columbia Circuit in *Winter v. Local 639, International Brotherhood of Teamsters*,[83] also looked to whether exhaustion through internal union remedies would be futile in deciding whether to allow an immediate court review. *Winter* involved a seniority dispute in which an employee, Edward A. Winter, alleged that seniority should have been

75. *Id.*
76. *Id.*
77. *Id.* at 184 (emphasis added).
78. 495 F.2d 919 (7th Cir. 1974). *See* text accompanying notes 57-71 *supra*.
79. 481 F.2d at 183.
80. *Id.*
81. *Id*
82. *Id.*
83. 569 F.2d 146 (D.C. Cir. 1977).

awarded on a company-wide, rather than plant-wide, basis. In 1971 Winter had filed a grievance on this issue, but after several meetings with management the union had decided not to pursue the issue. At this time Winter neither protested nor appealed the union's decision. Three years later he filed a similar grievance and then failed to attend a meeting with management which the union had arranged. In light of Winter's failure to attend the meeting and the fact that this grievance was really a reinstatement of the earlier complaint, the union decided not to further process the second grievance.[84]

The Teamsters' constitution provided several remedies for dissatisfied members and required that these be used before the member could seek relief elsewhere.[85] Internal review was available by appealing to the local executive board, then to the general executive board and finally to the president of the international union.[86] Instead of pursuing these internal remedies, Winter brought a court action.[87]

The district court granted a summary judgment to both the union and the company on the ground that Winter had not exhausted internal union remedies.[88] The United States Court of Appeals for the District of Columbia Circuit affirmed these summary judgments.[89] In doing so the appellate court implied[90] that exhaustion of internal union procedures is not a prerequisite to a section 301 action where pursuing them would be futile.[91] The court went on to state that exhaustion is futile if the internal procedures are inadequate to provide the relief requested,[92] and if union officials are so hostile that the complaining member could not get a fair hearing.[93] This statement comes closer to presenting a meaningful test than the language in other opinions.

The statement that internal procedures are futile where the union's constitution does not provide an "adequate procedural route to the relief requested"[94] would be clear were it not for the court's use of the word adequate. The use of the adjective suggests that the court is say-

84. *Id.* at 148.
85. *Id.* at 148-49.
86. *Id.* at 149.
87. *Id.*
88. *Id.* at 148.
89. *Id.*
90. Although the court does not directly state that a union member need not exhaust internal union remedies where to do so would be futile, it discussed two reasons why exhaustion could be futile. *Id.* at 149-50. In discussing the circumstances under which exhaustion could be futile, the court implied that where one or both of these situations are present the employee need not resort to internal procedures.
91. *See* 569 F.2d at 149.
92. 569 F.2d at 149.
93. *Id.* at 150.
94. *Id.* at 149.

ing, simply, that the procedure must be able to give the member what is desired. In stating that exhaustion of internal remedies is futile where "union officials are so hostile to a worker he could not hope to get a fair hearing regardless of the procedures available,"[95] the court considered how the existence of union hostility might be proven. Such hostility could either be inferred, the court said, from circumstances surrounding the grievance process or established by concrete evidence of personal animus.[96] The main shortcoming with this analysis is that it failed to recognize that some procedures might afford the member a fair hearing even if the alleged hostility existed. For example, where appeal to an impartial party is available, a member has the possibility of a fair hearing.[97] Nonetheless, the exhaustion test described in the *Winter* opinion is a clearer standard than offered in most other decisions.

In *Winter* the court found that Winter could have obtained some of the relief he sought through internal union procedures.[98] Further, the court did not find a clear showing of union hostility.[99] Consequently, the court concluded that Winter was required to exhaust internal remedies before suing the union.[100] Since he could receive an impartial hearing from internal union procedures, immediate judicial review was unnecessary.

Must Exhaust Where Internal Remedies Are "Reasonable"

Two months after deciding *Winter v. Local 639*,[101] the United States Court of Appeals for the District of Columbia Circuit issued another opinion regarding the exhaustion requirement. *Chambers v. Local 639, International Brotherhood of Teamsters*,[102] like *Winter*, involved a seniority dispute. The seniority issue in *Chambers* was whether the collective bargaining agreement required merger of the seniority lists at two separate plants. The employees bringing the action

