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Section 301(a) and the Employee: An Illusory Remedy

SECTION 301(a) AND THE EMPLOYEE: AN ILLUSORY REMEDY

I. INTRODUCTION

Section 301(a) of the Labor Management Relations Act[1] provides that any federal district court may hear suits based upon the breach of a contract between an employer and a labor organization.[2] Although it would appear that the basic purpose of the section was to "give to *employers* the right to sue a union in interstate commerce, in a Federal court, for violation of contract,"[3] the United States Supreme Court, in *Smith v. Evening News Ass'n*,[4] held that an *individual employee* may sue, under section 301(a), for a breach of the collective bargaining agreement between his employer and his union.[5]

Mr. Justice Black, dissenting in *Smith*, noted that the majority opinion "studiously refrains from saying when, for what kinds of breach, or under what circumstances an individual employee can bring a Section 301 action . . . ."[6] And in 1965, just three years after *Smith*, in another dissent, Mr. Justice Black underscored his *Smith* observation by adding, in *Simmons v. Union News Co.*,[7] that although the Supreme Court "has not yet gone so far as to say that where there is a personal grievance for breach of a collective bargaining agreement,

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1. Labor Management Relations Act (Taft-Hartley Act) § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964).

2. "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Ibid.

3. 93 Cong. Rec. 5014 (1947) (remarks of Senator Ball). (Emphasis added.) "[A] fair reading of § 301 in the context of its enactment shows that the suit that Congress primarily contemplated was the suit against a union for strike in violation of contract. . . . [W]e might in turn find a federal right in the union to sue for a lockout in violation of contract." Textile Workers v. Lincoln Mills, 353 U.S. 448, 479 (dissenting opinion).

But there is language in the congressional debates which indicates that an individual employee's suit was contemplated by the section. Congressman Hartley, a drafter of the section, acknowledged the following statement as accurate: "[I]n other words, proceedings could . . . be brought by the employers, the labor organizations, or interested individual [sic] . . . to secure declarations from the Court of legal rights under the contract." 93 Cong. Rec. 3656-57 (1947) (remarks of Congressmen Barden and Hartley). See 93 Cong. Rec. 4207 (1947) (remarks of Senator Morse).

For the legislative history of section 301(a), see, e.g., Appendix to Textile Workers v. Lincoln Mills, 353 U.S. at 485.

4. 371 U.S. 195 (1962).

5. The Court interpreted the word "between" in the section as referring to "contracts," and not to "suits." Id. at 200.

6. Id. at 204 (dissenting opinion).

7. 382 U.S. 884 (1965). The Supreme Court here denied certiorari. The case is reported below at 341 F.2d 531 (6th Cir. 1965).

the employee can be deprived of an independent judicial determination of the claim by an *agreement between the union and the employer* that no breach exists . . . denial of certiorari in this case . . . will undoubtedly lead people to believe, and I fear with cause, that this Court is now approving such a forfeiture of contractual claims of individual employees."[8]

II. Final Determination Clauses

A. *Generally*

Simmons arose out of the same facts as did an earlier case, *Hildreth v. Union News Co.*,[9] in which the Supreme Court also denied certiorari. In *Hildreth*, the Sixth Circuit rejected plaintiff-employee's contention that *Smith* constituted a basis upon which to reverse its earlier decision[10] barring the employee's section 301(a) action. The collective bargaining agreement in *Hildreth* had stipulated that an employee could be discharged for "just cause" only;[11] plaintiff argued that his dismissal was not for "just cause" and was thus in violation of the contract.[12] The contract stipulated that a union-employer agreement that an employee's discharge was for "just cause" would be "final and binding upon the parties."[13] This final determination clause formed the basis of the subsequent decision, where the court held that:

> The right of an individual employee to process an alleged grievance is not the issue in this case. Rather, it is whether . . . the Union had the authority . . . to agree with the [employer] . . . on necessary corrective measures . . . without such action being treated as a breach of the collective bargaining agreement.[14]

Consequently, the final determination clause in the collective bargaining contract constituted an effective affirmative defense.

The import of this holding was aptly summarized in a later Fifth Circuit case, which, referring to *Hildreth*, observed that "the doors of the court were open but the claim was barred."[15] It would appear that whatever the theoretical merit of the distinction adhered to in *Hildreth*, its practical effect is that it renders *Smith* nugatory from the standpoint of the individual employee. This conclusion follows from the fact that an overwhelming proportion of collective bargaining agreements contain a final determination clause similar to the one in *Hildreth*; that is, some provision to the effect that a determination under the grievance procedure shall be "final and binding upon the parties."[16] This

8. 382 U.S. at 886 (dissenting opinion). (Emphasis added.)
9. 315 F.2d 548 (6th Cir.), cert. denied, 375 U.S. 826 (1963).
10. Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961).
11. Id. at 660.
12. Id. at 662.
13. Id. at 660.
14. 315 F.2d at 551.
15. Haynes v. United States Pipe & Foundry Co., 362 F.2d 414, 418 (5th Cir. 1966).
16. Ninety percent of collective bargaining agreements in the United States provide for grievance and arbitration procedures. 2 BNA Collective Bargaining Negotiations and Contracts 51:6-7 (1965). "Arbitration," by definition, is to be a "final determination." Ibid.

