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Exhaustion Of Internal Union Remedies As A Prerequisite To Section 301 Actions Against Employers

EXHAUSTION OF INTERNAL UNION REMEDIES AS A PREREQUISITE TO SECTION 301 ACTIONS AGAINST EMPLOYERS

An employee alleging an employer's breach of a collective bargaining agreement must initially present his claim to union representatives who decide whether to resolve the grievance through procedures established by the labor contract.[1] If the union arbitrarily refuses to press the grievance, the aggrieved worker may sue the employer under section 301 of the Labor Management Relations Act (LMRA).[2] To obtain relief, the employee must prove that the union failed to represent him fairly when he sought to invoke the contractual procedures.[3] Thus, the aggrieved employee often names the union and the employer as defendants in the section 301 suit.

Under the National Labor Relations Act (NLRA),[4] a majority of the members of a bargaining unit[5] may select a labor union to serve as its

[1] Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965). An employee is not required to use labor contract remedies where pursuit of those remedies would be futile. *See* Glover v. St. Louis - S.F. Ry. Co., 393 U.S. 324, 330-31 (1969) (no exhaustion of contractual procedures necessary where conspiracy between union and employer would render such effort futile); Battle v. Clark Equip. Co., 579 F.2d 1338, 1344-46 (7th Cir. 1978) (employee may sue employer without resorting to labor agreement remedies where use of those remedies would necessitate union proving its own wrongdoing).

No exhaustion is required when labor contract procedures do not exist. *See* Atlantic Steel Co. v. Kitchens, 79 L.R.R.M. 2620, 2621-22 (Ga. 1972); *cf.* Bsharah v. Eltra Corp., 394 F.2d 502-03 (6th Cir. 1968) (despite plaintiff's allegations that grievance machinery had broken down, exhaustion required where employer could show processing of complaints). Further, courts do not require employees to submit to collective agreement procedures, where, though such machinery exists, the particular dispute is not covered by the collective bargaining agreement. *See* Steele v. Brewery Workers, Local 1162, 432 F. Supp. 369, 374 (N.D. Ind. 1977); Coleman v. Kroger Co., 399 F. Supp. 724, 731 (W.D. Va. 1975). *See also* Simpson & Berwick, *Exhaustion of Grievance Procedures and the Individual Employee,* 51 TEX. L. REV. 1179, 1200-13 (1973) [hereinafter cited as Simpson & Berwick]; Tobias, *A Plea For the Wrongfully Discharged Employee Abandoned By His Union,* 41 U. CIN. L. REV. 55, 67-70 (1972) [hereinafter cited as Tobias].

[2] LMRA or Taft-Hartley Act, § 301(a), 29 U.S.C. § 185(a) (1976). Section 301(a) provides that suits for breach of collective bargaining agreements between a labor organization and an employer may be brought in federal district court. Although state courts retain concurrent jurisdiction for breach of contract actions that may be within the purview of § 301(a), Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 506 (1962), state tribunals must apply federal labor law in § 301 suits. *See* Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95, 102-03 (1962). *See generally* Tobias, *Individual Employee Suits for Breach of the Labor Agreement and the Union's Duty of Fair Representation,* 5 U. TOL. L. REV. 514 (1974) [hereinafter cited as Tobias II]; *see also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451-52 (1957)

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

[4] National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1976).

[5] A bargaining unit is a group of jobs or job classifications sharing common interests which the union can effectively represent. *See* R. GORMAN, BASIC TEXT ON LABOR LAW 66-74 (1976). Section 9(b) of the NLRA empowers the National Labor Relations Board to determine the appropriateness of a proposed bargaining unit. NLRA section 9(b), 29 U.S.C. § 159(b) (1976). In these determinations, the Board considers such factors as the similarity in scale of

exclusive representative.[6] A labor union chosen as an exclusive representative is under a duty to fairly represent all unit members.[7] The duty of fair representation obligates the union to represent the employees without acting in a discriminatory or arbitrary manner, and requires the union to act in good faith.[8] This duty applies to all aspects of the collective bargaining process, including negotiation with management,[9] processing of grievances,[10] and representation of employees during arbitration.[11]

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earnings, employment benefits, conditions of employment, employee qualifications, the extent of integration of production processes, geographic proximity, common supervision of labor policy, and previous history of collective bargaining. *See* Mallinckrodt Chem. Works, 162 N.L.R.B. 387 (1966); Metropolitan Life Ins. Co., 156 N.L.R.B. 1408 (1966).

