Concurrent Three

Taylor Law at 50
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Strategies for Adapting to a post-*Janus* World

Including:
Strategies for Adapting to a post-*Janus* World

Figuring out the Future Fee Fallout:
An Indiana-Centric Insight into Public Sector Agency Fees

Statutes and Decisions

STRATEGIES FOR ADAPTING TO A POST-JANUS WORLD

Panelists:
Sarah Cudahy, Executive Director, General Counsel and PIO, Indiana Education Employment Relations Board
Kate Luscombe, CSEA Director of Field Operations
James Roemer, Founding Partner, Roemer Wallens Gold & Mineaux, LLP

OUTLINE OF DISCUSSION ISSUES[1]

I. What was the state of affairs in New York State prior to agency fees becoming a statutory mandate?

II. What role, if any, should New York State policy makers take to provide the framework for stable public-sector labor relations in a post-*Janus* environment?

III. Employer and Union Obligations Regarding the Provision of Data and Transmission of Dues

A. What will the employer's obligation be to provide employee data or transmit dues to the union?

The Taylor Law requires an employer to recognize the rights of a certified employee organization "to represent the employees in negotiations notwithstanding the existence of an agreement with an employee organization that is no longer certified or recognized, and in the settlement of grievances…" N.Y. Civ. Serv. Law § 208(1). Currently, the employer is required to provide the union with information necessary to collectively negotiate and administer the contract. *Bd. Of Ed. Of City of Albany*, 6 PERB ¶ 3012 (1973) ("An employee organization may request, and is entitled to receive, information which is necessary for the preparation for collective negotiations, for example, number of job titles, salary schedules, and information necessary for the administration of a contract including the investigation of grievances.")

The Taylor Law also provides for the transmission of union dues and agency fees to the recognized employee organization. N.Y. Civ. Serv. Law § 208(3).

B. *Should* different disclosure standards apply for release of members' data vs. non-paying bargaining unit members?

[1] All cases and statutes cited herein are included with this outline and materials.

IV. How will the "duty of fair representation" be defined post-*Janus*?

The Supreme Court defined the duty to fair representation in *Vaca v. Sipes*, 386 U.D. 171 (1967), which was adopted by the New York State Court of Appeals in *Baker v. Bd. Of Educ. Of the W. Irondequoit Cent. Sch. Dist.*, 70 N.Y.2d 314, 20 PERB 7512 (1987). The duty of fair representation is defined as "the exclusive agent's statutory authority to represent all members of a designated unit includ[ing] a statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.D. 171 (1967).

V. Representation Obligations in Disciplinary and Other Employment Related Procedures

A. What will the union's obligation be to provide representation for union members vs. non-dues paying members of the recognized bargaining unit with respect to disciplinary proceedings?

New York State Civil Service Law provides procedures for discipline of public sector employees. N.Y. Civil Service Law §§ 75, 76. These procedures provide the employee with the right to representation by the certified or recognized employee organization at an investigatory interview conducted in contemplation of discipline. N.Y. Civ. Serv. Law § 75(2). The statute also requires that the employee, upon request, be permitted "to be represented by counsel, or by a representative of a recognized or certified employee organization…" Id.

Alternatively, Section 76 of the Civil Service Law permits employers and employee organizations to negotiate procedures to supplement, modify, or replace these provisions. N.Y. Civ. Serv. Law § 76.

B. *Can and should* these obligations differ for employees who are subject to the procedures set forth in Sections 75 and 76 of the Civil Service Law, as opposed to those covered by contractually negotiated disciplinary procedures?

C. What will the union's obligation be to provide representation for union members vs. non-dues paying members of the recognized bargaining unit in proceedings to separate an employee from service based on a disability?

New York State Civil Service Law § 72 sets forth procedures by which an employer may separate an employee from service who is physically or mentally unable to perform their job duties by reason of disability, and states that the employee "may be represented" at any hearing upon that matter "by counsel or a representative of a certified or recognized employee organization." N.Y. Civ. Serv. Law § 72.

VI. How could a decision in *Janus* potentially erode the concept of bargaining unit exclusivity?

New York State Civil Service Law Section 204 sets forth the statutory rights that accompany bargaining unit exclusivity. The statute provides that "[w]here an employee organization has been certified or recognized…, it shall be the exclusive representative…of all the employees in the appropriate negotiating unit." N.Y. Civ. Serv. Law § 204(2). The statute further requires the employer to negotiate collectively with such employee organization regarding "wages, hours, and other terms and conditions of employment" of the public employees. Id.

VII. Could a decision in *Janus* encourage the growth of open-source unionism? What about national "No-Raid Agreements" and the AFL-CIO Articles of Protection?

VIII. Possible Rise of Fee-Based Services for Non-Union Members

A. Will fee-based services for non-paying bargaining unit members be a model for unions to consider?

B. Would these models be permissible under statutes such as New York State Civil Service Law Section 75, 76 and 72?

IX. What rights and exposures will attach to non-majority unions?

X. What are the labor relations implications for employers in a post-*Janus* environment?

Figuring out the Future Fee Fallout:
An Indiana-Centric Insight into Public Sector Agency Fees

By

Sarah Cudahy & John Henry[1]

I. Introduction

"Unions are confronted with an existential crisis" the Economist recently declared.[2] And it is not alone in predicting the potential demise of public sector bargaining if the Supreme Court prohibits agency fees in its pending *Janus* case.[3] The truth is more complicated. Public sector bargaining comes in all shapes and sizes.[4] Indeed, teachers have not paid agency fees in Indiana since 1995. Yet 20 years later, a majority of teachers belong not only to a union, but to their exclusive representative.

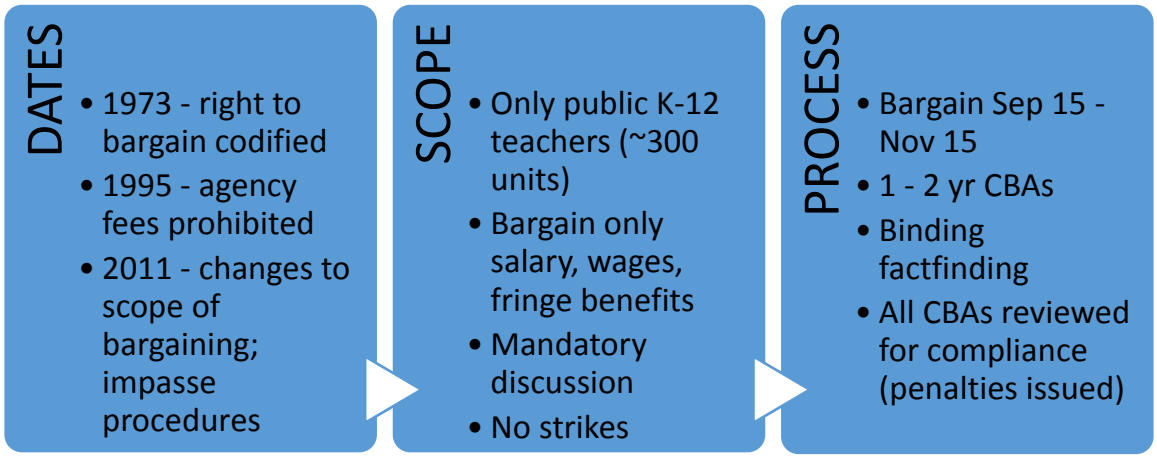
Indiana is not an outlier – many states already prohibit agency fees in the public and private sector. One estimate is that only 5 million – out of 20.9 million public-sector workers – would be affected, and it is likely lower.[5] Even for those affected by *Janus*, the scope of the impact will be determined by the response of employees and unions. State legislatures will continue to significantly impact public sector bargaining, arguably more than the outcome of *Janus*.

This article is intended to provide information regarding agency fees to agencies and practitioners in states that currently allow public sector agency fees, including information on the current status of agency fees, how the prohibition of agency fees has impacted union membership, possible union responses, and recent state legislation regarding collective bargaining. This article does not include information on the cumulative effects of a complete prohibition in union-dense states and its potential impact on national unions.[6]

This article should not be read to advocate for or endorse any particular position or action.

As many of the examples in this article are from Indiana, a brief introduction to Indiana public sector bargaining may be helpful. State employees were granted the right to bargain by executive order in 1990; this right was revoked in 2005. Public safety employees were granted the right to meet and confer in 1995.[7] Currently, the only guaranteed bargaining rights for public sector employees are for K-12 teachers.[8] Teacher bargaining is overseen by the Indiana Education Employment Relations Board ("IEERB").

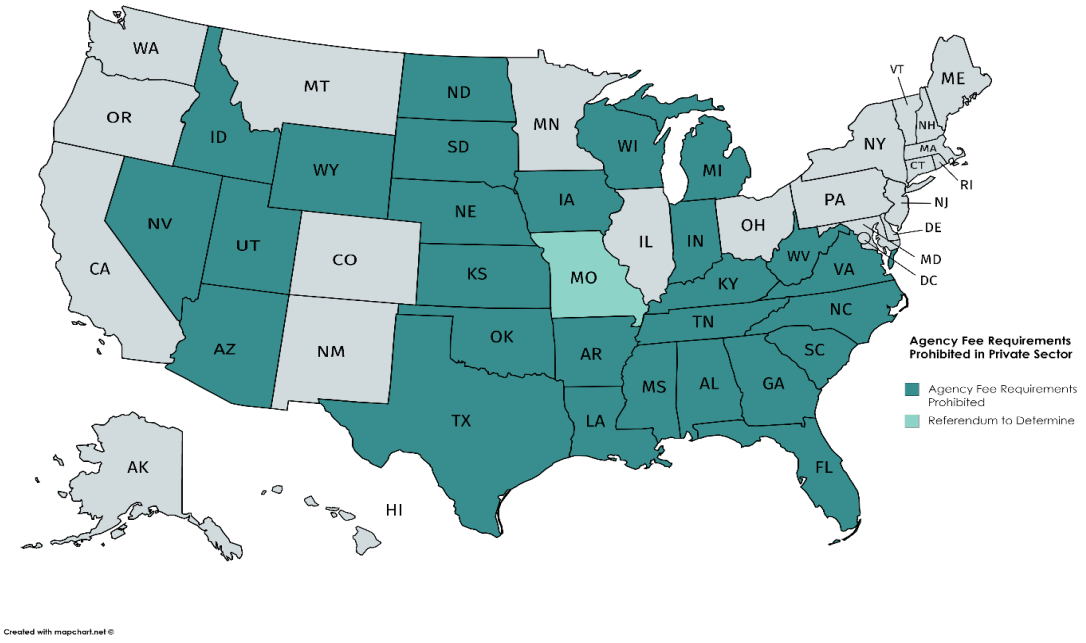
Indiana Teacher Bargaining Basics



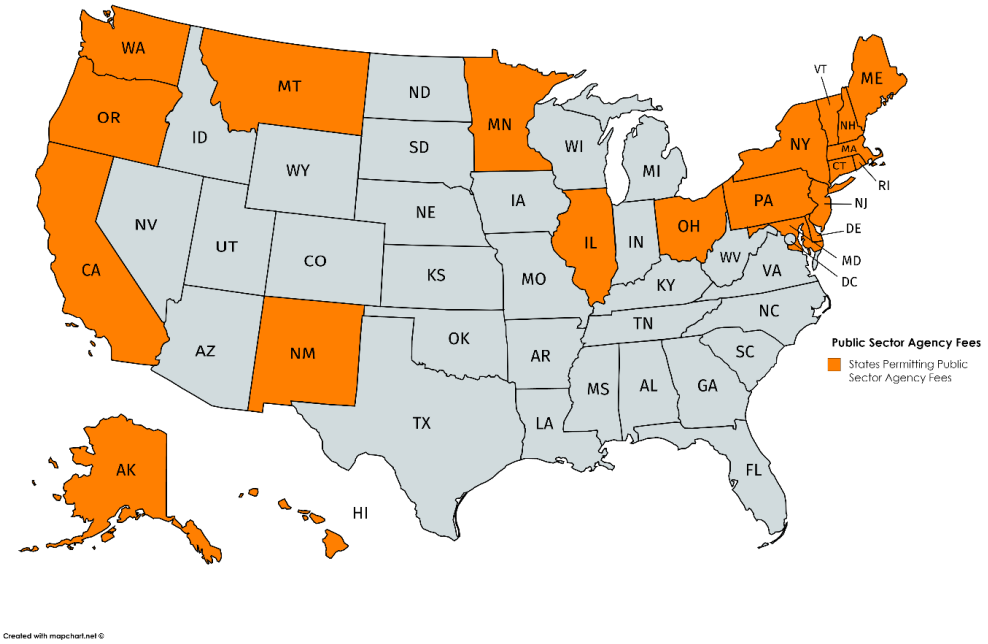
II. Agency Fees

It is easy to get lost in the jargon surrounding agency fees. Also called fair-share fees, agency fees refer to payments made by nonunion employees to "… pay the union for the union's representational expenses."[9] On February 26, 2018, the United States Supreme Court held oral argument in *Janus v. AFSCME*. The question presented is whether public-sector employees can be required to pay agency fees for a union's services.[10] This article provides information relevant to what might happen if the Supreme Court prohibits agency fees.

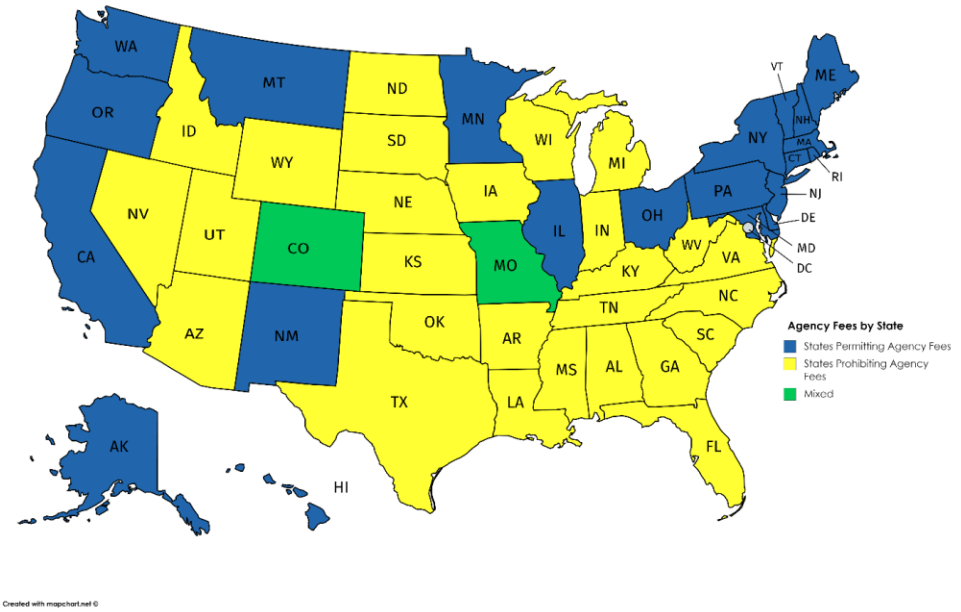
Most of the publicity around agency fees is in the private sector with "right-to-work" laws. "Right-to-work" laws refer to laws prohibiting agency fees. Indeed, as of the date of this publication, a majority of states have prohibited agency fees in private sector bargaining.[11]



The public sector is similar. Federal employees do not have to pay agency fees.[12] And roughly only half of states allow agency fees. Below is a chart that shows states that permit agency fees for at least some public-sector (non-federal) employees.[13]



The final chart in this series shows the overlay of agency fees in the public and private sector. The western and northeastern parts of the United States allow agency fees while most of the rest of the country does not.



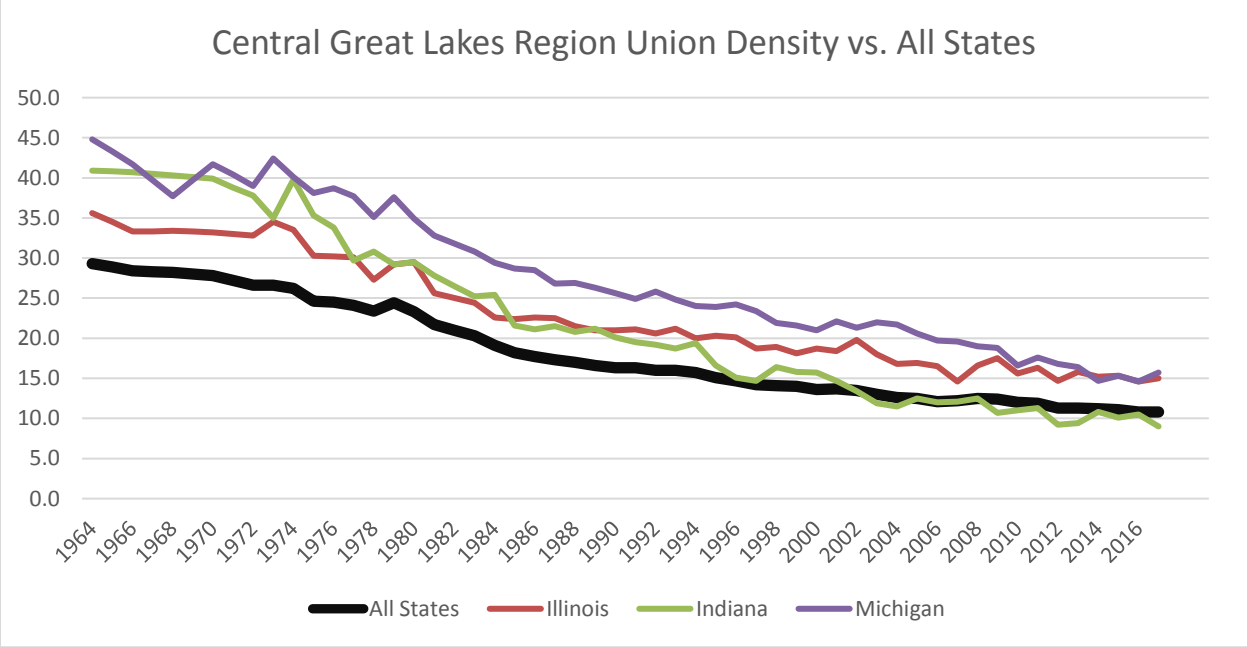
III. The Employee Response

The impact of *Janus* will depend on the response of employees. Although many warn that membership will plummet if agency fees are prohibited, it is possible that there could be no change or even an increase in membership. The experience of a few Midwestern states shows that the most likely outcome is that union membership will drop in the short term but plateau over time. And this drop will not be consistent across industries or units. Employees could also choose alternative ways to participate in work-related issues.

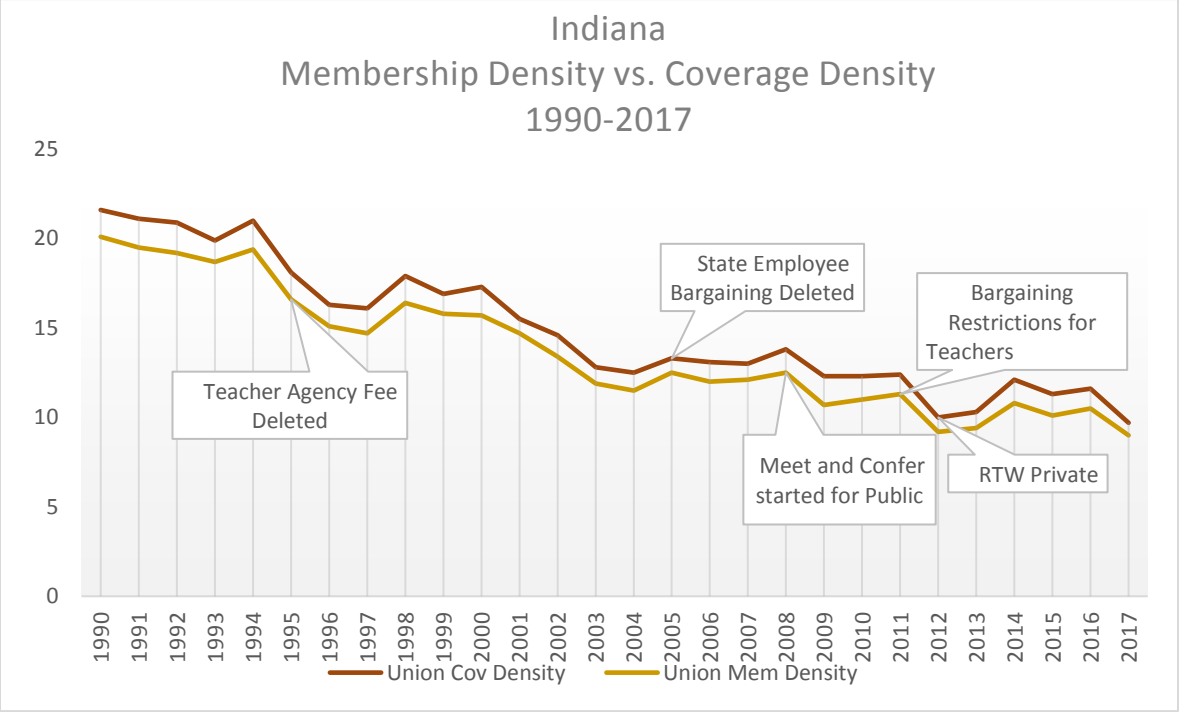
a. Will Employees Pay Membership Dues?