95. *Id.*
96. *Id.* at 149-50.
97. The constitution of the UAW provides an elaborate internal review system which ultimately allows a dissatisfied member to present a case before a non-partisan panel that has no connection with the union. UNITED AUTO WORKERS CONSTITUTION, art. 32. *See* text accompanying notes 42-44 *supra*. Under a constitution such as this, the member has the possibility of a fair hearing even if union hostility is present. In discussing the exhaustion requirement for a suit against the union, the *Winter* court did not consider the provisions of the UAW constitution. The court, however, did consider them in discussing the exhaustion of internal union remedies in a suit against the employer. 569 F.2d at 151 n.26.
98. 569 F.2d at 149.
99. *Id.* at 149-50.
100. *Id.* at 150.
101. 569 F.2d 146 (D.C. Cir. 1977).
102. 578 F.2d 375 (D.C. Cir. 1978).

had been laid off and sought to bump workers with less seniority who were employed at the second plant.

Although the union appeared to support these employees[103] when they filed their initial grievance,[104] later, at a hearing before the Maryland-District of Columbia Joint Area Committee, the union testified against dovetailed seniority.[105] The employees were not notified of this hearing and did not learn of the result until after they had instituted the lawsuit.[106]

The district court granted summary judgment to the union on the grounds that internal union remedies had not been exhausted.[107] The appellate court vacated this decision[108] stating that the "underlying test"[109] to determine whether a union member must exhaust internal union remedies before bringing a section 301 action was whether the exhaustion requirement was reasonable[110] in light of the facts and circumstances surrounding the case.[111] In deciding that the facts and circumstances in *Chambers* made an exhaustion requirement unreasonable, the court looked to the merit of the allegation that the union breached its duty of fair representation,[112] the type of internal review procedures available[113] and the fact that an employment relation rather than internal union affairs was in question.[114] The court concluded that the facts presented a fairly strong claim that the union breached its duty of fair representation. It noted that the union had reached a decision adverse to Chambers which the employer was willing to implement and that recourse to internal procedures "could not conceivably change that opinion."[115]

Consideration of whether a breach of fair representation claim is meritorious and whether an employment relation rather than internal union issue is involved are not the proper criteria for determining when

103. *Id.* at 378.
104. *Id.* at 377.
105. *Id.* at 378.
106. *Id*
107. *Id.* at 379, 383.
108. *Id.* at 388.
109. *Id.* at 386.
110. Thus, the United States Court of Appeals for the District of Columbia Circuit adopted the standard used by the United States Supreme Court in NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, 428 (1968). *See* text accompanying notes 20-36 *supra*. Just as the Court in *Marine & Shipbuilding Workers*, the circuit court in *Chambers* failed to provide a clear test to determine what would be considered reasonable.
111. 578 F.2d at 388.
112. *Id.* at 383.
113. *Id.* at 383-84.
114. *Id.* at 387.
115. *Id.*

exhaustion is reasonable. A purpose of the exhaustion requirement is to allow a union to rectify its own errors.[116] Where union procedures provide the member an impartial review, the merits of the fair representation claim can be resolved without court interference and should not be a factor in determining whether exhaustion is reasonable.[117] Consideration of whether an employment relation is involved is not helpful because situations involving a union's breach of its duty of fair representation are never strictly internal union matters.[118]

In looking to the internal union remedies available, the court in *Chambers* concluded, "The seniority-roster-merger question has gone too far, and involves the company too deeply, for the plaintiff-employees to expect any reasonable chance of relief from subsequent internal union complaint proceedings."[119] Had the court been more precise about the meaning of "gone too far" and "involves the company too deeply," a meaningful standard for the exhaustion requirement might have been the result. As presented, *Chambers* did not articulate a viable test for determining reasonableness.

In *Chambers* the court was evaluating the same union provisions as in *Winter*[120] but came to a different result. In *Winter* the court found that the member could get a fair hearing through the internal review process,[121] whereas in *Chambers* it concluded he could not because of the history of union hostility on the issue.[122] Whether an impartial review was possible was the deciding factor in both cases.[123]

116. *See* Simmons v. Avisco, Local 713, 350 F.2d 1012, 1016 (4th Cir. 1965); Harris v. Int'l Longshoremen's Ass'n, 321 F.2d 801, 805 (3d Cir. 1963); Jenkins v. General Motors Corp., 364 F. Supp. 302, 306 (D. Del. 1973); Hart v. Local 1292, United Bhd. of Carpenters & Joiners, 341 F. Supp. 1266, 1270 (D.N.Y. 1972), *aff'd*, 497 F.2d 401 (2d Cir. 1974); McGraw v. United Ass'n of Journeymen & Apprentices, 216 F. Supp. 655, 660 (D. Tenn. 1963), *aff'd*, 341 F.2d 705 (6th Cir. 1965).