[6] Section 9(a), 29 U.S.C. § 159(a) (1976). Under the theory of exclusive representation by the designated union, the employer may bargain only with the majority representative and not with individual employees or a minority union. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 61-65 (1975); J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944). An individual employee, however, may present his particular grievance to the employer if the issue is one of particular applicability to that individual employee, rather than one involving bargaining on the scope of the labor contract. *See* Hughes Tool Co. v. NLRB, 147 F.2d 69, 72-73 (5th Cir. 1945).

[7] The Supreme Court initially promulgated the duty of fair representation in Steele v. Louisville & N.R.R. Co., 323 U.S. 192, 202 (1944). Relying on the exclusive representation provisions of the Railway Labor Act, 45 U.S.C. §§ 151-164 (1976), the Court found the exercise of power to act on behalf of all employees subsumed a duty to exercise that power in their best interests. 323 U.S. at 202. In announcing this standard the Court held that the union must represent all bargaining unit members fairly, impartially, without hostile discrimination and in good faith, regardless of whether the employees were members of the union. *Id.* at 204. Thus, the Court in *Steele* enjoined the railroad and union from administering a collective bargaining agreement that discriminated against black workers ineligible for union membership. *Id.* Cox, *The Duty of Fair Representation,* 2 VILL. L. REV. 151 (1957) [hereinafter cited as Cox]. *See generally,* Fanning, *The Duty of Fair Representation,* 18 B.C. L. REV. 813 (1978); *see also* Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 215 (1944).

[8] *See* Vaca v. Sipes, 386 U.S. 171, 177 (1967).

[9] *See* Steele v. Louisville & N.R.R. Co., 323 U.S. 192, 204 (1944) (union may not disregard interests of minority workers by contracting for inequitable promotion provisions).

[10] *See* Humphrey v. Moore, 375 U.S. 335, 343 (1964) (union's duty of fair representation extends to processing grievances). The *Vaca* Court stated that the union could not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion. 386 U.S. at 191. The precise conduct in processing a grievance that constitutes an actionable breach, however, has not been clearly defined. Although the inexplicable failure to make a decision on an employee grievance has been held actionable, negligence by the union is usually not held a breach of the fair representation duty. *Compare* Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975) *with* Dill v. Greyhound Corp., 435 F.2d 231, 239 (6th Cir. 1970). *See also* Barhitte v. Kroger Co., [1978] 2 LAB. REL. REP. (BNA) 99 L.R.R.M. 2663; Clark, *The Duty of Fair Representation: A Theoretical Structure,* 51 TEX. L. REV. 1119, 1122-55 (1973); Note, *The Duty of Fair Representation and Exclusive Representation in Grievance Administration: The Duty of Fair Representation,* 27 SYRACUSE L. REV. 1199, 1204-08 (1976).

[11] *See* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 572 (1976). Although the union must act in good faith in respect to its members' interests, it nevertheless retains broad discretion in its decisions. *See* Humphrey v. Moore, 375 U.S. 335, 349-50 (1964) (union free to screen frivolous complaints which clog grievance process and take position in internal disputes if acting upon relevant, non-arbitrary considerations); Cox, *supra* note 7, at 160-64.

When a labor union fails to act on an employee's complaint through the contractual procedures of the labor agreement, the employee may remedy his grievance by suing the employer under section 301 of the LMRA. In *Vaca v. Sipes,*[12] the Supreme Court announced the basic principles governing section 301 actions involving issues of fair union representation. In *Vaca,* a union member discharged by his employer alleged in state court that his discharge violated the collective bargaining agreement. The employee also alleged that the union had unjustifiably failed to process his grievance to arbitration, the final stage of the grievance procedure.[13]

While noting the general rule that an employee must first attempt to exhaust the contractual grievance procedures provided by the collective bargaining agreement,[14] the *Vaca* Court construed section 301 to authorize employees to seek civil remedies without invoking existing grievance machinery when "the union has sole power . . . to invoke the higher stages of the grievance procedure, *and* . . . the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance."[15] The Court emphasized that without such an exception, the wronged employee would be left without a remedy.[16] Therefore, the *Vaca* Court held that an aggrieved employee could sue his employer under section 301 for violation of the labor contract if the employee could prove the union violated its duty of fair representation in processing his grievance.[17] The Court noted that employees may name the union as a defendant in section 301 suits to expedite their cases.[18]

