Case Western Reserve Law Review

Volume 19 | Issue 1

1967

Labor Law--Federal Preemption--Union's Duty of Fair Representation [*Vaca v,. Sipes,* 386 US. 171 (1967)]

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shire may be the first jurisdiction in this country to totally abrogate the immunity doctrine. Although a narrow reading of the decision would limit it to the facts before the court, the implications of the case suggest the total destruction of the parental immunity doctrine.

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LABOR LAW — FEDERAL PREEMPTION — UNION'S DUTY OF FAIR REPRESENTATION

Vaca v. Sipes, 386 U.S. 171 (1967).

The proper forum in which a discharged employee can assert a cause of action against his union for breach of the fiduciary obligation to fairly represent him[1] has been the subject of much recent commentary.[2] The choice of the forum by the employee and his

[1] The statutory duty of fair representation was developed in Steele v. Louisville N.R.R., 323 U.S. 192 (1944), in which the Court reasoned that a grant of power to act on behalf of others requires the assumption to act fairly on their behalf. *Id.* at 202. The Court construed the Railway Labor Act § 1, 45 U.S.C. § 151 (1964), as reflecting congressional intent to impose upon the bargaining representative a duty to act "without hostile discrimination, fairly, impartially, and in good faith." 323 U.S. at 204. Section 2 of the Railway Labor Act provides that "employees shall have the right to organize and bargain collectively through representatives of their own choosing." 45 U.S.C. § 152 (1964).

Subsequently, this same standard was applied to those unions who derived their authority under the National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1964) which provides in part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment . . . .

In Wallace Corp. v. NLRB, 323 U.S. 248 (1944), Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), and Syres v. Oil Workers Local 23, 350 U.S. 892, *rev'g* 223 F.2d 739 (5th Cir. 1955), the Court, relying on *Steele*, found the duty implicit in section 9(a). Until its decision in Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963), the NLRB had refused to take jurisdiction of fair representation suits. In *Miranda Fuel*, the Board found that congressional legislation permitted it to exercise fair representation jurisdiction and reasoned that section 7 of the Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 157 (1964) [hereinafter cited as LMRA], gives employees "the right to be free from unfair or invidious treatment by their exclusive bargaining agent in matters affecting their employment." 140 N.L.R.B. at 185. Thus traditional section 9 rights were absorbed into section 7 and became enforceable through section 8(b)(1)(a) of the LMRA. In addition, the Board has found violations of the fair representation duty that are imposed by sections 8(b)(3) and 8(d) of the same Act. *See, e.g.*, Galveston Marine Ass'n, 148 N.L.R.B. 897, 899 (1964). Since both the courts and the NLRB have exercised jurisdiction of fair representation suits, a problem of federal preemption has thereby developed.

[2] *See, e.g.*, Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957);

power to so choose have important consequences for the employer, the union, the individual worker, and, ultimately, the general public. The recent decision of *Vaca v. Sipes*[3] by the United States Supreme Court concerns the jurisdiction of a union member's suit against his union for its failure to properly represent him in his dispute with the employer.

Benjamin Owens, a member of Kansas City Local 12 of the National Brotherhood of Packinghouse Workers, was discharged by his employer, Swift & Company, because of poor health.[4] Although the union participated in the first four steps of the grievance procedure, it declined to take the final step, the arbitration process, because it believed that Owens' claim lacked merit.[5] Thereupon, Owens brought two suits: one against his employer for breach of contract and the other against the union for wrongful discharge and failure to process his grievance through arbitration.[6]

The union suit was brought as a class action against the membership of the national and local union. The state trial court set aside the jury's verdict for plaintiff for actual and punitive damages, reasoning that the federal government had vested jurisdiction of the subject matter in the National Labor Relations Board (NLRB). The state appellate court affirmed the decision,[7] but the Missouri Supreme Court reinstated the jury verdict, holding that jurisdiction of the subject matter by state courts was not preempted by federal legislation.[8] In addition, the court found sufficient evidence to support Owens' assertion that he had a meritorious claim against Swift,

Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations*, 15 HASTINGS L.J. 391 (1964); Van Zile, *The Componential Structure of Labor-Management Contractual Relationships*, 43 U. DET. L.J. 321 (1966); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958); Note, *Labor Law: Section 301 and the Union's Duty of Fair Representation*, 12 U.C.L.A.L. REV. 1238 (1965), Note, *Refusal to Process a Grievance, the NLRB and the Duty of Fair Representation*; 26 U. PITT. L. REV. 593 (1965); Note, *Federal Protection of Individual Rights Under Labor Contracts*, 73 YALE L.J. 1215 (1964); 32 GEO. WASH. L. REV. 402 (1963); 65 MICH. L. REV. 373 (1966); 42 TEXAS L. REV. 917 (1964).

