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COLLECTIVE BARGAINING AGREEMENTS WITHOUT ARBITRATION CLAUSES: DOES THE FINALITY DOCTRINE BAR SECTION 301 SUITS?

by
*Ronald L. Mason**

I. INTRODUCTION

A recent survey of collective bargaining agreements demonstrated that the parties to those agreements provided for a grievance procedure that included an arbitration proceeding in 96% of the cases surveyed.[1] In this overwhelming number of cases, the employee may sue an employer for breach of contract under section 301 of the National Labor Relations Act (the Act),[2] or follow a grievance procedure. In the latter instance, the employee is bound by the arbitration and its reward. The application of the finality doctrine to these cases is clear, fair, and established.

This is not true with respect to the remaining four per cent of those agreements in which the procedure does not provide for binding arbitration. The law governing when an employee may sue under section 301 in those situations in which the collective bargaining agreement has not provided for a culminating arbitration is not clear, at times unfair, and certainly not established. In fact, various courts differ significantly over the issue of whether the finality doctrine does or should apply when the grievance procedure does not employ binding arbitration as a form of dispute resolution.

If, as several federal courts have held, the employee is bound by the finality doctrine to the grievance procedure as set out in the agreement, then he is barred from litigating the merits of his grievance before a court under section 301 of the Act. If, on the other hand, as the state courts have held, the employee is not bound by the finality doctrine, then it follows that he is not so barred. The Supreme Court has not addressed this issue.[3]

This article will review briefly the law applicable to the majority of cases in which the agreements did provide for grievance procedures

* B.A. Ohio Dominican (1975); J.D. University of Dayton School of Law (1978); L.L.M. Georgetown Law Center (1981); National Labor Relations Board, Office of Appeals, Washington, D.C.

1. 2 Collective Bargaining Negotiations & Contracts (BNA) 51:5-7 (1970).
2. 29 U.S.C. § 185 (1970).
3. Rothlein v. Armour & Co., 391 F.2d 574, 578 (3d Cir. 1968).

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that employed some form of arbitration. Perhaps more importantly, it will then analyze in greater depth various court decisions that have attempted to resolve the more complex issue: that is, to what extent should the finality doctrine be applied, if at all, to grievance procedures which do not include binding arbitration.

II. Grievance Procedures Which Provide For Binding Arbitration

Generally, an employee[4] can sue an employer under section 301 only after he has first attempted to exhaust the grievance procedure set forth in the collective bargaining agreement. This fundamental principle was established in *Republic Steel Corp. v. Maddox.*[5] There an employee sued the employer under section 301 without first exhausting the grievance procedure. Under the collective bargaining agreement, any issues left unsettled by the grievance procedure could have been referred to binding arbitration. The Supreme Court held that federal labor policy required individual employees asserting contract grievances to attempt to resolve the grievances through the procedure outlined in the contract.[6] In reversing the state court,[7] the Supreme Court found that the grievance asserted by the employee was not so unique as to justify an exception to the general rule.[8]

The *Maddox* decision was refined somewhat by the Court's later decision in *Vaca v. Sipes.*[9] The employee in *Vaca* sued both the employer and the union under section 301. He alleged that he was wrongfully discharged and that the union had arbitrarily refused to take his grievance to arbitration. The Court cited *Maddox* for that case's general rule that an employee must exhaust his remedies set forth by the collective bargaining agreement.[10] The Court then addressed the narrower issue of whether this general rule should apply in those cases in which the employee seeks judicial review of a breach of contract claim. No exhaustion would be required under the Court's holding in two situations. First, if the conduct of the employer amounted to a repudiation

4. An employee can maintain a suit under § 301. Vaca v. Sipes, 386 U.S. 171 (1967); Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

5. 379 U.S. 650 (1965).

6. *Id.* at 652.

7. Republic Steel Corp. v. Maddox, 275 Ala. 685, 158 So.2d 492 (1963), *revd.* 379 U.S. 650 (1965).

8. Republic Steel Corp. v. Maddox, 379 U.S. 650, 657 (1965). *But see* Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 (1953) and Moore v. Illinois Central R.R. Co., 312 U.S. 630 (1941), in which the Court held that employees were not required under the Railway Labor Act (45 U.S.C. § 151 *et. seq.* (1949)) to exhaust the grievance procedures provided for in their respective contracts.

9. 386 U.S. 171 (1967).