Although employees are generally required to attempt to utilize union remedies before suing the union for breach of its fair representation duty,[19]

Thus, although the union is charged with the responsibility of serving all members' interests equally, the collective bargaining representative may make reasonable distinctions among its members based on important, non-discriminatory criteria. *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 342 (1953) (labor agreement allowing employer to give special credit to veterans in determining seniority provisions held valid); Aeronautical Indus. Dist. Lodge v. Campbell, 337 U.S. 521, 527-29 (1949) (collective bargaining contract providing union chairman top seniority in event of layoff does not constitute breach of union's duty).

[12] 386 U.S. 171 (1967).

[13] *Id.* at 173.

[14] *Id.* at 184 (citing Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965)); *see* Simpson & Berwick, *supra* note 1, at 1186.

[15] 386 U.S. at 185. *See also* Hubicki v. ACF Indus. Inc., 484 F.2d 519, 522 (3rd Cir. 1973); Dill v. Greyhound Corp., 435 F.2d 231, 237 (6th Cir. 1970).

The *Vaca* Court carved out a second exception to the contractual exhaustion rule where the employer's conduct constituted repudiation of the contractual procedures. 386 U.S. at 185. The Court reasoned that estoppel would operate to deny the employer the exhaustion defense where his own conduct was inconsistent with the contract terms. *Id.*

[16] 386 U.S. at 185-86.

[17] *Id.* at 186.

[18] *Id.* at 187.

[19] *See* Winterberger v. General Teamsters Auto Drivers, 558 F.2d 923, 925-26 (9th Cir. 1977); Gainey v. Brotherhood of Ry. Clerks, 313 F.2d 318, 321 (3rd Cir. 1963); Tobias II, *supra* note 2, at 531. In some jurisdictions, the union has the burden of demonstrating that union

courts do not agree whether an employer may invoke the employee's failure to exhaust internal union procedures as a defense in a section 301 action.[20] Those courts dismissing suits in which a union and employer are co-defendants for failure to exhaust internal union remedies often fail to distinguish between use of the exhaustion defense by the union and by the employer.[21] Different considerations underlie the decision whether employ-

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procedures are available and adequate to redress the particular grievance at issue. *See, e.g.*, Yeager v. C. Schmidt & Sons, Inc., 343 F. Supp. 927, 929-30 (E.D. Pa. 1972). *See also* Foust v. International Bhd. of Elec. Workers, 572 F.2d 710, 715-17 (10th Cir.), *cert. granted*, 99 S.Ct. 248 (1978). Other courts require that internal union remedies be explicitly stated by the union constitution. *See* Robinson v. Marsh Plating Corp., 443 F. Supp. 811, 815 (E.D. Mich. 1978); Emmanuel v. Omaha Carpenters Dist. Council, 422 F. Supp. 204 (D. Neb. 1976). The requirement that employees seek remedies within the union before instituting suit is often based on the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). 29 U.S.C. §§ 401-531 (1976). Section 411(a)(4) states that an employee may be required to exhaust union procedures before suing his union, *id.* at § 411(a)(4)(1976), however, this provision has been interpreted as discretionary in the federal courts. *See, e.g.*, Verville v. International Ass'n of Machinists, 520 F.2d 615, 620-21 (6th Cir. 1975); Beaird & Player, *Exhaustion of Intra-Union Remedies and Access to Public Tribunals Under the Landrum-Griffin Act*, 26 ALA. L. REV. 519, 529 (1974). A further policy consideration is the doctrine that private associations should try to settle their disputes internally before resorting to litigation. *See* Simpson & Berwick, *supra* note 1, at 1216.