117. At the end of the opinion in *Chambers* the court did state that it was not resolving the fair representation issue. 578 F.2d at 388.

118. To be a breach of the union's duty of fair representation a party in addition to the union must be involved.

119. 578 F.2d at 387.

120. 569 F.2d 146 (D.C. Cir. 1977). *See* text accompanying notes 83-100 *supra*.

121. *Id* at 149.

122. 578 F.2d at 387.

123. In *Chambers* the court stated that whether an employment relation rather than internal union affairs was being questioned was a factor in its decision that the member need not exhaust internal union remedies. *Id*. at 387. The court also considered the merits of the breach of fair representation claim and the type of union procedures available. *Id*. at 383-88. Thus, the nature of the alleged injury was only one of the "facts and circumstances" taken into account. *Id*. at 386, 388. Further, two months before *Chambers*, in Winter v. Local 639, Int'l Bhd. of Teamsters, 569 F.2d 146 (D.C. Cir. 1977), the same court of appeals held that the union member must exhaust internal union remedies without considering whether an employment relation was being questioned. 569 F.2d at 152. The issue before the court in *Winter* did involve an employment-related question. The basis of Winter's complaint was that the union failed to process his grievance involving seniority determination. 569 F.2d at 148. Despite the statement in *Chambers* that the

Recommendations for Future Decisions

Decisions thus far on the exhaustion question do, in fact, make sense in light of policy considerations.[124] Without clearly explaining how they have arrived at their holdings, courts have required a member to exhaust intra-union procedures where (1) impartial review is available within four months of the alleged wrong, and (2) the reviewing panel has the power to provide relief.[125]

In the future, instead of using words such as reasonable, adequate, and not futile, the courts should clearly set forth these two conditions as the criteria for when the union member will be required to exhaust union remedies. If either or both of the prerequisites are lacking, then the judiciary should allow an immediate section 301 action.[126] The courts should not concern themselves either with the merits of the employee's claim against the union for breach of the duty of fair representation or with the type of grievance involved.[127]

THE EXHAUSTION REQUIREMENT AND AN ACTION AGAINST AN EMPLOYER

In contrast to the general consensus among the federal courts that an employee must exhaust internal union remedies before suing a union, courts have not agreed whether exhaustion of internal union remedies is required in order for an action to be brought against an employer for violating a collective bargaining agreement.[128] Federal appellate courts generally have used a contract analysis in deciding this issue.[129] They have reasoned that an employer who has not entered into an agreement requiring exhaustion of internal union remedies has no basis for relying on an exhaustion defense.[130] Some district courts,

type of issue involved was a factor in determining whether internal remedies must be exhausted, the United States Court of Appeals for the District of Columbia Circuit does not treat this factor as decisive.

124. *See* text accompanying notes 37-41 *supra*.

125. *See* text accompanying notes 51-123 *supra*.

126. An alternative to clearer judicial standards is for Congress to pass legislation requiring exhaustion if review by an impartial party is available.

127. *See* text accompanying notes 116-18 *supra*.

128. *Compare* Winter v. Local 639, Int'l Bhd. of Teamsters, 569 F.2d 146 (D.C. Cir. 1977); Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977); Orphan v. Furnco Constr. Corp., 466 F.2d 795 (7th Cir. 1972); Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972) *with* Alridge v. Ludwig-Honold Mfg. Co., 385 F. Supp. 695 (E.D. Pa. 1974); Brookins v. Chrysler Corp., 381 F. Supp. 563 (E.D. Mich. 1974); Imbrunnone v. Chrysler Corp., 336 F. Supp. 1223 (E.D. Mich. 1971); Harrington v. Chrysler Corp., 303 F. Supp. 495 (E.D. Mich. 1969).

129. *See, e.g.*, Winter v. Local 639, Int'l Bhd. of Teamsters, 569 F.2d 146 (D.C. Cir. 1977); Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977); Orphan v. Furnco Constr. Corp., 466 F.2d 795 (7th Cir. 1972).