As an initial matter, it is hard to guess with any detail what will happen with union membership because agency fees are not the only reason for membership decline. Union density/membership has been on a steady decline since 1964, before the recent prohibitions against agency fees.[14]

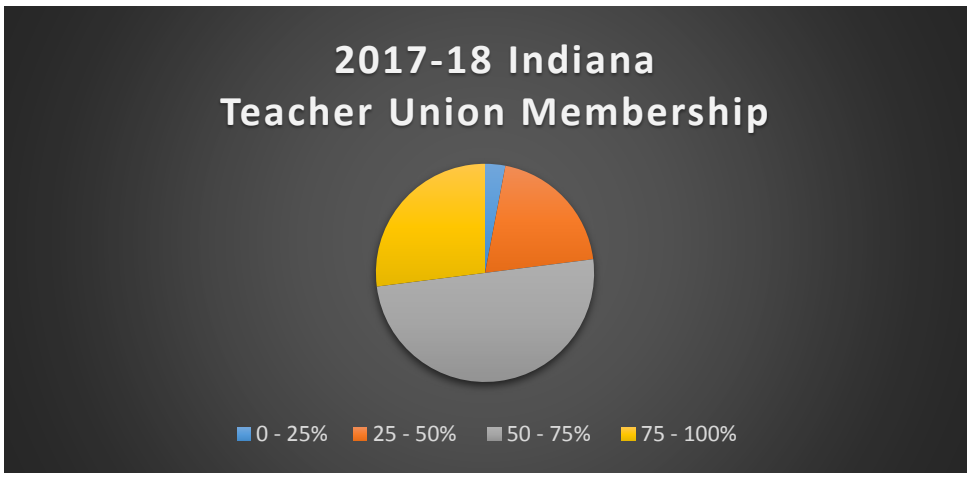
Although density is generally lower in non-agency fee states, it is not always significantly so. The chart below shows union density in one state with agency fees (Illinois) and two without (Indiana, Michigan).[15]

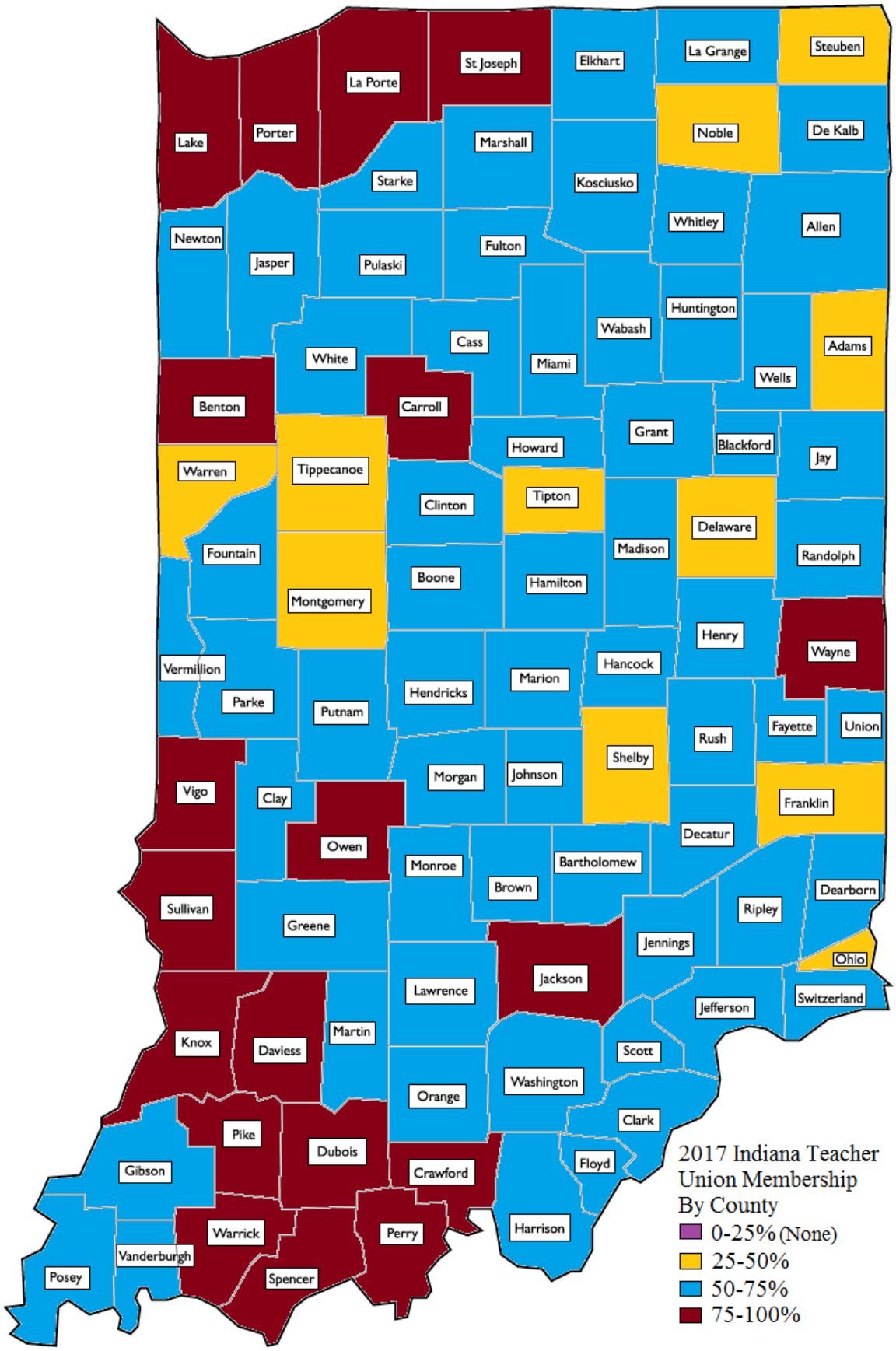


Union membership in Indiana has fluctuated, but not necessarily based on agency fees.[16]



Although these charts are a useful scanning tool, they have limited value. The data uses all union membership, so the numbers can appear inflated (e.g., if retirees are union members). Moreover, this data is for both the public and private sector. Finally, these numbers do not show how agency fees may impact individual industries, unions, or units. Union membership varies between industries. Indeed, membership can vary widely within an industry and union; the decline of dues and membership after the loss of agency fees in Wisconsin and Michigan ranged from 6% to 66%.[17] Below are two charts showing current Indiana teacher union membership by unit and county, respectively.[18] Although membership significantly varies, most teachers are union members.




Lake
Porter
La Porte
St Joseph
Elkhart
La Grange
Steuben
Noble
De Kalb
Marshall
Starke
Kosciusko
Whitley
Allen
Newton
Jasper
Pulaski
Fulton
Huntington
Wabash
Adams
White
Cass
Miami
Wells
Benton
Carroll
Grant
Blackford
Jay
Howard
Warren
Tippecanoe
Tipton
Clinton
Delaware
Madison
Randolph
Fountain
Montgomery
Boone
Hamilton
Henry
Wayne
Vermillion
Parke
Putnam
Hendricks
Marion
Hancock
Rush
Fayette
Union
Shelby
Vigo
Clay
Owen
Morgan
Johnson
Franklin
Decatur
Monroe
Brown
Bartholomew
Dearborn
Sullivan
Greene
Ripley
Jennings
Ohio
Jackson
Lawrence
Switzerland
Jefferson
Knox
Daviess
Martin
Scott
Washington
Orange
Clark
Pike
Dubois
Floyd
Gibson
Crawford
Harrison
Warrick
Perry
Vanderburgh
Posey
Spencer
2017 Indiana Teacher Union Membership By County
0-25% (None)
25-50%
50-75%
75-100%

It is possible that membership also will not fall as far as predicted given new growth in labor, although growth appears mostly relegated to the private sector. In a 2017 Pew Research Center study, Pew found that about six-in-ten adults have a favorable view of labor unions.[19] And union membership was up 0.1% in 2017, although that growth was in the private sector.[20] Labor organizations have been making some inroads in the fast food industry, such as the "Fight for $15" campaign, which was initially organized by the Service Employees International Union ("SEIU").[21] There also may be emerging labor growth in the tech sector.[22]

b. Employee Options Beyond Membership with Their Exclusive Representative

Employees have options for engaging in work-related issues in addition to choosing whether or not to join their exclusive representative. For example, within traditional labor, employees can join a union that is not their exclusive representative, file to change their exclusive representative, or file to decertify the union and have no exclusive representative. In the most recent IEERB election, the new union, which was unaffiliated, received 63% of the vote. Out of 955 eligible voters, only 2 votes were for no representation.[23]

Another option may be to strike without the (formal) help of a union. Over 20,000 teachers in West Virginia engaged in a strike on February 22, 2018, for a pay raise (even though West Virginia does not recognize the right to strike or collective bargaining).[24] Indeed, in New England, non-unionized employees, managers, and community members successfully protested together against a change in management at a grocery store.[25] Employees may also gather together for informal associations like worker centers. Worker centers assist low wage employees that do not belong to a union or are excluded from coverage by labor laws with legal representation and training.[26]

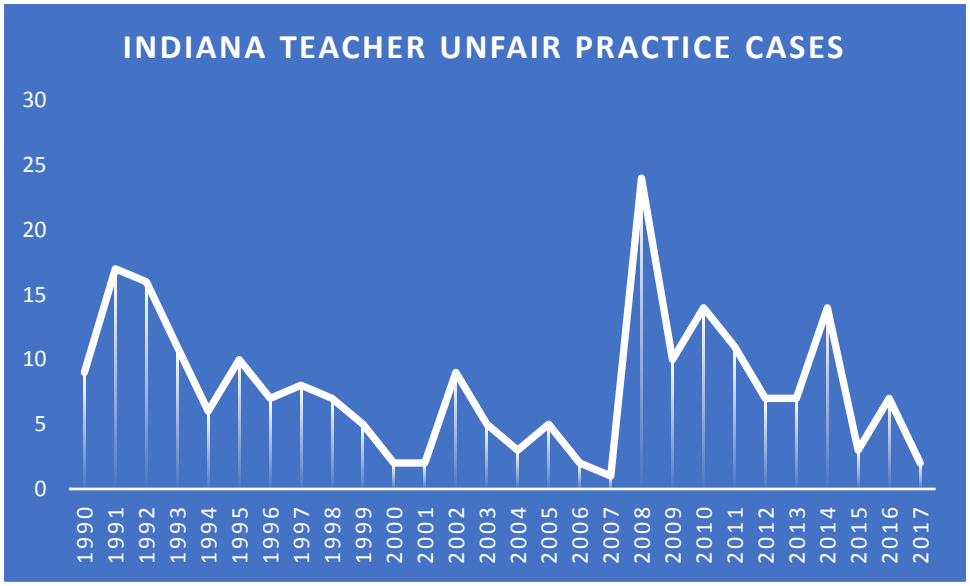
IV. Union Responses to the End of Agency Fees

One of the questions posed in the public sector sphere is how unions will respond to the loss of agency fees in the areas of: 1) member centric issues and rights; 2) organizational changes; and 3) external lobbying or policy changes.

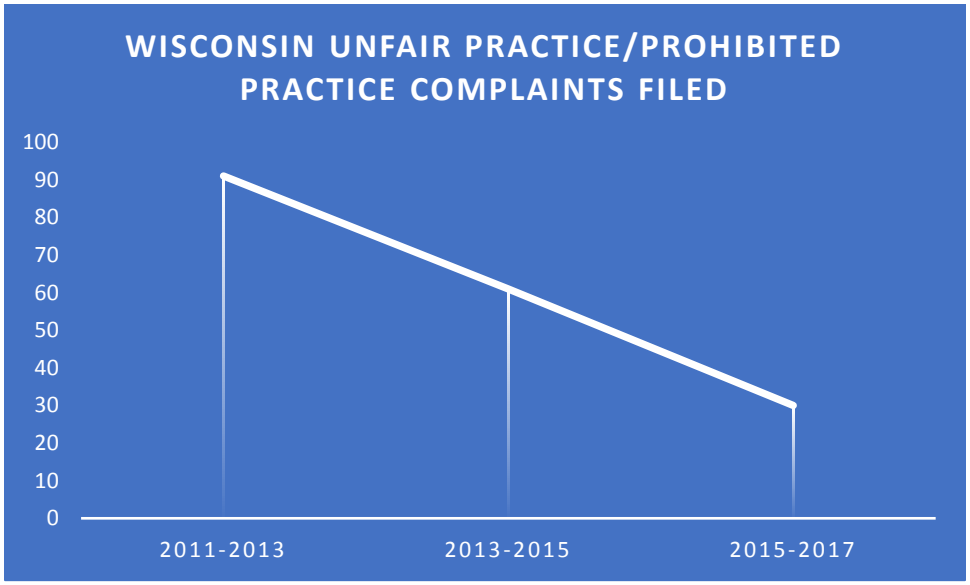
a. Member Issues & Rights

Although some speculate that there will be an increase in the number or frivolousness of claims filed by the union against the employer after the end of agency fees, this does not appear to have occurred in Indiana, Wisconsin, or Michigan.

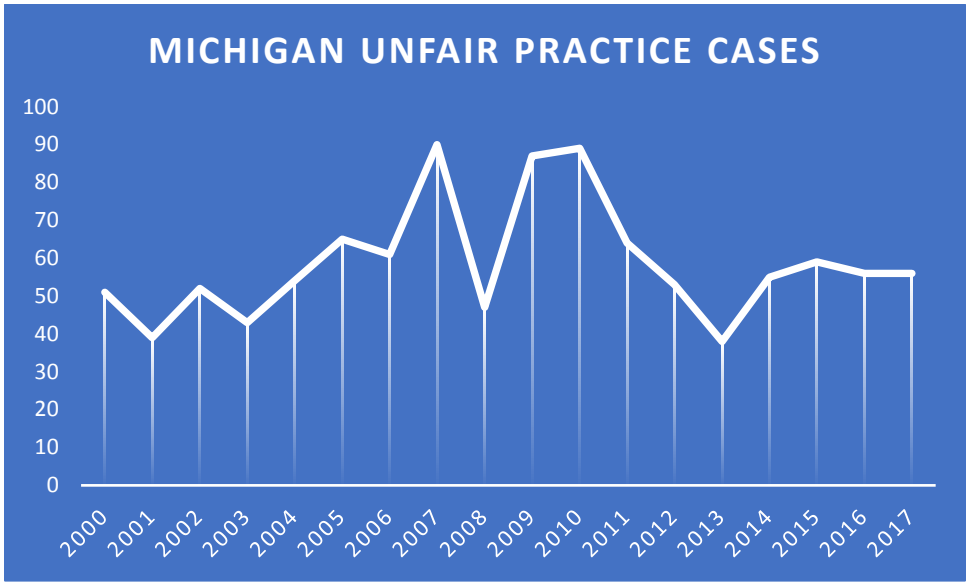
In Indiana, unfair practice cases for teachers did not significantly increase after repeal of agency fees in 1995. Indeed, repeal of agency fees appears not to have impacted the filing of unfair practices in Indiana. [27]



In Wisconsin, although there was a sharp decline in unfair practice and prohibited practice complaints following the prohibition of agency fees in 2015, the decrease was in line with a preceding decline. [28]



In Michigan, unfair practice case filings after agency fees were prohibited in 2012 have remained in line with historical trends.[29]



The data indicates no significant increase in the number of cases brought after the prohibition of agency fees. As for frivolousness, unions may be limited in bringing frivolous claims by state statutes requiring fee shifting for such claims.[30] At least in Indiana, IEERB has never made a finding of frivolity against a party.[31]

Similarly, there is speculation that unions may refuse to provide (or require payment for) grievance or other representation for nonunion members. However, courts reviewing the matter have found that pursuing fees or refusing to process grievances for nonmembers would violate the exclusive representative's duty of fair representation. For example, Wisconsin held that exclusive representatives are required to represent members and nonmembers under the duty of fair representation regardless of the existence of agency fees.[32] And although binding only in the private sector, the NLRB recently reaffirmed that "absent a valid union-security clause, or in a 'right to work' state, a union may not charge nonmembers for processing of grievances or other related services."[33]

It is possible that states could change the unions' duties via statute, or that the union could refuse to undertake certain services for nonmembers outside the scope of the duty of fair representation.

b. Organizational Structure

Unions may respond to the end of agency fees by reorganizing or modifying membership structures. For example, the union could unbundle its membership to allow employees to pay a lower fee for membership and then charge an additional fee for certain services (to the extent allowed, as discussed above).[34] In Indiana, the Fraternal Order of Police provides localized collective bargaining services for all unit members. However, union members can opt into the legal defense fund, which covers legal fees related to acts within an officer's duties, or the labor

council, which provides additional collective bargaining and legal services.[35] The effectiveness of additional legal coverage may rely on whether employees are guaranteed legal representation or reimbursement of such for acts within the scope of their employment.[36] A union could also split into separate legal entities, a bargaining union and a political union.[37] Some organizations collect differing dues based upon experience in the profession. For example, the American Bar Association collects different dues based on date of admission to the bar.[38]

Some unions have started embracing worker centers, which were recently considered rivals. For example, the SEIU formed "Workers Organizing Committees" which function as regional grassroots organizing groups operating much like workers centers to organize and unionize fast food labor.[39] And the AFL-CIO currently partners with workers centers in 11 states and advertises its ongoing willingness to partner with similar non-union organizations.[40]

c. External Responses

Unions will determine their external responses to *Janus*. For example, unions will likely continue to lobby for laws to broaden collective bargaining (for more information, see Section V below). Another public act is the strike, a traditional labor tool. Indeed, so far in 2018, there has been a strike in West Virginia, a threatened strike in Pittsburgh, and rumors of another statewide strike in Oklahoma.[41] However, striking may be a difficult or dangerous response for public sector unions. Of large public bargaining groups, it is illegal for firefighters to strike in 46 states, law enforcement officers to strike in 43 states, and teachers to strike in 36 states.[42] Striking is explicitly legal in only 2 states for firefighters and law enforcement officers and in 12 states for teachers.[43] The possible repercussions for illegally striking vary, but can be great. For example, in Indiana striking teacher unions lose dues deductions privileges for one year, while striking public safety unions are prohibited from representing employees for at least 10 years.[44]

Where available, some unions are focusing on ballot measures to provide constitutional protection of collective bargaining rights or to overturn statutes prohibiting collective bargaining or agency fees. In Missouri, for example, ten ballot measures have been proposed for 2018 to provide a state constitutional right to employees to negotiate, enter into, and enforce a collective bargaining agreement, and allow agency fees.[45] A similar 2012 ballot measure in Michigan failed by a 4% margin. The measure proposed adding a constitutional right to collective bargaining for public and private sector employees, as well overriding state laws regulating hours and conditions of employment when in conflict with a collective bargaining agreement.[46]

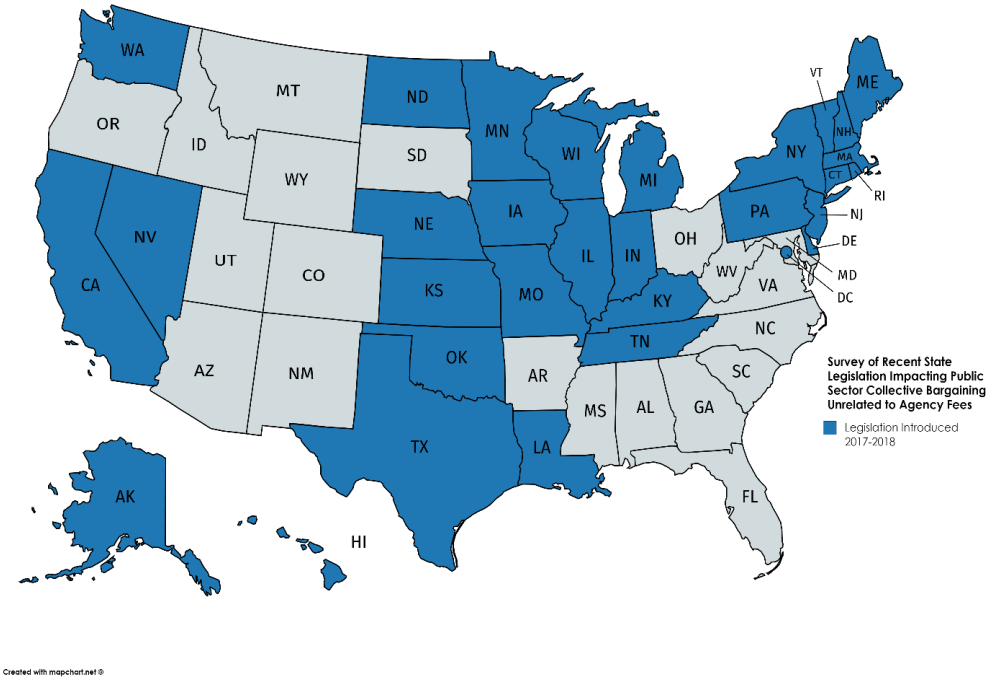
V. State Actions Shape Public Sector Bargaining[47]

States have the ultimate power over public sector bargaining – they can create, modify, or remove the right to it. Therefore, although states will have the opportunity to respond to *Janus*, they will likely also continue to impact public sector bargaining in ways unrelated to agency fees.