Courts will not, however, require exhaustion where such an effort would be futile. *See* Keene v. International Union of Operating Engr's, Local 624, 569 F.2d 1375, 1378 (5th Cir. 1978); Goclowski v. Penn Central Transp. Co., 571 F.2d 747, 758 (3rd Cir. 1977); *cf.* Sciacca v. Wine Salesmen's Union, Local 18, 65 Lab. Cas. ¶ 11,780 (1971) (conclusory allegations of anticipated union whitewash insufficient to establish futility of internal union procedures). *See also* Dorn v. Meyers Parking System, Local No. 596, 395 F. Supp. 779, 785 (E.D. Pa. 1975) (employee not required to utilize union remedies if accompanying delay is great enough to adversely prejudice his case). An employee who is not a member of the union is not required to exhaust union remedies. *See* Soto Segarra v. Sea-Land Serv., Inc., 581 F.2d 291, 295-96 (1st Cir. 1978) (expelled union member not bound to pursue formal union appeal procedures). Additionally, a union may be estopped from asserting failure to exhaust union remedies where the employee fails to utilize union procedures due to misrepresentations by union officials. *See* Ruggirello v. Ford Motor Co., 411 F. Supp. 758, 762 (E.D. Mich. 1976).

[20] *See* text accompanying notes 46-49 *infra*. *Compare* Winter v. Local 639, International Bhd. of Teamsters, 569 F.2d 146, 150 (D.C. Cir. 1977) *and* Orphan v. Furnco Constr. Corp., 466 F.2d 795, 801-03 (7th Cir. 1972) *with* Fizer v. Safeway Stores, Inc., 586 F.2d 182, 184 (10th Cir. 1978) *and* Petersen v. Rath Packing Co., 461 F.2d 312, 315-18 (8th Cir. 1972).

[21] *See* McGovern v. International Bhd. of Teamsters, 447 F. Supp. 368, 372 (E.D. Pa. 1978); Foy v. Norfolk & W. Ry. Co., 377 F.2d 243, 246 (4th Cir.), *cert. denied*, 389 U.S. 848 (1967). Some courts dismiss suits by stating that they have no jurisdiction until all extra-judicial remedies are utilized. *See* Fingar v. Seaboard Line R.R. Co., 277 F.2d 698, 700-01 (5th Cir. 1960); Harrington v. Chrysler Corp., 303 F. Supp. 495, 497 (E.D. Mich. 1969).

One of the early cases cited for the proposition that the employer could utilize the exhaustion of intra-union remedies defense is Bsharah v. Eltra Corp., 394 F.2d 502 (6th Cir. 1968), a case involving a suit against an employer and the International United Auto Workers Union. In a per curiam opinion, the Sixth Circuit affirmed the district court's grant of summary judgment for the defendants, basing its decision primarily on the employee's failure to exhaust labor contract remedies. *Id.* at 502-03. The court did not discuss the employer's use of the defense, stating only that it concurred with the lower court's conclusion that the plaintiff was required to exhaust intra-union remedies. *Id.* at 503; *see* Simpson & Berwick,

ers as well as unions should be allowed the defense of failure to exhaust internal union remedies in a section 301 action. Courts addressing the issue of employer use of the defense of failure to exhaust internal union remedies have followed two distinct approaches.

One view reasons that internal union remedies found in the union constitution are part of a contractual relationship between an employee and his union, and the employer thus may not avail himself of the union's defense.[22] The opposing line of cases hold that where pursuit of a union's remedial procedures may result in reversal of the union's wrongful decision not to process the grievance, the employee may be required to fully utilize his union procedures before suing the employer.[23]

In *Winter v. Local 639, International Brotherhood of Teamsters,*[24] the D.C. Circuit disagreed with the trial court's conclusion that the employer was entitled to rely on an internal union remedies exhaustion defense.[25] Instead, the court based its holding for the employer on a finding that the employer did not breach the labor contract.[26] In *Winter,* an employee asserted that his employer had violated the bargaining agreement by refusing to award seniority on a company-wide basis, rather than on a plant-wide basis.[27] The aggrieved employee also named the local union as a defendant, contending that the union breached its duty of fair representation by not pressing his grievance.[28] Winter claimed that the union based its refusal

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supra note 1, at 1214-16. *See also* Brady v. Trans World Airlines, Inc., 401 F.2d 87, 102 (3rd Cir. 1968), *cert. denied,* 393 U.S. 1048 (1969).

[22] *See* text accompanying notes 37-39 *infra.*

[23] Most union constitutions provide for some type of remedy to members who have been injured by local union decisions or actions. These remedies may include appeal procedures, beginning with the local union membership and extending to the international convention, which could lead to a reversal of the local union's decision. *See* Tobias, *supra* note 1, at 70-71. However, other union constitutions may provide only for punishment of the local union officials by prosecution for improper union action. If found guilty, the officer could be punished by fine, reprimand or suspension. *See* Orphan v. Furnco Constr. Corp., 466 F.2d 795, 801 (7th Cir. 1972).

