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Labor Law - Section 301 and Requiring Exhaustion of Grievance Procedures

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an exact replica of a case already decided—he acts at his peril[28] in subcontracting the work without first negotiating his decision with the collective bargaining representative of his employees involved.

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LABOR LAW — SECTION 301 AND REQUIRING EXHAUSTION OF GRIEVANCE PROCEDURES

Maddox, a laid-off employee of Republic Steel Corp., sued in an Alabama state court three years after his discharge to recover severance pay under a collective bargaining contract. The agreement provided for severance pay if any of Republic's mines were closed permanently, thereby resulting in layoff of the mine workers.[1] Although the contract contained a grievance procedure culminating in binding arbitration, Maddox, rather than utilize that mode of redress, sought relief in the courts for defendant employer's breach of the collective bargaining agreement.[2] The trial court entered judgment for the former employee, and the Alabama Supreme Court affirmed.[3] On certiorari the United States Supreme Court reversed, one Justice dissenting. *Held*, the federal labor policy which requires that individual employees desiring to assert contract grievances attempt to use the contract grievance procedure agreed upon by the employer and the union as the mode of redress applies to severance pay grievances, thereby precluding the aggrieved employee from resorting initially to the state courts for relief. *Republic Steel Corp. v. Maddox*, 85 Sup. Ct. 614 (1965).

28. If the employer subcontracts without bargaining, and later is found guilty of an 8(a)(5) violation, the Board has available the harsh remedy of compelling resumption of the subcontracted operation, and reinstatement of the employees with back pay. See note 3 *supra*.

1. 85 Sup. Ct. at 615, n.1.: "The section of the contract dealing with severance allowance provided in relevant part: 'When, in the sole judgment of the Company, it decides to close permanently a plant or discontinue permanently a department of a mine or plant, or substantial portion thereof and terminate the employment of individuals, an Employee whose employment is terminated either directly as a result thereof because he was not entitled to other employment with the Company under the provisions of Section 9 of this Agreement—Seniority and Subsection C of this Section 14, shall be entitled to a severance allowance in accordance with and subject to the provisions hereinafter set forth in this Section 14.'"

2. For this grievance procedure set out in the contract, see 85 Sup. Ct. at 620, n.2.

3. 158 So. 2d 487 (Ala. App. 1960), *aff'd*, 158 So. 2d 492 (Ala. 1963).

There are several remedial procedures available to an aggrieved employee at first instance. More often than not, the individual employee's industrial life is governed by a collective bargaining contract which provides for a grievance procedure, and seemingly the employee's use of the prescribed procedure would be his most convenient and least expensive mode of redress. However, the individual may believe that his claim would not be presented in a way most beneficial to him under the existing contractual grievance procedure.[4]

Federal labor statutes seem to recognize this problem, and in appearance, if not in effect, they limit the extent to which an individual's grievance can be disregarded in favor of majority interest. Section 9 of the National Labor Relations Act (NLRA) gives the individual the right at least to present his grievance to the employer without the intervention of the bargaining representative, provided the bargaining representative is given the opportunity to be present at the meeting.[5] Section 301 of the Labor Management Relations Act (LMRA),[6] under which the instant case ostensibly fell, has been interpreted as authorizing the individual employee to sue his employer for a breach of the collective bargaining contract.[7] Additionally, the individual

4. Several factors may induce the employee to hold this belief: the bargaining representative may desire to reach long range objectives while the employee is interested in an immediate solution to his problem; the employee may not believe he is in the union's good graces because of various reasons (he may be non-union; he may have defaulted in dues payments; or, he may have had a simple quarrel with union leaders); or the union may have plans which do not include the rapid solution to this particular individual's problems.

5. National Labor Relations Act § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1952) [hereinafter cited as NLRA], provides in part: "[A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in force; *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment."

6. Labor Management Relations Act § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958) [hereinafter cited as LMRA] provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

7. Smith v. Evening News Ass'n, 371 U.S. 195 (1962) overruled the prior decision in Association of Westinghouse Salaried Employees v. Westinghouse Corp., 348 U.S. 437 (1955) and announced that courts could take jurisdiction to hear individual complaints of contract breaches. In *Smith* the Court rejected the contention that § 301 excluded all suits brought by employees instead of unions. "Neither the language and structure of § 301 nor its legislative history requires or persuasively supports this restrictive interpretation, which would frustrate

apparently may enforce the bargaining representative's duty of fair representation through the courts and possibly the National Labor Relations Board (NLRB).[8]