fact, coupled with the fact that Mr. Justice Black's dissents in *Smith* and *Simmons* have not deterred subsequent tribunals from adhering to the *Hildreth* rationale,[17] would seem to justify the conclusion that union and management, simply by including a final determination clause in the collective bargaining contract, may effectively bar judicial review of the merits of an employee's breach of contract suit. Yet, in referring to the Supreme Court's decision in *Humphrey v. Moore*,[18] a case in which the collective bargaining agreement also contained a final determination clause,[19] the American Bar Association Section of Labor Relations Law reported that "the most important rule of law . . . emerging from *Humphrey v. Moore* is that, by ruling on the merits of the claim, the Supreme Court confirmed the plaintiff's standing to sue, thus rejecting the view that the grievance-arbitration procedures constitute the individual employee's 'exclusive' remedy." [20] Since it is true that the *Humphrey* Court expressly went to the "merits"[21] of the plaintiff-employee's section 301(a) claim, the ABA's logic would appear to be correct. But, since a court's acceptance of a final determination clause as an affirmative defense precludes a consideration of the merits of the claimed breach of contract, it would seem that the ABA's conclusion contradicts the intimation, to be found in a recent Fifth Circuit case,[22] that *Humphrey* recognized a final determination clause as an affirmative defense. An understanding of this seeming contradiction will provide an insight into the circumstances in which a collective bargaining agreement that is expressly intended to be an exclusive remedy will, in fact, bar a section 301(a) suit by an employee.

B. *Humphrey v. Moore*

1. Two Levels of "Merits"

The *Humphrey* Court relied on *Smith*[23] in acknowledging jurisdiction of the employee's[24] suit to enjoin implementation of a joint employer-union decision,[25]

Furthermore, in every case examined by this writer, union-management agreement prior to the arbitration step was, by the terms of the agreement, to constitute a "final" determination.

17. E.g., Haynes v. United States Pipe & Foundry Co., 362 F.2d 414 (5th Cir. 1966); Serra v. Pepsi-Cola Gen. Bottlers, Inc., 248 F.Supp. 684 (N.D. Ill. 1965). See text accompanying notes 72-84 infra.

18. 375 U.S. 335 (1964).

19. See text accompanying notes 33-35 infra.

20. Report of the Committee on Labor Arbitration and the Law of Collective Bargaining Agreements, ABA Section of Labor Relations Law, 1965 Ann. Rep. 254, 271. (Footnote omitted.)

21. "We now come to the merits of this case." 375 U.S. at 344.

22. In Haynes v. United States Pipe & Foundry Co., 362 F.2d 414 (5th Cir. 1966), the court stated: "The action under the grievance procedure, here a final decision under the terms of the agreement, may be asserted in bar as an affirmative defense. . . . [C]f. Humphrey v. Moore . . . ." Id. at 418. See text accompanying note 46 infra.

23. 375 U.S. at 344.

24. This suit was a class action in which the plaintiff represented the discharged employees. 375 U.S. at 340.

25. Actually, the decision was rendered by a Joint Conference Committee "upon which

resulting in his discharge, which purported to settle certain grievances in accordance with the collective bargaining agreement. The plaintiff's suit was advanced on two claims. First, he alleged that the joint committee exceeded its powers as defined by the collective bargaining contract;[26] secondly, he alleged that the committee's decision was the result of "dishonest union conduct;"[27] that is, that the union breached its duty of fair representation.

The first claim clearly was within the ambit of a section 301(a) action for violation of the collective bargaining contract.[28] The employee alleged that the committee's decision, which was "expressly recited"[29] to be in accordance with section 5 of the contract, was a nullity because it was reached in a situation in which the contract did not empower the committee to act.[30] Specifically, section 5 of the collective bargaining contract provided that in the case of an "absorption" of another business by the employer, " 'the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect

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the employers and the unions in the overall bargaining unit had an equal number of representatives." Id. at 338. At least one commentator has considered this fact crucial, and has remarked: "[T]he joint conference committee did not constitute the contracting parties; it was an arbitration board limited in its power to the settlement of disputes within the scope of its authority under the agreement. . . . In short, Humphrey . . . merely ruled that the court will entertain the conventional suit to set aside an arbitration award if it is alleged that the arbitrator exceeded his authority under the terms of the agreement." Wyle, Labor Arbitration and the Concept of Exclusive Representation, 7 Boston College Industrial and Commercial L. Rev. 783, 794-95 (1966). (Footnotes omitted.) But there is no reason to believe that the Humphrey decision would have differed had the committee been composed exclusively of the contracting parties. In either situation, the contracting parties have the right to agree that their decision as to an interpretation of a term in the contract shall be final. Drake Bakeries, Inc. v. Local 50, Am. Bakery Workers, 370 U.S. 254, 263 (1962); cf. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). Indeed, several cases that have relied on Humphrey did not appear to deem it relevant that parties in addition to the contracting parties were on the committee that rendered the contested decision. E.g., Haynes v. United States Pipe & Foundry Co., 362 F.2d 414 (5th Cir. 1966). Finally, the Humphrey Court itself did not appear to attach any significance to the fact that non-contracting parties were on the committee.