130. Sometimes, however, it has been unclear what the appellate courts held or what reason-

on the other hand, have made the exhaustion defense available to an employer in the same way it is to a union.[131]

In light of the United States Supreme Court decision in *Vaca v. Sipes*[132] and other general policy considerations,[133] the preferable approach is to apply the same rules governing a suit against a labor union[134] when the action is against an employer. In *Vaca* the Court indicated that in a section 301 action against an employer for violating a collective bargaining agreement, it must be established that the union breached its duty of fair representation.[135] To dismiss an action against the union[136] but allow it to continue against the employer places an unfair burden on the employer. If the union will escape liability it might have no incentive to cooperate with management in establishing that it did not breach its duty of fair representation. Thus, the complaining member might be able to present a convincing argument that the union breached its duty when, in fact, it did not.

Further, if the union will have no liability, collusion between the union and the member might be encouraged. The member might agree to sue only the employer in return for union help in establishing

ing they used in deciding this issue. For example, in Bsharah v. Eltra Corp., 394 F.2d 502 (6th Cir. 1968), the United States Court of Appeals for the Sixth Circuit in a six paragraph per curiam opinion found that the employee had failed to establish exhaustion of internal union remedies and that "[o]ther contentions advanced by the appellant [the employee] are not meritorious." *Id.* at 503. The published opinion does not indicate what other points were alleged by the employee. Therefore, it is uncertain if the court found that the employee must exhaust internal union remedies before bringing suit against the employer. Nevertheless, *Bsharah* has been cited as support for the proposition that an employer may rely on an exhaustion defense. *See, e.g.*, Simpson & Berwick, *Exhaustion of Grievance Procedures of the Individual Employee*, 51 TEX. L. REV. 1179, 1215 (1973).

In Retana v. Apartment, Motel, Hotel & Elevator Operators Union, 453 F.2d 1018 (9th Cir. 1972), the United States Court of Appeals for the Ninth Circuit remanded the case because the record was deemed insufficient to determine whether the internal review procedures could provide an adequate remedy and whether the employee had a sufficient excuse for failing to exhaust internal remedies before bringing an action against the union. In dicta the court stated, "Failure to exhaust internal union remedies could not be urged by the employer as a defense in a suit by the employee for wrongful discharge," but the court's reasoning behind this statement was not given. *Id.* at 1027 n.16 (citing Brady v. Trans World Airlines, 401 F.2d 87, 102 (3d Cir. 1968)). *See* note 58 *supra* for a more complete discussion of the facts of this case.

131. *See, e.g.*, Alridge v. Ludwig-Honold Mfg. Co., 385 F. Supp. 695 (E.D. Pa. 1974); Brookins v. Chrysler Corp., 381 F. Supp. 563 (E.D. Mich. 1974); Imbrunnone v. Chrysler Corp., 336 F. Supp. 1223 (E.D. Mich. 1971); Harrington v. Chrysler Corp., 303 F. Supp. 495 (E.D. Mich. 1969).

132. 386 U.S. 171 (1967).

133. *See* text accompanying notes 138-40 *infra*.

134. *See* text accompanying notes 37-41 *supra*.

135. *See* 386 U.S. at 186. *See also* 386 U.S. at 203 (Black, J., dissenting); Comment, *Individual Control over Personal Grievances Under Vaca v. Sipes*, 77 YALE L.J. 559 (1968).

136. In some cases only the employer was sued. *See, e.g.*, Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977); Orphan v. Furnco Constr. Corp., 466 F.2d 795 (7th Cir. 1972). Bringing an action against only the employer is unfair for the same reasons applicable to a situation where the union also is named as a defendant and charges against the union are dismissed but the action is allowed to continue against the employer.

that there was a breach of the duty of fair representation. Such an arrangement would benefit the union because it would not have the potential liablility it would have if it were named as a defendant. The employee would profit because, with the union's assistance in establishing a breach of the duty of fair representation, a winning case against the employer might be possible.

In addition to these considerations, general policy arguments applicable to a suit against a union are relevant to an action against an employer.[137] A policy requiring that internal union procedures be exhausted before a member can turn to the courts for relief is sound because it may save the expense involved in litigation,[138] because it is in keeping with the national policy of encouraging parties to resolve their own disputes[139] and because it may avoid further burdening the already overcrowded courts.[140]

Generally the result of appellate court decisions has been consistent with the preferable policy of requiring exhaustion if impartial review is possible under internal union procedures. Even though these courts, using contract analysis,[141] have allowed an immediate section 301 action, they have only done so in cases where impartial review was not available through internal procedures.[142] The danger in these appellate court decisions is that strict application of a contract analysis, disregarding all other factors, could lead to the wrong result. Under a per se rule that if the employer has not entered into an agreement with the employees requiring exhaustion the employer cannot rely on an exhaustion defense, the employee might be able to bring a section 301 action despite the existence of internal procedures affording impartial review.

