Michigan Law Review

Volume 65 | Issue 2

1966

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Plaintiff, discharged by his employer on the ground that he was no longer physically able to work, enlisted the aid of his union to contest the dismissal. Under the provisions of the collective bargaining agreement between the union and the employer, the union was to seek redress of employee complaints by means of a five step grievance procedure, with arbitration as the final step. The union processed plaintiff's grievance without success through the first four steps of the procedure, but refused to take the issue to the arbitral level. Plaintiff brought suit against the union in a Missouri county circuit court, claiming damages sustained as a result of the union's "arbitrary" and "capricious" refusal to process fully his grievance.[1] The jury awarded actual and punitive damages, but the court set aside the verdict on the ground that the jurisdiction of the state court had been pre-empted by the National Labor Relations Board (NLRB). The Kansas City Court of Appeals affirmed.[2] On appeal to the Missouri Supreme Court, *held*, reversed and jury verdict reinstated. A discharged employee's suit against his union based upon its wrongful refusal to process fully his grievance is a purely internal union matter, and, as such, is not subject to pre-emption by the NLRB.

The United States Supreme Court has derived from section 9 of the National Labor Relations Act (NLRA), which grants to a majority union powers of exclusive representation, a duty on the part of the union "to exercise fairly the power conferred upon it in behalf of all whom it represents."[3] This statutory duty of fair representation, although occasionally supplemented by common law concepts of tort or contract,[4] has become the individual employee's primary

* 397 S.W.2d 658 (Mo. Sup. Ct. 1965) [hereinafter referred to as principal case].

1. Plaintiff claimed that the union officials arbitrarily and wrongfully demanded $300 from him before they would carry his grievance to the fifth step. The union denied that such a demand had been made and asserted that the grievance had been dropped in good faith for lack of adequate medical evidence.

2. Owens v. Vaca, 51 CCH Lab. Cas. ¶ 19613 (Mo. Ct. App. 1965). While appeal to the Missouri Supreme Court was pending, plaintiff died and his administrator replaced him as plaintiff.

3. Steele v. Louisville & N. Ry., 323 U.S. 192, 203 (1944).

4. Prior to the birth of the § 9 theory, the union's duty of fair representation was construed by the courts in terms of various common law concepts. Employees were described as third party beneficiaries under the bargaining contract, as principals in an agency relation with the union, and as cestuis que trustent to whom a fiduciary duty was owed by the trustee union. Although today, federal law probably dominates the area of individual rights in the bargaining process, the states are not bound to a § 9 interpretation of the duty and the field has not been formally pre-empted. See Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations: Unions,*

protection against arbitrary or discriminatory union activity.[5] The alleged conduct of the defendant union in the principal case—failure to represent fairly a member in the grievance procedure—constituted a clear-cut breach of this duty.[6] Thus, the fundamental question presented by the principal case is whether an individual employee, aggrieved by his union's breach of its duty of fair representation, may sue the union for damages in a state judicial forum or whether such an action is within the exclusive jurisdiction of the NLRB.

The general rule which defines the respective jurisdictions of the courts and the NLRB was enunciated by the Supreme Court in *San Diego Building Trades Council v. Garmon.*[7] In *Garmon,* the Court held that in order to avoid judicial interference with national labor policy, the state and federal courts must defer to the exclusive competence of the NLRB whenever the activity which is the subject matter of litigation is arguably prohibited by section 8 or protected by section 7 of the NLRA. Until recently, an application of this general rule to the facts in the principal case would have resulted in the sustaining of state court jurisdiction. Traditionally, a union's breach of its duty of fair representation was not considered to constitute activity prohibited by section 8 of the NLRA.[8] In

Union Officials and the Worker in Collective Bargaining, 15 HASTINGS L.J. 391, 395-99 (1964). However, if the *Miranda* theory, see notes 11–20 *infra* and accompanying text, or the § 301 theory, see notes 43-50 *infra* and accompanying text, are ultimately fully accepted, state law may become obsolete in the area.

5. The statutory duty of fair representation originated in cases involving the Railway Labor Act. See, *e.g.,* Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Steele v. Louisville & N. Ry., 323 U.S. 192 (1944). Subsequently, the duty was found in § 9 of the NLRA on the rationale that the power of exclusive representation conferred by that section on the unions could not be absolute but must be limited by a fiduciary obligation to wield the power with fairness to all. See Syres v. Local 123, Oilworkers Union, 350 U.S. 892 (1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Hardcastle v. Western Greyhound Lines, 303 F.2d 182, 185 (9th Cir. 1962); Durandetti v. Chrysler Corp., 195 F. Supp. 653 (E.D. Mich. 1961). See generally Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship,* 61 MICH. L. REV. 1435, 1519-20 (1963); Cox, *The Duty of Fair Representation,* 2 VILL. L. REV. 151 (1957); Hanslowe, *The Collective Agreement and the Duty of Fair Representation,* 14 LAB. L.J. 1052 (1963); Summers, *Individual Rights in Collective Bargaining Agreements and Arbitration,* 37 N.Y.U.L. REV. 362 (1962); Comment, *Federal Protection of Individual Rights Under Labor Contracts,* 73 YALE L.J. 1215 (1964). *But cf.* Humphrey v. Moore, 375 U.S. 335 (1964), wherein the Supreme Court indicates that the duty is derived from the collective bargaining agreement.