The United Auto Workers constitution is often praised by courts for its extensive remedial procedures. *See, e.g.,* Fleming v. Chrysler Corp., 416 F. Supp. 1258, 1264 (E.D. Mich. 1975), *aff'd,* 575 F.2d 1187 (6th Cir. 1978). The UAW constitution provides for appeal to the local membership, then to the International Board of the union which has often reversed local union decisions and may award monetary relief. 416 F. Supp. at 1262-63. In addition, appeal may further be made to a Public Review Board which is completely autonomous and may grant extensive relief to the employee. *Id.* at 1263-64.

[24] 569 F.2d 146 (D.C. Cir. 1977).

[25] *Id.* at 148.

[26] *Id.* at 150-52.

[27] *Id.* at 148. The labor agreement did not contain a specific provision on whether seniority was to be awarded on a company-wide or plant-wide basis. *Id.* at 151 n.30. Industry practice, however, was to award seniority on a plant-wide basis. *Id.*

[28] *Id.* at 148. In response to an earlier, similar complaint by Winter, the union participated in several meetings with the management, but had decided not to pursue the grievance. When Winter filed his second grievance, the union again met with management representatives but Winter did not attend the meeting. *Id.*

to pursue his complaint on political hostility towards him.[29] The union countered that since his grievance represented a restatement of an earlier complaint disposed of on the merits, and that since Winter had failed to appear at an arranged meeting with management representatives,[30] it had justifiably refused to process his grievance.[31] Finding that the employee had failed to pursue his internal union remedies,[32] the district court granted summary judgment to both the employer and the union.[33]

On appeal, Winter argued that he should be excused from exhausting internal union remedies because such an attempt would have been futile.[34] Rejecting plaintiff's contention that any attempt to utilize union procedures would have been fruitless under the facts presented,[35] the D.C. Circuit agreed that failure to exhaust the grievance procedures precluded Winter from maintaining suit against his local union.[36]

The *Winter* court then considered whether the exhaustion defense was available to an employer. The majority opinion adopted the reasoning of a Seventh Circuit case, *Orphan v. Furnco Construction Corporation,*[37] which had characterized the employee-union relationship as contractual based on the union constitution and its by-laws.[38] Thus, the D.C. Circuit Court reasoned that the internal union procedures provided by the union constitution could not be invoked as a defense by the employer.[39] The

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[29] *Id.*

[30] *Id.* Winter claimed that he did not attend the meeting because he feared that he would lose job time. *Id.* The labor contract, however, provided that attendance at grievance meetings was an excused absence. *Id.* n.2.

[31] 569 F.2d at 148.

[32] *Id.* The Teamsters' constitution and by-laws provided several remedies for an aggrieved union member, including filing charges with a Local Executive Board. An adverse decision at this level was appealable to a General Executive Board authorized to hear the case de novo. An employee could also appeal directly to the International union's president. *Id.* at 148-49.

[33] *Id.* at 148.

[34] *Id.* at 149. The plaintiff asserted that the union's inability to provide both monetary and injunctive relief excused his failure to resort to union remedies. The *Winter* court conceded that claimant could not have obtained monetary relief through union procedures, but found that the possibility of injunctive relief offered by the union constitution precluded Winter's claim of futility. *Id.* Winter also contended that the union's hostility towards him would prevent him from receiving a fair hearing. The court concluded that Winter's allegations of hostility fell short of the requisite showing of specific personal animus. *Id.* at 150. Courts often excuse the failure to exhaust extra-judicial remedies where the plaintiff can prove such an effort would be futile. *See* note 19 *supra.*

[35] 569 F.2d at 150.

[36] *Id.* The *Winter* court relied on § 411(a)(4) of the LMRDA in requiring exhaustion before suing the union. *Id.* at 148; *see* note 19 *supra.*

[37] 466 F.2d 795 (7th Cir. 1972).

[38] 569 F.2d at 150.