26. 375 U.S. at 342.

27. Ibid.

28. Problems arise, however, in seeking justification for the Court's excursion to the merits of the unfair representation charge. See text accompanying notes 54-61 infra.

29. "We need not consider the problem posed if § 5 had been omitted from the contract or if the parties had acted to amend the provision. The fact is that they purported to proceed under the section. They deadlocked at the local level and it was pursuant to § 5 that the matter was taken to the Joint Conference Committee which, under Art. 7, was to make a decision 'after listening to testimony on both sides.' The committee expressly recited that its decision was in accordance with § 5 of the contract." 375 U.S. at 345 n.7. See text accompanying notes 58-72 infra.

30. 375 U.S. at 342.

to such matter shall be submitted to the joint grievance procedure.' "[31] The plaintiff contended that no "absorption," within the meaning of the contract, had occurred, so any committee decision under section 5 was in violation of the contract.[32]

It is important, at this point, to examine what "final determination" provisions were present in the collective bargaining agreement. One such provision was that decisions of the committee were to be " 'final and conclusive and binding upon the employer and the union, and the employees involved.' "[33] Another clause stated that " 'all matters pertaining to the interpretation of any provision of this Agreement . . . must be submitted to the . . . Committee . . . which Committee . . . shall make a decision.' "[34] And, as if these clauses were not explicit enough to express an intention that the grievance procedure was to be exclusive, another provision stated that it was " 'the intention of the parties to resolve all questions of interpretation by mutual agreement.' "[35]

Despite these various contract provisions, the Court, after having established jurisdiction, stated: "We now come to the merits of this case."[36] The Court then decided that there was in fact an "absorption" within the meaning of section 5 of the contract,[37] so that "the Joint Conference Committee's decision . . . was a decision which § 5 empowered the committee to make."[38] It might appear, therefore, that, as the ABA Labor Law Section concluded,[39] *Humphrey* does stand for the proposition that grievance-arbitration procedures may not be made to constitute an employee's exclusive remedy. But a careful examination of the language in *Humphrey* reveals such a conclusion to be an oversimplification. At the outset of the Court's discussion of the merits, the following language appeared: "*If we assume* . . . that the Joint Conference Committee's power was circumscribed by § 5 and that its interpretation of the section is open to court review . . . [plaintiff's] cause is not measurably advanced. For in our opinion the section reasonably meant what the Joint Committee said or assumed it meant."[40] In other words, the Court deemed it unnecessary to decide whether interpretation of the contract was open to its review, because its decision would have been against the plaintiff in any event.[41]

The procedure followed by the *Humphrey* Court is plainly at variance with

31. Id. at 338.
32. Id. at 342.
33. Id. at 338.
34. Ibid.
35. Id. at 339.
36. Id. at 344.
37. Id. at 345-48.
38. Id. at 347-48.
39. See text accompanying note 20 supra.
40. 375 U.S. at 345. (Footnote omitted.) (Emphasis added.) Clearly, in stating that its decision was in accord with § 5 of the contract, the committee was assuming that an absorption within the meaning of the section had occurred.
41. If the Court had found no "absorption," it then would have had to decide whether it had the power to make such a finding. See text accompanying note 42 infra.

the procedure followed by the *Hildreth* court. *Hildreth* simply recognized the final determination clause in the contract as an affirmative defense; the merits of plaintiff's claim were never considered. But *Humphrey* hypothetically went to the merits of the claim immediately, and, on the basis of its finding against the plaintiff on the merits, the Court deemed it unnecessary to render any decision as to the efficacy of the final determination clause. In a footnote, the Court stated:

> We also put aside the union's contention that Art. 7, § (d) [of the contract]—providing that all matters of interpretation . . . be submitted to the Joint Conference Committee—makes it inescapably clear that the committee had the power to decide that the transfer of operating authority was an absorption within the scope of § 5. But it is by no means clear that this provision in Art. 7 was intended to apply to interpretations of § 5, for the latter section by its own terms appears to limit the authority of the committee to disputes over seniority in the event of an absorption. Reconciliation of these two provisions, *going to the power of the committee under the contract*, itself presented an issue ultimately for the court, not the committee, to decide. Our view of the scope and applicability of § 5, *infra*, renders an accommodation of these two sections unnecessary.[42]

But if the provisions in the *Humphrey* contract[43] did not render it clear to the Supreme Court that it was the intention of the contracting parties that their decision (as to whether there was an "absorption") should not be subject to court review, what language would do so? It is unfortunate that the Court did not expressly state what it deemed to be the source of this supposed unclarity. Indeed, it would appear that such a contention could be supported only by a showing that "all" does not in fact mean "all," and "any" does not in fact mean "any."[44] Since the contract in *Humphrey* was at least as clear as the one in *Hildreth* insofar as expressing an intention that union-management agreement under the grievance procedure be beyond court review,[45] *Humphrey*, in varying from the *Hildreth* procedure, cast some confusion on the efficacy of final determination clauses.