[3] 386 U.S. 171 (1967).

[4] *Id.* at 175.

[5] The union suggested rehabilitation after conferring with the employer, but Owens offered medical testimony from his family physician and an independent doctor that he was fit to work. *Id.*

[6] Sipes v. Vaca, 397 S.W.2d 658 (Mo. 1965), *rev'd*, 386 U.S. 171 (1967). The suit against Swift for breach of contract was pending in the state court at the pretrial stage at the time of the Court's decision. 386 U.S. at 176 n.4.

[7] Sipes v. Vaca, 397 S.W.2d 658 (Mo. 1965), *rev'd*, 386 U.S. 171 (1967).

[8] *Id.* at 664. The court relied on International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), to uphold state jurisdiction. 397 S.W.2d at 664.

thus reflecting the union's bad faith in refusing to carry Owens' grievance to arbitration.[9]

Granting certiorari,[10] the United States Supreme Court was thus faced with the issues of whether congressional legislation had pre-empted a union member's damage suit against union officers based on their wrongful failure to seek arbitration of his grievance, and, if not, whether a state court in determining union liability is bound by federal standards.[11]

Although the Court held that the subject matter was not pre-empted by federal legislation[12] and that federal standards must be applied,[13] the former aspect of the decision has greater significance.

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[9] 397 S.W.2d at 665. The Supreme Court emphasized that the state court had attributed "bad faith" to the union on the mere showing of a wrongful discharge by the employer, "regardless of the union's good faith in reaching a contrary conclusion." 386 U.S. at 189-90.

[10] Vaca v. Sipes, 384 U.S. 969 (1966).

[11] *See* 386 U.S. at 171.

[12] *Id.* at 177.

[13] *Id.* at 193. It is apparent that the federal law should have been applied by the state court, since the alleged union wrong was governed by federal statutes. *See* note 1 *supra*; Smith v. Evening News Ass'n, 371 U.S. 195 (1963); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). In holding that the employee must show evidence that "a Union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith," the Court has correctly adopted the federal standard and appears to have correctly applied it to the facts of the *Vaca* case. 386 U.S. at 189. In *Steele*, the Court emphasized the union's duty to put forth an *honest effort* on behalf of the employee without *hostile discrimination*. Note 1 *supra*. *See also* Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953). Furthermore, the *Huffman* Court noted that the union is entitled to a wide range of reasonableness in its exercise of discretion, subject to good faith and honesty of *purpose*. *Id.* at 338. In Humphrey v. Moore, 375 U.S. 335, 349-50 (1963), the Court reasoned that the union must act honestly and upon *relevant* factors. It therefore seems that the *Vaca* Court could satisfy the *Steele* standards in holding that mere proof that the underlying grievance was meritorious is not sufficient to justify a presumption of bad faith by the union where it actively processed the grievance into the fourth step, attempted to gather sufficient evidence to prove Owens' case, attempted to secure less demanding work for Owens, and finally suggested rehabilitation. 386 U.S. at 195. Furthermore, there was only controverted testimony of any hostile discrimination. *Id.* As the Court well notes, however, had the union only perfunctorily processed Owens' claim after he had offered medical testimony relating to his fitness, a breach of duty might have been found. *Id.* Hence, the Court implies that evidence which indicates a meritorious claim against the employer might be sufficient to establish a breach of fair representation by the union, *with* a showing by the employee of union inactivity at the lower levels of the grievance procedure. Of most interest in its discussion of the good faith standard is the Court's application of the *Huffman-Humphrey* requirements of honesty of purpose, wide range of reasonableness, and union action upon relevant factors. The Court notes that a rule which would enable the employee to take his grievance to arbitration without union approval would undermine the settlement process established by the employer and the union and would undercut the union's authority as bargaining agent; thus, the employer would have less confidence in the union and collective bargaining would be endangered. Furthermore, the union has a valid stake as to which claims merit arbitration since the cost of the process is high. *Id.* at 193. The fact that the union acted upon independent evidence that Owens

Also of significance was the Court's pronouncement that the employee must prove bad faith on the part of the union in filing and pursuing grievances in order to combat the exhaustion of remedies defense available to the employer in the breach of contract action.