[39] The contract approach discussed in *Winter* and *Orphan* is similar to the holding of an earlier Eighth Circuit case, Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972). In *Petersen,* two employees challenged the company's job reclassification as a breach of the labor agreement. *Id.* at 314. In their § 301 action against the union and employer, the plaintiffs

Winter court, however, recognized that *Orphan* had implied that the employer might use the exhaustion defense in limited circumstances.[40] Employees might, for example, be required to exhaust union remedies where continued appeal could result in reversal of the union's decision not to process the grievance. Thus, if the union appeals procedure offered a reasonable expectation that the higher union tribunal would reverse the adverse grievance decision and reinstate the grievance, the aggrieved employee would be required to exhaust his union remedies.[41] The *Winter* court found that the provisions of the Teamster's constitution[42] would not result in reversal of adverse grievance decisions, but were merely trial-type procedures for prosecuting offending union officials.[43] The D.C. Circuit therefore denied the employer the exhaustion defense on the facts of the *Winter* case.[44]

Prior to Winter, several federal district courts have allowed the exhaustion defense to an employee in limited circumstances.[45] These lower courts emphasize *Vaca*'s basic principle that an employee may sue an employer under section 301, rather than employ grievance machinery, only when the

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alleged that the union breached its duty towards them by refusing to process the grievance past the third step of the grievance machinery of the bargaining agreement. *Id.* at 314-15. The Eighth Circuit affirmed a lower court judgment for the aggrieved employees, stating that the exhaustion of internal union remedies was a concern of the union, not the employer, and the labor agreement contained no requirement for exhaustion of intra-union appeals. *Id.* at 315. The *Petersen* court did not elaborate on its statement denying the employer the exhaustion defense nor cite any authority for its holding. The court affirmed the judgment against both the employer and the union on the merits, also denying the union the defense of failure to exhaust internal remedies based on grounds that such an appeal would have been futile under the circumstances. *Id.* at 315-16.

The Tenth Circuit recently based a denial of the internal union exhaustion defense on the theory that an employer cannot avail himself of a defense arising by virtue of the union constitution. Fizer v. Safeway Stores, Inc., 586 F.2d 182, 184 (10th Cir. 1978). The *Fizer* court relied on an often cited Ninth Circuit opinion, Retana v. Apartment Operators, Local 14, 453 F.2d 1018 (9th Cir. 1972). *Retana,* however, did not decide the issue of employer use of the defense of non-exhaustion of intra-union remedies, a point raised on appeal by the union. *Id.* at 1027. The opinion makes passing reference to an employer's use of the defense, and can only be construed as dicta. *Id.* at 1027, n.16. For a discussion of the contract approach, *see* Comment, *The Exhaustion of Internal Union Remedies as a Prerequisite to Section 301 Actions Against Labor Unions and Employers,* 55 CHI.-KENT L. REV. 259, 277-81 (1979) [hereinafter cited as *Exhaustion of Internal Union Remedies].*

[40] 569 F.2d at 150.

[41] *Id.* at 150-51. *See* Orphan v. Furnco Constr. Corp., 466 F.2d 795, 801 (7th Cir. 1972).

[42] *See* note 32 *supra.*

[43] 569 F.2d at 151. The *Winter* court found the Teamsters' procedures similar to those of the Bricklayers Union, which the *Orphan* court had characterized as punitive in nature. *See* Orphan v. Furnco Constr. Corp., 466 F.2d 795, 801 (7th Cir. 1972).

[44] 569 F.2d 151. The court affirmed the grant of summary judgment for the employer, holding that Winter's claim of breach of the labor contract presented no genuine issue of fact for trial. *Id.* at 151-52.

[45] *See* Fleming v. Chrysler Corp., 416 F. Supp. 1258 (E.D. Mich. 1975), *aff'd,* 575 F.2d 1187 (6th Cir. 1978); Brookins v. Chrysler Corp., 381 F. Supp. 563 (E.D. Mich. 1974); Harrington v. Chrysler Corp., 303 F. Supp. 495 (E.D. Mich. 1969).

union has breached its duty of fair representation.[46] Requiring exhaustion of all union appeals which might result in reversal of the union decision and reinstatement of the grievance allows the union another chance to prove its good faith, thereby eliminating plaintiff's section 301 claim.[47] The *Winter* court reached an opposite result because previous cases involved the United Auto Workers constitution, which provided a more extensive union appellate system.[48] Such a comprehensive system was more likely to result in an employee securing adequate relief than the Teamsters' punitive-type procedures in *Winter* and therefore, exhaustion was required.[49]