But it is clear that *Humphrey* may not be properly viewed as authority by which to deprive union and management of the power to provide that the grievance procedure they establish be exclusive. A concluding sentence by the *Humphrey* majority stated that "the decision of the committee, *reached after proceedings adequate under the agreement*, is final and binding upon the parties, *just as the contract says it is*."[46] Apparently, the *Humphrey* Court would consider its decision to be in accord with *Hildreth* insofar as upholding the efficacy of a "final determination" clause as an affirmative defense. Nonetheless, the difference in approach suggests that the Supreme Court will recognize two

42. 375 U.S. at 345-46 n.8. (Emphasis added.)

43. See text accompanying notes 33-35 supra.

44. Ibid.

45. Compare text accompanying note 13 supra with text accompanying notes 33-35 supra.

46. 375 U.S. at 351. (Emphasis added.)

distinct levels of "merits" in considering an employee's section 301(a) claim: one relating to the power of union and management to act in a particular situation; the other relating to decisions rendered in accordance with this power. Under this view, the presence of a final determination clause notwithstanding, union and management apparently will be subjected to court review of their power to initiate procedures affecting employees, but not of their decisions reached under procedures properly initiated.

At the very most, then, *Humphrey* indicates that union and management must carefully draft the collective bargaining agreement if they want to insure their immunity from an employee's attack on the ground that the grievance procedure was improperly initiated. The irony of this aspect of the case is that the requisite degree of care might be achieved by eliminating any specific contract clause relating to the circumstances in which union and management could act. For example, if the contract in *Humphrey* did not contain section 5, the "absorption" section, and had provided only that "all disputes" be finally settled by the Joint Conference Committee,[47] it would seem that the Court could not have questioned whether the committee's decision was "reached after proceedings adequate under the agreement," so that it would have been forced to recognize the final determination clause as an affirmative defense.

2. The Relevance of Alleging Unfair Representation

In *Republic Steel Corp. v. Maddox*,[48] decided subsequent to *Humphrey*, the Supreme Court ruled that an individual employee must at least attempt to utilize the grievance procedure before he may bring suit under section 301(a).[49] The *Maddox* Court stated that "if the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the *forms* of redress then available. See *Humphrey v. Moore*, 375 U.S. 335; *Labor Board v. Miranda Fuel Co.*, 326 F.2d 172."[50] Since *Humphrey* was also a section 301(a) suit, this reference to it apparently indicates that *Maddox* interpreted *Humphrey* to stand for the proposition that the grievance procedure is not an exclusive remedy,[51] at least when the complaint, as it did in *Humphrey*, contains an allegation of unfair representation on the part of the union.[52] Such an interpretation of *Humphrey* is quite different from the one advanced by the ABA Report,[53]

47. Such general clauses are commonplace. See 5 P-H Lab. Arb. Serv. ¶ 64063-67.

48. 379 U.S. 650 (1965).

49. Id. at 652.

50. Ibid. (Emphasis added.) For a discussion of Miranda Fuel and its relevancy see note 57 infra.

51. Accord, Simmons v. Union News Co., 382 U.S. 884, 886 (Black, J., dissenting), denying cert. in 341 F.2d 531 (6th Cir. 1965).

52. Clearly, in speaking of a union's refusal to conscientiously press individual grievances, the Maddox Court was referring to unfair representation claims. Miranda Fuel Co., 140 N.L.R.B. 181 (1962), mentioned by the Court in Maddox, also involved an unfair representation charge. See note 57 infra.

53. See text accompanying note 20 supra.

which apparently did not deem the unfair representation claim to be relevant to the determination of whether the grievance procedure may be exclusive.

Of course, the *Humphrey* Court was itself of the view that it was ruling on an action "to enforce a collective bargaining contract"[54] and "arising under § 301,"[55] so it is beyond question that "the real essence of the action was based on a breach of such contract."[56] But the Court did go to the merits of plaintiff's unfair representation charge against the union, notwithstanding a finding that the committee had not exceeded the powers expressly granted to it in the contract, and notwithstanding the existing controversy of whether such charges are a proper matter for judicial determination.[57] The *Humphrey* Court stated that:

Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act, it is not necessary for us to resolve that difference here. Even if it is, or arguably may be,

54. 375 U.S. at 341.