In *Textile Workers Union of America v. Lincoln Mills*,[9] the Supreme Court held that section 301 of the LMRA not only opened the doors of federal courts for the enforcement of labor arbitration, but also required those courts to fashion a body of substantive law to apply in resolving labor disputes. In *Smith v. Evening News Ass'n*[10] the Supreme Court recognized the standing of individuals to maintain a suit under section 301 and limited the prior jurisprudential rule that state and federal courts must yield exclusive jurisdiction to the NLRB whenever an unfair labor practice is revealed by the complaint,[11] ruling that section 301 jurisdiction prevails even if the breach of contract may constitute an unfair labor practice.[12] *Smith* specifically declined, however, to decide "when, for what kinds of breach, or under what circumstances, an individual employee can bring a § 301 action."[13] In *Humphrey v. Moore*,[14] the Supreme Court again did not resolve questions concerning the import of section 301 jurisdiction, but it has been said[15] that Justice Goldberg's "concurrence in the result" provided a significant indication:

> "A mutually acceptable grievance settlement between an employer and a union, which is what the decision of the Joint Committee was, cannot be challenged by an individual dissenting employee under section 301(a) on the ground that the parties exceeded their contractual powers in making the settlement."[16]

It has been argued that the "fullest implications" of Justice Goldberg's reasoning would admit jurisdiction under section 301

rather than serve the congressional policy expressed in that section." 371 U.S. at 200.

8. See notes 37 and 43 *infra*.

9. 353 U.S. 448 (1957).

10. 371 U.S. 195 (1962); see note 7 *supra*.

11. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

12. Smith v. Evening News Ass'n, 371 U.S. 195, 200 (1962).

13. *Id.* at 204 (Black, J., dissenting).

14. 375 U.S. 335 (1964). The Court held that a decision by the contract-created Joint Conference Committee, reached after proceedings adequate under the agreement, was final and binding upon the parties. Since the aggrieved employee failed to prove a breach of the duty of fair representation, the Committee's adjustment of his grievance was final.

15. Comment, 73 YALE L.J. 1215, 1230 (1964).

16. Humphrey v. Moore, 375 U.S. 335, 352 (1964).

for individual actions by employees regarding contract breaches, but that the courts would nevertheless refuse recovery in almost every case in which it could be inferred that the employer and the bargaining representative agreed to dismiss the individual's claim.[17] Thus the refusal by a representative to process a grievance would in effect be a renegotiation of any contract right the aggrieved employee might have possessed.[18] If, however, such refusal amounted to unfair representation, a right of action against the union and the employer would arise.[19]

When challenge is made to the standing of an individual to bring an action for breach of a contract entered into by his collective bargaining agent and his employer, the courts will undoubtedly inquire whether that individual has exhausted his remedies under the contract. Since the source of the individual's rights is the collective bargaining contract itself, his attempt to invoke the aid of the courts without prior use of the contract grievance procedure will almost invariably fail. Thus if an individual tries to sue on a contract under section 301, he will be forced to abide by the terms of the particular contract and avail himself of any remedies provided in the contract before seeking the aid of any court.[20]

In the instant case, the Supreme Court was concerned whether Maddox' severance pay claim could be classified as an exception to the general rule that federal labor policy requires that individual employees desiring to assert contract grievances shall attempt to use the contract grievance procedure agreed upon by the employer and the union as the mode of redress. The court first recognized that if the union refuses to press or merely perfunctorily presses the individual's claim, differences may arise as to the form of redress then available. Further, the court declared that unless the contract provides otherwise, the employee must afford the union the opportunity to act on his behalf. The court noted that Congress had expressly approved contract grievance procedures as a preferred method of settling disputes and stabilizing the "common law" of the plant.[21] Additionally,

17. Comment, 73 YALE L.J. 1215, 1230 (1964).
18. *Id.* at 1231.
19. See notes 37 and 43 *infra*.
20. See, *e.g.*, Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Belk v. Allied Aviation Service Co., 315 F.2d 513 (2d Cir. 1963); Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963).
21. 85 Sup. Ct. at 616. The court referred to the following federal statutes: LMRA § 201(c): "[C]ertain controversies which arise between parties to

the court emphasized the strong interest of employers and unions in the utilization of the contract grievance procedure as an exclusive mode of redress, stressing the administrative desirability of a uniform and exclusive method of settling employee grievances. More significantly, the court declared that severance pay and other contract terms governing discharge are not essentially unlike other types of grievances, since they are of obvious concern to all employees and remain a potential cause of dispute which may disrupt orderly industrial life.[22]