States could respond to *Janus* in several ways. As an initial matter, if *Janus* allows agency fees to stand, states can still prohibit them.[48] Moreover, states – whether agencies, courts, or legislatures – may determine, or be asked to determine, the scope of representation required by the union for non-dues-paying unit members. Specifically, 1) reevaluating the duty of fair

representation, and 2) determining whether the unit must represent nonmember bargaining unit members for grievances/disciplinary matters.[49]

Regardless of the Supreme Court's ruling in *Janus*, states will continue to shape public sector bargaining. It is difficult to make generalizations about public-sector bargaining, even between agency fee and non-agency fee states, as "public-sector labor law and labor relations have been in a state of tumult in the past thirty years. … not only through varying agency interpretations, but also through significant rewriting of statutes, and the creation and elimination of statutes."[50] The chart below provides a sampling of states that introduced legislation in 2017 or 2018 that impacted public sector bargaining *aside from* agency fees, including but not limited to, the possible deletion of exclusivity in labor representation.[51] A survey of five types of recent public sector legislation follows.



a. Bargaining Rights & Scope

Who can bargain – and what they can bargain – can change quickly. In California, two bills passed that extended collective bargaining rights to various court employees and student employees.[52] And California now requires public employers to provide union access to newly hired employees during orientation, as well as contact information for all bargaining unit members.[53] In Nevada, school administrators, including principals, can now bargain regardless of salary.[54] Bills to expand collective bargaining were introduced in New Hampshire (state legislative and judicial branches), New York (farm laborers), and North Dakota (public safety employees).[55]

Other laws sought to restrict bargaining. Iowa limited collective bargaining rights for non-safety public employees.[56] A Kansas bill proposed to significantly narrow the scope of bargaining for school employees.[57] And Indiana expanded the subjects for which employers can pay non-bargained bonuses for teachers.[58]

b. Required Recertification

Legislation to require unions to win elections at regular intervals to remain the exclusive representative was introduced in Washington, Maine, New Jersey, Missouri, Florida, Oklahoma, and Illinois.[59] In Iowa, unions must now receive a majority of unit employees in an election prior to negotiating a new contract.[60]

In Indiana, a bill to require recertification died in committee.[61] However, since 2011, unions must provide membership numbers to schools annually. Starting in 2017, unions also must submit this information to IEERB. If the number of union members is less than a majority of unit members, a letter is sent to every bargaining unit member explaining a teacher's right to representation and to change representatives.[62] In 2017, close to one-quarter of bargaining units had less than a majority of union members.[63]

c. Dues Deductions

One of the most common subjects of recent labor legislation is restricting or prohibiting employers from deducting dues from employee paychecks. In Iowa, dues deductions are now banned.[64] Similar bills were introduced in Maine, Nebraska, New Hampshire, Louisiana, New Jersey, and Texas.[65] In Kentucky, dues deductions must now be affirmed in writing.[66] Similar bills were introduced in New York and Missouri.[67]

There are some variations on dues deductions legislation. An Alaskan bill would have allowed the employee – rather than the union – to choose the charity that receives the employee's agency fee equivalent.[68] A bill in Pennsylvania would have allowed dues deductions only for an amount equal to a fair share fee (i.e., no dues deduction for political contributions or membership dues).[69] In Tennessee, a bill sought to regulate the size of dues deduction authorization forms.[70]

d. Financial Records

Under federal law, unions must maintain financial records to determine agency fees.[71] Public sector unions in Kentucky must do the same.[72] Similar bills were introduced in Missouri and Michigan.[73]

e. Compliance

Since 2015, IEERB has been charged with determining the compliance of teacher CBA's. IEERB is required to provide penalties for non-compliance, including cease and desist and prior agency approval of future contracts.[74] Similarly, Connecticut now requires the legislature to affirmatively approve all state CBAs and arbitration awards.[75]

VI. Conclusion

Janus is but one piece of a larger puzzle. The prohibition of agency fees will have an impact, but the scope will likely be primarily based on the response of employees and unions. As in Indiana and elsewhere, it is possible that the status quo will continue with lower membership rates. And regardless of the response of employees and unions, state lawmakers will continue to have wide latitude to shape public sector bargaining.

[1] Sarah and John are staff members of the Indiana Education Employment Relations Board. Special thanks to staff members Cheri Spicer and Jacob May for their assistance on this article.

Care has been taken to use neutral terms and to include political terms only for clarification. Any use of politically charged terms is unintentional. Additionally, although great care and research was undertaken to provide current information, please consult state laws or other relevant sources before relying on any information in this article.

[2] *Unions are confronted with an existential crisis: The Supreme Court is poised to strike a decisive blow*, Economist, Feb. 22, 2018, https://www.economist.com/news/united-states/21737318-supreme-court-poised-strike-decisive-blow-unions-are-confronted (last accessed Mar. 26, 2018).

[3] *See, e.g.*, *Labour's lost: The Future of Public-Sector Unions Hinges on the Vote of Neil Gorsuch*, Economist, Mar. 1, 2018.; Jess Bravin, *Supreme Court to Decide Fate of Public Sector Unions*, Wall St. J. Feb. 25, 2018, https://www.wsj.com/articles/supreme-court-to-decide-fate-of-public-sector-unions-1519607316.

[4] For a comprehensive look at public sector bargaining state by state, *see* Milla Sanes & John Schmitt, Center for Economic and Policy Research, Regulation of Public Sector Collective Bargaining in the States (Mar. 2014).

[5] Daniel Disalvo, *Explaining the 'Janus v. AFSCME' Case*, Manhattan Institute (February 15, 2018), https://www.manhattan-institute.org/html/explaining-janus-v-afscme-case-10956.html (last accessed on March 26, 2018); U.S. Dept. of Lab. Bureau of Lab. Stat., *Union affiliation of employed wage and salary workers by occupation and industry*, Last Modified January 19, 2018, https://www.bls.gov/news.release/union2.t03.htm.

[6] *See* Kenneth Giardin, *The Janus Stakes: How a Coming Supreme Court Ruling Could Affect New York's Government Unions*, Empire Center for Public Policy January 2018 at 16, https://www.empirecenter.org/wp-content/uploads/2018/01/Janus-Stakes_1-8-18_FINAL.pdf (last accessed on March 27, 2018).

[7] There are currently 22 local affiliates of the Indiana Fraternal Order of Police, which serve numerous smaller municipal units. Indiana State Fraternal Order of Police, https://instatefop.org/index.cfm?zone=/unionactive/view_page.cfm&page=Links (last accessed on Mar. 26, 2018). There are 76 local affiliates of the Professional Firefighters Union of Indiana. Professional Firefighters Union on Indiana, https://www.pffui.com/locals.htm (last accessed on Mar. 26, 2018). Professional Firefighters Union on Indiana, https://www.pffui.com/locals.htm (last accessed on Mar. 26, 2018).

[8] Ind. Code Article 20-29; www.in.gov/ieerb.

[9] Fair-Share Clause, Black's Law Dictionary 716 (10th ed. 2014).

[10] Questions Presented, *Janus v. Am. Fed. of State, County, and Mun. Employees, Council 31, et al.*, No. 16-1466 (___ U.S. ___, 2018). More specifically, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court held that agency fees are constitutional. Last term the Court split 4 to 4 on whether to overrule *Abood*. *Friedrichs v. Cal. Teachers Ass'n*, _U.S._, 136 S. Ct. 1083 (2016). The petitioners request that *Abood* be overruled and agency fees be declared unconstitutional under the First Amendment. Other relevant cases include *Harris v. Quinn*, _U.S._, _, 134 S. Ct. 2618, 2632-34 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 309, 132 S. Ct. 2277, 2289 (2012).

[11] Right-to-Work States, National Conference of State Legislatures, http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx (last accessed Mar. 27, 2018); Jackson Lewis P.C., Missouri to Vote on State's Right-to-Work Law, National Law Review, Jan. 23, 2018,

https://www.natlawreview.com/article/missouri-to-vote-state-s-right-to-work-law (last accessed Mar. 27, 2018).

[12] Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 17, 1962).

[13] Jeffrey Keefe, Economic Policy Institute, *Eliminating Fair Share Fees and Making Public Employment 'Right-to-Work' Would Increase the Pay Penalty for Working in State and Local Government* (Oct. 2015); Jason Hart, *State, local laws force public employees to pay labor unions*, Watchdog.org (Sept. 24, 2014); Maxford Nelson, Freedom Foundation, *The Effect of Agency Fees on Labor Peace in Public Employment Relations* (Nov. 2017).

Note that this chart is based on articles from 2010 and 2014 and may not reflect recent state developments. It is meant for illustrative purposes only. Moreover, states where agency fees may not be prohibited but where they are not collected, such as Kentucky, are not included on this chart. It is difficult to determine the exact number of states with public sector agency fees for a few reasons. First, the laws are constantly in flux. Many states only let certain public-sector employees – generally teachers and public safety employee – bargain. And some states allow agency fees in some areas but not others. Finally, in some states there is no statute permitting or prohibiting agency fees, so it is either determined through case law or simply as a matter of practice. Therefore, state laws and cases should be consulted before relying on this map to ensure accuracy. Finally, Missouri will have a referendum in 2018 on the issue of agency fees in the private sector. That is noted on the private right to work map, and Missouri is listed as "mixed" on the public-sector map.

[14] Barry T. Hirsch, David A. Macpherson, & Wayne G. Vroman, *Estimates of Union Density by State*, 124 Monthly Lab. Rev., no. 7, 2001, at 51-55. (Underlying data for years following article publication available at www.unionstats.com, last accessed Mar. 20, 2018).

[15] Figures represent the percentage of state's nonagricultural union employees as compared to all employees. Estimates are based on the 1983-2017 Current Population Survey Outgoing Rotation Group earning files and the 1977-81 May CPS earnings files. Chart compiled using most current data from Hirsch, Macpherson, & Vroman, *supra* note 14.

[16] *Id.* Note that the union membership percentage appears high, which may be partly explained by union members not covered by collective bargaining agreements (e.g., retirees or employees not covered under labor laws).

[17] *Id.*; Kenneth Giardin, *The Janus Stakes: How a Coming Supreme Court Ruling Could Affect New York's Government Unions*, Empire Center for Public Policy January 2018 at 11-12, https://www.empirecenter.org/wp-content/uploads/2018/01/Janus-Stakes_1-8-18_FINAL.pdf (last accessed on March 27, 2018).

[18] ERO Upload Report for 2017, Indiana Gateway, https://gateway.ifionline.org (select "Report Search"; then select "Collective Bargaining"; then select ERO Upload Report). Note that unlike the density charts earlier in the paper, charts based on this information include only members of their exclusive representative (and not, for example, retired employees and employees not covered by a CBA).

[19] Shiva Maniam, *Most Americans See Labor Unions, Corporations Favorably*, Pew Research Center (Jan. 30, 2017), http://www.pewresearch.org/fact-tank/2017/01/30/most-americans-see-labor-unions-corporations-favorably.

[20] Lawrence Michel, *Overall union membership rises in 2017, union density holds steady*, Economic Policy Institute (January 19, 2018), https://www.epi.org/blog/union-membership-density-2017/ (last accessed on March 26, 2018); U.S. Dept. of Lab. Bureau of Lab. Stat., *Union affiliation of employed wage and salary workers by occupation and industry*, Last Modified January 19, 2018, https://www.bls.gov/news.release/union2.t03.htm.

[21] Kate Andrias, *The New Labor Law*, 125 Yale L.J. 1 (2016).

[22] *See* Ruth Berins Collier, V.B. Dubal, and Christopher Carter, Institute for Research on Labor and Employment, IRLE Working Paper #106-17 (Sept. 2017).

[23] *Carmel Clay Schools*, R-16-04-3060 (IEERB H.O. 2017).

[24] Miles Kampf-Lassin, *The Lesson From West Virginia Teachers? If You Want to Win, Go on Strike.*, In These Times (Mar. 7, 2018, 1:57 PM), http://inthesetimes.com/working/emtry/20965/west_virginia_teachers_strike_victory_raise_oklahoma.

[25] Julina Guo, *A Backgrounder: The Market Basket Strike*, onlabor (Oct. 28, 2014), https://onlabor.org/a-backgrounder-the-market-basket-strike/.

[26] Benjamin Sachs, *Worker Centers and the "Labor Organization" Question*, onlabor (Sept. 1, 2013), http://onlabor.org/worker-centers-and-the-labor-organization-question/.

[27] Data provided by Indiana Education Employment Relations Board on Mar. 20, 2018.

[28] Data provided by Wisconsin Employment Relations Commission on Mar. 20, 2018.

[29] Data provided by Michigan Bureau of Employment Relations on Mar. 20, 2018.

[30] Ind. Code § 20-29-7-1 (2017) (requiring unions to pay attorney fees for discussion cases determined to be frivolous).

[31] *Id*.

[32] *Int'l Ass'n of Machinists Dist. 10 & Its Local Lodge 1061 v. State*, 903 N.W.2d 141, 151 (Wis. Ct. App. 2017).

[33] *United Steel Workers Local 1192 (Gilman Building Products)*, 12-CB-182935 (NLRB 2016).

[34] For example, the American Bar Association allows members to pay more to join committees. *See* 2017-18 ABA Membership and Specialty Group Memberships, https://www.americanbar.org/membership/dues_eligibility.html (last accessed on Mar. 26, 2018).

[35] Indiana Fraternal Order of Police Labor Council, Inc., https://instatefop.org/docs/labor%20council%20brochure.pdf (last accessed on Mar. 26, 2018); Indiana State Lodge Fraternal Order of Police Legal Defense Fund, https://instatefop.org/docs/LDF%20Brochure%20rev2018.pdf (last accessed on Mar. 26, 2018).

[36] For example, the Indiana Attorney General must represent teachers for no cost in certain cases. Ind. Code § 4-6-2-1.5. Schools also must reimburse teachers for certain representation costs. Ind. Code § 36-1-17 *et seq*.

[37] Benjamin I. Sachs, *The Unbundled Union: Politics without Collective Bargaining*, 123 Yale L.J. 148 (2013).

[38] 2017-18 ABA Membership and Specialty Group Memberships, https://www.americanbar.org/membership/dues_eligibility.html (last accessed on Mar. 20, 2018).

[39] Jarol B. Manheim, *The Emerging Role of Worker Centers in Union Organizing: An Update and Supplement*, p. 55 U.S. Chamber of Commerce Workforce Freedom Initiative (Dec. 6, 2017), https://www.uschamber.com/sites/default/files/uscc_wfi_workercenterreport_2017.pdf.

[40] *Id.* at 57. *AFL-CIO Worker Center Partners*, https://aflcio.org/what-unions-do/social-economic-justice/worker-centers (last accessed on Mar. 20, 2018).

[41] Jess Bidgood, *West Virginia Raises Teachers' Pay to End Statewide Strike*, N.Y. Times (Mar. 6, 2018), https://www.nytimes.com/2018/03/06/us/west-virginia-teachers-strike-deal.html; Elizabeth Behrman,

Strike averted after Pittsburgh Public Schools, teachers union reach tentative deal, Pittsburgh Post-Gazette (Feb. 27, 2018), http://www.post-gazette.com/news/education/2018/02/27/Pittsburgh-Public-Schools-Federation-of-Teachers-contract-negotiations-strike-agreement-union/stories/201802270201; Dana Goldstein, *Their Pay Has Stood Still. Now Oklahoma Teachers Could Be the Next to Walk*, N.Y. Times (Mar. 20, 2018), https://www.nytimes.com/2018/03/20/us/oklahoma-teachers-strike.html.

[42] *See* Sanes & Schmitt, *supra* note 4.

[43] *Id*.

[44] Ind. Code § 20-29-9-3 (2017); Ind. Code § 36-8-22-15 (2017).

[45] Missouri Measures 2018-092, 2018-093, 2018-094, 2018-095, 2018-096, 2018-097, 2018-098, 2018-099, 2018-101, and 2018-102.

[46] Note that state constitutional provisions or other legislative ballot measures regarding public sector agency fees would need to follow *Janus*.

[47] This section used the following articles and online tools to find most of the bills cited:

> Matthew Greer & Charles "Buddy" Wheatley, American Bar Association - State and Local Government Bargaining and Employment Law Committee, *Subcommittee Report: States Without Bargaining Legislation* (Jan. 2017), https://www.americanbar.org/groups/labor_law/committees/slgbcom.html.
>
> Matthew Greer & Charles "Buddy" Wheatley, American Bar Association - State and Local Government Bargaining and Employment Law Committee, *Subcommittee Report: States Without Bargaining Legislation* (Jan. 2018), https://www.americanbar.org/groups/labor_law/committees/slgbcom.html.
>
> http://www.ncsl.org/research/labor-and-employment/collective-bargaining-legislation-database.aspx

[48] A bill to do this recently died in Maine. H. Paper 53, 128th Leg., 1st Reg. Sess. (Me. 2017).

[49] *International Association of Machinists District 10 et al. v. State of Wisconsin*, 903 N.W.2d 141 (Wis. Ct. App. 2017) (finding that a union still has the duty of fair representation, even without being able to collect agency fees).

[50] Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 Hofstra Lab. & Emp. L.J. 511, 511–12 (2013).

[51] Some states already have similar laws. See infra, notes 52-75. For more information on public sector collective bargaining schemes, *see* Marilyn Raskin-Ortiz & Emily Martin, American Bar Association - State and Local Government Bargaining and Employment Law Committee, *Bargaining in States without Public Sector Collective Bargaining Legislation* (Jan. 2010), https://www.americanbar.org/groups/labor_law/committees/slgbcom.html; *See, e.g.*, S.B. 302, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); Act of March 23, 2016, Pub. L. No. 127-2016 (Ind. 2016) (urging the legislative council to assign to study committee the issue of feasibility of allowing school corporations and individual teachers to negotiate terms different than those set forth in the applicable CBA); H.B. 4596, Mich. Leg., 2017-2018 Sess. (Mich. 2017).

[52] Act of Oct. 15, 2017, ch. 835, 2017 Cal. Laws (enacting Assemb. B. 83, Cal. 2017); Higher Education Employer-Employee Relations Act, ch. 854, 2017 Cal. Laws (enacting S.B. 201, Cal. 2017)(codified as amended at Cal. Gov. Code § 3562).

[53] Act of June, 27, 2017, ch. 21, 2017 Cal. Laws (enacting Assemb. B. 119).

[54] Act of June 1, 2017, ch. 265, 2017 Nev. Laws (enacting S.B. 493, Nev. 2017) (codified as amended at NRS 288.170).

[55] H.B. 1432, N.H Gen. Ct., 2016 Sess. (N.H. 2016); S. 1291, N.Y. Assemb., 2015-2016 Reg. Sess. (N.Y. 2015); and H.B. 1401, 65th Leg. Assemb., Reg. Sess. (N.D. 2017).

[56] H. File 291, 87th Gen. Assemb. (Iowa 2017). A legal challenge is pending.

[57] S.B. 176, Kan. Leg., 2015-2016 Reg. Sess. (Kan. 2015).

[58] *See Act of Mar. 21, 2018, Pub. L. No. 170-2018 (Ind. 2018)*; *see also* Ind. Code §§ 20-28-9-1.5(a); 20-43-10-3(g).