55. Id. at 343.

56. Chasis v. Progress Mfg. Co., 256 F. Supp. 747, 751 (E.D. Pa. 1966).

57. Prior to 1962, a union's duty of fair representation was plainly within the jurisdiction of the courts. E.g., Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955) (per curiam); Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953). But in Miranda Fuel Co., 140 N.L.R.B. 181 (1962), the NLRB held that breach of a union's duty of fair representation constitutes an unfair labor practice under the NLRA and is, therefore, within the jurisdiction of the Board. Such jurisdiction would generally be exclusive. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959). For a discussion of Miranda Fuel, see, e.g., Sovern, Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda, 16 N.Y.U. Conf. Lab. 3 (1963); 112 U. Pa. L. Rev. 711 (1964). The Second Circuit denied enforcement of the Board's Miranda decision, NLRB v. Miranda Fuel Co., 326 F.2d 172 (2nd Cir. 1963), albeit without a majority holding on the Board's theory that a breach of the duty of fair representation is an unfair labor practice. Judge Medina rejected the Board's theory. Id. at 173-80. Judge Lumbard denied enforcement on other grounds and did not consider the theory. Id. at 180. Judge Friendly dissented. Ibid. Despite this division, unfair representation charges will presently be heard in the Second Circuit. E.g., Hiller v. Liquor Salesmen's Union, 338 F.2d 778 (2nd Cir. 1964).

The Board has not been discouraged by the Second Circuit's Miranda Fuel holding. In a recent case, the Board stated: "With due deference to the circuit court's opinion, we adhere to our previous decision [Miranda] until such time as the Supreme Court of the United States rules otherwise." Local 1367, Int'l Longshoremen's Ass'n, 148 N.L.R.B. 897, 898 n.7 (1964), enforced per curiam, 368 F.2d 1010 (5th Cir. 1966). Such a ruling may be forthcoming, for the Supreme Court has recently granted certiorari in a case in which the preemption issue is squarely presented. Sipes v. Vaca, 384 U.S. 969 (1966) (granting certiorari). But for the present, the Fifth Circuit, Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), Sixth Circuit, Knox v. UAW, 223 F. Supp. 1009, 1011 (E.D. Mich. 1963), aff'd, 351 F.2d 72 (6th Cir. 1965), and Eighth Circuit, District 9, Int'l Ass'n of Machinists v. Sterling Aluminum Prods., Inc., 4 CCH Lab. L. Rep. (54 Lab. Cas.) ¶ 11430 (8th Cir. Sept. 2, 1966), have upheld the Board's Miranda doctrine, and so have district courts in the Third Circuit, Chasis v. Progress Mfg. Co., 256 F. Supp. 747 (E.D. Pa. 1966), and in the Tenth Circuit, Mendicki v. UAW, 4 CCH Lab. L. Rep. (54 Lab. Cas.) ¶ 11438 (D. Kansas Dec. 23, 1965).

an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal . . . courts . . . .[58]

In other words, *Humphrey* stands for the proposition that, at least in some circumstances, a section 301(a) claim is a proper vehicle with which to bring an unfair representation charge in a federal court,[59] while at the same time, the Court expressly declined to determine whether courts may properly consider an unfair representation charge unconnected with any section 301(a) allegations.

But, the nature of the required nexus between the unfair representation claim and the section 301(a) claim is left uncertain. If a collective bargaining contract is or is not breached irrespective of whether the union has discharged its duty of fair representation,[60] then it would appear that the *Humphrey* Court erred in going to the merits of the unfair representation charge. But perhaps the Court's procedure bears a relation to the distinction that the Court apparently drew between a union-management decision that there was power to act under the contract, and a decision rendered in accordance with this power. Specifically, since the duty of fair representation is paralleled by the power to (exclusively) represent,[61] it could be argued that the power is non-existent unless exercised pursuant to the duty. In this view, a breach of the duty (i.e., unfair representation) by the union would preclude its power to participate in decisions, so that an allegation of unfair representation would be tantamount to an allegation that any determination by union-management is void and unenforceable. In other words, unfair representation, per se, would render any collective bargaining decision a breach of contract, and thus within the ambit of section 301(a).

This interpretation would appear to find support in a footnote in *Humphrey*, where the Court stated that "even in the absence of [the particular contract provision that was allegedly breached] . . . it would be necessary to deal with the alleged breach of the union's duty of fair representation."[62] But recently, a court confronted with a motion to dismiss an employee's section 301(a) claim,

58. 375 U.S. at 344. (Footnotes omitted.)

59. Mr. Justice Goldberg, in a concurring opinion in Humphrey, disagreed with the Court's holding that an unfair representation charge may be brought under § 301(a). He stated that "in my view, such a claim of breach of the union's duty of fair representation cannot properly be treated as a claim of breach of the collective bargaining contract supporting an action under § 301(a)." 375 U.S. at 355 (concurring opinion). Mr. Justice Goldberg further stated that the plaintiff's claim "must be treated as an individual employee's action for a union's breach of its duty of fair representation—a duty derived not from the collective bargaining contract but from the National Labor Relations Act . . . ." Id. at 351.

60. That is, for example, had the discharge in Hildreth been for just cause, objectively defined, then, in this view, even absent the final determination clause, there would not have been a breach of contract, notwithstanding bad faith on the part of the union.