Until the Court's decision in *San Diego Building Trades Council v. Garmon*,[14] no broad test had been delineated as to what labor practices were preempted from state jurisdiction by congressional legislation.[15] In *Garmon*, the Court held that if activity is arguably an unfair labor practice, subject to sections 7 or 8 of the Taft-Hartley Act,[16] the NLRB retains exclusive jurisdiction over the subject matter.[17]

It has been suggested that it was not until the decision in *Miranda Fuel Co.*[18] that the power of state courts to hear fair representation suits, based upon the *Steele v. Louisville & Nashville Rail-*

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was unfit to work seems to satisfy the requirement of acting upon relevant factors. *Id.* at 195.

[14] 359 U.S. 236 (1959).

[15] The problem of federal preemption posed by sections 7 and 8 of the LMRA was well reflected in decisional law prior to *Garmon*. The Courts considered congressional intent as indefinite and incapable of any fixed general rule. *See* International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958); Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480 (1955).

[16] LMRA §§ 7, 8, 29 U.S.C. §§ 157, 158 (1964).

[17] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959). The *Garmon* Court, however, recognized exceptions to the broad preemption rule. Certain fact situations, such as in International UAW v. Russell, 356 U.S. 634 (1958), demanded state jurisdiction since the states were legitimately concerned, that is, "where the regulated conduct touched interests . . . deeply rooted in local feeling and responsibility." 359 U.S. at 244. In addition, state jurisdiction would obtain in cases like International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), since "the activity regulated was a merely peripheral concern of the Labor Management Relations Act." 359 U.S. at 243. In Local 100, United Ass'n of Journeymen v. Borden, 373 U.S. 690 (1963), the Court deemed the *Gonzales* exception to *Garmon* as constituting action not concerned directly with employment rights, but only with internal union matters. Thus, in these two areas, there would be no presumption of administrative preemption unless expressly declared by Congress and both forms of conduct could be subject to concurrent jurisdiction. *See* 359 U.S. at 244. Additional exceptions to the *Garmon* rule were created by legislative enactment and interpretive decisional law. LMRA § 301(a), 29 U.S.C. § 185(a) (1964), provides that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States."

In Smith v. Evening News Ass'n, 371 U.S. 195 (1962), the Court construed section 301, holding that the *Garmon* rule was inapplicable and that state jurisdiction obtained in a suit brought by an employee against his employer for breach of a discriminatory contract clause. In Humphrey v. Moore, 375 U.S. 335 (1964), the Court extended *Smith* to allow an employee to sue his union and an employer in one state court proceeding for violation of the collective bargaining agreement, although the conduct could be considered an unfair labor practice. Thus, under *Smith* and *Humphrey*, even if conduct could arguably be considered an unfair labor practice, state jurisdiction obtains. In addition, the state courts would apply the applicable federal law.

[18] 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

road Co.[19] rationale, was questioned.[20] In *Miranda Fuel* the NLRB reversed its prior stand and found that a union's breach of the duty of fair representation was an unfair labor practice and thereby subject to sections 7 and 8 of the Taft-Hartley Act.[21] Although *Miranda Fuel* was not enforced by the Second Circuit,[22] the Fifth Circuit, in *Local 12, United Rubber Workers v. NLRB*,[23] has recently enforced the Board's finding of an unfair labor practice based upon a union's discriminatory failure to process a worker's grievance. Thus, the National Labor Relations Board affords machinery whereby an employee can seek redress for a union's improper conduct in handling the grievance procedure if the General Counsel wishes to assert the jurisdiction of the Board.[24] Since the NLRB could have enforced Owens' claim in the instant case, the question arose as to whether this possibility preempted the state jurisdiction.