10. *Id.* at 184.

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of the contract procedures, then the employee would not have to exhaust those procedures. Second, the Court would not require exhaustion in those situations in which the union had the sole power under the contract to seek the advanced stages of the grievance procedure, and the employee was prevented from exhausting his contractual remedies by the wrongful refusal of the union to seek such remedy through further procedures.[11]

The holdings of *Maddox* and *Vaca* lead one to conclude that the employee must exhaust his contractual procedures, unless he can demonstrate either that the employer repudiated that contract's procedures or that the union breached its duty to represent the employee fairly.

After the employee exhausts a grievance procedure which culminates with binding arbitration of the dispute, then, the employee encounters the finality doctrine. That doctrine effectively bars him from maintaining a section 301 suit against his employer on the merits of his grievance, unless he can establish one of the two exceptions set forth in *Vaca*.

The importance of the finality doctrine as a bar to section 301 suits was noted in *Hines v. Anchor Motor Freight, Inc.*.[12] Employees in that case were mistakenly accused of dishonesty. The employer discharged the employees on the basis of those accusations. A grievance was filed and processed through an arbitration committee.[13] The employees lost the case before the committee. They subsequently sued both the employer and the union under section 301 alleging that the employer breached the contract and that the union breached its duty of fair representation. The Supreme Court found that the employees were not entitled to relitigate their discharges, even though they could offer new evidence to prove that they were, in fact, fired without just cause. The Court believed that the finality provision of the contract had "sufficient force to surmount occasional instances of mistake" and that

11. The Court stated:

> 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 breached its duty of fair representation in the handling of the employee's grievance.

Id. at 171 (emphasis added).

12. 424 U.S. 554, 571 (1976).

13. Arbitration committees are often used in the trucking industry. While the situation in *Hines* was not, in the technical sense, an arbitration, the arbitration committee's decision was treated by the Court as if it were an arbitration. *See id.* at 569-72. *See* Coulson, *Vaca v. Sipes' Illegitimate Child: The Impact of Anchor Motor Freight on the Finality Doctrine in Grievance Arbitration*, 10 GA. L. REV. 693 (1976) [hereinafter cited as Coulson].

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"[t]he grievance process cannot be expected to be error-free."[14] However, the Court also held that enforcement of the finality doctrine was conditioned upon the union's compliance with "its statutory duty fairly to represent the employee in connection with the arbitration proceedings."[15]

Thus, *Maddox* required exhaustion of the employee's grievance procedure remedies; yet, once those procedures are concluded, he is bound by that final decision. Further, *Hines'* holding would prevent the employee from relitigating the issue in another forum, unless he was able to argue that one of the two *Vaca* exceptions applied. This is the state of the law for 96% of all collective bargaining agreements[16] in which either the grievance filed by the employee resulted in an arbitration proceeding[17] or when the union refused to proceed to arbitration.[18] The law here is clear.[19] It is also fair[20] once one understands that any tribunal passing upon this question must consider current labor policy in favor of arbitration of labor disputes. That policy was announced by the Supreme Court in the *Steelworkers* trilogy,[21] and reflected the Court's refusal to grant an individual a right to sue under section 301.[22]

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14. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

15. *Id.* at 571.

16. *See* note 1 *supra.*

17. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Santos v. Dist. Council of New York City, 547 F.2d 197 (2d Cir. 1977); Boone v. Armstrong Cork Co., 384 F.2d 285 (5th Cir. 1967); Miller v. Spector Freight Systems, Inc., 366 F.2d 92 (1st Cir. 1966) (per curiam); Durabond Products v. United Steelworkers, 421 F. Supp. 76 (N.D. Ill. 1976); Davis v. Howard, 404 F. Supp. 678 (N.D. Ga. 1975); Alonso v. Kaiser Aluminum & Chemical Corp., 345 F. Supp. 1356 (S.D. W. Va. 1971); Davidson v. Int'l UAW, 332 F. Supp. 375 (N.J. 1971); Thompson v. Monsanto Co., 559 S.W.2d 873 (Tex. Civ. App. 1977).

18. Cannon v. Consol. Freightways Corp., 524 F.2d 290 (7th Cir. 1975); Cady v. Twin Rivers Towing Co., 486 F.2d 1335 (3d Cir. 1973); Harris v. Chemical Leaman Tank Lines, Inc., 437 F.2d 167 (5th Cir. 1971); Rivers v. NMU Pension & Welfare & Vacation Plan, 288 F. Supp. 874 (E.D. La. 1968).