61. Labor Management Relations Act (Taft-Hartley Act) § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964). This section makes the union an exclusive representative for the employees.

62. 375 U.S. at 345 n.7.

which claim included a charge of unfair representation, deemed this footnote in *Humphrey* to be simply an indication that *Humphrey* "realized that different problems would be posed if there were no allegation of a breach of contract."[63] This case, *Chasis v. Progress Mfg. Co.*,[64] apparently did not consider an unfair representation charge, per se, to fall within the ambit of section 301(a), as it dismissed plaintiff's suit because no specific provisions of the collective bargaining contract were alleged to have been breached.[65] The language of *Chasis*, and its reliance on *Humphrey*, make it clear that had the plaintiff in *Chasis* alleged a breach of a specific contract clause, the court would have not only gone to the merits of this allegation, but to the merits of the unfair representation charge as well.

Thus, *Chasis* viewed the "real essence"[66] of *Humphrey* to be the breach of contract allegation, and not the unfair representation charge. But another case, of which *Chasis* also said "the real essence of the action was based on a breach of . . . contract,"[67] does not appear to have interpreted *Humphrey* in the same manner as did *Chasis*. This case, *Fuller v. Highway Truck Drivers & Helpers Local 107*,[68] involved facts very similar to the facts in *Humphrey*.[69] In refuting the defendants' contention that the final determination clause of the collective bargaining contract rendered the court powerless to review the merits of the decision of which plaintiff complained, the *Fuller* court noted that

> *Plaintiffs' complaint is not directed merely to the Committee's interpretation of the contract.* They assert that that construction was reached as the result of conspiratorial action between [the union and other labor forces] . . . on the one hand, and [the employers] . . . on the other. *The distinction lies at the base of the* Humphrey *decision* [*which*] . . . *held that both grounds* [*i.e., that the Joint Conference Committee exceeded its powers, and that the union breached its duty of fair representation*] *stated a claim under* § *301 of the Act.*[70]

Of course, since, as *Fuller* itself recognized, the complaint in *Humphrey* "did not charge employer participation in the union's breach of its duty of fair representation,"[71] the "distinction" alluded to in *Fuller* must be based on the presence of the unfair representation charge, not a charge of conspiracy between union and employer. That is, the *Fuller* court apparently would have dismissed plaintiff's

63. Chasis v. Progress Mfg. Co., 256 F. Supp. 747, 750 n.6 (E.D. Pa. 1966). It is true that the Humphrey note stated the Court's view that it "need not consider the problem posed if § 5 had been omitted from the contract . . . ." 375 U.S. at 345 n.7. But, it is submitted, this language, and the context in which it appeared, was not related to the question of the per se status of the unfair representation charge, and the other language in the note, quoted in text accompanying note 62 supra, renders Humphrey's view on this matter unequivocal.

64. 256 F. Supp. 747 (E.D. Pa. 1966).

65. Id. at 753.

66. Id. at 751.

67. Ibid.

68. 233 F. Supp. 115 (E.D. Pa. 1964).

69. In Fuller, however, a union-employer conspiracy was alleged. Ibid.

70. Id. at 118-19. (Emphasis added.)

71. Id. at 118.

complaint on the basis of the final determination clause of the contract were there no allegation of unfair representation. So, *Fuller's* view of *Humphrey* differs from *Chasis'* view. *Chasis* correctly deemed *Humphrey* to be similar to *Fuller*, but failed to recognize the unfair representation charge as a critical element of either case.

In view of the foregoing discussion, it is submitted that *Chasis'* interpretation of *Humphrey* and of *Fuller* was erroneous; had *Chasis* considered the unfair representation claim before it in the same manner as did *Humphrey*, it would not have dismissed plaintiff's complaint.

In *Haynes v. United States Pipe & Foundry Co.*,[72] the Fifth Circuit court of appeals, relying on *Hildreth*,[73] recently upheld a final determination clause as an affirmative defense. But in so doing, the court deemed it worthy to observe that the plaintiff-employee did "not contend that the union did not faithfully represent him,"[74] and cited *Humphrey* on the "duty of the union to do so."[75] If, as it would appear, this language indicates that *Haynes* would have gone to the merits of an unfair representation claim had plaintiff presented such a claim, then *Haynes* is in accord with the interpretation of *Humphrey* presented above; specifically, that an unfair representation charge, per se, is within the ambit of section 301(a). This is especially true when it is realized that a successful affirmative defense had been established by the defendant-employer in *Haynes*;[76] that is, since the plaintiff was suing for a breach of contract, and since a final determination clause was deemed by the court to negate the possibility of a breach of any contract provision, the only conceivable reason why the *Haynes* court would have considered the absence of an unfair representation charge to have been relevant is if such a charge, per se, constituted an allegation of breach of contract.

One further observation on *Haynes* substantiates this point. At the time that *Haynes* was decided, the Fifth Circuit had yet to resolve the preemption controversy with regard to unfair representation claims.[77] So it may not fairly be presumed that the mention of the absence of such a claim was an indication that the court would have gone to the merits of an unfair representation allegation unaccompanied by a section 301(a) claim.[78]

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72. 362 F.2d 414 (5th Cir. 1966).