The Court was thus faced with various alternatives: (1) the state court could have been overruled on the preemption issue and the Court could have vested sole jurisdiction in the NLRB by refusing to apply any exceptions to the *Garmon* rule and by so doing approved the Fifth Circuit's approach in *Rubber Workers*; (2) concurrent jurisdiction of the subject matter could have been vested by affirming the state court's reliance on the rationale of *International Association of Machinists v. Gonzales*[25] so as not to negate *Rubber*

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19 323 U.S. 192 (1944).

20 *See* 65 MICH. L. REV. 373, 374-75 (1966). The author notes that prior to *Miranda Fuel*, sections 7 and 8 of the LMRA were interpreted by the NLRB itself as dealing with activities concerning the encouragement or discouragement of union membership, and not the traditional section 9 breach of fair representation violation. In fact, in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), the Board, in an amicus curiae brief, expressly denied jurisdiction of these fair representation suits. *See* 386 U.S. at 180 n.6. In *Garmon*, the Court stated, "In the absence of the Board's clear determination that an activity is neither protected nor prohibited . . . it is not for this Court to decide whether such activities are subject to state jurisdiction." 359 U.S. at 246. *See also* Cox, *supra* note 2, at 174.

21 LMRA, §§ 7, 8, 29 U.S.C. §§ 157, 158 (1964).

22 NLRB v. Miranda Fuel Co. 326 F.2d 172 (2d Cir. 1963). Of the three-judge panel, only Judge Medina disallowed the Board's assumption of fair representation jurisdiction. Judge Lumbard did not consider whether breach of the duty was an unfair labor practice, but concurred with Judge Medina in the finding that the NLRB had insufficient evidence to support its finding of breach of duty. Judge Friendly dissented and agreed with the NLRB's assumption of jurisdiction and in the finding that the evidence was sufficient. *See* 386 U.S. at 198 n.1.

23 368 F.2d 12 (5th Cir. 1966), *enforcing* Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964); *see* 20 SW. L.J. 937 (1966).

24 He can refuse to institute an unfair labor practice action and his discretion is not reviewable by the courts. *See* United Elec. Contractors Ass'n v. Ordman, 336 F.2d 776 (2d Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967).

25 356 U.S. 617 (1958); *see* notes 8 & 17 *supra*.

Workers; (3) the Court could have rejected the Fifth Circuit's approval of NLRB jurisdiction in the matter and thus negated administrative jurisdiction, leaving sole jurisdiction to the states; (4) administrative jurisdiction could have been sanctioned, thus resolving the conflict between the Second and Fifth Circuits, while at the same time state jurisdiction could have been vested by applying the section 301 exception to *Garmon*;[26] or (5) the Court could have avoided the conflict between the circuits, thus leaving the NLRB's jurisdiction subject to question, but still could have approved jurisdiction by applying section 301 of Taft-Hartley.[27] It appears as if the last alternative was chosen by the Court in *Vaca.*

In stating its preemption test, the Court noted that the ultimate decision "must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies."[28] The Court reasoned that although one of the bases of the federal preemption doctrine is to avoid conflicting rules of substantive law, the NLRB had itself removed this obstacle by accepting the traditional *Steele* concept of the extent of the union's duty.[29] Hence, consistent standards could be obtained from both administrative and state proceedings.[30]

In addition, the Court noted that the traditional "expertise" argument on behalf of federal preemption[31] would be inapplicable because fair representation suits "often require review of the sub-

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[26] Note 17 *supra.*

[27] *See* 65 MICH. L. REV. 373, 385 (1966) wherein the author discusses these alternatives. *See also* note 17 *supra.*

[28] 386 U.S. at 180.

[29] Note 1 *supra.*

[30] 386 U.S. at 171. Although the Court stressed the "substantive" aspects of federal preemption, the decision placed little emphasis on the need to avoid conflicting tribunals that apply this substantive law. In *Garmon,* the Court quoted from Garner v. Teamsters Local 776, 346 U.S. 485, 490-91 (1953):

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242-43 (1959); *see* Brief for NLRB as Amicus Curiae at 16, Vaca v. Sipes, 386 U.S. 171 (1967).