[59] *See, e.g.*, H.B. 1607, 65th Leg., Reg. Sess. (Wash. 2017); S. 544, 128th Me. Leg. (Me. 2017); Assemb. 3692, 217th Leg., (N.J. 2016); S.B. 668, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2015); H.B. 11, 2017 Leg., Reg. Sess. (Fla. 2017); S.B. 597, 56th Leg., Reg. Sess (Okla. 2017) and H.B. 1767, 56th Leg., Reg. Sess. (Okla. 2017); and H.B. 3219, 100th Gen. Assemb., (Ill. 2017).

[60] H. File 291, *supra* note 56.

[61] S.B. 538, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015).

[62] *See* Ind. Code §§ 20-29-5-7, 20-29-5-8 (2017).

[63] For more information, *see* teacher union membership data available at Indiana Gateway, *supra* note 18.

[64] H. File 291, *supra* note 56.

[65] H. Paper 53 (Maine), *supra* note 48; Leg. B. 503, 105th Leg., 1st Session (Neb. 2017); H.B. 438, N.H. Gen. Ct., 2018 Sess. (N.H. 2018); H.B. 543, La. Leg., 2017 Reg. Sess. (La. 2017); Assemb. 574, 217th Leg. (N.J. 2018); S.B. 7, 85th Leg., 1st Called Sess. (Tex. 2017); S.B. 13, 85th Leg., Reg. Sess. (Tex. 2017); S.B. 94, 85th Leg., 1st Called Sess. (Tex. 2017); H.B. 156, 85th Leg., 1st Called Sess. (Tex. 2017); H.B. 510, 85th Leg., Reg. Sess. (Tex. 2017).

[66] Paycheck Protection Act, Act 6 of 2017 Reg. Sess. (Ky. 2017)(enacted Jan. 9, 2017); *see also* Ind. Code § 20-29-5-6 (2017).

[67] S. 5778-A, N.Y. Assemb., 2017-2018 Reg. Sess. (N.Y. 2017); H.B. 1891, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016)(vetoed by Gov.).

[68] S.B. 44, 29th Leg., 1st Sess. (Alaska 2015).

[69] H.B. 1174, Pa. Gen. Assemb., 2017-2018 Reg. Sess. (Pa. 2017).

[70] S.B. 890, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015).

[71] 29 U.S.C. §431(b) (1959).

[72] Paycheck Protection Act (Ky. 2017), *supra* note 67.

[73] H.B. 4595, Mich. Leg., 2017-2018 Sess. (Mich. 2017); S.B. 599, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016)

[74] *See* Ind. Code § 20-29-6-6.1 (2017).

[75] Conn. Gen. Stat. § 5-278 (West, Westlaw through 2018 Supp.).

McKinney's Consolidated Laws of New York Annotated
Civil Service Law (Refs & Annos)
Chapter 7. Of the Consolidated Laws (Refs & Annos)
Article 14. Public Employees' Fair Employment Act (Refs & Annos)

McKinney's Civil Service Law § 208

§ 208. Rights accompanying certification or recognition

Effective: April 2, 2016
Currentness

1. A public employer shall extend to an employee organization certified or recognized pursuant to this article the following rights:

(a) to represent the employees in negotiations notwithstanding the existence of an agreement with an employee organization that is no longer certified or recognized, and in settlement of grievances; and

(b) to membership dues deduction, upon presentation of dues deduction authorization cards signed by individual employees.

2. An employee organization certified or recognized pursuant to this article shall be entitled to unchallenged representation status until seven months prior to the expiration of a written agreement between the public employer and said employee organization determining terms and conditions of employment. For the purposes of this subdivision, (a) any such agreement for a term covering other than the fiscal year of the public employer shall be deemed to expire with the fiscal year ending immediately prior to the termination date of such agreement, (b) any such agreement having a term in excess of three years shall be treated as an agreement for a term of three years, provided, however, any such agreement between the state and an employee organization representing employees in the executive or judicial branches which commences in the calendar year two thousand sixteen having a term in excess of three years shall be treated as an agreement for a term certain specified in such agreement but in no event for a term greater than four years, and (c) extensions of any such agreement shall not extend the period of unchallenged representation status.

3. (a) Notwithstanding provisions of and restrictions of sections two hundred two and two hundred nine-a of this article, and section two hundred one of the state finance law, every employee organization that has been recognized or certified as the exclusive representative of employees of the state within a negotiating unit of classified civil service employees, employees within a negotiating unit of civilian state employees of the division of military and naval affairs or employees in a collective negotiating unit established pursuant to this article for the professional services in the state university, for the members of the state police or for the members of the capitol buildings police force of the office of general services shall be entitled to have deducted from the wage or salary of the employees in such negotiating unit who are not members of said employee organization the amount equivalent to the dues levied by such employee organization, and the state comptroller shall make such deductions and transmit the sum so deducted to such employee organization. Provided, however, that the foregoing provisions of this subdivision shall only be applicable in the case of an employee organization which has established and maintained a procedure providing for the refund to any employee demanding the return any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms

and conditions of employment. Nothing herein shall be deemed to require an employee to become a member of such employee organization.

(b) Notwithstanding provisions of and restrictions of sections two hundred two and two hundred nine-a of this article and section ninety-three-b of the general municipal law, every employee organization that has been recognized or certified as the exclusive representative of employees within a negotiating unit of other than state employees shall be entitled to have deducted from the wage or salary of employees of such negotiating unit who are not members of said employee organization the amount equivalent to the dues levied by such employee organization and the fiscal or disbursing officer of the local government or authority involved shall make such deductions and transmit the sum so deducted to such employee organization. Provided, however, that the foregoing provisions of this subdivision shall only be applicable in the case of an employee organization which has established and maintained a procedure providing for the refund to any employee demanding the return of any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment. Nothing herein shall be deemed to require an employee to become a member of such employee organization.

Credits

(Added L.1967, c. 392, § 2. Amended L.1971, c. 503, § 7; L.1977, c. 677, § 3; L.1977, c. 678, § 2; L.1978, c. 122, § 1; L.1988, c. 582, § 11; L.1992, c. 606, § 2; L.1993, c. 99, § 1; L.1995, c. 315, § 4; L.1997, c. 205, § 10, eff. July 15, 1997, deemed eff. April 1, 1995; L.1997, c. 501, § 8, eff. Aug. 27, 1997, deemed eff. April 1, 1995; L.2000, c. 68, pt. A, § 3, eff. June 20, 2000, deemed eff. April 2, 1999; L.2004, c. 103, pt. A, § 4, eff. June 4, 2004, deemed eff. April 2, 2003; L.2008, c. 10, pt. A, § 3, eff. Jan. 28, 2008, deemed eff. April 2, 2007; L.2011, c. 491, pt. A, § 3, eff. Aug. 17, 2011, deemed eff. April 2, 2011; L.2017, c. 165, § 2, deemed eff. April 2, 2016.)

Notes of Decisions (47)

McKinney's Civil Service Law § 208, NY CIV SERV § 208
Current through L.2018, chapters 1 to 3.

End of Document

6 PERB ¶ 3012, 6 Off. Dec. of N. Y. Pub. Employee Rel. Bd. ¶ 3012, 1973 WL 340312

New York Public Employment Relations Board

In the Matter of BOARD OF EDUCATION, CITY SCHOOL DISTRICT OF THE CITY OF ALBANY, AND DR. JAMES HEPPENSTALL, SUPERINTENDENT OF SCHOOLS, Respondents, and ALBANY PUBLIC SCHOOL TEACHERS ASSOCIATION, Charging Party.

No. U-0433

ROBERT D. HELSBY, Chairman; JOSEPH R. CROWLEY

March 5, 1973

Back reference: 5 PERB 4587

Judge/Administrative Officer

ROBERT D. HELSBY, Chairman; JOSEPH R. CROWLEY

Case Summary

While an employer must provide information needed by an employee organization in preparing for negotiations or in investigating a grievance, an employer's refusal of access to inspect its facilities is not improper if the necessity for such access is not established.

Full Text

Board Decision and Order

The Albany Public School Teachers Association (Association) filed an improper practice charge against the City School District of the City of Albany and Dr. Heppenstall, Superintendent of Schools (employer) alleging a violation of §§ 209-a.1(b) and (d) of the Public Employees' Fair Employment Act (Act). [1]

The gravamen of the charge is that the employer refused to permit representatives of the Association to visit facilities of the employer to inspect the physical conditions of such facilities in connection with the preparation of proposals for negotiations and the investigation of grievances.

The hearing officer found that the denials by the employer of the Association's requests did not constitute a violation of the Act.

The Association filed exceptions to the hearing officer's decision. After reviewing the record, the exceptions, the briefs of the parties, and after hearing oral argument, we agree with the conclusion reached by the hearing officer, though on somewhat different grounds. Thus, it is our conclusion that the Association has not sustained its charge that the employer violated § 209-a. 1(d) of the Act;

Firstly, there is no provision in the agreement between the parties providing for access by the Association to the employer's schools to investigate grievances or other functions of a negotiating representative.

Secondly, while the absence of such an “access provision” in the agreement does not necessarily negate any right of the Association to have access to the employer's premises, it places upon the Association the burden of establishing on an *ad hoc* basis that the right of visitation is necessary to provide adequate representation of the employees it represents. The duty and obligation of a negotiating representative is not discharged upon the negotiation and execution of an agreement covering wages and other terms and conditions of employment. The negotiating representative has the obligation to administer the agreement so that the rights of the employees it represents as delineated in the contract are protected.

Similarly, the obligation of an employer to negotiate in good faith is not discharged upon the execution of a negotiated agreement. The obligation of the employer to negotiate continues in the administration ?? of the agreement to deal with representational its employees as to grievances which may arise under the agreement.

These respective obligations, in turn, give rise to further considerations dealing with the right of an employee organization to obtain and the duty of the employer to furnish information. Generally stated, an employee organization may request, and is entitled to receive, information which is necessary for the preparation for collective negotiations, for example, number of job titles, salary schedules, and information necessary for the administration of a contract including the investigation of grievances. In both cases, the obligation of the employer would be circumscribed by the rules of reasonableness, including the burden upon the employer to provide the information, the availability of the information elsewhere, the necessity therefor, the relevancy thereof and, finally, that the information supplied need not be in the form requested as long as it satisfies a demonstrated need.

Further as to grievance investigation, the duty of the employer to provide necessary information may include permitting a representative of the employee organization to inspect facilities. For example, if the grievance raises the issue of unsafe conditions endangering the health or safety of employees, the representative should be afforded the opportunity to inspect the facility in issue to make a determination whether the grievance has merit and to obtain and confirm evidence as to the condition of the facility which is the subject of the grievance. However, in the instant case the Association, in its request to the employer, has failed to demonstrate the need for such access.

The first request of November 23, 1971 was to "verify needs" of the Schuyler High School faculty. There is nothing in this request to indicate either that such verification required the visitation to the school by the Association's executive committee or that it was necessary for the preparation of negotiations or the investigation of any grievance.

The response of the employer in denying this request warrants a brief comment. The employer denied the request on the ground that "the Schuyler faculty has not evidenced any desire" for the visitation. The right of visitation by an employee organization does not depend upon the employer's assessment of employee sentiment therefor, but upon demonstration of a need therefor based upon the employee organization's negotiating responsibilities.

Similarly, the request of the Association dated November 28, 1971 does not specify the need for the inspection of facilities at five schools other than a general and non-informative statement that, "We are, however obligated legally to protect our membership, and morally obligated to respond to what the community and students feel are their educational needs." Neither does it state or explain why the information obviously known to the employees at these five schools would not satisfy the needs of the Association. Again, in the request of February 27, 1972 involving a request to inspect facilities in preparation of contract proposals, there is nothing in the request to indicate why the employees at each school were unable to provide adequate information to enable the Association to formulate or prepare contract proposals. Further, the chief negotiator for the Association testified that the bulk of the work of formulating proposals for negotiations had been completed by the end of October, 1971.

Finally, in May 1972, the chairman of the grievance committee of the Association sought permission to visit School 9 to observe conditions "that may be grounds for a grievance". The facts underlying this request were that there were false fire alarms at this school and the chairman of the grievance committee wished to visit the school and see the alarm system. The employer did not accede to the request, but did furnish to the Association a report from the principal of the school reporting on the situation and remedial measures taken, and a report of an inspection of the system by the Fire Department that the problem has been corrected.

As noted previously, an employee organization may have a right to inspect employer facilities in an investigation of a grievance, subject to a proper showing of need or relevant contractual provisions. Here, the chairman of the Association

was given two reports on the steps taken to correct the defects in the alarm system and that it was then in good order. There is nothing in the record to indicate that the grievance chairman possessed the expertise that a visual inspection would be informative. Perhaps the employer should have permitted such visitation as a matter of good relationship between the parties, but it cannot be said that the employer's denial constituted a violation of its duty to negotiate in good faith.

The charge herein could have been obviated, if the parties had negotiated an access provision in their agreement, and any question as to the interpretation or application thereof could have been resolved in a grievance procedure.

As to the charge that the aforesaid conduct of the employer violated § 209-a.1(b), we are of the opinion that the allegations set forth in the charge do not constitute a violation of this subsection.

It is obvious to us, absent any legislative history to the contrary, that the Legislature, in enacting § 209-a.1(a), (b), (c) and (d) sought to identify with comparable sections of the National Labor Relations Act, viz § 8(a)(1), (2), (3) and (5). [2] If this be so, then § 209-a.1(b) was an attempt by the Legislature to emulate the structures of § 8(a)(2) of the National Labor Relations Act. If this analysis is correct, then the purport of subsection 209-a.1(b) was to proscribe employer domination of an employee organization or the grant of unlawful assistance or support to an employee organization. [3] Clearly, the conduct of the employer herein would not, therefore, violate the statutory proscriptions as it would constitute neither domination nor unlawful assistance or support.

THEREFORE, IT IS ORDERED that the charges herein be dismissed.

Footnotes

1 §§ 209-a.1(b) and (d) provide: "1. . . . (b) to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights; ... or (d) to refuse to negotiate in good faith with the duly recognized or certified representative of its public employees."

2 Title 29, U.S.C. § 158(a)(1), (2), (3) and (5).

3 Cf International Ladies' Garment Workers Union v. NLRB, 366 U.S. 731.

87 S.Ct. 903
Supreme Court of the United States

Manuel VACA et al., Petitioners,
v.
Niles SIPES, Administrator of the Estate
of Benjamin Owens, Jr., Deceased.

No. 114.
|
Argued Nov. 17, 1966.
|
Decided Feb. 27, 1967.

Synopsis

Class action by discharged union member against officers and representatives of national and local union for damages. The Circuit Court for Jackson County, Missouri, entered judgment for the defendants and the member appealed. The Kansas City Court of Appeals affirmed and transferred the case on its own motion. The Missouri Supreme Court, 397 S.W.2d 658, reversed and remanded with directions and certiorari was granted. The Supreme Court, Mr. Justice White, held, inter alia, that state court had jurisdiction of union member's action against officers and representatives of his union based on claim that employee had been wrongfully discharged from his employment in violation of collective bargaining agreement and that union had arbitrarily and without cause refused to take grievance with employer to arbitration, and jurisdiction of court was not pre-empted although an unfair labor practice on part of union might be involved, but evidence did not show a breach of union's duty.

Reversed.

Mr. Justice Black dissented.

Attorneys and Law Firms

****907** ***172** David E. Feller, Washington, D.C., for petitioners.

Allan R. Browne, Kansas City, Mo., for respondent.

Opinion

***173** Mr. Justice WHITE delivered the opinion of the Court.

On February 13, 1962, Benjamin Owens filed this class action against petitioners, as officers and representatives of the National Brotherhood of Packinghouse ****908** Workers [1] and of its Kansas City Local No. 12 (the Union), in the Circuit Court of Jackson County, Missouri. Owens, a Union member, alleged that he had been discharged from his employment at Swift & Company's (Swift) Kansas City Meat Packing Plant in violation of the collective bargaining agreement then in force between Swift and the Union, and that the Union had 'arbitrarily, capriciously and without just or reasonable reason or cause' refused to take his grievance with Swift to arbitration under the fifth step of the bargaining agreement's grievance procedures.

[1] Petitioners' answer included the defense that the Missouri courts lacked jurisdiction because the gravamen of Owens' suit was 'arguably and basically' an unfair labor practice under s 8(b) of the National Labor Relations Act (N.L.R.A.), as amended, 61 Stat. 141, 29 U.S.C. s 158(b), within the exclusive jurisdiction of the National Labor Relations Board (NLRB). After a jury trial, a verdict was returned awarding Owens $7,000 compensatory and $3,300 punitive damages. The trial judge set aside the verdict and entered judgment for petitioners on the ground that the NLRB had exclusive jurisdiction ***174** over this controversy, and the Kansas City Court of Appeals affirmed. The Supreme Court of Missouri reversed and directed reinstatement of the jury's verdict, [2] relying on this Court's decisions in International Assn. of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018, and in International Union, United Automobile, etc. Workers of America v. Russell, 356 U.S. 634, 78 S.Ct. 932, 2 L.Ed.2d 1030. 397 S.W.2d 658. During the appeal, Owens died and respondent, the administrator of Owens' estate, was substituted. We granted certiorari to consider whether exclusive jurisdiction lies with the NLRB and, if not, whether the finding of Union liability and the relief afforded Owens are consistent with governing principles of federal labor law. 384 U.S. 969, 86 S.Ct. 1863, 16 L.Ed.2d 1863. The American Federation of Labor and Congress of Industrial Organizations (AFL—CIO), Swift, and the United States have filed amicus briefs supporting petitioners. Although we conclude that state courts have jurisdiction in this type of case, we hold that federal law

governs, that the governing federal standards were not applied here, and that the judgment of the Supreme Court of Missouri must accordingly be reversed.

I.

In mid-1959, Owens, a long-time high blood pressure patient, became sick and entered a hospital on sick leave from his employment with Swift. After a long rest during which his weight and blood pressure were reduced, Owens was certified by his family physician as fit to resume his heavy work in the packing plant. However, Swift's company doctor examined Owens upon his return and concluded that his blood pressure was too high to permit reinstatement. After securing a second authorization from another outside doctor, Owens returned to the plant, and a nures permitted him to resume work ***175** on January 6, 1960. However, on January 8, when the doctor discovered Owens' return, he was permanently discharged on the ground of poor health.

Armed with his medical evidence of fitness, Owens then sought the Union's help in securing reinstatement, and a grievance was filed with Swift on his behalf. By mid-November 1960, the grievance had been processed through the third and into the fourth step of the grievance procedure established by the ****909** collective bargaining agreement. [3] Swift adhered to its position that Owens' poor health justified his discharge, rejecting numerous medical reports of reduced blood pressure proffered by Owens and by the Union. Swift claimed that these reports were not based upon sufficiently thorough medical tests.

On February 6, 1961, the Union sent Owens to a new doctor at Union expense 'to see if we could get some better medical evidence so that we could go to arbitration with his case.' R., at 107. This examination did not support Owens' position. When the Union received the report, its executive board voted not to take the Owens grievance to arbitration because of insufficient medical evidence. Union officers suggested to Owens that he accept Swift's offer of referral to a rehabilitation center, and the grievance was suspended for that purpose. Owens rejected this alternative and demanded that the Union take his grievance to arbitration, but the Union ***176** refused. With his contractual remedies thus stalled at the fourth step, Owens brought this suit. The grievance was finally dismissed by the Union and Swift shortly before trial began in June 1964. [4]

In his charge to the jury, the trial judge instructed that petitioners would be liable if Swift had wrongfully discharged Owens and if the Union had 'arbitrarily * * * and without just cause or excuse * * * refused' to press Owens' grievance to arbitration. Punitive damages could also be awarded, the trial judge charged, if the Union's conduct was 'willful, wanton and malicious.' However, the jury must return a verdict for the defendants, the judge instructed, 'if you find and believe from the evidence that the union and its representatives acted reasonably and in good faith in the handling and processing of the grievance of the plaintiff.' R., at 161—162. The jury then returned the general verdict for Owens which eventually was reinstated by the Missouri Supreme Court.

II.

Petitioners challenge the jurisdiction of the Missouri courts on the ground that the alleged conduct of the Union was arguably an unfair labor practice and within the exclusive jurisdiction of the NLRB. Petitioners rely on Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (C.A.2d Cir. 1963), where a sharply divided Board held for the first time that a union's breach of its statutory duty of fair representation violates N.L.R.A. s 8(b), as amended. With the NLRB's adoption of Miranda Fuel, petitioners argue, the broad pre-emption doctrine defined in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775, becomes ***177** applicable. For the reasons which follow, we reject this argument.