73. Id. at 418; see text accompanying notes 9-14 supra.

74. 362 F.2d at 418.

75. Ibid.

76. Ibid.

77. See note 57 supra. The Fifth Circuit subsequently decided this question in Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966).

78. Haynes is of interest on another point. The court discussed the Maddox case, see text accompanying notes 48-52 supra, at one point stating that Maddox "held that the individual employee is bound by the remedy selected by the union as his agent." 362 F.2d at 417. But Maddox stands for no such proposition; it simply held that an attempt at utilizing the contract remedy is a condition precedent to court aid. 379 U.S. at 652. In fairness to the Haynes court, however, it would appear that its above quoted statement in regard to Maddox was of unintended generality. This is so because Haynes went on to

In *Serra v. Pepsi-Cola Gen. Bottlers, Inc.*,[79] the plaintiff-employee sought reinstatement and back pay under section 301(a).[80] The court denied defendant-employer's motion to dismiss, and refuted the defendant's contention that the union was an indispensable party to the suit.[81] But *Serra* does not refute any of the contentions advanced above, for "in passing"[82] the court observed that "there is no evidence before the court at this time as to the reasons why the union here declined to press the grievance. Accordingly, it may be that ultimately the case will fall within the ambit of Hildreth . . . ."[83] This remark would appear to be of more than "passing" significance. The employee in *Pepsi*, as the employee in *Hildreth*, did not allege unfair representation; in neither case was the union a defendant. This being so, the only explanation as to the relevance of "why the union . . . declined to press the grievance" is that the court would have heard an unfair representation charge brought under section 301(a). And absent such a charge, it is likely that the *Pepsi* plaintiff will be confronted with a final determination clause that will bar his claim.[84]

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say that a "distinction between Maddox and the instant case is that Maddox, unlike the employer [obviously meaning employee] here, made no effort to process his grievance . . . . This presents the additional question of whether the doors of the court open after the contractual remedy has been exhausted." 362 F.2d at 417. With regard to this question, the Haynes court noted that the employee "argues that the implication may be gained from some of the language . . . in Maddox that the employee may sue once he has exhausted his remedy under the grievance procedure of the collective bargaining agreement. There is some such language, but there is other language, equally compelling, to the contrary." Id. at 417-18. It has been submitted that Maddox's allusion to Humphrey is a proper basis for inferring that the Maddox Court did not deem the grievance procedure to be the employee's sole remedy in all circumstances. See text accompanying notes 51-52 supra. A careful examination of Maddox fails to reveal any language from which the contrary conclusion might be drawn. Maddox did discuss the desirability of making a grievance procedure exclusive, but the context of this discussion was delineated by the Court's statement that "it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedure and found them so." 379 U.S. at 653. It would appear, therefore, that Maddox in no way intimated that the grievance procedure is the individual's sole recourse; Haynes would have done well to restrict its reliance to Hildreth. But perhaps Haynes was troubled by the fact that if the plaintiff-employee's assertions about Maddox were correct, the spirit—if not the holding—of Maddox and of Smith would stand contrary to Hildreth.

79. 248 F. Supp. 684 (N.D. Ill. 1965).

80. Id. at 685.

81. Id. at 688.

82. Ibid.

83. Ibid.

84. Since there was no formal union-management agreement in Pepsi, it may be that a final determination clause would be an affirmative defense only if the collective bargaining contract stated that independent decisions by union and management that a grievance will not be processed shall constitute a final determination with respect to the grievance. But it is arguable that even absent such an express contract provision, independent determinations not to process a grievance should be considered an agreement within the terms of the collective bargaining contract.

III. Conclusion

In *Smith*, the Court, in response to defendant-employer's assertion that section 301(a) should not be made available to individual employees, stated that "neither the language and structure of § 301 nor its legislative history requires or persuasively supports this restrictive interpretation, which would frustrate rather than serve the congressional policy expressed in that section."[85] Since the "legislative history of section 301 is somewhat cloudy and confusing,"[86] it cannot be said that *Smith* was without justification in declaring that section 301(a) is available to individual employees. But, to be juxtaposed with *Smith* is the view that

> Congress explicitly stated by way of a policy, in § 203(d) of the Taft-Hartley Act, 29 U.S.C.A. § 173(d), that in settling grievance disputes, the Act contemplated that the method agreed upon by parties to collective bargaining agreements should be the means of settling such disputes.[87]

Although there is no theoretical conflict between following the "method agreed upon" in the collective bargaining contract and allowing the individual employee to sue for breach of this contract, the practical conflict is apparent; for, as has already been stated,[88] the "method agreed upon" almost always provides for "an agreement . . . that no breach exists."[89]

Consequently, as has been seen, an aggrieved employee is likely to meet with a situation in which his breach of contract claim will not be reviewed on its merits. Of course, there are convincing reasons why such a result is desirable.[90] It has not been the purpose of this comment to take issue with these reasons, nor with the reasons supporting the contrary view. Rather, the purpose here has been simply to examine the utility of section 301(a) to the aggrieved employee. This examination has revealed that it is a very simple matter for union and management to preclude an employee's successful section 301(a) claim when such a claim is unconnected with any allegation of unfair representation. It need only be added that *Humphrey*'s willingness to go to the merits of an unfair representation claim brought under section 301(a) is likely to be of no practical importance, for courts have proved an unfavorable forum for unfair representation suits.[91] Thus, for the aggrieved employee, the benefits of *Smith*

85. 371 U.S. at 200.