19. For a thorough discussion of the possible impact of the *Hines* decision on the limitations of the finality doctrine in arbitration decisions, *see* Coulson, *supra* note 13. *See also* Adomeit, *Hines v. Anchor Motor Freight: Another Step in the Seemingly Inexorable March Toward Converting Federal Judges (and Juries) into Labor Arbitrators of the Last Report,* 9 Conn. L. Rev. 627 (1977); Martucci, *Employer Liability for Unfair Union Representation: The Underlying Policy Considerations,* 46 Mo. L. Rev. 78 (1981).

20. *Hines* has been criticized by one commentator for not going far enough to protect the rights of employees. Note, *Finality and Fair Representation: Grievance Arbitration is not Final in the Union has Breached its Duty of Fair Representation,* 34 Wash. & Lee L. Rev. 309 (1977).

21. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

22. In Steinman v. Spector Freight Sys., Inc., 476 F.2d 437 (2d Cir. 1973), the court of appeals upheld the propriety of the district court's action of setting aside the breach of contract question until the issue of the union's breach of duty of fair representation had been decided, and

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III. Grievance Procedures Which Do Not Provide For Binding Arbitration

The issue confronting state and federal courts[23] is whether the law applied to procedures including arbitration should also be applied to those agreements in which the grievance proceedings do not include arbitration provisions.[24] That four per cent of collective bargaining agreements may be read by courts as falling within the law outlined by the *Maddox, Vaca,* and *Hines* decisions. The issue may become even less clear in those situations where the employee, for several possible reasons, does not wish to allege that the union failed in its duty to represent him fairly.[25]

It is not surprising, given the difficulty of this issue, that courts addressing it do not agree on its resolution. Indeed, some federal courts have uniformly applied the principles of the *Maddox, Vaca,* and *Hines* decisions. This is most often the case when the employee exhausted a grievance procedure that did not include binding arbitration. Other federal courts recognize the potential inequities of requiring exhaustion in these instances. They, too, nevertheless have been unwilling to grant those employees broad access to the courts under section 301. The state courts, in contrast, have not been consistent in barring such actions.

A. *The Federal Courts*

The leading federal court case was decided by the fifth circuit in *Haynes v. United States Pipe and Foundry Co.*[26] In *Haynes*, a discharged employee processed his grievance through a four-step procedure. The grievance, however, was ultimately denied at the fourth step by the plant manager. The collective bargaining agreement provided for a fifth step; that step, however, would have necessitated a plant worker's strike in protest of the plant manager's decision. No strike took place. The agreement further provided that if no strike occurred, the decision of the plant manager would be final and binding. Thus, the

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affirmed the lower court's holding for both union and the employer when the lower court found that no breach of representational duty had occurred.

23. State courts have concurrent jurisdiction with federal courts to hear actions filed under § 301. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

24. When an action is brought in state court under § 301, the "federal common law" of labor management relations is applied. *See* Textile Workers v. Lincoln Mills, 353 U.S. 448, 456-57 (1957).

25. For example, the union could request a strike vote from the grievant's fellow employees, but they could, though believing the validity of his claim, decline to strike. It is also true that many contracts contain "no-strike" provisions, but the *quid pro quo* for such terms is usually an agreement to arbitrate grievances. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957).

26. 362 F.2d 414 (5th Cir. 1966).

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employee subsequently filed suit against the employer in state court. The action was then moved to federal court based upon the jurisdictional provision of section 301. The district court dismissed the action. It did so because of its belief that the union, by signing the collective bargaining agreement as the employee's agent, expressly agreed to the particular grievance procedure as the exclusive method by which such disputes would be settled. The employee appealed.

In its opinion, the fifth circuit found Congress to have provided explicitly in section 203(d)[27] that the method agreed to by the parties should be the means of settling grievances. In so doing, the court examined the legislative history of section 203(d). It noted that Congress had refused to prescribe compulsory arbitration due to its belief that the federal government should not dictate to the parties the particular method for dispute settlement.[28] The court went on to note that the Supreme Court had consistently sanctioned whatever dispute resolution procedure the parties had chosen. The only evidence of that choice was what was contained in the collective bargaining agreement. In the fifth circuit's opinion, the *Steelworkers* trilogy[29] was indicative of the Supreme Court's approval of selective arbitration procedures. Interestingly, *Maddox* was cited as well for the proposition that the parties to a collective bargaining agreement are limited to that agreement's remedies. Finally, the court did note, however, that *Smith v. Evening News Ass'n*[30] provided some basis for the Supreme Court's endorsement of the employee's right to sue under section 301 when the agreement did not provide for a grievance or arbitration procedure.