[31] The Board is better equipped to handle fair representation cases than the courts since it is more familiar with the proper functionings of unions in the industrial relations area. The courts are institutionally limited and cannot evaluate the wisdom of collective bargaining agreements. *See* Cox, *supra* note 2, at 174; Wellington, *supra* note 2, at 1358; Brief for NLRB as Amicus Curiae at 13, Vaca v. Sipes, 386 U.S. 171, 181-83 (1967).

stantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery . . . as these matters are not normally within the Board's unfair labor practice jurisdiction . . . ."[32] Further, the Court reasoned that vesting sole jurisdiction in the NLRB could foreclose any remedy for the individual in his suit against the union because of the General Counsel's unreviewable discretion to institute the complaint.[33]

As its final argument to deny federal preemption, the Court considered the various problems which would occur if an employee could sue his employer for breach of a contract in a state court, based upon section 301, but could not litigate the union's breach of duty in the same tribunal. The Court reasoned that in many suits against an employer in a state court, the employer could raise the defense of exhaustion of remedies and it would therefore force the employee to prove that his union had breached its fair representation duty before the employer could be held liable for the breach of his contract.[34] Although the state court would be permitted to consider the fault of the union in order to sustain the suit against the employer, the relief could only be obtained against the employer since the state court would not have obtained jurisdiction over the union. Hence, the employer would have to pay for the union's wrong or, if the court awarded only partial recovery, the aggrieved litigant would be forced to take his fair representation claim to the NLRB, without a definite chance of recovery due to the unreviewable discretion of the General Counsel.[35]

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[32] 386 U.S. at 181. Although the Court agrees in this respect with the dissenting Board members in Hughes Tool Co., 147 N.L.R.B. 1573, 1584-90 (1964), it is still doubtful that the Court intended to take away the Board's jurisdiction. Note 40 *infra*. *But see* note 34 *infra*. The concurring opinion disagrees with this approach, stating that the NLRB has jurisdiction of the substantive bargaining behavior of the parties in numerous respects. *See* 386 U.S. at 202-03 n.5.

[33] 386 U.S. at 181-83; *see* note 24 *supra* & accompanying text. The Court stated that the "public interest in effectuating the policies of the federal labor laws, not the wrong done to the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies." 386 U.S. at 182 n.8. The above language seems to say that the Court could not deny the administrative remedy. The availability of the Board as an *additional* forum could only aid the individual litigant. In fact, it has been suggested that the Board reversed itself and assumed jurisdiction of the employee's grievance complaint since the *courts* themselves denied remedies to the individual litigant by presuming good faith on the part of the union. *See* 65 MICH. L. REV. 373, 375 & n.12 (1966).

[34] 386 U.S. at 184; *see* text accompanying note 48 *infra*.

[35] 386 U.S. at 188 & n.12. It could be asserted that NLRB jurisdiction was negated by the Court by the following discussion of remedies: "These remedy problems are difficult enough when one tribunal has all parties before it; they are impossible if two

It appears that the Court relied on an extension of the state court's jurisdiction under section 301 to deny administrative preemption in the instant case. The state court's reliance on the *Gonzales*[36] rationale could not be justified. It appears that the *Local 100, United Association of Journeymen v. Borden*[37] modification of *Gonzales* would make the "peripheral" exception to *Garmon* inapplicable in the instant case since the *Vaca* Court relied heavily on employment factors.[38] Furthermore, the application of the "violence" exception to *Garmon*[39] would be inappropriate, considering the absence of violence in the instant case. Hence, with these judicial exceptions to *Garmon* seemingly inapplicable in the *Vaca* case, it appears that the Court could have justifiably vested jurisdiction in the state court only by finding section 301 jurisdiction, unless it can be implied that the Court totally negated NLRB jurisdiction of the union conduct.[40]

In order to have absorbed the fair representation duty into section 301 jurisdiction, in view of the facts of the *Vaca* case, the Court expanded prior interpretation of this legislation. *Humphrey v. Moore*[41] had at least established that a suit against a union for breach of the duty of fair representation was allowable in a state court where the employer was joined in the action with the union.[42] The nature of the claim in *Humphrey* and the particular union misconduct asserted can be distinguished from the *Vaca* case. In the former, the aggrieved employee alleged that *both* union and man-

independent tribunals, with different procedures, time limitations, and remedial powers, must participate." *Id.* at 188 n.12. It has been suggested that the fact that the state may provide more relief than the Board does not negate federal preemption. In addition, the conflict inherent in state law remedies unavailable to the Board strongly supports federal preemption. *See* Brief for the NLRB as Amicus Curiae at 18, Vaca v. Sipes, 386 U.S. 171 (1967).