137. *See* text accompanying notes 37-41 *supra*.

138. *See* note 39 *supra*.

139. *See generally* Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 HARV. L. REV. 727, 755-56 (1969); Simpson & Berwick, *Exhaustion of Grievance Procedures and the Individual Employee*, 51 TEX. L. REV. 1179, 1217-18 (1973); Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1086-92 (1951). *See also*, Simmons v. Avisco, Local 713, 350 F.2d 1012, 1016 (4th Cir. 1965); Harris v. Int'l Longshoremen's Ass'n, 321 F.2d 801, 805 (3d Cir. 1963); Jenkins v. General Motors Corp., 364 F. Supp. 302, 306 (D. Del. 1973); Hart v. Local 1292, United Bhd. of Carpenters & Joiners, 341 F. Supp. 1266, 1270 (D.N.Y. 1972), *aff'd*, 497 F.2d 401 (2d Cir. 1974); McGraw v. United Ass'n of Journeymen & Apprentices, 216 F. Supp. 655, 660 (E.D. Tenn. 1963), *aff'd*, 341 F.2d 705 (6th Cir. 1965).

140. *See* note 41 *supra*.

141. *See, e.g.*, Winter v. Local 639, Int'l Bhd. of Teamsters, 569 F.2d 146 (D.C. Cir. 1977); Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977); Orphan v. Furnco Constr. Corp., 466 F.2d 795 (7th Cir. 1972).

142. *See* text accompanying notes 159-63, 171-72 & 179-81 *infra*.

The Contract Approach

The United States Court of Appeals for the Seventh Circuit in *Orphan v. Furnco Construction Corp.*[143] was the first appellate court to explicitly[144] apply contract analysis to the question of whether an employer may rely on an exhaustion defense. In *Orphan* a class action was brought against the Furnco Construction Corporation for allegedly violating the collective bargaining agreement by underpaying the employees, discriminating against them in hiring and depriving them of work on certain days.[145] The union was not joined as a defendant[146] even though establishment of the union's breach of its duty of fair representation was necessary for the action against the employer to be successful.[147]

The district court dismissed the complaint[148] for failure to state a claim upon which relief could be granted[149] because the employees had failed to file proper grievances, they had not alleged exhaustion of intra-union remedies, their allegation that the union had breached its duty of fair representation was facially unsupportable and the union had the power to screen grievances.[150] Although the United States Court of Appeals for the Seventh Circuit agreed that the grievances in question were subject to procedures made exclusive under the contract[151] and that the union did have the power to screen grievances,[152] it reversed the district court's decision. The appellate court held that the facts did not warrant dismissal of the breach of fair representation claim[153] and that the employer could not rely on an exhaustion de-

143. 466 F.2d 795 (7th Cir. 1972).

144. The United States Court of Appeals for the Eighth Circuit had earlier adopted a similar approach in Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972). In that case two female employees alleged that their employer, the Rath Packing Company, had breached the collective bargaining agreement in failing to reclassify certain jobs, making them available to women and, alternatively, for failing to assign them to jobs to which they were entitled based on their seniority and qualifications. An action was also brought against their union, Local 46 of the United Packinghouse, Food and Allied Workers, for failing to adequately process their grievances. The district court found these claims to be meritorious. *Id.* at 314.

In affirming the trial court's decision, the United States Court of Appeals for the Eighth Circuit held that the company could not rely on an exhaustion defense because "[t]he question of exhaustion of internal Union procedures is the Union's concern, not the Company's." *Id.* at 315. Although the court did not state that it was employing a contract analysis, such an approach may be implied from this statement.

145. 466 F.2d at 797.

146. *Id.* at 796-97.

147. Vaca v. Sipes, 386 U.S. 171, 181-88 (1967). *See* text accompanying notes 132-35 *supra.*

148. 325 F. Supp. 1220 (N.D. Ill. 1971).

149. FED. R. CIV. P. 12(b)(6).

150. 325 F. Supp. at 1221-23.

151. 466 F.2d at 798-99.

152. *Id.* at 802.