Another issue remained. Was the plant manager's decision "final" and, therefore a bar to the employee's section 301 action? The employee had urged on appeal that *Maddox* did not bar his suit, since once the employee exhausted his grievance procedure (which contained no arbitration clause), he could sue under section 301. No direction was to be found from any previous Supreme Court cases, so the answer for the fifth circuit was unclear.[31] Instead, the court looked to two sixth circuit decisions which held employees were barred from filing section 301 suits even if the union had refused to process the grievances.[32] Once again, the court found the agreement's terms compelling. That agreement expressly provided for the plant manager's decision to be

27. 29 U.S.C. § 173(d) (1970).
28. *Id.* at 416 & 416 n.2.
29. See note 20 *supra*.
30. 371 U.S. 195 (1962).
31. Haynes v. United States Pipe & Foundry Co., 362 F.2d 414, 417 (5th Cir. 1966).
32. Simmons v. Union News Co., 341 F.2d 531 (6th Cir. 1965); Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961).

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final, unless the work force struck. The union, in effect, acquiesced in the plant manager's decision by refusing to strike over the matter. In holding the parties so closely to the agreement, the court recognized the employer's affirmative defense that the employee was barred for a section 301 action, because the decision obtained at the close of the grievance procedure was final and binding.

Only the United States Court of Appeals for the Third Circuit has addressed this issue at the federal appellate level. When confronted with the issue, however, the court managed to avoid it. In *Rothlein v. Armour & Co.*,[33] certain employees sued under section 301. Again, the grievance procedure contained no provision for arbitration. The suit sought an accounting and payment of money allegedly owed to the employees under the terms of a pension plan. That plan had been established under a prior collective bargaining agreement. Once again, although the plant employees had the right to strike over this issue, they chose not to exercise that right. Instead, the employees sued the company for breach of contract. Citing *Haynes* as adequate authority, the district court granted summary judgment for the company. Once again, filing the grievance had exhausted the remedies available to the employees. The district court bound them to that decision.

The third circuit, however, reversed.[34] Nevertheless, the court did not hold that an employee had a right to sue under section 301 when the agreement did not provide for binding arbitration. Instead, it remanded the case to the district court for a determination as to whether the particular dispute was a matter contemplated by the parties as subject to the grievance procedures. The circuit court sought to guide the lower court in making its determination, if it should happen to find that the employees had, in fact, obtained a final decision through the grievance procedures in the contract.[35] First, the circuit court refused to apply the finality doctrine as a complete bar to employees in non-arbitration cases, regardless of the employee's claim.[36] In place of the finality doctrine, the court proposed that the lower court consider "in some detail" whether it should accept the decision made pursuant to the contract. Further, the district court was directed to balance the rights of the few (the complaining employees) against the rights of the many ("all of the employees who have a collective interest in the bargaining

33. 268 F.Supp. 545 (W.D. Pa. 1967), *revd.* 391 F.2d 574 (3d Cir. 1968).

34. 391 F.2d 574 (3d Cir. 1968).

35. *Id.* at 578-79. The court raised the issue of whether the parties had followed the correct grievance procedure because the employees were seeking an accounting and payment of money owed them under a pension plan that was established in a prior agreement. The circuit court left it to the district court to decide which grievance procedure was applicable. *Id.* at 577-78.

36. *Id.* at 579.

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position of their union and the integrity of the contract").[37]

The third circuit's position is significant in at least one respect. It may allow other lower courts a substantial degree of flexibilty when hearing section 301 cases of this nature. The court hesitated, however, to open the courthouse doors for "run-of-the-mill" disputes.[38] This balancing of interests and concern for opening the doors to relatively petty litigation are legitimate problems. The district courts, however, may find themselves in a quandary when they attempt to discern, much less balance, the competing interests. Nor is the task of discernment any easier with respect to distinguishing "petty" litigation from that which presents significant legal issues.