36 International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

37 373 U.S. 690 (1963); *see* note 17 *supra.*

38 *See* 65 MICH. L. REV. 373, 378-79 (1966), in which the author doubts that the Court could base its decision on *Gonzales. But see* 386 U.S. at 199, where the concurring opinion states that the majority *thought* the instant case to be "merely peripheral." However, it appears that the majority merely listed *Gonzales* as one exception to *Garmon* and did not rely on it. *Id.* at 179.

39 *See* note 17 *supra.*

40 The very fact that the Court emphasized section 301 jurisdiction suggests that the NLRB was not denied its power to handle fair representation suits. *See* 386 U.S. at 183; note 17 *supra. See also* note 31 *supra.*

41 375 U.S. 335 (1964). An employee brought suit in a Kentucky state court, praying for injunctive relief, since he feared that a dovetailing agreement between two firms would result in his layoff as he was a member of the younger firm.

42 *See* 386 U.S. at 186; Brief for the NLRB as Amicus Curiae at 22, Vaca v. Sipes, 386 U.S. 171 (1967).

agement breached the collective bargaining agreement since neither had the power to make the dovetailing decision.[43] In addition, the worker alleged that this collective bargaining decision was obtained *as a result* of union deceit. Therefore, the union also breached its duty of fair representation.[44]

Some commentators assert that the employee *based* his claim against both union and management on the enforcement of the collective bargaining agreement.[45] Of most interest, the *Vaca* Court itself suggests that it was presented with a different factual situation than that posed in *Humphrey*.[46] The Court thus seems to make a significant extension of the *Humphrey* rule: The union need not cause the alleged breach of contract by the employer, the direct allegation against the union need not include an allegation against it for breach of contract, and the employer and union need not be joined.[47] All that seems to be required to vest section 301 jurisdiction in a state court is an allegation against a union for breach of fair representation when the union's fair representation issue may

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[43] Humphrey v. Moore, 375 U.S. 335, 342 (1964).

[44] *Id.* at 342-43. No fraud was charged against the employer, and but for the union misconduct, the employer would have retained the employee. *Id.* at 343; *see* Brief for the NLRB as Amicus Curiae at 22, Vaca v. Sipes, 386 U.S. 171 (1967), wherein it is shown that in *Vaca*, the alleged unfair representation occurred *after* the alleged wrongful discharge by the employer.

[45] *See* Note, *Labor Law: Section 301 and the Union's Duty of Fair Representation*, 12 U.C.L.A.L. REV. 1238, 1241 (1965); Note, *Refusal to Process a Grievance, The NLRB, and the Duty of Fair Representation*, 26 U. PITT. L. REV. 593, 610 (1965).

[46] Speaking in hypothetical terminology, as if both employer and union were liable, the Court stated in reversing the state court's award of damages:

> [I]n particular, may an award against a union include, as it did here, damages attributable solely to the employer's breach of contract? We think not. Though the union has violated a statutory duty in failing to press the grievance, it is the employer's *unrelated breach of contract* which triggered the controversy and which caused this portion of the employee's damages. 386 U.S. at 196-97 (emphasis added).

In addition, the Court stated:

> We are *not* dealing here with situations where a union has affirmatively caused the employer to commit the alleged breach of contract . . . . Even if this approach would be appropriate for analogous § 301 and breach of duty suits, it is *not* applicable here, [s]ince the Union played *no part* in Swift's alleged breach of contract . . . . *Id.* at 197 n.18 (emphasis added).

[47] It appears that the *Vaca* Court would not require joinder of management with the union since Owens' employer is not before the Court. The *Vaca* Court stated, "And, insofar as adjudication of the union's breach of duty is concerned, the result [of *Humphrey*] should be no different if the employee, as Owens did here, sues the employer and union in separate actions." 386 U.S. at 187; *see* note 6 *supra* & accompanying text. However, the Court seems to qualify its prior language by asserting, in its damage discussion, "in fact, the employer may be (*and probably should be*) joined as a defendant in the fair representation suit." 386 U.S. at 197 (emphasis added).

be involved in the *separate* action against the employer for breach of contract pending in a state court.