153. *Id.* at 802-04.

fense.[154]

In discussing the exhaustion issue, the appellate court distinguished between provisions of a collective bargaining agreement and procedures which are found in a union's internal by-laws and constitution. According to the court, an employer may rely on an exhaustion defense where employees failed to employ provisions of the collective bargaining agreement but not when the procedures involved are provided internally by the union.[155] The court found that internal union procedures require a different result because the employer had not bargained for adherence to union procedures and had no control over compliance with them.[156]

The court went on to say that an employer may use the employee's failure to exhaust internal union remedies as evidence that the union had not breached its duty of fair representation. It stated:

> All this does not mean that the employer may not raise the plaintiff's failure to observe the by-law requirement as a defense. It is clearly entitled to raise that failure as a defense against the plaintiff's charge that the Union breached its duty of fair representation, a charge that the plaintiffs must prove before they can reach the merits of their breach of contract suit. Certainly the plaintiffs are entitled to no advantage in this regard, because they failed to join the Union as a defendant, suing only the employer. If the Union would be entitled to defend itself on the basis that the plaintiffs did not file timely and proper grievances so that it was not obligated to take them up, the employer should be able to advance that same counter to the plaintiffs' unfair representation claim.[157]

This statement that the employee should be given no advantage because only the employer was sued is correct, but the court's approach does not solve the problem. If the union is not a defendant, either because suit was not brought against the union or because the action against the union was dismissed, an employer's ability to establish that the union did not breach its duty of fair representation is diminished.[158] To avoid placing this unfair disadvantage on an employer, the union should be joined as a defendant.

The court considered and rejected Furnco Construction Corporation's argument that allowing it to use an exhaustion defense would facilitate the national policy favoring arbitration.[159] It gave three reasons for this decision. First, it concluded that the intra-union remedy

154. *Id.* at 799-802.
155. *See* 466 F.2d at 799-800.
156. 466 F.2d at 800.
157. *Id.*
158. *See* text following note 136 *supra*.
159. 466 F.2d at 801-02.

in question was not designed to provide relief to an injured member, but rather was established to begin a criminal-type prosecution of a union official accused of wrong-doing.[160] Second, the court did not find exhaustion of internal union remedies to be mandatory under the internal union rules.[161] Third, it stated that there was reason to believe that use of the internal union procedures would be futile.[162] Thus, even if the court had applied the same exhaustion requirement generally used in a suit against a union,[163] exhaustion would not have been required in *Orphan*.

Whether the court's response to Furnco's policy argument can be considered dicta that an employer, under certain circumstances, could rely on an exhaustion defense even if the employer was not party to an agreement requiring exhaustion is unclear from the *Orphan* opinion. A later case decided by the same court, *Harrison v. Chrysler Corp.*,[164] indicates that the contract analysis was not meant to be a per se rule that an employer may never rely on an exhaustion defense.

In *Harrison* an employee, Terrence J. Harrison, had been discharged from his job with the Chrysler Corporation for allegedly falsifying a production count.[165] Harrison attempted to regain his position through union grievance procedures. Eventually, he was reinstated but denied back pay. Dissatisfied with this result, he brought suit against Chrysler.[166] The district court granted a summary judgment for Chrysler on the grounds that Harrison had not sought relief through internal union procedures before suing.[167]

The United States Court of Appeals for the Seventh Circuit reversed the district court.[168] After repeating the same type of contractual analysis employed by the court in *Orphan*, it included dicta regarding an employer's reliance on an exhaustion defense. The court stated that where the collective bargaining agreement provides that the union has the exclusive power to bring an employee's claim, internal union remedies may be a method by which an employee may insure fair representation. If internal union procedures could result in a reversal of the union's position and a grievance, formerly denied, could

160. *Id.*
161. *Id.* at 802.
162. *Id.*
163. *See* text accompanying notes 49-123 *supra*.
164. 558 F.2d 1273 (7th Cir. 1977).
165. *Id.* at 1275.
166. As in Orphan v. Furnco Constr. Corp., 466 F.2d 795 (7th Cir. 1972), in *Harrison* the union was not named as a defendant.
167. 558 F.2d at 1275.
168. *Id.*

be reinstated, the *Harrison* court indicated it would require the employee to exhaust internal union remedies before suing the employer unless use of such internal procedures would be futile.[169]

Arguably *Harrison* represents an expansion rather than abandonment of the contract analysis. The court would allow an employer to rely on an exhaustion defense only where the employee has an obligation under the collective bargaining agreement to resort to union review procedures if dissatisfied.[170] Thus, the employer's contractual right to rely on an exhaustion defense is found in the collective bargaining agreement.