86. Textile Workers v. Lincoln Mills, 353 U.S. 448, 452 (1957). See note 3 supra.

87. Haynes v. United States Pipe & Foundry Co., 362 F.2d 414, 416 (5th Cir. 1966). (Footnote omitted.)

88. See note 16 supra.

89. Simmons v. Union News Co., 382 U.S. 884, 886 (1965) (dissenting opinion).

90. See, e.g., Wyle, Labor Arbitration and the Concept of Exclusive Representation, 7 Boston College Industrial and Commercial L. Rev. 783 (1966).

91. "[T]he adequacy of existing judicial remedies afforded individual unfair representation claims has been seriously questioned. Under current practice, the aggrieved employee is not only compelled to bear the substantial expense of an individual lawsuit, but must also face the burden of overcoming the strong judicial presumption of legality of union action in this area. Thus confronted with jurisdictional, monetary and procedural obstacles, the individual employee may well find his right to fair representation as enforced by the

and *Humphrey* are entirely theoretical. But these cases may present a real detriment to the advancement of the employee's cause, for in their recognition of abstract rights, they may well be concealing the absence of any concrete rights. If the employee is to be denied a *bona fide* opportunity to contest, in court, a collective bargaining decision that adversely affects him, this "should be clearly and unequivocally announced by [the Supreme Court] . . . so that Congress can, if it sees fit, consider this question and protect the just claims of employees from the joint power of employers and unions."[92]*

courts more theoretical than real." Local 12, United Rubber Workers v. NLRB, 368 F.2d 12, 23 (5th Cir. 1966). (Footnote omitted.) See, e.g., Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 Mich. L. Rev. 1435, 1470 (1963), which was cited by the Rubber Workers court, 368 F.2d at 23 n.22.

It should be realized that "a successful suit against the union will only result in an award of damages." Serra v. Pepsi-Cola Gen. Bottlers, Inc., 248 F. Supp. 684, 688 (N.D. Ill. 1965); cf. Thompson v. Int'l Ass'n of Machinists, 258 F. Supp. 235, 240 (E.D. Va. 1966) (memorandum decision). So even if the employee were to succeed in an unfair representation suit, he would still be unable to obtain reinstatement.

In addition to the fact that the courts would seem to be an unfavorable forum for an unfair representation suit, there are compelling positive reasons for the individual to advocate that unfair representation claims be handled by the NLRB. First, while court expenses can be costly, the cost of filing a charge with the Board is nominal. Secondly, the Board's investigatory power would assure an accurate picture of what occurred during the grievance procedure, and thus allow that forum to decide the issue from a more realistic viewpoint than the one presented by the union and the employer to the courts. Furthermore, the unfair representation suit, as classified by the Board in Miranda, would fall into the category of charges which take predominance over all other charges before the Board. Labor Management Relations Act (Taft-Hartley Act) § 160(m), 73 Stat. 545 (1959), 29 U.S.C. § 160(m) (1964). Thus, the individual would be assured of a speedy determination of his claim. On the other hand, the time required for a lawsuit may result in a loss of wages due to the individual's inability to find a permanent position while the suit is pending. Sipes v. Vaca, 397 S.W.2d 658, 660 (Mo. Sup. Ct. 1965). Furthermore, a considerable passage of time could adversely affect innocent parties. For example, if the suit took four years to be decided, not an extremely long time when one considers the backlog of cases before the courts, individuals who had secured employment, received promotions, or increased their seniority standing in the interim, may be forced to give up these rights without access to any forum to hear their complaints. These problems may be resolved in the upcoming Supreme Court decision in Sipes v. Vaca, where the Court may decide the status of unfair representation charges. Certiorari has been granted. 384 U.S. 969 (1966).

92. Simmons v. Union News Co., 382 U.S. 884, 888 (1965) (dissenting opinion).

* After this comment was in proofs, the Supreme Court decided Vaca v. Sipes, 35 U.S.L. Week 4213 (U.S. Feb. 27, 1967). Printing deadlines and space limitations render it impossible to fully discuss this important case. Suffice it to note that Vaca concluded that the NLRB does not have exclusive jurisdiction over unfair representation claims, see notes 57 & 91 supra, and substantiated the position assumed above regarding the indispensability of an unfair representation charge to a suit alleging a breach of the collective bargaining agreement. But the Court did not adopt the view that an unfair representation charge, per se, is tantamount to a breach of contract charge.