Fortunately, the *Rothlein* case has been illuminated to some degree by the third circuit in a more recent case. In *Bieski v. Eastern Automobile Forwarding Co.,*[39] the plaintiffs sought "dovetailing" rights from M & G Convoy, Inc.. They alleged that M & G Convoy had acquired their previous employer, Eastern. Eastern subsequently went out of business and left them unemployed. The former employees of Eastern filed a grievance that was processed to the ùnion-management joint committee.[40] After that committee unanimously held that M & G Convoy had not acquired Eastern, the employees sued under section 301. Here, then, the third circuit was presented with the finality issue in an arbitration setting, and was asked to determine whether the employees were barred from raising the grievance in federal court once the committee had rendered its final decision. The court, citing *Rothlein* as support, stated that it would assert the finality rule only:

> [i]f the court is convinced both that the contract procedure was intended to cover the dispute and, in addition, *that the intended procedure was adequate to provide a fair and informed decision,* then the review of the merits of any decision should be limited to cases of fraud, deceit, or instances of unions in breach of their duty of fair representation.[41]

The adequacy and fairness standard seems to be less than the union's duty of fair representation. In light of that disparity, whether this additional test can withstand review by the Supreme Court is certainly problematic given that Court's *Hines* decision. The additional test might, however, be valid for cases in which there is no arbitration

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37. *Id.* at 580.

38. *Id.* at 579. It should be noted that the court cited the situation in *Haynes* (*see* note 31 *supra* and accompanying text) as an example of a run-of-the-mill grievance. *Id.* at 579 n.23.

39. 396 F.2d 32 (3d Cir. 1968).

40. *Id.* at 36. This committee was composed of an equal number of union and employer representatives and a decision by the committee was considered final and binding on all parties. *Id.* at 34.

41. *Id.* at 38 (emphasis added).

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clause, thus allowing district courts to give greater scrutiny to the grievance process.[42]

The only federal court decision discussing both *Rothlein* and *Bieski* in the context of a non-arbitration grievance procedure suit under section 301 is *Safely v. Time Freight, Inc.*.[43] The district court in that case adhered closely to the holding in *Haynes* by refusing "to examine the merits of the grievance unless some exception to the general rule [of finality] is applicable."[44] The district court cited *Vaca* for the general exception applicable when the union breaches it fair representation duty. The employee had alleged no such breach before the district court. Thus, the district court duly noted the *Rothlein* exception for cases in which the grievance procedure was inadequate or unavailable. It did not, however, rule on the matter. Instead, it cited *Bieski* as the final exception to the finality rule. This exception appealed to the district court, as it allowed review of the reasonableness of the private decisionmaker's "jurisdictional" refusal to hear the grievance.[45]

The district court's plight in *Safely* is a prime example of the quandary in which courts have been left following the third circuit's refusal to confront the finality doctrine in a nonarbitration setting. District courts are now able to assert a very selective "jurisdictional" review of grievance procedures.[46] This type of selectivity and exception-making ultimately places a premium on the district court's scanning cases in search of those which have facts the same as or similar to those before it. The third circuit's refusal, in other words, has forced the courts to pigeon-hole certain cases into certain narrow exceptions.

The seventh circuit court of appeals has not been presented with the issue directly. It has cited *Haynes* in only two situations. In both of these, the grievance procedure did culminate in some form of binding

42. The court held that if an arbitrator refuses to consider the merits of a dispute, then a court is the proper forum for reviewing the reasonableness of this refusal. *Id.* at 34. *See also* John Wiley & Sons v. Livingston, 376 U.S. 543, 546-51 (1964), where the Court seems to indicate that the duty to arbitrate is not derived solely from an express contractual agreement to do so.

43. 307 F. Supp. 319 (W.D. Va. 1969).

44. *Id.* at 324.

45. *Id.* at 323-24. The court also stated that if

> [T]he grievance has never been considered on the merits by a committee whose decision is to be "final and binding," this court has no authority (by statute, case law or federal policy) to dismiss this suit without making an inquiry into the merits of the grievance.

Id. at 325. Note that if the court had found the private decision maker's ruling was on the merits of the grievance, it could not have independently reviewed the merits because of the finality doctrine. Hines v. Motor Freight, Inc., 424 U.S. 554 (1976).

46. See Judge Seitz's dissent in *Bieski* in which he points out that the courts will obviously consider some grievance decisions by arbitrators to be incorrect, but that is the price that must be paid for according finality to non-judicial decisions.