In *Harrison* the court found that Chrysler could not rely on an exhaustion defense because even if Harrison were to win an appeal within the union, the union did not have the power to reinstate the grievance.[171] The complaint already had been reviewed by an appeal board,[172] and the written decision of this board was binding on all parties. Even if the union were to agree it had not represented Harrison fairly, it would have been powerless to reinstate the grievance. Not requiring exhaustion in *Harrison* makes sense because the internal review procedures could not correct the wrong, not because the contract analysis mandated this result.

Contract analysis also was used by the United States Court of Appeals for the District of Columbia Circuit. In *Winter v. Local 639*[173] the court stated, "[T]he union constitution, which provides for the internal remedies, is a 'contract' only between the union and its members, and the employer cannot avail himself of the union's contractual defense."[174] The court found that the union[175] could rely on an exhaustion defense,[176] but held that the employer could not because he was not party to the contract between the union and its members.[177]

The court then went on to consider the implication in *Orphan v. Furnco Construction Corp.*[178] that under certain circumstances an em-

169. *Id.* at 1278-80. Judge Fairchild, in a concurring opinion, stated that he "prefer[s] not to speculate as to whether there are any 'limited circumstances' under which an employer may predicate a defense on the employee's failure to exhaust intraunion remedies." *Id.* at 1280 (Fairchild, J., concurring).

170. *See* 558 F.2d at 1279.

171. 558 F. 2d at 1279.

172. *Id.*

173. 569 F.2d 146 (D.C. Cir. 1977). *See* text accompanying notes 83-100 *supra* for a more complete discussion of this case.

174. 569 F.2d at 150.

175. In *Winter*, unlike *Orphan*, both the employer and the union were named as defendants.

176. 569 F.2d at 150. *See* text accompanying notes 88-100 *supra*.

177. 569 F.2d at 150-51.

178. 466 F.2d 795, 801-02 (7th Cir. 1972). *See* text accompanying notes 159-63 *supra*.

ployer may rely on an exhaustion defense. In concluding that these conditions were not present in *Winter*, the court stated:

> The procedures at issue here, significantly, are quite similar to those at issue in *Orphan*: the Teamsters' constitution likewise provides no procedures for appealing adverse grievance decisions, but only trial-type procedures for prosecuting offending union members. Even under the *Orphan* dictum, therefore, there is no circuit court authority for making the defense of failure to exhaust union remedies available to the employer on the facts of this case.[179]

This reasoning is inconsistent and troubling. In dismissing the action against the union because intra-union remedies had not been exhausted, the court had found that pursuit of these remedies would not be futile.[180] Nevertheless, in considering the employer's possible reliance on the same defense the court concluded that the prospect for relief under the procedures available was sufficiently uncertain to make the exhaustion defense unavailable.[181]

Under a strict contract analysis there is a per se rule that, unless the employer had entered into an agreement with the employees that mandated exhaustion of internal union procedures before a court action could be started, an employer can never rely on an exhaustion defense. A literal application of the contract approach has certain advantages. If the employer can never claim that an employee's action must fail because there was not exhaustion of internal union remedies, all parties involved have the advantage of knowing exactly what the court will decide. Also, the contract approach can easily be reconciled with section 101(a)(4).[182] This statute explicitly states that before suit may be brought against a union exhaustion of internal union remedies may be required[183] but does not specify what is to happen in actions brought against an employer. Arguably if Congress had intended to include suits against an employer, it would have drafted a statute explicitly stating this. Despite these factors, however, applying the same exhaustion requirement in suits against employers as is used where unions are the defendants is the preferable policy.[184]

179. 569 F.2d at 151.

180. *Id.* at 149-50.

181. *Id.* at 150-51. Perhaps this inconsistency is due to the differing relief requested in the action against Furnco from that in the suit against the union. The published decision is not clear on this point.

182. *See* text accompanying note 18 *supra* for the provisions of section 101(a)(4).

183. *See* text accompanying notes 16-19 *supra* for a discussion of section 101(a)(4).

184. *See* text accompanying notes 132-42 *supra*.