Several practical reasons have been urged as justifying denial of the internal union remedies exhaustion defense to an employer.[50] Employees may often be unaware of remedies made available by the union constitution or, even if informed of their existence, may not understand highly technical procedures.[51] Also, most collective bargaining agreement proce-

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[46] Vaca v. Sipes, 386 U.S. 171 (1967); *see* text accompanying notes 12-18 *supra.*

[47] *See* Brookins v. Chrysler Corp., 381 F. Supp. 563 (E.D. Mich. 1974). The *Brookins* court dismissed the suit against the union for plaintiff's failure to exhaust internal union remedies and then considered whether the employer could invoke the exhaustion defense. *Id.* at 567. The *Brookins* court identified the issue as whether the union's dismissal from the case constituted an adjudication that the union had not yet breached its duty of fair representation until plaintiff had pursued all remedies. If the dismissal went to the merits, and the union did not breach its duty, then the plaintiff could not maintain a direct § 301 action against the employer, since *Vaca* would allow the employer to insist that the plaintiff resort to contractual grievance machinery. *Id.* at 567-68. If, however, the dismissal of the union recognized that the union may have breached its duty but, procedurally, there was no judicial remedy yet allowable, then the employee could still maintain an action against the employer and attempt to prove union breach of duty in order to escape the employer's defense of failure to utilize the collective bargaining agreement procedures. *Id.* at 568. The *Brookins* court found that dismissal of the union for failure to exhaust internal remedies fell between these two characterizations. *Id.* The court determined the applicable UAW procedures were adequate to provide plaintiff with the requested relief and required the employee to exhaust union remedies before suing Chrysler. *Id.* at 568-69. The *Brookins* court emphasized that pursuit of union appellate procedures would allow the union the opportunity to reverse its previous decision and thereby prevent any breach of its duty of fair representation. *Id.* at 569. Therefore, the failure of the employee to exhaust his remedies prevents him from proving the union has committed a breach. *Id. See also* O'Hern v. Chicago Typographical Union No. 16, No. 78-C-1577 (N.D. Ill. Dec. 13, 1978) (employer may use exhaustion defense where decision not to process grievance not final); Austin v. United States Postal Serv., No. 76-C-4681 (N.D. Ill. Aug. 28, 1978) (possibility that grievance may be prosecuted if appeal taken allows employer to invoke exhaustion defense); Ditzler v. International Ass'n of Machinists, Local 1984, 453 F. Supp. 50 (E.D. Pa. 1978); Neipert v. Arthur McKee & Co., 448 F. Supp. 206 (E.D. Pa. 1978).

[48] 569 F.2d at 151 n.26; *see* note 23 *supra.*

[49] 569 F.2d at 151 n.26.

[50] *See* Tobias, *supra* note 1, at 70-72; Simpson & Berwick, *supra* note 1, at 1220-26; Tobias II, *supra* note 2, at 529-32.

[51] *See* Simpson & Berwick, *supra* note 1, at 1220; Tobias, *supra* note 1, at 71. Most courts agree that ignorance of union remedies does not excuse failure to utilize them. By becoming a union member, the employee assumes an obligation to become familiar with the union's

dures allow only short time periods for an employee to file a complaint. If the aggrieved worker is required to utilize often lengthy internal procedures, he may miss this time period set by the labor contract and thereby be barred from exhausting his contractual remedies.[52] Further, higher union tribunals may be unavoidably biased in favor of local union officials[53] and reluctant to reverse local decisions.[54] Although these practical factors are valid considerations, they present no convincing argument for denying the employer the exhaustion defense since they apply with equal force in situations where the employee sues the union and is required to exhaust his remedies.[55]

The major criticism of allowing the employer to defend a section 301 suit by asserting that the plaintiff has not pursued union remedies rests on a contract analysis.[56] Critics emphasize that internal union procedural requirements are rules over which the employer has no control and has not bargained for, and, thus, he should not be allowed to avail himself of them.[57]

Although the *Orphan* and *Winter* decisions utilized this contract theory, both courts undercut the theory on policy grounds, concluding that exhaustion may be required where internal remedies have not been fully pursued and union procedures could result in reinstatement and continued presentation of the grievance.[58] Allowing the employer to defend a suit based on a failure to exhaust under these limited circumstances is preferable to the strict application of the contract analysis.[59] Further, this result seems more consistent with the reasoning of *Vaca v. Sipes*. *Vaca* sanc-

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constitution. *See* Newgent v. Modine Mfg. Co., 495 F.2d 919, 927-28 (7th Cir. 1974); Pawlak v. International Bhd. of Teamsters, 444 F. Supp. 807, 811 (M.D. Pa. 1977); Cammarata v. Ice Cream Drivers, Local 757, 441 F. Supp. 696, 701 (E.D.N.Y. 1977), *aff'd* 591 F.2d 1329 (2d Cir. 1978).