Justice Black, as the lone dissenter, felt the majority opinion manifested great concern for the interests of employers and unions but little understanding of the individual worker who is required to "follow the long, time-consuming, discouraging road to arbitration" regardless of his feelings and whether or not he is still in the good graces of the union.[23]

The effect of the cases interpreting section 301 of the LMRA, from *Lincoln Mills to Maddox*, has been to sustain a broad jurisdiction in the federal courts to enforce collective bargaining contracts, and arbitration clauses in particular, and thus to promote and encourage arbitration as a method of resolving industrial disputes. An added impetus inducing management and labor to resort to arbitration has been given in NLRB holdings in favor of honoring arbitration awards in both unfair labor practice and representation cases.[24] The factual situation of the

collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies."

LMRA § 203(d): "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

22. 85 Sup. Ct. at 618. The Court, noting that the Alabama courts had relied on the holdings of Moore v. Illinois Central R.R., 312 U.S. 630 (1941) and Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 (1953), reasoned that since federal jurisdiction in those cases was based on diversity and federal law was not applied, subsequent decisions had removed major underpinnings of the decisions. Without overruling *Moore* within the field of the Railway Labor Act, the Court refused to extend it to suits under § 301 of the Taft-Hartley Act.

23. 85 Sup. Ct. at 624.

24. See, *e.g.*, Insulation & Specialities, Inc., 144 N.L.R.B. 1540 (1963); Raley's Supermarkets, 143 N.L.R.B. 256 (1963); Raytheon Co., 140 N.L.R.B. 883 (1963); International Harvester Co., 138 N.L.R.B. 923 (1962); Gateway

present case accentuates the high regard the Supreme Court has for arbitration and its role as a stabilizer of labor-management strife. Here Maddox was no longer an employee and in fact had not been one for some three years. The Alabama courts weighed this fact heavily in holding that federal law was not applicable in suits for severance pay since the employment relationship had necessarily terminated, thus ending danger of industrial strife such as would warrant the application of federal law.[25] Even under these circumstances, the Supreme Court steadfastly refused to extend the rationale of cases[26] governed by the Railway Labor Act to suits under section 301 of the LMRA.[27]

It is submitted that the result reached by the Supreme Court is consistent with the federal labor policy requiring all individual employees to assert their contractual grievances within the grievance procedure agreed upon by the employer and the bargaining representative.[28] However, it is perhaps a matter of some concern, as Justice Black suggests in his dissent,[29] that the federal courts have given overwhelming support to the interests of the majority despite the apparent grant of some freedom to the individual to present his own interests before the employer under section 9[30] and despite the construction of section 301[31] by the courts[32] in favor of the individual. The courts have reasoned that it is not inconsistent with the NLRA, although it is seemingly contrary to the language of the section 9 proviso, to require all grievances to be processed through the contractual

Transp. Co., 137 N.L.R.B. 1763 (1962); Montgomery Ward & Co., 137 N.L.R.B. 346 (1962); Denver-Chicago Trucking Co., 132 N.L.R.B. 1416 (1961); Osherwitz & Sons, 130 N.L.R.B. 418 (1961); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).

25. 158 So. 2d 487 (Ala. App. 1960), *aff'd*, 275 Ala. 685, 158 So. 2d 492 (1963).

26. In Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 (1953) and Moore v. Illinois Central R.R., 312 U.S. 630 (1941), the Supreme Court refused to hold that a discharged worker must pursue collective bargaining grievance procedures before suing in a court for wrongful discharge.

27. The Court reasoned that major underpinnings of the Railway Labor Act cases had been removed since they were decided when it was not thought that federal law was to be applied merely because the collective bargaining agreements were subject to the Railway Labor Act. The Court noted that substantive federal law now applies to suits on collective bargaining agreements covered by the Railway Labor Act. 85 Sup. Ct. at 618.

28. See Humphrey v. Moore, 375 U.S. 335 (1964). See generally Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1962); *Cox, Rights Under a Labor Agreement*, 69 HARV. L. REV. 600 (1956).

29. 85 Sup. Ct. at 624 (Black, J., dissenting).