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arbitration. In *Ford v. General Electric Co.*,[47] employees sued as a class to recover wages allegedly due them under the collective bargaining agreement. Previously, a grievance had been filed with the union, and was processed to arbitration. The contract required mutual agreement between the union and the company in order to arbitrate a dispute. The union had the right to issue a strike notice within thirty days of the final step in the grievance procedure. If it failed to do so, the issue was considered settled. No such notice was filed, and this inaction became the significant factor in the seventh circuit's decision. It ruled that the employer's decision was final. The court then affirmed summary judgment in favor of the employer.

The court in *Ford*, however, questioned *Haynes* insofar as that case barred court action subsequent to the employer's decision and the union's failure to take strike action:

> With all respect, we question whether such a result accords with congressional policy, since it either leaves the settlement of disputed contract rights to a test of economic strength, or makes a strike the price of an opportunity for an impartial adjudication of the dispute.[48]

The seventh circuit was again presented with an employee suit in *In Re Jackson*.[49] The collective bargaining agreement again provided for a grievance and arbitration procedure. Uniquely, however, the employee in Jackson had petitioned the referee for relief under Chapter XIII of the Bankruptcy Act. The referee ordered the employee to deduct an amount from the employee's wages and to pay that amount to the trustee. The employer complied with the order, but notified the employee that pursuant to the contract, he would be suspended and eventually terminated, unless the referee's order was released. The employee sought a petition with the referee to enjoin this action. He was successful. The seventh circuit reversed on the basis that the case clearly involved application and interpretation of the collective bargaining agreement. Therefore, any disciplinary action taken by the employer was subject to review through the contract's grievance and arbitration procedure. Citing *Haynes*, the circuit court said: "when a dispute arises within the scope of a collective bargaining agreement, the parties are relegated to the remedies which are provided in such agreement."[50]

The employee in *Jackson* failed to attempt exhaustion of his remedies under the contract's grievance procedures. This reliance on *Haynes*

47. 395 F.2d 157 (7th Cir. 1968).
48. *Id.* at 159.
49. 424 F.2d 1220 (7th Cir. 1970).
50. *Id.* at 1222.

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was not, however, a complete endorsement of the result in that case. An employer before the seventh circuit who seeks to raise *Haynes* and *Jackson* as authority for support in a non-arbitration setting should beware. That court has yet to address the question in such a setting.

The two most recent federal court decisions that have met this issue in a non-arbitration setting have set out the law in a general manner with respect to a section 301 action in which the agreement did not provide for arbitration. A federal district court granted the union's motion for summary judgment in *Olsieski v. Transco Plastics Corp.*.[51] This followed from the court's finding that the employee had presented no evidence of the union's alleged breach of its representation duty. Nor did the court need to reach or discuss the effect of such a ruling in an employee's suit against the employer.[52]

Frame v. B.F. Goodrich Co.[53] did discuss, however, the effect of such a ruling. That case involved a retired employee who sued his former employer under section 301 without any allegation of union wrongdoing. The plaintiff had filed a grievance before he brought his court action. His grievance alleged that the company owed him money under his retirement entitlements. Binding arbitration was provided for in the grievance procedures only in the event that the parties failed to agree. Thus, the district court was presented squarely with the issue of whether the plaintiff could maintain his suit after he had exhausted the grievance procedure. The court granted summary judgment to the employer holding that "absent a showing of a breach of the union's duty of fair representation, disposition of a grievance pursuant to an exclusive method provided in the collective bargaining agreement is final."[54]

This decision illustrates clearly the harsh realities of applying the finality doctrine to an "ordinary" grievance. The plant manager in *Frame* made a decision concerning the retirement benefits of the plaintiff. The union had represented the plaintiff fairly and adequately. In the final analysis, the employee was pitted in an economic test of strength with the employer, and lost.

B. *The State Courts*

The state courts have not followed the federal courts. Unlike their

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51. [1971] LAB. L. REP. (CCH) (Lab. Cas.) ¶ 12,059.

52. In an arbitration setting, this ruling would have also terminated the plaintiff's case against the employer because a finding that the union breached its duty of fair representation is an essential prerequisite to holding the employer liable for breach of contract. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Steinman v. Spector Freight Sys., Inc., 476 F.2d 437 (2d Cir. 1973).

53. 453 F. Supp. 63 (E.D. Pa. 1978).