The Preferable Approach

Some courts have followed the preferable approach that where the union is entitled to rely on an exhaustion defense, an action for violating the collective bargaining agreement cannot be brought against the employer. For example, in *Harrington v. Chrysler Corp.*[185] an employee of the Chrysler Corporation, Edward R. Harrington, alleged that he had wrongfully been denied seniority rights. The district court entered a summary judgment for Chrysler Corporation and Harrington's union, Local 412 of the UAW, because Harrington had not exhausted available internal union remedies.[186]

The court did not treat the action against Chrysler any differently than it had the action against the union. The *Harrington* decision may be criticized in that the court did not explain its rationale for requiring exhaustion of internal union remedies before a court action could be brought against the employer,[187] but its result makes sense. The court did not dismiss the action against only the union and thus leave Chrysler to defend the charge that the union breached its duty of fair representation.[188]

A later case, *Brookins v. Chrysler Corp.*,[189] held, in effect, that if the union could rely on an exhaustion defense so could the employer. *Brookins* involved the discharge of Willie Brookins from his position with the Chrysler Corporation. A grievance was filed on Brookins' behalf, but after the union withdrew it, Brookins sued the union and Chrysler for breach of the duty of fair representation, breach of contract and fraud. The court awarded summary judgment to the union and Chrysler because Brookins had failed to exhaust his internal union remedies.[190]

Under the test applied by the *Brookins* court, whether an employer can rely on an exhaustion defense turns on whether the merits of the breach of fair representation claim have been determined. If the union was successful in defending itself because it had not yet breached its

185. 303 F. Supp. 495 (E.D. Mich. 1969).

186. *Id.* at 497.

187. *See also* Alridge v. Ludwig-Honold Mfg. Co., 385 F. Supp. 695 (E.D. Pa. 1974); Inbrunnone v. Chrysler Corp., 336 F. Supp. 1223 (E.D. Mich. 1971). *But see* Anderson v. Ford Motor Co., 319 F. Supp. 134 (E.D. Mich. 1970) (where the action against the union was dismissed for failure to exhaust internal union remedies but the action against the employer was dismissed on the merits).

188. This approach eliminates the unfairness to the employer of having to establish that the union did not breach its duty of fair representation under circumstances where the union has no liability. *See* text accompanying notes 132-37 *supra*.

189. 381 F. Supp. 563 (E.D. Mich. 1974).

190. *Id.* at 569.

duty of fair representation, the action against the employer would be dismissed because the union member had failed to exhaust internal union remedies. On the other hand, if the court recognizes that a breach may have occurred and dismisses the suit against the union only because no judicial remedies are available, the employer could not rely on an exhaustion defense.[191]

In putting forth this test, the *Brookins* court took the position that a union's breach of fair representation cannot be proven until it is shown that the member unsuccessfully exhausted all internal review procedures. The court's rationale was that if use of internal union remedies could reverse a union's incorrect behavior, the employee could not establish that the union breached its duty of fair representation. Because an employee cannot sue an employer for violating the collective bargaining agreement unless it can be shown that the union breached its duty of fair representation,[192] the court's analysis in *Brookins* is sound. An employer should not be forced to defend itself by establishing that the union did not breach its duty of fair representation if the union is not also a defendant.[193] Where internal review by an impartial panel with the power to change the result is available and the union, consequently, cannot be sued until such remedies are exhausted,[194] the action should not be allowed to proceed only against the employer.

CONCLUSION

A review of decisions by the federal courts on whether a union member must exhaust internal union remedies before bringing a section 301 action against a union or employer reveals that the courts have not always articulated the best approach for determining the answer. The decisions concerning exhaustion of union procedures before suit is brought against the union have had the correct result but their analysis has been weak. Where suits against employers have been in question, the courts have often applied a contract analysis when the better approach would have been to state that the employee must first seek relief under internal union procedures if review is possible by an impartial party with the power to change the result.

Public policy considerations favor applying the same exhaustion standards to suits against both union and employer. By requiring the

191. *Id.* at 567-68.
192. 386 U.S. 171, 186 (1967). *See* text accompanying note 135 *supra*.
193. *See* text accompanying notes 136-37 *supra*.
194. *See* text accompanying notes 51-125 *supra*.

employee to exhaust internal union remedies if internal rules provide a hearing by an impartial body which has power to rectify any wrong, the employer will not be denied due process, and collusion between the union and its members will not be encouraged. In addition, union democracy will be furthered, unnecessary expense will be avoided and the already overcrowded court docket will not be further clogged with unnecessary litigation.

Although the current statute provides that an employee may have to exhaust internal union remedies before bringing a court action against the union, no such provision expressly exists for an action against an employer. The law should be rewritten to require exhaustion of internal union procedures as a prerequisite to a section 301 action against a union for a breach of its duty of fair representation and against an employer for breach of contract where review is available by an impartial body with the power to change the result. A law drafted in this way would eliminate all uncertainty. However, if congressional action on this matter is not forthcoming, courts can find the basis for requiring exhaustion in section 101(a)(4) and justify such a finding by public policy considerations.

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