In its discussion of section 301 jurisdiction, the Court also may have created a new rule of law. After it asserted that the employee's rights are not endangered by demanding a showing of lack of good faith by the union,[48] the Court went on to declare, "we think the wrongfully discharged employee may bring an action against his employer . . . provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance."[49] Prior to the Court's disposition of the matter, it had been established that the employee must, at least, *attempt* to utilize the grievance procedure and give the union an opportunity to act on his behalf.[50] If the Court's assertion is to be treated as a new rule of law, a conflict between the circuit courts may have been resolved.[51]

It has been suggested that such a rule would strengthen the collective bargaining process and thereby promote industrial peace since the employer, realizing that the union's conduct could be relied on as a defense to his own conduct, would be more likely to acquiesce to the union as sole representative of the workers, rather than hear independent individual claims.[52] On the other hand, this

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[48] *See* note 1 *supra.*

[49] 386 U.S. at 186; *see* note 33 *supra* & accompanying text. The Court would not apply the rule by which the employer is estopped by his own conduct from repudiating the contractual procedures. *Id.* at 185. Although the Court's statement might be considered dictum, since the suit against the employer is still pending in the state court, it gives every indication of applying to the present employee. As the concurring opinion notes: "I do not believe the Court relieves this injustice [to leave the employee without a remedy when the union wrongfully refuses to process his grievance] . . . by *requiring* the employee to prove an unfair labor practice as a prerequisite to judicial relief for the employer's breach of contract." *Id.* at 200 n.3 (emphasis added). Furthermore, Mr. Justice Black states, "The Court today opens slightly the courthouse door to an employee's incidental claim against his union . . . . This result follows from the Court's announcement . . . of a *new rule* to govern an employee's suit against his employer." *Id.* at 203 (dissenting opinion) (emphasis added).

[50] Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965). In this case the employee bypassed the union entirely.

[51] In a pre-*Maddox* decision, the Fourth Circuit relying upon Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 630-34 (1956), stated that individuals must be bound to the grievance procedure and the only exception whereby an employee could gain relief against his employer is where the union arbitrarily discriminates. *See* Henderson v. Eastern Gas & Fuel Ass'n, 290 F.2d 677, 681 (1961). *But see* Brown v. Sterling Aluminum Prods., Inc., 365 F.2d 651 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967), where the court, in a post-*Maddox* opinion suggests that it is only necessary for the employee to seek out the union and afford it an opportunity to act on his behalf.

[52] *See* Cox, *Individual Enforcement of Collective Bargaining Agreements*, 8 LAB. L.J. 850 (1957); Cox, *supra* note 51, at 630-34.

new rule would raise the possibility that an employer could breach the contract, and yet, if the union was found to have acted in good faith, the employee's claim could not be heard "by a jury, nor by an arbitrator, nor by the employer, nor by the union."[53]

The instant case may well implement the Court's current trend to provide the best of two forums by which an individual employee can assert his claim and yet promote the philosophy of the Taft-Hartley Act — the establishment of industrial peace between labor and management for the benefit of the public which desires stable relations between employer and representative. Since the Court does not appear to have negated NLRB jurisdiction of an employee's grievance against his union for unfair representation, the individual worker has the benefit of administrative decisionmaking — expertise without the expense of court procedure[54] — as long as the decision is not denied enforcement upon appropriate judicial review. If state jurisdiction of the matter has been vested, the employee has the advantage of controlling his own suit, gaining unlimited damages *if* properly apportioned between union and management, and avoiding the unreviewable discretion of the General Counsel.[55] However, the employee would be subject to the presumption of good faith in favor of the union in handling his grievance.

It also seems that the *Vaca* decision extends a good faith presumption in favor of the employer, since he can rely on the union's good faith conduct in handling the complaint. Although there could be instances where the employee has obviously been wrongfully discharged and the union would *still* be found to have acted in good faith, these instances would appear to be too infrequent to require a contrary exhaustion of remedies rule against the employer. If such a rule were required, the public interest in stable labor relations would be thwarted. Hence the *Vaca* Court, by providing an additional forum for the worker and at the same time stabilizing industrial relations, has properly achieved a workable solution.

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[53] 386 U.S. at 209 (dissenting opinion).

[54] 65 MICH. L. REV. 373, 381 (1966).

[55] *Id.* at 381-82.