54. *Id.* at 66.

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federal counterparts, the state courts have consistently permitted employees to proceed under section 301 after the employees have exhausted procedures which did not include binding arbitration.

The leading state court case is *Breish v. Ring Screw Works.*[55] In that case, the Michigan Supreme Court specifically disagreed with the fifth circuit's reasoning in *Haynes*. In *Breish,* the employee was discharged because of an alleged theft. He filed a grievance, and, at each of the three steps of the procedure, the employer denied the grievance. The collective bargaining agreement provided for a union strike as a final recourse. The members voted against a strike. Therefore, the employee sued the employer and the union in state court under section 301.[56] The union removed the cause of action against it to federal court,[57] where that court granted the union's motion for summary judgment. The state court subsequently granted the employer's summary judgment motion. That decision was based upon the conclusion that the employee was required to establish under *Vaca* that the union had breached its duty of fair representation.

The employee appealed, and the court of appeals affirmed. It did not do so, however, on the grounds that the employee had failed to establish an element of his case. Rather, it applied the finality doctrine to hold that in a case in which the agreement did not provide for binding arbitration, the employee was bound by the decision reached at the conclusion of the grievance procedure.[58]

Therefore, the Michigan Supreme Court could not avoid passing upon the appeals court's ruling. In its review of the federal common law, the supreme court found two exceptions to the finality doctrine.[59] The first exception, of course, concerned the union's duty of fair representation as established in *Vaca* and reiterated in *Hines*. The second exception occurred if the grievance procedure was inadequate in providing for a fair decision on the grievance's merits. It was this second exception that the supreme court noted in the third circuit's decisions in *Rothlein* and *Bieski*. As it duly noted that the United States Supreme Court had not addressed the issue directly, the Michigan high court believed that the Court had put its imprimatur on this exception.

55. 397 Mich. 586, 248 N.W.2d 526 (1976).

56. State courts have concurrent jurisdiction with federal courts to hear suits brought under § 301. *See* note 23 *supra.*

57. 397 Mich. at 590, 248 N.W.2d at 528. The employer evidently did not request removal of the employee's suit to federal court the district court, upon the employee's motion, remanded the action against the employer to the state court. *Id.*

58. Breish v. Ring Screw Works, 59 Mich.App. 464, 468-70, 229 N.W.2d 806, 808-09 (1975), *revd.* 397 Mich. 586, 248 N.W.2d 526 (1976).

59. State courts are required to apply "federal common law" for suits brought under § 301. *See* note 24 *supra.*

When it referred to Congressional intent in *Hines*, the Court stated:

> Congress has put its blessing on private dispute settlement arrangements provided in collective agreements, but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity.[60]

The Michigan court additionally cited *Maddox* and the *Steelworkers* trilogy in support of its view that the second exception exists to permit review of the grievance's merits in those instances where the court finds the grievance procedure inadequate.[61]

Applying this second exception to the case before it, the Michigan court held a grievance procedure that provides as its final step a strike vote by the grievant's fellow employees is inadequate to provide the grievant with a procedurally fair decision. The court believed that this procedure placed the employees "in a legally unacceptable position."[62] That is, even if the fellow employees agreed with the grievant's position, they would not be readily willing to risk their own economic and employment status by striking. Application of the finality rule in such a situation struck the court as a denial of basic justice inasmuch as it placed the grievant's judges (the union membership) in a position which conflicted with his.

The Michigan court took direct issue with the fifth circuit's holding in *Haynes*. It questioned the soundness of the fifth circuit's application of the finality doctrine to a non-arbitration situation. Nor did it agree with the fifth circuit's reading of section 203(d) as a sanction for *any* grievance procedure chosen by the parties.[63] Application of the finality doctrine to situations in which the final step was a strike vote did not, in the court's opinion, operate "within the minimal level of integrity mandated by the Supreme Court in *Hines*."[64]

While the Michigan Supreme Court did expand the second exception to the finality doctrine, its reliance upon the United States Supreme Court's language is tenuous at best. The discussion in *Hines* of minimal levels of integrity was in reference to a union's breach of its duty to fairly represent the employee. It was not in reference to a contract grievance procedure for which the union and the employer had bargained collectively. Any other interpretation reads the Court's language out of context.