[2] [3] [4] It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining with Swift, see ****910** Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048; Syres v. Oil Workers International Union, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785, and in its enforcement of the resulting collective bargaining agreement, see Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370. The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see Steele v. Louisville & N.R. Co., 323 U.S. 192, 65 S.Ct. 226,

89 L.Ed. 173; Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187, and was soon extended to unions certified under the N.L.R.A., see Ford Motor Co. v. Huffman, supra. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Humphrey v. Moore, 375 U.S., at 342, 84 S.Ct., at 367. It is obvious that Owens' complaint alleged a breach by the Union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action. e.g., Ford Motor Co. v. Huffman, supra.

Although N.L.R.A. s 8(b) was enacted in 1947, the NLRB did not until Miranda Fuel interpret a breach of a union's duty of fair representation as an unfair labor practice. In Miranda Fuel, the Board's majority held that N.L.R.A. s 7 gives employees 'the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their ***178** employment,' and 'that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.' 140 N.L.R.B., at 185. The Board also held that an employer who 'participates' in such arbitrary union conduct violates s 8(a)(1), and that the employer and the union may violate ss 8(a)(3) and 8(b)(2), respectively, 'when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee.' [5] Id., at 186.

The Board's Miranda Fuel decision was denied enforcement by a divided Second Circuit, 326 F.2d 172 (1963). However, in Local Union No. 12, United Rubber, etc., Workers of America v. N.L.R.B., 368 F.2d 12, the Fifth Circuit upheld the Board's Miranda Fuel doctrine in an opinion suggesting that the Board's approach will pre-empt judicial cognizance of some fair representation duty suits. In light of these developments, petitioners argue that Owens' state court action was based upon Union conduct that is arguably proscribed by N.L.R.A. s 8(b), was potentially enforceable by the NLRB, and was therefore pre-empted under the Garmon line of decisions.

[5] A. In Garmon, this Court recognized that the broad powers conferred by Congress upon the National Labor Relations Board to interpret and to enforce the complex Labor Management Relations Act (L.M.R.A.) necessarily imply that potentially conflicting 'rules of law, of remedy, and of administration' cannot be permitted to ***179** operate. 359 U.S. at 242, 79 S.Ct. 778, at 3 L.Ed.2d 775. In ****911** enacting the National Labor Relations Act and later the Labor Management Relations Act,

'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. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal * * *. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. * * * 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.' Garner v. Teamsters, etc., Union, 346 U.S. 485, 490—491, 74 S.Ct. 161, 165—166, 98 L.Ed. 228.

Consequently, as a general rule, neither state nor federal courts have jurisdiction over suits directly involving 'activity (which) is arguably subject to s 7 or s 8 of the Act.' San Diego Building Trades Council v. Garmon, 359 U.S., at 245, 79 S.Ct., at 780.

[6] This pre-emption doctrine, however, has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB. Congress itself has carved out exceptions to the Board's exclusive jurisdiction: Section 303 of the Labor Management Relations Act, 1947, 61 Stat. 158, 29 U.S.C. s 187, expressly permits anyone injured by a violation of N.L.R.A. s 8(b)(4) to recover damages in a federal court even though such unfair labor practices are also remediable by the Board; s 301 of that Act, 61 Stat. 156, 29 U.S.C. s 185, permits suits for breach of a collective ***180** bargaining agreement regardless of whether the particular breach is also an unfair labor practice within the jurisdiction of the Board (see Smith v. Evening News Assn., 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246); and N.L.R.A. s 14, as amended by Title VII, s 701(a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, 29 U.S.C. s 164(c),

permits state agencies and courts to assume jurisdiction 'over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction' (compare Guss v. Utah Labor Relations Board, 353 U.S. 1, 77 S.Ct. 598, 609, 1 L.Ed.2d 601).

[7] **[8]** In addition to these congressional exceptions, this Court has refused to hold state remedies pre-empted 'where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. * * * (or) touched interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act.' San Diego Building Trades Council v. Garmon, 359 U.S., at 243—244, 79 S.Ct. at 779. See, e.g., Linn v. United Plant Guard Workers, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (libel); International Union, United Automobile, etc., Workers of America v. Russell, 356 U.S. 634, 78 S.Ct. 932, 2 L.Ed.2d 1030 (violence); International Assn. of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018 (wrongful expulsion from union membership); Allen-Bradley Local No. 1111, United Electrical, etc., Workers v. Wisconsin Employment Relations Board, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154 (mass picketing). See also Hanna Mining Co. v. District 2, Marine Engineers Beneficial Assn., 382 U.S. 181, 86 S.Ct. 327, 15 L.Ed.2d 254. While these exceptions in no way undermine the vitality of the pre-emption rule where applicable, they demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies ****912** of concurrent judicial and administrative remedies.

[9] A primary justification for the pre-emption doctrine —the need to avoid conflicting rules of substantive law ***181** in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation. The doctrine was judicially developed in Steele and its progeny, and suits alleging breach of the duty remained judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the L.M.R.A.[6] Moreover when the Board declared in Miranda Fuel that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the Board adopted and applied the doctrine as it had been developed by the federal courts. See 140 N.L.R.B., at 184—186. Finally, as the dissenting Board members in Miranda Fuel have pointed out, fair representation duty suits often require review of the substantive 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, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts, which have been engaged in this type of review since the Steele decision.[7]

[10] **[11]** **[12]** **[13]** **[14]** **[15]** In addition to the above considerations, the unique interests served by the duty of fair representation doctrine ***182** have a profound effect, in our opinion, on the applicability of the pre-emption rule to this class of cases. The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining. See N.L.R.A. s 1, as amended, 61 Stat. 136, 29 U.S.C. s 151. The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. See, e.g., J. I. Case Co. v. N.L.R.B., 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762. This Court recognized in Steele that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination. 323 U.S., at 198 —199, 65 S.Ct., at 230—231, 89 L.Ed. 173. Since that landmark decision, the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Were we to hold, as petitioners and the Government urge, that the courts are foreclosed by the NLRB's Miranda Fuel decision from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial ****913** review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. See United Electrical

Contractors Assn. v. Ordman, 366 F.2d 776 (C.A.2d Cir., 1966), cert. denied, 385 U.S. 1026, 87 S.Ct. 753, 17 L.Ed.2d 674.[8] The existence of even a small group ***183** of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. For these reasons, we cannot assume from the NLRB's tardy assumption of jurisdiction in these cases that Congress, when it enacted N.L.R.A. s 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative.

[16] B. There are also some intensely practical considerations which foreclose pre-emption of judicial cognizance of fair representation duty suits, considerations which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under L.M.R.A. s 301 charging an employer with a breach of contract. To illustrate, let us assume a collective bargaining agreement that limits discharges to those for good cause and that contains no grievance, arbitration or other provisions purporting to restrict access to the courts. If an employee is discharged without cause, either the union or the employee may sue the employer under L.M.R.A. s 301. Under this section, courts have jurisdiction over suits to enforce collective bargaining agreements even though the conduct of the employer which is challenged as a breach of contract is also arguably an unfair labor practice within the jurisdiction of ***184** the NLRB. Garmon and like cases have no application to s 301 suits. Smith v. Evening News Assn., 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246.

[17] **[18]** The rule is the same with regard to pre-emption where the bargaining agreement contains grievance and arbitration provisions which are intended to provide the exclusive remedy for breach of contract claims.[9] If an employee is discharged without cause in violation of such an agreement, that the employer's conduct may be an unfair labor practice does not preclude a suit by the union[10] against the employer to compel arbitration of the employee's grievance, the adjudication of the claim by the arbitrator, or a suit to enforce the resulting arbitration award. See, e.g., United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403.

****914** **[19]** However, if the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. ***185** Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580. However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures.

[20] An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. Cf. Drake Bakeries, Inc. v. Local 50, Am. Bakery, etc., Workers, 370 U.S. 254, 260—263, 82 S.Ct. 1346, 1350—1352, 8 L.Ed.2d 474. See generally 6A Corbin, Contracts s 1443 (1962). In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action.

[21] We think that another situation when the employee may seek judicial enforcement of his contractual rights arises, if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance. It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer

has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances would, in our ***186** opinion, be a great injustice. We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements. Cf. Richardson v. Texas & N.O.R. Co., 242 F.2d 230, 235—236 (C.A.5th Cir.).

[22] [23] [24] For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, 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. [11] We ****915** may assume for present purposes that such a breach of duty by the union is an unfair labor practice, as the NLRB and the Fifth Circuit have held. The employee's suit against the employer, however, remains a s 301 suit, and the jurisdiction of the courts is no more destroyed by the fact that the employee, as part and parcel of his s 301 action, finds it necessary to prove an unfair labor practice by the union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself. The court is free to determine ***187** whether the employee is barred by the actions of his union representative, and, if not, to proceed with the case. And if, to facilitate his case, the employee joins the union as a defendant, the situation is not substantially changed. The action is still a s 301 suit, and the jurisdiction of the courts is not pre-empted under the Garmon principle. This, at the very least, is the holding of Humphrey v. Moore, supra, with respect to pre-emption, as petitioners recognize in their brief. And, insofar as adjudication of the union's breach of duty is concerned, the result should be no different if the employee, as Owens did here, sues the employer and the union in separate actions. There would be very little to commend a rule which would permit the Missouri courts to adjudicate the Union's conduct in an action against Swift but not in an action against the Union itself.

For the above reasons, it is obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many s 301 breach-of-contract actions. If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably, in at least some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the court to pay for the union's wrong—slight deterrence, indeed, to future union misconduct—or the injured employee would be forced to go to two tribunals to repair a single injury. Moreover, the Board would be compelled in many cases either to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it, or to leave the individual employee without ***188** remedy for the union's wrong. [12] Given the strong reasons for not pre-empting duty of fair representation suits in general, and the fact that the courts in many s 301 suits must adjudicate whether the ****916** union has breached its duty, we conclude that the courts may also fashion remedies for such a breach of duty.

It follows from the above that the Missouri courts had jurisdiction in this case. Of course, it is quite another problem to determine what remedies may be available against the Union if a breach of duty is proven. See Part IV, infra. But the unique role played by the duty of fair representation doctrine in the scheme of federal labor laws, and its important relationship to the judicial enforcement of collective bargaining agreements in the context presented here, render the Garmon pre-emption doctrine inapplicable.

III.

Petitioners contend, as they did in their motion for judgment notwithstanding the jury's verdict, that Owens failed to prove that the Union breached its duty of fair representation in its handling of Owens' grievance. Petitioners ***189** also argue that the Supreme Court of Missouri, in rejecting this contention, applied a

standard that is inconsistent with governing principles of federal law with respect to the Union's duty to an individual employee in its processing of grievances under the collective bargaining agreement with Swift. We agree with both contentions.

A. In holding that the evidence at trial supported the jury's verdict in favor of Owens, the Missouri Supreme Court stated:
'The essential issue submitted to the jury was whether the union * * * arbitrarily * * * refused to carry said grievance * * * through the fifth step. * * *

'We have concluded that there was sufficient substantial evidence from which the jury reasonably could have found the foregoing issue in favor of plaintiff. It is notable that no physician actually testified in the case. Both sides were content to rely upon written statements. Three physicians certified that plaintiff was able to perform his regular work. Three other physicians certified that they had taken plaintiff's blood pressure and that the readings were approximately 160 over 100. It may be inferred that such a reading does not indicate that this blood pressure was dangerously high. Moreover, plaintiff's evidence showed that he had actually done hard physical labor periodically during the four years following his discharge. We accordingly rule this point adversely to defendants.' 397 S.W.2d, at 665.

Quite obviously, the question which the Missouri Supreme Court thought dispositive of the issue of liability was whether the evidence supported Owens' assertion that he had been wrongfully discharged by Swift, regardless of the Union's good faith in reaching a contrary ***190** conclusion. This was also the major concern of the plaintiff at trial: the bulk of Owens' evidence was directed at whether he was medically fit at the time of discharge and whether he had performed heavy work after that discharge.

[25] A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. See Humphrey v. Moore, supra; Ford Motor Co. v. Huffman, supra. There has been considerable debate over the extent of this duty in the context of a union's enforcement of the grievance and arbitration procedures in a collective bargaining agreement. See generally Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 Mich.L.Rev. 1435, 1482—1501 (1963); Comment, ****917** Federal Protection of Individual Rights under Labor Contracts, 73 Yale L.J. 1215 (1964). Some have suggested that every individual employee should have the right to have his grievance taken to arbitration. [13] Others have urged that the union be given substantial discretion (if the collective bargaining agreement so provides) to decide whether a grievance should be taken to arbitration, subject only to the duty to refrain from patently wrongful conduct such as racial discrimination or personal hostility. [14]

***191** **[26]** **[27]** **[28]** Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. In L.M.R.A. s 203(d), 61 Stat. 154, 29 U.S.C. s 173(d), Congress declared that 'Final adjustment by a method agreed upon by the parties is * * * the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.' In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement. See Cox, Rights Under a Labor Agreement, 69 Harv.L.Rev. 601 (1956).

[29] If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed

to ***192** arbitration.[15] This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to ****918** prevent it from functioning successfully. See NLRB v. Acme Industrial Co., 385 U.S. 432, 438, 87 S.Ct. 565, 569, 17 L.Ed.2d 495; Ross, Distressed Grievance Procedures and Their Rehabilitation, in Labor Arbitration and Industrial Change, Proceedings of the 16th Annual Meeting, National Academy of Arbitrators 104 (1963). It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedures of the kind encouraged by L.M.R.A. s 203(d), supra, if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration. Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration. For these reasons, we conclude that a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration.

[30] For these same reasons, the standard applied here by the Missouri Supreme Court cannot be sustained. For if a union's decision that a particular grievance lacks ***193** sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial. Since the union's statutory duty of fair representation protects the individual employee from arbitrary abuses of the settlement device by providing him with recourse against both employer (in a s 301 suit) and union, this severe limitation on the power to settle grievances is neither necessary nor desirable. Therefore, we conclude that the Supreme Court of Missouri erred in upholding the verdict in this case solely on the ground that the evidence supported Owens' claim that he had been wrongfully discharged.

[31] **[32]** B. Applying the proper standard of union liability to the facts of this case, we cannot uphold the jury's award, for we conclude that as a matter of federal law the evidence does not support a verdict that the Union breached its duty of fair representation. As we have stated, Owens could not have established a breach of that duty merely by convincing the jury that he was in fact fit for work in 1960; he must also have proved arbitrary or bad-faith conduct on the part of the Union in processing his grievance. The evidence revealed that the Union diligently supervised the grievance into the fourth step of the bargaining agreement's procedure, with the Union's business representative serving as Owens' advocate throughout these steps. When Swift refused to reinstate Owens on the basis of his medical reports indicating reduced blood pressure, the Union sent him to another doctor of his own choice, at Union expense, in an attempt to amass persuasive medical evidence of Owens' fitness for work. When this examination proved unfavorable, the Union ***194** concluded that it could not establish a wrongful discharge. It then encouraged Swift to find light work for Owens at the plant. When this effort failed, the Union determined that arbitration would be fruitless and suggested to Owens that he accept Swift's offer to send him to a heart association for rehabilitation. At this point, Owens' grievance was suspended in the fourth step in the hope that he might be rehabilitated.

****919** **[33]** **[34]** In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances. See Humphrey v. Moore, 375 U.S. 335, 349—350, 84 S.Ct. 363, 371—372, 11 L.Ed.2d 370; Ford Motor Co. v. Huffman, 345 U.S. 330, 337—339, 73 S.Ct. 681, 685—687, 97 L.Ed. 1048. In a case such as this, when Owens supplied the Union with medical evidence supporting his position, the Union might well have breached its duty had it ignored Owens' complaint or had it processed the grievance in a perfunctory manner. See Cox, Rights under a Labor Agreement, 69 Harv.L.Rev., at 632—634. But here the Union processed the grievance into the fourth step, attempted to gather sufficient evidence to prove Owens' case, attempted to secure for Owens less vigorous work at the plant, and joined in the employer's efforts to have Owens rehabilitated. Only when these efforts all proved unsuccessful did the Union conclude both that arbitration would be fruitless and that the grievance should be dismissed. There was no evidence that any Union officer was personally hostile to Owens or that the Union acted at any time other than in good faith.[16] Having concluded that ***195** the individual employee

has no absolute right to have his grievance arbitrated under the collective bargaining agreement at issue, and that a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious, we must conclude that that duty was not breached here.

IV.

[35] In our opinion, there is another important reason why the judgment of the Missouri Supreme Court cannot stand. Owens' suit against the Union was grounded on his claim that Swift had discharged him in violation of the applicable collective bargaining agreement. In his complaint, Owens alleged 'that, as a direct result of said wrongful breach of said contract, by employer * * * Plaintiff was damaged in the sum of Six Thousand, Five Hundred ($6,500.00) Dollars per year, continuing until the date of trial.' For the Union's role in 'preventing Plaintiff from completely exhausting administrative remedies,' Owens requested, and the jury awarded, compensatory damages for the above-described breach of contract plus punitive damages of $3,000. R., at 4. We hold that such damages are not recoverable from the Union in the circumstances of this case.

[36] The appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach. In this case, the employee's complaint was that the Union wrongfully failed to afford him the arbitration remedy against his employer established by the collective bargaining agreement. But the damages sought by Owens were primarily those suffered ***196** because of the employer's alleged breach of contract. Assuming for the moment that Owens had been wrongfully discharged, Swift's only defense to a direct action for breach of contract would have been the Union's failure to ****920** resort to arbitration, compare Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580, with Smith v. Evening News Assn., 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246, and if that failure was itself a violation of the Union's statutory duty to the employee, there is no reason to exempt the employer from contractual damages which he would otherwise have had to pay. See p. 914, supra. The difficulty lies in fashioning an appropriate scheme of remedies.

[37] **[38]** Petitioners urge that an employee be restricted in such circumstances to a decree compelling the employer and the union to arbitrate the underlying grievance. [17] It is true that the employee's action is based on the employer's alleged breach of contract plus the union's alleged wrongful failure to afford him his contractual remedy of arbitration. For this reason, an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved. But we see no reason inflexibly to require arbitration in all cases. In some cases, for example, at least part of the employee's damages may be attributable to the union's breach of duty, and an arbitrator may have no power under the bargaining agreement to award such damages against the union. In other cases, the arbitrable issues may be substantially resolved in the course of trying the fair representation controversy. In such situations, the court should be free to decide the contractual claim and to award the employee appropriate damages or equitable relief.

[39] **[40]** A more difficult question is, what portion of the employee's damages may be charged to the union: in particular, ***197** 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. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act; in fact, the employer may be (and probably should be) joined as a defendant in the fair representation suit, as in Humphrey v. Moore, supra. It could be a real hardship on the union to pay these damages, even if the union were given a right of indemnification against the employer. With the employee assured of direct recovery from the employer, we see no merit in requiring the union to pay the employer's share of the damages. [18]

[41] The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not ****921** be charged to the union, but increases if any ***198** in those damages caused by the union's refusal to process the grievance should not be charged to

the employer. In this case, even if the Union had breached its duty, all or almost all of Owens' damages would still be attributable to his allegedly wrongful discharge by Swift. For these reasons, even if the Union here had properly been found liable for a breach of duty, it is clear that the damage award was improper.

Reversed.

Mr. Justice FORTAS, with whom THE CHIEF JUSTICE and Mr. Justice HARLAN join, concurring in the result.

1. In my view, a complaint by an employee that the union has breached its duty of fair representation is subject to the exclusive jurisdiction of the NLRB. It is a charge of unfair labor practice. See Miranda Fuel Co., 140 N.L.R.B. 181 (1962); [1] Local 12, United Rubber Workers, 150 N.L.R.B. 312, enforced, 368 F.2d 12 (C.A.5th Cir., 1966). [2] As is the case with most other ***199** unfair labor practices, the Board's jurisdiction is preemptive. Garner v. Teamsters, Chauffeurs and Helpers Union, No. 776, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953); Guss v. Utah Labor Board, 353 U.S. 1, 77 S.Ct. 598, 1 L.Ed.2d 601 (1957); San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959); Local 438, Constr. Laborers v. Curry, 371 U.S. 542, 83 S.Ct. 531, 9 L.Ed.2d 514 (1963); Local 100 of the United Association of Journeymen & Apprentices v. Borden, 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed.2d 638 (1963); Local No. 207 International Assoc. of Bridge etc., Iron Workers v. Perko, 373 U.S. 701, 83 S.Ct. 1429, 10 L.Ed.2d 646 (1963); Liner v. Jafco, Inc., 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964). Cf. Woody v. Sterling Alum. Prods., Inc., 365 F.2d 448 (C.A.8th Cir. 1966), pet. for cert. pending, No. 946, O.T. 1966. There is no basis for failure to apply the pre-emption principle in the present case, and, as I shall discuss, strong reason for its application. The relationship between the union and the individual employee with respect to the processing of claims to employment rights under the collective bargaining agreement is fundamental to the design and operation of federal labor law. It is not 'merely peripheral,' as the Court's opinion states. It 'presents difficult problems of definition of status, problems which we have held are precisely 'of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole.'' Local No. 207 International Assoc. of Bridge etc., Iron Workers v. Perko, supra, 373 U.S., at 706, 83 S.Ct. at 1432. Accordingly, the judgment of the Supreme Court of Missouri should be reversed and the complaint dismissed for this reason and on this basis. I agree, however, that if it were assumed that jurisdiction of the subject matter exists, ****922** the judgment would still have to be reversed because of the use by the Missouri court of an improper standard for measuring the union's duty, and the absence of evidence to establish that the union refused further to process Owens' grievance because of bad faith or arbitrarily.