30. See note 5 *supra*.

31. See note 6 *supra*.

32. See note 7 *supra*.

grievance procedure, and now section 301 has met a similar fate for the same reason,[33] namely, to foster arbitration as a stabilizer of industrial disputes.[34]

In the instant case the court suggests that the individual may be able to resort to other means of redress, presumably to the courts or to the NLRB, if his bargaining representative refuses to press or only perfunctorily presses his claim.[35] Beginning with *Steele v. Louisville & N. R.R.*,[36] the Supreme Court has read federal statutes to require fair representation of employees. It has been said, however, that this duty of fair representation, as enforced by the courts,[37] has provided scant protection of the individual's rights because the courts have applied a presumption of reasonableness[38] which has virtually precluded a finding of breach.[39] Although it is submitted that this criticism is too harsh, the failure of the courts to articulate workable standards either to measure or to enforce the duty has led commentators to urge that the NLRB enforce the duty under its unfair labor practice jurisdiction.[40] The initial adjudication by

33. In Black-Clawson Co. v. International Ass'n of Mach., 313 F.2d 179, 185 (2d Cir. 1962), the Court interpreted the § 9 proviso in the following manner: "[T]he proviso was designed merely to confer upon the employee the privilege to approach his employer on personal grievances when his union reacts with hostility or apathy . . . . [The employee] is therefore without power to compel Black-Clawson to arbitrate the grievance stemming from his accusation of wrongful discharge. The Union is the sole agency empowered to do so by the statute and by the terms of the contract before us."

See, *e.g.*, Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co., 312 F.2d 181 (2d Cir. 1962); Palnau v. Detroit Edison Co., 301 F.2d 702 (6th Cir. 1962); Ostrofsky v. United Steelworkers, 273 F.2d 614 (4th Cir. 1959), *cert. denied*, 363 U.S. 849 (1960); Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945); United States v. Voges, 124 F. Supp. 543 (E.D.N.Y. 1954); *contra*, Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963) (construing federal law).

34. Republic Steel Corp. v. Maddox, 85 Sup. Ct. 614, 619 (1965). See Comment, 73 YALE L.J. 1215 (1964).

35. 85 Sup. Ct. at 616.

36. 323 U.S. 192 (1944).

37. See, *e.g.*, Syres v. Oil Workers Union, 350 U.S. 892 (1955), *reversing per curiam*, 223 F.2d 739 (5th Cir. 1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952); Wallace Corp. v. Labor Board, 323 U.S. 248 (1944); Tunstall v. Firemen & Enginemen, 323 U.S. 210 (1944); Steele v. Louisville & N. R.R., 323 U.S. 192 (1944).

38. In Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953), the Court suggested the following: "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

39. Comment, 73 YALE L.J. 1215, 1234 (1964); see generally Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958).

40. Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957);

the NLRB[41] declaring a breach of the duty of fair representation to be an unfair labor practice was somewhat abortive, since the Board's order was denied enforcement on appeal,[42] but a recent Board decision stands as a reaffirmation and reiteration of the legal principles first laid down.[43]

It is submitted that if federal labor policy dictates that the individual's right to prosecute his own action for breach of contract in court must be sacrificed to the needs of collective bargaining, the individual's rights within those internal procedures provided by contract ought to have complete protection. It seems that the last recourse for the protection of these rights is a cause of action against the union and the employer when the employee is unfairly represented. Regardless of the forum chosen to receive such a cause of action, it is submitted that the existence of an adequate remedy for an individual's valid claim is of paramount importance.

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LOUISIANA MERCHANT DETENTION STATUTE

To assist storekeepers in coping with a burgeoning shoplifting problem,[1] the Louisiana legislature enacted, in 1958, a merchant detention statute[2] authorizing privileged detention of suspected shoplifters for questioning. The statute joined a growing list of similar legislation by most states; to date, forty-five states have acted in some manner to combat shoplifting through the various expedients of new criminal provisions, broadened arrest powers and a qualified privilege for merchants

Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958).

41. Miranda Fuel Co., 140 N.L.R.B. 181 (1962).

42. NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963).

43. Hughes Tool Co., 147 N.L.R.B. No. 166 (July 1, 1964), noted, 50 VA. L. REV. 1221.

1. The number of reported shoplifting complaints rose 81% from 1958 to 1963, and 13% from 1962 to 1963, FBI UNIFORM CRIME REPORTS 18 (1963). This increase is attributed to greater opportunity made possible by the growth of self-service merchandising. Shoplifting losses are estimated to run from .5% to 3% of sales, depending on the type of store. The estimated monetary loss is about $300 million annually in the nation. See Gunn, *An Advanced Study for Controlling External and Internal Retail Pilferage* (1964) (unpublished thesis in Louisiana State University Library, used with permission); Comments, 62 YALE L.J. 788 (1953), 61 DICK. L. REV. 256 (1957), 58 MICH. L. REV. 429 (1959).

2. LA. R.S. 15:84.5, 84.6 (Supp. 1964).