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60. Hines v. Anchor Freight, Inc., 424 U.S. 554, 571 (1976).
61. Breish v. Ring Screw Works, 397 Mich. 586 n.11, 248 N.W.2d 526 n.11 (1976).
62. 397 Mich. at 603, 248 N.W.2d at 534.
63. 397 Mich. at 608-09, 248 N.W.2d at 536-37.
64. 397 Mich. at 609, 248 N.W.2d at 537 (quoting Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 571 (1976)).

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This criticism is equally applicable to the Michigan court's reliance on *Maddox* and the *Steelworkers* trilogy. Its reliance upon *Rothlein* and *Bieski,* however, is proper. In those cases, the third circuit proposed, but did not adopt, a review of the grievance procedure's adequacy. It was unwilling to risk flooding the lower courts' dockets with "run-of-the-mill" grievances. The Michigan court, in contrast, was not as timid.

Two other state courts have addressed this issue, but have chosen to resolve it by means other than the exception to the finality doctrine upon which the *Breish* court relied. Rather, these courts distinguished *Haynes* on the basis that the cases before them had no contracts in which the grievance procedure was to be final and binding.

Hansel v. Parker Seal Co.[65] involved a section 301 suit by an employee against the union and the company. The employee had already exhausted his grievance procedure which did not include binding arbitration.[66] After the court found that there existed no breach by the union of its duty of fair representation, it addressed the more important issue: whether the employee was bound by the decision of the grievance procedure even though that procedure did not provide for binding arbitration. The court distinguished *Haynes* on the grounds that that case passed upon an agreement in which the parties had specifically agreed that the decision of the plant manager would be final and binding. The contract in *Hansel* contained no such finality provision.

The grievance procedure at question in *Local Lodge No. 1426, I.A.M. v. Wilson Trailer Co.*[67] did not contain a provision for binding arbitration. The Supreme Court of Iowa was presented in *Local Lodge* with a situation in which the employee had again exhausted his contractual three-step grievance procedure. Similarly, the final step was to be a strike by the union, if it so voted. Important to the Iowa court, however, was the omission in the contract of a provision that would have made the procedure's decision final in the event that a strike did not take place. It was upon this factual difference that the court distinguished *Haynes*:

> The agreement in the present case does not expressly make the right to strike the only remedy of the union after exhaustion of grievance procedures, and the bargaining history does not show any such limitation was intended. Therefore we hold that the union and Lourens are not barred

65. 514 S.W.2d 673 (Ky. 1974).

66. The grievance procedure did provide for a recommendation by a mediator. The mediator recommended the employee's reinstatement but the employer chose not to follow his recommendation. *Id.* at 674.

67. 289 N.W.2d 608 (Ia. 1980).

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from having the courts decide the dispute.[68]

IV. Conclusion

The fifth circuit's decision in *Haynes* set forth the application of the finality doctrine to section 301 suits in which the employee had previously exhausted his grievance procedure. The inequities of applying that doctrine to section 301 suits in a non-arbitration setting, however, are considerable. Determination of the employee's rights in these situations should not be, as the seventh circuit noted in *B.F. Goodrich,* a test of economic strength. Any finding that the employee must rely upon his fellow members to strike in order to benefit his rights is unfair and inadequate.

Employers, on the other hand, would argue that the union bargained for the very contract which an individual now claims does not provide him with fair and adequate procedures. The employer may have had to forego something of value during the contract negotiations, because the union might have struck to obtain a grievance procedure which was more favorable. Viewed in this manner, the *Haynes* decision seems less inequitable. The result is one for which the union bargained and the employees accepted.

The Michigan Supreme Court, nevertheless, was unwilling to accept this very argument in the *Breish* case. It refused to recognize the finality of a decision not to strike, a decision which was, in the court's opinion, unduly weighted against the employee. This was a conflict of interest so great as to deny the employee the basic justice to which he was entitled under any fair grievance procedure.

While judicial economy is a valid consideration, the fact remains that section 301 is a statutory right to sue for breach of contract. The Supreme Court has applied that right to individual employees.[69] It is true that the Court has limited this right through the finality doctrine to decisions derived from a grievance procedure's award. The employee is denied, nevertheless, any forum for his grievance in those instances where there exists no provision for binding arbitration in the grievance procedures. The consequences of such an application of the finality doctrine are considerable. They should render the remedy provided in such non-arbitration agreements inadequate and proper for review by an impartial forum.

68. *Id.* at 611 (emphasis added).

69. *See* note 4 *supra.*

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