2. I regret the elaborate discussion in the Court's opinion of problems which are irrelevant. This is not an action by the employee against the employer, and the ***200** discussion of the requisites of such an action is, in my judgment, unnecessary, sue the employer under L.M.R.A. s 301; and that to maintain such an action the employee would have to show that he has exhausted his remedies under the collective bargaining agreement, or alternatively that he was prevented from doing so because the union breached its duty to him by failure completely to process his claim. That may be; or maybe all he would have to show to maintain an action against the employer for wrongful discharge is that he demanded that the union process his claim to exhaustion of available remedies, and that it refused to do so. [3] I see no need for the Court to pass upon that question, which is not presented here, and which, with all respect, lends no support to the Court's argument. The Court seems to use its discussion of the employee-employer litigation as somehow analogous to or supportive of its conclusion that the employee may maintain a court action against the union. But I do not believe that this follows. I agree that the NLRB's unfair labor practice jurisdiction does not preclude an action under s 301 against the employer for wrongful discharge ***201** from employment. Smith v. Evening News Assn., 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962). Therefore, Owens might have maintained an action against his employer in the present case. This would be an action to enforce the collective bargaining agreement, and Congress has authorized the courts to entertain actions of this type. But his claim against the union is quite different in character, as the Court itself recognizes. The Court holds—and I think correctly if the issue is to be reached—that the union could not be required to pay damages measured by the breach of the employment contract, because it was not the union but the employer that breached the contract. I agree; but I

suggest that this reveals the point for which I contend: that the employee's claim against the union is not a claim under the collective bargaining agreement, but a claim that the union has breached its statutory duty of fair representation. This claim, I submit, is a claim of unfair labor practice and it is within the exclusive jurisdiction of the NLRB. The Court agrees that 'one of the available remedies (obtainable, the Court says, by court action) when a breach of the union's duty is proved' is 'an order compelling arbitration.' This is precisely and uniquely the kind of order which is within the province of the Board. Beyond this, the Court is exceedingly vague as to remedy: 'appropriate damages or equitable relief' are suggested as possible remedies, apparently when arbitration is not available. Damages against ****923** the union, the Court admonishes, should be gauged 'according to the damage caused by (its) fault'—i.e., the failure to exhaust remedies for the grievance. The Court's difficulty, it seems to me, reflects the basic awkwardness of its position: It is attempting to force into the posture of a contract violation an alleged default of the union which is not a violation of the collective bargaining agreement but a breach of its separate and basic duty fairly ***202** to represent all employees in the unit. This is an unfair labor practice, and should be treated as such. [4]

3. If we look beyond logic and precedent to the policy of the labor relations design which Congress has provided, court jurisdiction of this type of actions seems anomalous and ill-advised. We are not dealing here with the interpretation of a contract or with an alleged breach of an employment agreement. As the Court in effect acknowledges, we are concerned with the subtleties of a union's statutory duty faithfully to represent employees in the unit, including those who may not be members of the union. The Court—regrettably, in my opinion—ventures to state judgments as to the metes and bounds of the reciprocal duties involved in the relationship between the union and the employee. In my opinion, this is precisely and especially the kind of judgment that Congress intended to entrust to the Board and which is well within the pre-emption doctrine that this Court has prudently stated. [5] See cases cited, supra, especially ***203** the Perko and Borden cases, the facts of which strongly parallel the situation in this case. See also Linn v. Plant Guard Workers, 383 U.S. 53, 72, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966) (dissenting opinion). The nuances of union-employee and union-employer relationships are infinite and consequential, particularly when the issue is an amorphous as whether the union was proved guilty of 'arbitrary or bad-faith conduct' which the Court states as the standard applicable here. In all reason and in all good judgment, this jurisdiction should be left with the Board and not be placed in the courts especially with the complex and necessarily confusing guidebook that the Court now publishes.

Accordingly, I join the judgment of reversal, but on the basis stated.

Mr. Justice BLACK, dissenting.

The Court today opens slightly the courthouse door to an employee's incidental claim against his union for breach of its duty of fair representation, only to shut it in his face when he seeks direct judicial relief for his underlying and more valuable breach-of-contract claim against his employer. This result follows from the Court's announcement in this case, involving an employee's suit against ****924** his union, of a new rule to govern an employee's suit against his employer. The rule is that before an employee can sue his employer under s 301 of the L.M.R.A. for a simple breach of his employment contract, the employee must prove not only that he attempted to exhaust his contractual remedies, but that his attempt to exhaust them was frustrated by 'arbitrary, discriminatory, or * * * bad faith' conduct on ***204** the part of his union. With this new rule and its result I cannot agree.

The Court recognizes as it must, that the jury in this case found at least that Benjamin Owens was fit for work, that his grievance against Swift was meritorious, and that Swift breached the collective bargaining agreement when it wrongfully discharged him. The Court also notes in passing that Owens [*] has a separate action for breach of contract pending against Swift in the state courts. And in Part IV of its opinion, the Court vigorously insists that 'there is no reason to exempt the employer from contractual damages which he would otherwise have had to pay,' that the 'employee should have no difficulty recovering these damages from the employer' for his 'unrelated breach of contract,' and that 'the employee (is) assured of direct recovery from the employer.' But this reassurance in Part IV gives no comfort to Owens, for Part IV is based on the assumption that the union breached its duty to Owens, an assumption which, in Part III of its opinion, the Court finds unsupported by the facts of this case. What this all means, though the Court

does not expressly say it, is that Owens will be no more successful in his pending breach-of-contract action against Swift than he is here in his suit against the union. For the Court makes it clear 'that the question of whether a union has breached its duty of fair representation will * * * be a critical issue in a suit under L.M.R.A. s 301,' that 'the wrongfully discharged employee may bring an action against his employer' only if he 'can prove that the union * * * breached its duty of fair representation in its handling of the employee's grievance,' and 'that the employee, as part and parcel of his s 301 action, finds ***205** it necessary to prove an unfair labor practice by the union.' Thus, when Owens attempts to proceed with his pending breach-of-contract action against Swift, Swift will undoubtedly secure its prompt dismissal by pointing to the Court's conclusion here that the union has not breached its duty of fair representation. Thus, Owens, who now has obtained a judicial determination that he was wrongfully discharged, is left remediless, and Swift, having breached its contract, is allowed to hide behind, and is shielded by, the union's conduct. I simply fail to see how it should make one iota of difference, as far as the 'unrelated breach of contract' by Swift is concerned, whether the union's conduct is wrongful or rightful. Neither precedent nor logic supports the Court's new announcement that it does.

Certainly, nothing in Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, supports this new rule. That was a case where the aggrieved employee attempted to 'completely sidestep available grievance procedures in favor of a lawsuit.' Id., at 653, 85 S.Ct. at 616. Noting that 'it cannot be said * * * that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so,' ibid., the Court there held that the employee 'must attempt use of the contract grievance procedure,' id., at 652, 85 S.Ct. at 616, and 'must afford the union the opportunity to act on his behalf,' id., at 653, 85 S.Ct. at 616. I dissented on the firm belief that an employee should be free to litigate his own lawsuit with his own lawyer in ****925** a court before a jury, rather than being forced to entrust his claim to a union which even if it did agree to press it, would be required to submit it to arbitration. And even if, as the Court implied, 'the worker would be allowed to sue after he had presented his claim to the union and after he had suffered the inevitable discouragement and delay which necessarily accompanies the union's refusal ***206** to press his claim,' id., at 669, 85 S.Ct. at 625, I could find no threat to peaceful labor relations or to the union's prestige in allowing an employee to by-pass completely contractual remedies in favor of a traditional breach-of-contract lawsuit for back pay or wage substitutes. Here, of course, Benjamin Owens did not 'completely sidestep available grievance procedures in favor of a lawsuit.' With complete respect for the union's authority and deference to the contract grievance procedures, he not only gave the union a chance to act on his behalf, but in every way possible tried to convince it that his claim was meritorious and should be carried through the fifth step to arbitration. In short, he did everything the Court's opinion in Maddox said he should do, and yet now the Court says so much is not enough.

In Maddox, I noted that the 'cases really in point are those which involved agreements governed by the Railway Labor Act and which expressly refused to hold that a discharged worker must pursue collective bargaining grievance procedures before suing in a court for wrongful discharge. Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653, 73 S.Ct. 906, 97 L.Ed. 1325; Moore v. Illinois Central R. Co., 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089.' 379 U.S., at 666, 85 S.Ct. at 623. I also observed that the Court's decision in Maddox 'raised the overruling axe so high (over those cases) that its falling is just about as certain as the changing of the seasons.' Id., at 667, 85 S.Ct. at 624. In the latter observation I was mistaken. The Court has this Term, in Walker v. Southern R. Co., 385 U.S. 196, 87 S.Ct. 365, 17 L.Ed.2d 294, refused to overrule in light of Maddox such cases as Moore and Koppal. Noting the long delays attendant upon exhausting administrative remedies under the Railway Labor Act, the Court based this refusal on '(t)he contrast between the administrative remedy' available to Maddox and that available to Walker. If, as the Court suggested, the availability of an administrative remedy determines whether an employee can sue without first ***207** exhausting it, can there be any doubt that Owens who had no administrative remedy should be as free to sue as Walker who had a slow one? Unlike Maddox, Owens attempted to implement the contract grievance procedures and found them inadequate. Today's decision, following in the wake of Walker v. Southern R. Co., merely prepetuates an unfortunate anomaly created by Maddox in the law of labor relations.

The rule announced in Maddox, I thought, was a 'brainchild' of the Court's recent preference for arbitration. But I am unable to ascribe any such genesis to today's rule, for arbitration is precisely what Owens

sought and preferred. Today the Court holds that an employee with a meritorious claim has no absolute right to have it either litigated or arbitrated. Fearing that arbitrators would be overworked, the Court allows unions unilaterally to determine not to take a grievance to arbitration—the first step in the contract grievance procedure at which the claim would be presented to an impartial third party—as long as the union decisions are neither 'arbitrary' nor 'in bad faith.' The Court derives this standard of conduct from a long line of cases holding that '(a) breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.' What the Court overlooks is that those cases laid down this standard in the context of situations where the employee's sole or fundamental complaint was against the union. There was not the slightest hint in those cases that the **926 same standard would apply where the employee's primary complaint was against his employer for breach of contract and where he only incidentally contended that the union's conduct prevented the adjudication, by either court or arbitrator, of the underlying grievance. If the Court here were satisfied with merely holding that in this situation the employee *208 could not recover damages from the union unless the union breached its duty of fair representation, then it would be one thing to say that the union did not do so in making a good-faith decision not to take the employee's grievance to arbitration. But if, as the Court goes on to hold, the employee cannot sue his employer for breach of contract unless his failure to exhaust contractual remedies is due to the union's breach of its duty of fair representation, then I am quite unwilling to say that the union's refusal to exhaust such remedies—however non-arbitrary—does not amount to a breach of its duty. Either the employee should be able to sue his employer for breach of contract after having attempted to exhaust his contractual remedies, or the union should have an absolute duty to exhaust contractual remedies on his behalf. The merits of an employee's grievance would thus be determined by either a jury or an arbitrator. Under today's decision it will never be determined by either.

And it should be clear that the Court's opinion goes much further than simply holding that an employee has no absolute right to have the union take his grievance to arbitration. Here, of course, the union supervised the grievance into the fourth step of the contract machinery and dropped it just prior to arbitration on its belief that the outcome of arbitration would be unfavorable. But limited only by the standard of arbitrariness, there was clearly no need for the union to go that far. Suppose, for instance, the union had a rule that it would not prosecute a grievance even to the first step unless the grievance were filed by the employee within 24 hours after it arose. Pursuant to this rule, the union might completely refuse to prosecute a grievance filed several days late. Thus, the employee, no matter how meritorious his grievance, would get absolutely nowhere. And unless he could prove that *209 the union's rule was arbitrary (a standard which no one can define), the employee would get absolutely no consideration of the merits of his grievance—either by a jury, an arbitrator, nor by the employer, or by the union. The Court suggests three reasons for giving the union this almost unlimited discretion to deprive injured employees of all remedies for breach of contract. The first is that 'frivolous grievances' will be ended prior to time-consuming and costly arbitration. But here no one, not even the union, suggests that Benjamin Owens' grievance was frivolous. The union decided not to take it to arbitration simply because the union doubted the chance of success. Even if this was a good-faith doubt, I think the union had the duty to present this contested, but serious, claim to the arbitrator whose very function is to decide such claims on the basis of what he believes to be right. Second, the Court says that allowing the union to settle grievances prior to arbitration will assure consistent treatment of 'major problem areas in the interpretation of the collective bargaining contract.' But can it be argued that whether Owens was 'fit to work' presents a major problem in the interpretation of the collective bargaining agreement? The problem here was one of interpreting medical reports, not a collective bargaining agreement, and of evaluating other evidence of Owens' physical condition. I doubt whether consistency is either possible or desirable in determining whether a particular employee is able to perform a particular job. Finally, the Court suggests that its decision 'furthers the interest of the union as statutory agent.' I think this is the real reason for today's decision which entirely overlooks the interests of the injured employee, the only one who **927 has anything to lose. Of course, anything which gives the union life and death power over those whom it is supposed to represent furthers its 'interest.' I simply fail to see how *210 the union's legitimate role as statutory agent is undermined by requiring it to prosecute all serious grievances to a conclusion or by allowing the injured employee to sue his employer after he has given the union a chance to act on his behalf.

Henceforth, in almost every s 301 breach-of-contract suit by an employee against an employer, the employee will have the additional burden of proving that the union acted arbitrarily or in bad faith. The Court never explains what is meant by this vague phrase or how trial judges are intelligently to translate it to a jury. Must the employee prove that the union in fact acted arbitrarily, or will it be sufficient to show that the employee's grievance was so meritorious that a reasonable union would not have refused to carry it to arbitration? Must the employee join the union in his s 301 suit against the employer, or must he join the employer in his unfair representation suit against the union? However these questions are answered, today's decision, requiring the individual employee to take on both the employer and the union in every suit against the employer and to prove not only that the employer breached its contract, but that the union acted arbitrarily, converts what would otherwise be a simple breach-of-contract action into a three-ring donnybrook. It puts an intolerable burden on employees with meritorious grievances and means they will frequently be left with no remedy. Today's decision, while giving the worker an ephemeral right to sue his union for breach of its duty of fair representation, creates insurmountable obstacles to block his far more valuable right to sue his employer for breach of the collective bargaining agreement.

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Footnotes

1 Now known as the National Brotherhood of Packinghouse & Dairy Workers.

2 Punitive damages were reduced to $3,000, the amount claimed by Owens in his complaint.

3 The agreement created a five-step procedure for the handling of grievances. In steps one and two, either the aggrieved employee or the Union's representative presents the grievance first to Swift's department foreman, and then in writing to the division superintendent. In step three, grievance committees of the Union and management meet, and the company must state its position in writing to the Union. Step four is a meeting between Swift's general superintendent and representatives of the National Union. If the grievance is not settled in the fourth step, the National Union is given power to refer the grievance to a specified arbitrator.

4 No notice of the dismissal was given to Owens, who by that time had filed a second suit against Swift for breach of contract. The suit against Swift is still pending in a pretrial stage.

5 See also Cargo Handlers, Inc., 159 N.L.R.B. No. 17; Local 12, United Rubber Workers, 150 N.L.R.B. 312, enforced, 368 F.2d 12 (C.A.5th Cir. 1966); Maremont Corp., 149 N.L.R.B. 482; Galveston Maritime Assn., Inc., 148 N.L.R.B. 897; Hughes Tool Co., 147 N.L.R.B. 1573.

6 See Ford Motor Co. v. Huffman, 345 U.S. 330, 332, n. 4, 73 S.Ct. 681, 97 L.Ed. 1048. In Huffman, the NLRB submitted an amicus brief stating that it had not assumed pre-emptive jurisdiction over fair representation duty issues. Mem. for the NLRB, Nos. 193 and 194, Oct. Term, 1952. In Syres v. Oil Workers International Union, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785, the Court reversed the dismissal of a suit which claimed breach of the duty of fair representation despite express reliance by one respondent on exclusive NLRB jurisdiction. Brief for Resp. Gulf Oil Corp., No. 390, Oct. Term, 1955.

7 See Hughes Tool Co., 147 N.L.R.B. 1573, 1589—1590 (Chairman McCulloch and Member Fanning, dissenting in part).

8 The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies. See N.L.R.A. s 10(c), as amended, 61 Stat. 147, 29 U.S.C. s 160(c); Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271. Thus, the General Counsel will refuse to bring complaints on behalf of injured employees where the injury complained of is 'insubstantial.' See Administrative Decision of the General Counsel, Case No. K—610, Aug. 13, 1956, in CCH N.L.R.B. Decisions, 1956—1957, at Transfer Binder, 54,059.

9 If a grievance and arbitration procedure is included in the contract, but the parties do not intend it to be an exclusive remedy, then a suit for breach of contract will normally be heard even though such procedures have not been exhausted. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 657—658, 85 S.Ct. 614, 13 L.Ed.2d 580; 6A Corbin, Contracts s 1436 (1962).

10 Occasionally, the bargaining agreement will give the aggrieved employee, rather than his union, the right to invoke arbitration. See Retail Clerks Intern. Ass'n, etc. v. Lion Dry Goods, Inc., 6 Cir., 341 F.2d 715, cert. denied, 382 U.S. 839, 86 S.Ct. 87, 15 L.Ed.2d 81.

11 Accord, Hiller v. Liquor Salesmen's Union, 338 F.2d 778 (C.A.2d Cir.); Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (C.A.9th Cir.), cert. denied, 371 U.S. 920, 83 S.Ct. 288, 9 L.Ed.2d 229; Fiore v. Associated Transport, Inc., D.C., 255 F.Supp. 596; Bieski v. Eastern Automobile Forwarding Co., D.C., 231 F.Supp. 710, aff'd, 354 F.2d 414 (C.A.3d Cir.); Ostrofsky v. United Steelworkers, etc., D.C., 171 F.Supp. 782, aff'd per curiam, 273 F.2d 614 (C.A.4th Cir.), cert. denied, 363 U.S. 849, 80 S.Ct. 1628, 4 L.Ed.2d 1732; Jenkins v. Wm. Schluderberg-T. J. Kurdle Co., 217 Md. 556, 144 A.2d 88.

12 Assuming for the moment that Swift breached the collective bargaining agreement in discharging Owens and that the Union breached its duty in handling Owens' grievance, this case illustrates the difficulties that would result from a rule pre-empting the courts from remedying the Union's breach of duty. If Swift did not 'participate' in the Union's unfair labor practice, the Board would have no jurisdiction to remedy Swift's breach of contract. Yet a court might be equally unable to give Owens full relief in a s 301 suit against Swift. Should the court award damages against Swift for Owens' full loss, even if it concludes that part of that loss was caused by the Union's breach of duty? Or should it award Owens only partial recovery hoping that the Board will make him whole? These remedy problems are difficult enough when one tribunal has all parties before it; they are impossible if two independent tribunals, with different procedures, time limitations, and remedial powers, must participate.

13 See Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825; Report of Committee on Improvement of Administration of Union-Management Agreements, 1954, Individual Grievances, 50 Nw.U.L.Rev. 143 (1955); Murphy, The Duty of Fair Representation under Taft-Hartley, 30 Mo.L.Rev. 373, 389 (1965); Summers, Individual Rights in Collective Agreements and Arbitration, 37 N.Y.U.L.Rev. 362 (1962).

14 See Sheremet v. Chrysler Corp., 372 Mich. 626, 127 N.W.2d 313; Wyle, Labor Arbitration and the Concept of Exclusive Representation, 7 B.C.Ind. & Com.L.Rev. 783 (1966).