[52] *See* Simpson & Berwick, *supra* note 1, at 1220; Tobias, *supra* note 1, at 71. *See, e.g.*, Sciaraffa v. Oxford Paper Co., 310 F. Supp. 891 (D. Me. 1970). *But cf.* Pesola v. Inland Tool & Mfg. Inc., 423 F. Supp. 30, 34 (E.D. Mich. 1976) (applicable statute of limitations tolled during pendency of union appeals to avoid penalizing plaintiff for exhaustion of union remedies).

[53] *See* Tobias, *supra* note 1, at 71.

[54] *See id.;* Tobias II, *supra* note 2, at 532.

[55] Most courts require that an employee exhaust union remedies before suing his union, reinforcing their conclusion with LMRDA § 411(a)(4); *see* note 19 *supra.*

[56] *See* text accompanying notes 37-39 *supra.*

[57] *See* Simpson & Berwick, *supra* note 1, at 1219-21. The authors point out that the contract theory of the relationship between the union and its members fails when the employee is not a union member but merely a member of the bargaining unit. *Id.*

[58] Recent Seventh Circuit cases affirm the *Orphan-Winter* approach. *See* Harrison v. Chrysler Corp., 558 F.2d 1273, 1278-79 (7th Cir. 1977) (employer cannot invoke intra-union exhaustion defense since union appeal board's decision not to process the grievance was final and not appealable). *See also* Baldini v. Local 1095, UAW, 581 F.2d 145 (7th Cir. 1978) (employee not required to use union appellate procedures where union no longer has power to revive grievance).

[59] *See Exhaustion of Internal Union Remedies, supra* note 39, at 282-84.

tioned employee actions against their employers only when the union's arbitrary refusal to process the complaint left plaintiffs without a remedy. If the employee is required to pursue internal union remedies, the union may reverse its decision, reinstate the grievance and establish its good faith thereby avoiding litigation.[60] The same reasoning behind the decision to allow a union to raise the exhaustion defense when complaints of breach of duty to fairly represent are brought against it also applies to actions against employers.[61] Encouragement of extra-judicial systems of settling disputes, recognition of crowded dockets in federal courts, judicial resistance to interference with internal union affairs, and the judiciary's desire to allow the union's highest tribunal to interpret complex constitutions and rules all favor permitting employers to raise the defense of failure to exhaust union remedies.[62]

By requiring employees to utilize all union remedies, the judiciary advances the national labor policy in favor of arbitration.[65] This policy promotes settlement of employee-employer disputes through extra-judicial means—the use of contractual grievance machinery, voluntary settlements and arbitration.[66] In order to effectuate this policy, employees should be required to pursue all possible internal remedies. Since the primary objective of federal labor policy is the promotion of industrial peace through private settlement of disputes, section 301 plaintiffs should attempt to exhaust all internal union procedures before resorting to court action.

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[60] *See* note 47 *supra.*

[61] *See* note 19 *supra.*

[62] *See* Vorenburg, *Exhaustion of Intraunion Remedies as a Condition Precedent to Appeal to the Courts,* 2 LAB. L.J. 487, 488 (1951).

[65] *See* Orphan v. Furnco Constr. Corp., 466 F.2d 795, 801-02 (7th Cir. 1972); Brookins v. Chrysler Corp., 381 F. Supp. 563, 569 (E.D. Mich. 1974).

[66] *See* LMRA, 29 U.S.C. § 173(d) (1976). Section 173(d) declares that:

> 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 best expression of this policy is contained in three cases collectively referred to as the Steelworkers' Trilogy. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960); United States v. Warrier & Gulf Navigation Co., 363 U.S. 574, 582 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960). *See also* Mayer, *Labor Relations, 1961: The Steelworkers Cases Re-examined,* 13 LAB. L.J. 213 (1962); Simpson & Berwick, supra note 1, at 1183.