15 Under current grievance practices, an attempt is usually made to keep the number of arbitrated grievances to a minimum. An officer of the National Union testified in this case that only one of 967 grievances filed at all of Swift's plants between September 1961 and October 1963 was taken to arbitration. And the AFL—CIO's amicus brief reveals similar performances at General Motors Corporation and United States Steel Corporation, two of the Nation's largest unionized employers: less than .05% of all written grievances filed during a recent period at General Motors required arbitration, while only 5.6% of the grievances processed beyond the first step at United States Steel were decided by an arbitrator.

16 Owens did allege and testify that petitioner Vaca, President of the Kansas City local, demanded $300 in expenses before the Union would take the grievance to arbitration, a charge which all the petitioners vigorously denied at trial. Under the collective bargaining agreement, the local union had no power to invoke arbitration. See n. 3, supra. Moreover, the Union's decision to send Owens to another doctor at Union expense occurred after Vaca's alleged demand, and the ultimate decision not to invoke arbitration came later still. Thus, even if the jury believed Owens' controverted testimony, we do not think that this incident would establish a breach of duty by the Union.

17 Obviously, arbitration is an appropriate remedy only when the parties have created such a procedure in the collective bargaining agreement.

18 We are not dealing here with situations where a union has affirmatively caused the employer to commit the alleged breach of contract. In cases of that sort where the union's conduct is found to be an unfair labor practice, the NLRB has found an unfair labor practice by the employer, too, and has held the union and the employer jointly and severally liable for any back pay found owing to the particular employee who was the subject of their joint discrimination. E.g., Imparato Stevedoring Corp., 113 N.L.R.B. 883 (1955); Squirt Distrib. Co., 92 N.L.R.B. 1667 (1951); H. M. Newman, 85 N.L.R.B. 725 (1949). Even if this approach would be appropriate for analogous s 301 and breach-of-duty suits, it is not applicable here. Since the Union played no part in Swift's alleged breach of contract and since Swift took no part in the Union's alleged breach of duty, joint liability for either wrong would be unwarranted.

1 This decision of the NLRB was denied enforcement by the Court of Appeals for the Second Circuit but on a basis which did not decide the point relevant here. NLRB v. Miranda Fuel Co., 326 F.2d 172 (C.A.2d Cir. 1963). Only one judge, Judge Medina, took the position that the NLRB had incorrectly held violation of the duty of fair representation to be an unfair labor practice. As an alternative ground for decision, he held that the NLRB had not had sufficient evidence to support its finding of breach of the duty. Judge Lumbard agreed with this latter holding, and explicitly did not reach the question whether breach of the duty is an unfair labor practice. Judge Friendly dissented. He would have affirmed the NLRB both on the sufficiency of the evidence and on the holding that breach of the duty of fair representation is an unfair labor practice as to which the NLRB can give relief.

2 The opinion by Judge Thornberry for the Fifth Circuit supports the views expressed herein. See also Cox, The Duty of Fair Representation, 2 Vill.L.Rev. 151, 172—173 (1957); Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L.J. 1327 (1958).

3 Cf. my Brother BLACK's dissenting opinion in this case. Cf. also Brown v. Sterling Alum. Prods. Corp., 365 F.2d 651, 656—657 (C.A.8th Cir. 1966) cert. denied, 386 U.S. 957, 87 S.Ct. 1023, 18 L.Ed.2d 105. Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965), does not pass upon the issue. The Court states that 'To leave the employee remediless' when the union wrongfully refuses to process his grievance, 'would * * * be a great injustice.' I do not believe the Court relieves this injustice to any great extent by requiring the employee to prove an unfair labor practice as a prerequisite to judicial relief for the employer's breach of contract. Nor do I understand how giving the employee a cause of action against the union is an appropriate way to remedy the injustice which would exist if the union were allowed to foreclose relief against the employer.

4 The Court argues that since the employee suing the employer for breach of the employment contract would have to show exhaustion of remedies under the contract, and since he would for this purpose have to show his demand on the union and, according to the Court, its wrongful failure to prosecute his grievance, the union could be joined as a party defendant; and since the union could be joined in such a suit, it may be sued independently of the employer. But this is a non sequitur. As the Court itself insists, the suit against the union is not for breach of the employment contract, but for violation of the duty fairly to represent the employee. This is an entirely different matter. It is a breach of statutory duty—an unfair labor practice—and not a breach of the employment contract.

5 In a variety of contexts the NLRB concerns itself with the substantive bargaining behavior of the parties. For example: (a) the duty to bargain in good faith, see, e.g., Fibreboard Corp. v. Labor Board, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964); (b) jurisdictional disputes, see, e.g., National Labor Relations Board v. Radio Engineers, 364 U.S. 573, 81 S.Ct. 330, 5 L.Ed.2d 302, (1961); (c) secondary boycotts and hot cargo clauses, see, e.g., Orange Belt District Council of Painters No. 48 v. NLRB, 117 U.S.App.D.C. 233, 328 F.2d 534 (1964).

* Owens died while the appeal of his case from the trial court was pending. The administrator of his estate was substituted and is the respondent herein though for simplicity is referred to herein as Owens.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Service Law (Refs & Annos)
Chapter 7. Of the Consolidated Laws (Refs & Annos)
Article 14. Public Employees' Fair Employment Act (Refs & Annos)

McKinney's Civil Service Law § 204

§ 204. Recognition and certification of employee organizations

Currentness

1. Public employers are hereby empowered to recognize employee organizations for the purpose of negotiating collectively in the determination of, and administration of grievances arising under, the terms and conditions of employment of their public employees as provided in this article, and to negotiate and enter into written agreements with such employee organizations in determining such terms and conditions of employment.

2. Where an employee organization has been certified or recognized pursuant to the provisions of this article, it shall be the exclusive representative, for the purposes of this article, of all the employees in the appropriate negotiating unit, and the appropriate public employer shall be, and hereby is, required to negotiate collectively with such employee organization in the determination of, and administration of grievances arising under, the terms and conditions of employment of the public employees as provided in this article, and to negotiate and enter into written agreements with such employee organizations in determining such terms and conditions of employment.

3. For the purpose of this article, to negotiate collectively is the performance of the mutual obligation of the public employer and a recognized or certified employee organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Credits
(Added L.1967, c. 392, § 2. Amended L.1977, c. 429, § 1; L.1989, c. 91, § 1.)

Notes of Decisions (195)

McKinney's Civil Service Law § 204, NY CIV SERV § 204
Current through L.2018, chapters 1 to 3.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Service Law (Refs & Annos)
Chapter 7. Of the Consolidated Laws (Refs & Annos)
Article V. Personnel Changes
Title A. Transfers; Reinstatements (Refs & Annos)

McKinney's Civil Service Law § 72

§ 72. Leave for ordinary disability

Currentness

1. When in the judgment of an appointing authority an employee is unable to perform the duties of his or her position by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workers' compensation law, the appointing authority may require such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction. Written notice of the facts providing the basis for the judgment of the appointing authority that the employee is not fit to perform the duties of his or her position shall be provided to the employee and the civil service department or commission having jurisdiction prior to the conduct of the medical examination. If, upon such medical examination, such medical officer shall certify that such employee is not physically or mentally fit to perform the duties of his or her position, the appointing authority shall notify such employee that he or she may be placed on leave of absence. An employee placed on leave of absence pursuant to this section shall be given a written statement of the reasons therefor. Such notice shall contain the reason for the proposed leave and the proposed date on which such leave is to commence, shall be made in writing and served in person or by first class, registered or certified mail, return receipt requested, upon the employee. Such notice shall also inform the employee of his or her rights under this procedure. An employee shall be allowed ten working days from service of the notice to object to the imposition of the proposed leave of absence and to request a hearing. The request for such hearing shall be filed by the employee personally or by first class, certified or registered mail, return receipt requested. Upon receipt of such request, the appointing authority shall supply to the employee, his or her personal physician or authorized representative, copies of all diagnoses, test results, observations and other data supporting the certification, and imposition of the proposed leave of absence shall be held in abeyance until a final determination is made by the appointing authority as provided in this section. The appointing authority will afford the employee a hearing within thirty days of the date of a request by the employee to be held by an independent hearing officer agreed to by the appointing authority and the employee except that where the employer is a city of over one million in population such hearing may be held by a hearing officer employed by the office of administrative trials and hearings. If the parties are unable to agree upon a hearing officer, he or she shall be selected by lot from a list of persons maintained by the state department of civil service. The hearing officer shall not be an employee of the same appointing authority as the employee alleged to be disabled. He or she shall be vested with all of the powers of the appointing authority, and shall make a record of the hearing which shall, with his or her recommendation, be referred to the appointing authority for review and decision and which shall be provided to the affected employee free of charge. A copy of the transcript of the hearing shall, upon request of the employee affected, be transmitted to him without charge. The employee may be represented at any hearing by counsel or a representative of a certified or recognized employee organization and may present medical experts and other witnesses or evidence. The employee shall be entitled to a reasonable period of time to obtain such representation. The burden of proving mental or physical unfitness shall be upon the person alleging it. Compliance with technical rules of evidence shall not be required. The appointing authority will render a final determination within ten working days of the date of receipt of the hearing officer's report and recommendation. The appointing authority may either uphold the original proposed notice of leave of absence, withdraw such notice or modify the notice as appropriate. In any event, a final determination of an employee's contest of a notice of leave shall be rendered within seventy-five days of the receipt of the request for review. An employee on such leave of absence shall

be entitled to draw all accumulated, unused sick leave, vacation, overtime and other time allowances standing to his or her credit. The appointing authority in the final determination shall notify the employee of his or her right to appeal from such determination to the civil service commission having jurisdiction in accordance with subdivision three of this section.

2. An employee placed on leave pursuant to subdivision one of this section may, within one year after the date of commencement of such leave of absence, or thereafter at any time until his or her employment status is terminated, make application to the civil service department or municipal commission having jurisdiction over the position from which such employee is on leave, for a medical examination by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such employee is physically and mentally fit to perform the duties of his or her position, he or she shall be reinstated to his or her position.

3. An employee who is certified as not physically or mentally fit to perform the duties of his or her position and who is placed on leave of absence pursuant to subdivision one of this section, or who is denied reinstatement after examination pursuant to subdivision two of this section, may appeal from such determination to the state or municipal civil service commission having jurisdiction over his or her position. Such employee and appointing officer or their representatives shall be afforded an opportunity to present facts and arguments in support of their positions including medical evidence at a time and place and in such manner as may be prescribed by the commission. Provided however, that in considering appeals pursuant to subdivision two of this section where a hearing has not been held within nine months from the date of notification pursuant to subdivision one of this section, the commission shall designate an independent hearing officer who shall hold a hearing and report thereon. The commission shall make its determination on the basis of the medical records and such facts and arguments as are presented to it. The final determination of the commission shall be binding on both the employee and the appointing authority; provided, however, that an employee or appointing authority may seek review of a final determination of a commission in accordance with the provisions of article seventy-eight of the civil practice law and rules.

4. If an employee placed on leave pursuant to this section is not reinstated within one year after the date of commencement of such leave, his or her employment status may be terminated in accordance with the provisions of section seventy-three of this article.

5. Notwithstanding any other provisions of this section, if the appointing authority determines that there is probable cause to believe that the continued presence of the employee on the job represents a potential danger to persons or property or would severely interfere with operations, it may place such employee on involuntary leave of absence immediately; provided, however that the employee shall be entitled to draw all accumulated unused sick leave, vacation, overtime and other time allowances standing to his or her credit. If such an employee is finally determined not to be physically or mentally unfit to perform the duties of his or her position, he or she shall be restored to his or her position and shall have any leave credits or salary that he or she may have lost because of such involuntary leave of absence restored to him or her less any compensation he or she may have earned in other employment or occupation and any unemployment benefits he or she may have received during such period.

Credits

(Added L.1969, c. 225, § 2. Amended L.1983, c. 561, § 1; L.1984, c. 547, § 1.)

Notes of Decisions (84)

McKinney's Civil Service Law § 72, NY CIV SERV § 72
Current through L.2018, chapters 1 to 3.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Service Law (Refs & Annos)
Chapter 7. Of the Consolidated Laws (Refs & Annos)
Article V. Personnel Changes
Title B. Removal and Other Disciplinary Proceedings

McKinney's Civil Service Law § 76

§ 76. Appeals from determinations in disciplinary proceedings

Currentness

1. Appeals. Any officer or employee believing himself aggrieved by a penalty or punishment of demotion in or dismissal from the service, or suspension without pay, or a fine, or an official reprimand, unaccompanied by a remittance of said officer or employee's prehearing suspension without pay, imposed pursuant to the provisions of section seventy-five of this chapter, may appeal from such determination either by an application to the state or municipal commission having jurisdiction, or by an application to the court in accordance with the provisions of article seventy-eight of the civil practice law and rules. If such person elects to appeal to such civil service commission, he shall file such appeal in writing within twenty days after service of written notice of the determination to be reviewed, such written notice to be delivered personally or by registered mail to the last known address of such person and when notice is given by registered mail, such person shall be allowed an additional three days in which to file such appeal.

2. Procedure on appeal. Where appeal is taken to the state or municipal commission having jurisdiction, such commission shall review the record of the disciplinary proceeding and the transcript of the hearing, and shall determine such appeal on the basis of such record and transcript and such oral or written argument as the commission may determine. The commission may direct that such appeal shall be heard by one or more members of the commission or by a person or persons designated by the commission to hear such appeal on its behalf, who shall report thereon with recommendations to the commission. Upon such appeal the commission shall permit the employee to be represented by counsel.

3. Determination on appeal. The determination appealed from may be affirmed, reversed, or modified, and the state or municipal commission having jurisdiction may, in its discretion, direct the reinstatement of the appellant or permit the transfer of such appellant to a vacancy in a similar position in another division or department, or direct that his name be placed upon a preferred list pursuant to section eighty-one of this chapter. In the event that a transfer is not effected, the commission is empowered to direct the reinstatement of such officer or employee. An employee reinstated pursuant to this subdivision shall receive the salary or compensation he would have been entitled by law to have received in his position for the period of removal including any prior period of suspension without pay, less the amount of any unemployment insurance benefits he may have received during such period. The decision of such civil service commission shall be final and conclusive, and not subject to further review in any court.

4. Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division. Such sections may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter. Where such sections are so supplemented, modified or replaced, any employee against whom charges have been preferred prior to the effective date of such supplementation, modification or replacement shall continue to be subject to the provisions of such sections as in effect on the date such charges were preferred.

Credits

(L.1958, c. 790, § 1. Amended L.1962, c. 310, § 68; L.1964, c. 626, § 1; L.1969, c. 721, § 1; L.1970, c. 458, § 1; L.1972, c. 283, § 1; L.1985, c. 851, § 1; L.1985, c. 852, § 1.)

Notes of Decisions (443)

McKinney's Civil Service Law § 76, NY CIV SERV § 76
Current through L.2018, chapters 1 to 3.

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McKinney's Consolidated Laws of New York Annotated
Civil Service Law (Refs & Annos)
Chapter 7. Of the Consolidated Laws (Refs & Annos)
Article V. Personnel Changes
Title B. Removal and Other Disciplinary Proceedings

McKinney's Civil Service Law § 75

§ 75. Removal and other disciplinary action

Currentness

1. Removal and other disciplinary action. A person described in paragraph (a) or paragraph (b), or paragraph (c), or paragraph (d), or paragraph (e) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or

(b) a person holding a position by permanent appointment or employment in the classified service of the state or in the several cities, counties, towns, or villages thereof, or in any other political or civil division of the state or of a municipality, or in the public school service, or in any public or special district, or in the service of any authority, commission or board, or in any other branch of public service, who was honorably discharged or released under honorable circumstances from the armed forces of the United States having served therein as such member in time of war as defined in section eighty-five of this chapter, or who is an exempt volunteer firefighter as defined in the general municipal law, except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department, or

(c) an employee holding a position in the non-competitive class other than a position designated in the rules of the state or municipal civil service commission as confidential or requiring the performance of functions influencing policy, who since his last entry into service has completed at least five years of continuous service in the non-competitive class in a position or positions not so designated in the rules as confidential or requiring the performance of functions influencing policy, or

(d) an employee in the service of the City of New York holding a position as Homemaker or Home Aide in the non-competitive class, who since his last entry into city service has completed at least three years of continuous service in such position in the non-competitive class, or

(e) an employee in the service of a police department within the state of New York holding the position of detective for a period of three continuous years or more; provided, however, that a hearing shall not be required when reduction in rank from said position is based solely on reasons of the economy, consolidation or abolition of functions, curtailment of activities or otherwise.

2. Procedure. An employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization under article fourteen of this

chapter and shall be notified in advance, in writing, of such right. A state employee who is designated managerial or confidential under article fourteen of this chapter, shall, at the time of questioning, where it appears that such employee is a potential subject of disciplinary action, have a right to representation and shall be notified in advance, in writing, of such right. If representation is requested a reasonable period of time shall be afforded to obtain such representation. If the employee is unable to obtain representation within a reasonable period of time the employer has the right to then question the employee. A hearing officer under this section shall have the power to find that a reasonable period of time was or was not afforded. In the event the hearing officer finds that a reasonable period of time was not afforded then any and all statements obtained from said questioning as well as any evidence or information obtained as a result of said questioning shall be excluded, provided, however, that this subdivision shall not modify or replace any written collective agreement between a public employer and employee organization negotiated pursuant to article fourteen of this chapter. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, or by a representative of a recognized or certified employee organization, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of any unemployment insurance benefits he may have received during such period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge.

3-a. Suspension pending determination of charges and penalties relating to police officers of the police department of the city of New York. Pending the hearing and determination of charges of incompetency or misconduct, a police officer employed by the police department of the city of New York may be suspended without pay for a period not exceeding thirty days. If such officer is found guilty of the charges, the police commissioner of such department may punish the police officer pursuant to the provisions of sections 14-115 and 14-123 of the administrative code of the city of New York.

4. Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges or, in the case of a state employee who is designated managerial or confidential under article fourteen of this chapter, more than one year after the occurrence of the alleged incompetency or misconduct complained of and described in the charges, provided, however, that such limitations shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.

Credits

(L.1958, c. 790, § 1. Amended L.1960, c. 312, § 1; L.1962, c. 645, § 1; L.1965, c. 738, § 1; L.1970, c. 942, § 1; L.1978, c. 240, § 1; L.1983, c. 774, § 1; L.1984, c. 710, § 1; L.1985, c. 842, §§ 1, 2; L.1986, c. 439, § 2; L.1989, c. 350, § 1; L.1990, c. 753, § 2; L.1993, c. 279, § 1; L.1994, c. 226, § 1; L.1995, c. 197, § 1.)

Notes of Decisions (1695)

McKinney's Civil Service Law § 75, NY CIV SERV § 75
Current through L.2018, chapters 1 to 3.

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70 N.Y.2d 314, 514 N.E.2d 1109, 520 N.Y.S.2d 538, 127 L.R.R.M. (BNA) 2039, 42 Ed. Law Rep. 854

Linda Baker, Appellant,
v.
Board of Education of the West Irondequoit Central School District et al., Defendants, and Thomas Nichols, as President of the West Irondequoit Teachers Association, et al., Respondents.

Court of Appeals of New York
221
Argued September 1, 1987;
decided October 13, 1987

CITE TITLE AS: Baker v Board of Educ. of W. Irondequoit Cent. School Dist.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered September 26, 1986, which (1) reversed, on the law, an order of the Supreme Court at Special Term (Wilmer J. Patlow, J.), entered in Monroe County, to the extent that it denied a motion by defendant West Irondequoit Teachers Association to dismiss the complaint as against it, and (2) granted the motion to dismiss.

Baker v Board of Educ., 123 AD2d 500, reversed.

HEADNOTES

Limitation of Actions
What Statute Governs
Action by Teacher against Public Sector Union for Breach of Duty of Fair Representation

([1]) An action by a teacher against a public sector union for breach of its duty of fair representation is governed by the six-year Statute of Limitations (CPLR 213 [1]). The rights and obligations of public sector employees and unions are governed by the Taylor Law (Civil Service Law § 200 *et seq.),* but neither the Taylor Law nor the CPLR prescribes a Statute of Limitations applicable to actions for a union's breach of duty of fair representation. Thus, until the Legislature acts to impose a limitations period, the six-year statute must be applied because this is the period the Legislature has prescribed for "an action for which no limitation is specifically prescribed by law." (CPLR 213 [1].)

Labor Unions
Breach of Duty of Fair Representation
Cause of Action Viable after Resignation of Employee Where Gravamen of Complaint is Constructive Discharge

([2]) A cause of action against defendant public sector union for breach of its duty of fair representation can be stated by plaintiff teacher after resigning her position where constructive discharge is the gravamen of the complaint. A wrongful discharge--which is premised on a breach of agreement occurring during employment, while the individual was a member of the collective bargaining unit--does not automatically sever the union's duty of fair representation arising from its role as exclusive bargaining agent. The fact that employment has terminated, in such instances, cannot absolve the labor organization of its responsibilities under the collective bargaining agreement and the law. While plaintiff indeed filed her alleged grievance only after she had resigned, she was nonetheless a regular employee and thus a member of the bargaining unit at the time her grievance arose, and she has charged that breach of the collective bargaining agreement forced ***315** her resignation and amounted to a constructive discharge. It appears that plaintiff's status is not materially different from that of an employee who claims he or she was actually fired in violation of the collective bargaining agreement. As in the case of a wrongful discharge, plaintiff's status as a former employee here does not divest her of the right to maintain an action for breach of the duty of fair representation during her employment.

Labor Unions
Breach of Duty of Fair Representation
Motion to Dismiss for Failure to Exhaust Contractual and Union Remedies-- Sufficiency of Allegations of Complaint

([3]) In an action by plaintiff teacher against defendant public sector union for breach of its duty of fair

representation, the allegation of the complaint that plaintiff merely "attempted to" file a grievance cannot be regarded as a fatal deficiency with respect to the ground of defendant's dismissal motion that the action against the union must be dismissed because plaintiff failed to exhaust contractual and internal union remedies, in light of the record of plaintiff's efforts to present her claim in accordance with the three-stage grievance procedure provided in the collective bargaining agreement.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Labor and Labor Relations, §§61, 1764, 1770, 1963, 1968; Limitation of Actions, § 92.

Carmody-Wait 2d, Limitation of Actions §§13:2, 13:4, 13:9, 13:24 *et seq.*

CLS, Civil Service Law § 200 *et seq.;* CPLR 213 (1).

NY Jur 2d, Civil Servants and Other Public Officers and Employees, §347 *et seq.*

ANNOTATION REFERENCES

Who may be included in "unit appropriate" for collective bargaining at school or college, under section 9 (b) of National Labor Relations Act (29 USCS § 159 [b]). 46 ALR Fed 580.

What constitutes unfair labor practice under State Public Employee Relations Acts. 9 ALR4th 20.

Choice of law as to applicable Statute of Limitations in contract actions. 78 ALR3d 639.

POINTS OF COUNSEL

Thomas G. Dignan and *Margaret A. Clemens* for appellant.
I. Plaintiff's cause of action against her union was timely commenced. *(McClary v Civil Serv. Employees Assn.,* 130 Misc 2d 883; *Hoerger v Board of Educ.,* 98 AD2d 274; *DelCostello v Teamsters,* 462 US 151; *Taylor v St. John's Episcopal Hosp.,* 96 AD2d 886; *Jackson v Regional Tr. Serv.,* 54 AD2d 305; *Matter* ***316** *of West Irondequoit Teachers Assn. v Helsby,* 35 NY2d 46; *Matter of Civil Serv. Assn. v Helsby,* 21 NY2d 541; *Parker v Borock,* 5 NY2d 156; *Stempien v Civil Serv. Employees Assn.,* 91 AD2d 864; *Rieder v State Univ. of N. Y.,* 47 AD2d 865, 39 NY2d 845.) II. Plaintiff was entitled to representation by her union with respect to the inequitable treatment causing her constructive discharge. *(Syracuse Teachers Assn. v Board of Educ.,* 42 AD2d 73, 35 NY2d 743; *Smith v Sipe,* 67 NY2d 928; *Ferri v Public Employees Fedn.,* 92 AD2d 1054; *Gosper v Fancher,* 49 AD2d 674, 40 NY2d 867, 430 US 915; *Jackson v Regional Tr. Serv.,* 54 AD2d 305.)
Bernard F. Ashe, Ivor R. Moskowitz and *Rocco A. Solimando* for respondents.
I. Appellant's cause of action against the association was properly dismissed by the court below pursuant to CPLR 3211 (a) (5) for failure to institute her action within the applicable limitation of time. *(Steele v Louisville & Nashville R. R. Co.,* 323 US 192; *Tunstall v Brotherhood,* 323 US 210; *Ford Motor Co. v Huffman,* 345 US 330; *Vaca v Sipes,* 286 US 171; *Matter of Civil Serv. Bar Assn. v City of New York,* 64 NY2d 188; *Albino v City of New York,* 80 AD2d 261; *De Cherro v Civil Serv. Employees Assn.,* 60 AD2d 743; *Jackson v Regional Tr. Serv.,* 54 AD2d 305; *DelCostello v Teamsters,* 462 US 151; *Ferri v Public Employees Fedn.,* 115 AD2d 814.) II. Appellant's cause of action against the association should have been dismissed pursuant to CPLR 3211 (a) (7) for failure to state a cause of action. *(Republic Steel v Maddox,* 379 US 650; *Rieder v State Univ. of N. Y.,* 47 AD2d 865, 39 NY2d 845; *Matter of Diaz v Pilgrim State Psychiatric Center,* 64 NY2d 693; *Matter of Hauppauge Teachers Assn. v New York State Pub. Employment Relations Bd.,* 116 AD2d 816; *Vaca v Sipes,* 386 US 171; *Ford Motor Co. v Huffman,* 345 US 330; *Matter of Civil Serv. Bar Assn. v City of New York,* 64 NY2d 188.)

OPINION OF THE COURT

Kaye, J.

([1], [2]) This appeal calls upon us to determine *first,* what Statute of Limitations should govern an action by a teacher against a public sector union for breach of its duty of fair representation and *second,* whether a cause of action can be stated for breach of such duty by a teacher after resigning her position. We conclude that the action was timely because brought within six years of accrual, and that where constructive ***317** discharge is the gravamen of the complaint resignation does not divest a teacher of a cause of action against the union.

For approximately 14 years plaintiff was a mathematics teacher in the West Irondequoit Central School District (the district) and a member of the West Irondequoit

Teachers Association (the union). According to her complaint, during the 1983-1984 school year, plaintiff had been allowed a full-time education leave to pursue graduate studies in computer science, which the district planned to have her teach. In March 1984, she requested an extension to continue the two-year Masters' degree program, and was refused by the district superintendent. As an alternative, plaintiff in August requested relief from certain administrative duties so that she might continue her studies part time. After the superintendent replied that such relief might be arranged for one semester only, plaintiff resigned. Weeks later, she learned facts indicating that her requests may have been inequitably denied, including the fact that male teachers in similar circumstances had been granted leaves of absence and relief from administrative duties.

The collective bargaining agreement between the union and the district included a mandatory three-stage grievance procedure. Efforts were first to be made to resolve any grievance informally with the principal; next, a unit member was to submit the matter to the union's grievance committee. If the committee found the grievance legitimate, it would file a written appeal with the district superintendent, who would conduct a hearing and issue a written decision. Finally, if the member and union were dissatisfied, and if the union determined the grievance to be meritorious, it could submit the matter to arbitration.

Plaintiff alleges that on October 5, 1984, she delivered a letter to the school, with a copy to the union, outlining her grievance under the collective bargaining agreement. Five days later, the union notified her that it would not represent her and that she would have to pursue the matter on her own. One reason advanced was that, since plaintiff had already resigned, the union could not represent her in any grievance matters. Plaintiff's grievance was subsequently denied by the principal. Thereafter, the district superintendent denied a request that her resignation be set aside and that she be granted an extension of her education leave. The superintendent ***318** stated that he met with plaintiff as a courtesy but that the formal grievance procedure provided for in the collective bargaining agreement was not available to her because she was no longer an employee. Plaintiff's subsequent request for arbitration was denied by the district, which asserted that she could not use the grievance procedure without the union. Plaintiff then asked that the union reconsider submitting her grievance to arbitration; in February 1985 the union refused.

In July 1985, some 10 months after her resignation, plaintiff commenced the present action for reinstatement and other relief, alleging that the district had treated her inequitably based on her gender, in violation of the collective bargaining agreement as well as State and Federal laws, and that she had in effect been forced to resign, or had been constructively discharged. That matter is not now before us. She also asserted a cause of action against the union for breach of its duty of fair representation, claiming that the union's refusal to pursue the grievance on her behalf was arbitrary, capricious and in bad faith as it had not investigated her claims, had not contacted any witness concerning the circumstances of her case, and had never even contacted her for any information. The complaint further charged that the union's refusal to reconsider its decision was similarly arbitrary, capricious and in bad faith because the union had failed to consult her or her attorney and did not consult its own attorney regarding the merits of her grievance and her right to union representation. That is the matter now before us.

The union sought dismissal of the fair representation cause of action on three grounds: first, that it was untimely, having been commenced more than six months after accrual; second, that the complaint did not state a cause of action in that, upon her resignation, plaintiff ceased to be a member of the bargaining unit entitled to representation; and third, that plaintiff failed to exhaust contractual and internal union remedies. Special Term denied the motion but the Appellate Division reversed, concluding that the applicable limitations period for a cause of action for breach of a duty of fair representation by a public sector union is the Federal six-month period for filing an unfair labor practice against a private employer *(DelCostello v Teamsters,* 462 US 151), and that any duty to represent plaintiff ceased when she resigned (123 AD2d 500). The court did not address the alleged failure to exhaust remedies. ***319**

We now reverse and deny the union's motion to dismiss the complaint as against it.

STATUTE OF LIMITATIONS

The rights and obligations of public sector employees and unions are governed by article 14 of the Civil Service Law,

known as the Taylor Law (Civil Service Law § 200 *et seq.*). Neither the Taylor Law nor the CPLR prescribes a Statute of Limitations applicable to actions for a union's breach of duty of fair representation. This appeal requires us to identify the period.

In *DelCostello,* the Supreme Court held that the six-month Statute of Limitations for bringing unfair labor practice charges before the National Labor Relations Board, contained in section 10 (b) of the National Labor Relations Act (the NLRA) (29 USC § 160 [b]), governs suits by private employees against unions for breach of the duty of fair representation and against private employers for breach of collective bargaining agreements. The union argues that *DelCostello* compels us to apply the same limitations period to fair representation actions by public employees. In the alternative, the union urges that we apply the 90-day period provided in CPLR 7511 (a) for proceedings to vacate arbitration awards or the four-month limitations period established by the Public Employment Relations Board (PERB) for bringing unfair labor practice charges before PERB *(see,* Civil Service Law § 205 [5] [d]; § 209-a; 4 NYCRR 204.1 [a] [1]).

([1]) We conclude that the Federal statute applied in *DelCostello* cannot govern this action under State law, and that--until the Legislature acts to impose a limitations period--the six-year statute (CPLR 213 [1]) must be applied.

The duty of fair representation may be traced to Federal law, where it arose as an implied cause of action under the scheme of the NLRA *(DelCostello v Teamsters,* 462 US, at 164, *supra; Matter of Civil Serv. Bar Assn. v City of New York,* 64 NY2d 188, 195-196). In determining the Statute of Limitations for such claims, the Supreme Court faced a familiar problem in Federal civil law: the law provided no Statute of Limitations for this cause of action, so the court had to borrow one elsewhere. While the court might ordinarily have selected the most closely analogous Statute of Limitations under State law, in *DelCostello* it determined that available State provisions were unsatisfactory and that implementation of Federal policy ***320** required application of a rule drawn from Federal law (462 US, at 166-169, *supra).* The court chose the limitations period set forth in the NLRA for making unfair practice charges to the National Labor Relations Board, reasoning that it had been designed with an eye to balancing the same Federal interests that were at issue in fair representation cases (462 US, at 169, *supra).*

Our determination must have a different focus because the fair representation cause of action against public sector unions has a different source. The State and its political subdivisions are explicitly excluded from the definition of employer contained in the NLRA (29 USC § 152 [2]); that statute does not govern public sector unions or their members. Instead, the relationship among public employers, public employees and public employee organizations in New York State is governed by New York State's Taylor Law. In applying the section of the statute regarding improper employer and union practices, the Taylor Law provides that the "fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent." (Civil Service Law § 209-a [3]; *see also, Matter of West Irondequoit Teachers Assn. v Helsby,* 35 NY2d 46, 50.) The Taylor Law establishes the scheme by which certified unions are recognized as the exclusive bargaining agents for their members (Civil Service Law § 204). This statutory role is the basis for the implied cause of action in favor of public employees against their unions for breach of the duty to represent all members fairly *(Matter of Civil Serv. Bar Assn. v City of New York,* 64 NY2d 188, 196, *supra).*

When *DelCostello* is applied to actions by private employees against their employers or unions for violations of obligations established under the NLRA, this is a simple matter of applying Federal limitations periods to Federal causes of action. But in article 2 of the CPLR the State Legislature has established time limitations for causes of action arising under State law, including even a catch-all provision to be applied when no other period has been specifically prescribed by law (CPLR 213 [1]). "The Statute of Limitations has been changed from time to time in New York in response to current needs and expectations in society and has been peculiarly a subject of legislative solicitude." *(Cubito v Kreisberg,* 69 AD2d 738, 746, *affd for reasons stated in opn of Hopkins, J.,* 51 NY2d 900; *see also,* 1 Weinstein-Korn-Miller, NY Civ Prac ¶ 201.01 ***321** ["Statutes of limitation are essentially creatures of the legislative rather than of the judicial process."].) We therefore must look to the limitations periods prescribed by the Legislature and select the one

that best fits the character of an action for breach of the duty of fair representation under State law.

The options proposed by the union--the 90-day limit for a proceeding to vacate an arbitration award (CPLR 7511 [a]) and the four-month period established by PERB for filing unfair practices claims (4 NYCRR 204.1 [a] [1])--are not suitable. In an action to vacate an arbitration award, the grievance has already "run its full course, culminating in a formal award by a neutral arbitrator" *(DelCostello v Teamsters,* 462 US, at 166, n 16, *supra);* this is scarcely parallel to an action for arbitrary refusal to take a grievance to arbitration in the first instance, where it is necessary to make investigation, evaluate responses, retain counsel and frame a complaint *(id.).* Unlike the statutory six-month period chosen by the Supreme Court in *DelCostello,* the four-month period found in the PERB regulation is of course not a period that has been fixed by the State Legislature for the preclusion of court actions. When a four-month limitation has been prescribed by statute for particular proceedings--as in CPLR 217--it has been upon the Legislature's determination that there are strong policy considerations supporting such a truncated period, vital for the conduct of certain kinds of governmental affairs *(Solnick v Whalen,* 49 NY2d 224, 232).

Plaintiff urges that the closest analogy to an action for breach of the duty of fair representation is a claim for legal malpractice, since both challenge the adequacy of representation in circumstances requiring specialized knowledge and advocacy skills. Based on *Video Corp. v Flatto Assocs.* (58 NY2d 1026) and *Sears, Roebuck & Co. v Enco Assocs.* (43 NY2d 389), plaintiff would then have us apply the six-year Statute of Limitations for contract actions (CPLR 213 [2]), instead of the three-year statute for malpractice actions (CPLR 214 [6]), reasoning that ultimately the rights and obligations as established by the collective bargaining agreement between the union (as exclusive representative of the employees) and the district are at the root of the issues raised against the union in this action. In our view, this analogy also is flawed *(see, United Parcel Serv. v Mitchell,* 451 US 56; *see also, DelCostello v Teamsters,* 462 US, at 165, *supra),* but we are nonetheless led to the result urged by plaintiff--a six-year limitations period--because this is the period the Legislature ***322** has prescribed for "an action for which no limitation is specifically prescribed by law". (CPLR 213 [1].)

We recognize that application of the six-year period results in great disparity between similar claims of public and private employees, and also that it runs counter to other policy considerations. It is obviously desirable that labor disputes be resolved expeditiously. As has been noted in the private union context, the grievance and arbitration procedure often involves interpretation of the collective bargaining agreement and fundamentally affects the relationship between the employer and the union; the system can become unworkable if these interpretations may be called into question years later *(see, DelCostello v Teamsters,* 462 US, at 169, *supra; United Parcel Serv. v Mitchell,* 451 US 56, 63-64, *supra).* Whether or not identical considerations prevail in a member's fair representation claims against a public sector union, there is surely an equivalent interest in the prompt disposition of grievances. In deciding the case before us, we invite the Legislature to address the issue and fix a more suitable Statute of Limitations--one that balances the private interest of employees in prosecuting their grievances and the public interest in the expeditious resolution of public sector labor disputes. [1]

DUTY OF FAIR REPRESENTATION

While various contentions are advanced regarding the scope of the duty of fair representation, only a narrow facet of this issue is before us. In its dismissal motion the union did not challenge the complaint on the basis that the conduct alleged fails to state a cause of action for breach of the duty of fair representation, and we do not reach that issue. [2] The union by its motion contested only its continuing duty to represent plaintiff after her resignation. As the court below concluded: ***323** "there is no duty to represent someone who is not a member of a union * * * Since plaintiff ceased to be a regular employee when she resigned effective September 4, 1984, the Union had no duty to represent her with respect to her grievance filed a month after her resignation. *(see, Smith v Sipe,* 67 NY2d 928)." (123 AD2d 500, 501-502, *supra.)* We disagree.

Initially, it is plain both that the union's duty extends beyond actual union members--the collective bargaining agreement itself speaks of "unit members" as those regularly employed by the district *(see also,* Civil Service Law § 203)--and that *Smith v Sipe* (67 NY2d 928, *supra)* did not address the status issue that now confronts us. While the dissent of Presiding Justice Mahoney, adopted by this court, indeed speaks of a union's duty to fairly

represent its "members" (109 AD2d 1034, 1036), the issue in that case was whether mere acts of negligence might constitute a breach of the duty of fair representation; the person to whom such a duty runs was not considered.

An employer cannot extinguish an employee's rights under a collective bargaining agreement by simply terminating the employment; nor would a wrongful discharge--which is premised on a breach of agreement occurring during employment, while the individual was a member of the bargaining unit-- automatically sever the union's duty of fair representation arising from its role as exclusive bargaining agent. A cause of action can be and commonly is, brought after termination, premised on breach of the collective bargaining agreement or breach of the duty of fair representation during employment. *(See, e.g., DelCostello v Teamsters,* 462 US 151, *supra; Vaca v Sipes,* 386 US 171; *Gosper v Fancher,* 49 AD2d 674, *affd* 40 NY2d 867, *cert denied* 430 US 915; *Ferri v Public Employees Fedn.,* 92 AD2d 1054; *Jackson v Regional Tr. Serv.,* 54 AD2d 305.) The fact that employment has terminated, in such instances, cannot absolve the labor organization of its responsibilities under the collective bargaining agreement and the law.

([2]) While plaintiff indeed filed her alleged grievance only after she had resigned, she was nonetheless a regular employee and thus a member of the bargaining unit at the time her grievance arose, and she has charged that breach of the collective bargaining agreement forced her resignation and amounted to a constructive discharge. Viewing plaintiff's assertions ***324** in her favor as we must on this dismissal motion, and without reaching the question whether there is any merit in plaintiff's claim, it appears that plaintiff's status is not materially different from that of an employee who claims he or she was actually fired in violation of the collective bargaining agreement. As in the case of a wrongful discharge, plaintiff's status as a former employee here does not divest her of the right to maintain an action for breach of the duty of fair representation during her employment.

([3]) The third ground of the dismissal motion--that the action against the union must be dismissed because plaintiff failed to exhaust contractual and union remedies--is fully answered by the record of plaintiff's efforts to present her claim in accordance with the three-stage grievance procedure provided in the collective bargaining agreement. In light of this record, the allegation of the complaint that she merely "attempted to" file a grievance cannot be regarded as a fatal deficiency *(see, Credit Alliance Corp. v Andersen & Co.,* 65 NY2d 536, 541, n 1; *Rovello v Orofino Realty Co.,* 40 NY2d 633).

Accordingly, the Appellate Division order should be reversed, with costs, and the motion of defendant West Irondequoit Teachers Association to dismiss the complaint as against it denied.

Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock, Jr., and Bellacosa concur.

Order reversed, etc. ***325**

Footnotes

1 As the union points out in its brief, resolution of the issue as to the union could also determine the applicable limitations period as against the employer. Additionally, in light of our holding, we need not determine when plaintiff's cause of action accrued--whether upon exhaustion of the grievance procedures or upon the union's first notification that it would proceed no further on her behalf. If the Legislature were to fix the appropriate Statute of Limitations, it might further choose to settle the interrelated issue of accrual date *(see, e.g.,* CPLR 217).

2 We therefore do not consider the contention first raised on this appeal that the union's rejection of plaintiff's grievance is at most a mere mistake in contract interpretation, which does not rise to the level of violation of the duty of fair representation *(see, Smith v Sipe,* 67 NY2d 928).