6. See, *e.g.,* Humphrey v. Moore, 375 U.S. 335, 343 (1964); Mendicki v. UAW, 61 L.R.R.M. 2142 (D. Kan. 1965); Comment, 73 YALE L.J. 1215, 1219 (1964).

7. 359 U.S. 236 (1959).

8. Section 8(b)(1) of the NLRA designates as an unfair labor practice union conduct that restrains or coerces employees in the exercise of their § 7 rights. But, because § 7 was not considered to contain a right of fair representation, § 8(b)(1) did not reach a union's arbitrary treatment of its members. Section 8(b)(2) prohibits union action which causes an employer to discriminate against an employee. However, the

fact, the NLRB itself had expressly denied that such a breach was an unfair labor practice over which it could exercise jurisdiction.[9] Thus, responsibility for protecting the individual employee against arbitrary or invidious union action rested exclusively with the state and federal courts.[10]

In 1962, in *Miranda Fuel Co.*,[11] the NLRB reversed its earlier position and held that a union's breach of its duty of fair representation is an unfair labor practice.[12] Specifically, the Board decided that section 8(b)(1) of the NLRA prohibits a union from taking action against its members on considerations that are arbitrary, irrelevant, or invidious.[13] Subsequent NLRB decisions expressly ex-

courts require that the discrimination involved be of such a nature that it would encourage or discourage union membership. This was usually construed to mean that the discriminatory conduct had to be based upon union-connected activity. See, *e.g.*, NLRB v. Local 294, Teamsters Union, 317 F.2d 746 (2d Cir. 1963). Thus, the broad area of union arbitrary or invidious action toward members not based upon union membership was outside the scope of the federal labor laws. It was this type of union action which was involved in the principal case.

9. In Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), the NLRB filed an amicus curiae brief in which it argued that the Board did not have jurisdiction over fair representation cases.

10. See, *e.g.*, NLRB v. Local 294, Teamsters Union, 317 F.2d 746 (2d Cir. 1963); Durrandetti v. Chrysler Corp., 195 F. Supp. 653 (E.D. Mich. 1961); Berman v. National Maritime Union, 166 F. Supp. 327 (S.D.N.Y. 1958). See also Blumrosen, *supra* note 5, at 1470-72, 1504; Rosen, *supra* note 4, at 395-409; Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529, 548 (1963); *cf.* Hiller v. Local 2, Liquor Salesmen's Union, 338 F.2d 778 (2d Cir. 1964).

11. 140 N.L.R.B. 181 (1962). A union member had been absent from work because of illness. Although the absence was excusable, the union demanded that the employer reduce the member's seniority. The employer acquiesced to this demand and the member filed unfair labor practice charges against both the union and the employer.

12. The Board's change of attitude toward fair representation cases, see note 9 *supra* and accompanying text, may be attributed to the fact that the courts had proven to be an unsatisfactory forum for the protection of individual rights in the collective bargaining process. The Supreme Court had developed a broad standard of fairness, Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), which the lower courts had applied with a heavy presumption in favor of union reasonableness, thereby virtually precluding a finding of a breach of its duty. Other prohibitive factors were the time, expense and procedural problems involved in a judicial action. See Blumrosen, *supra* note 5, at 1470-72, 1514-15; Herring, *The Fair Representation Doctrine: An Effective Weapon against Racial Discrimination*, 24 MD. L. REV. 113 (1964); Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations; Unions, Union Officials and the Worker in Collective Bargaining*, 15 HASTINGS L.J. 391, 399-409 (1964); Rosen, *Individual Worker in the Grievance Procedure, Still Another Look at the Problem*, 24 MD. L. REV. 233, 286-89 (1964). For discussion of a series of New York decisions that effectively cut off the individual's recourse to the judicial forum, see Hanslowe, *supra* note 5, at 1054-58.

13. The revolutionary aspect of the Board's holding is that it entailed reading into § 7 of the NLRA a duty of fair representation. See note 8 *supra*. Section 7 gives workers the right to bargain collectively through representatives of their own choosing. Section 9 had formerly been construed to impose on the unions a duty to act fairly on behalf of all their members. Reading the two sections together, the Board concluded that implicit in the § 7 right to bargain collectively is a right to bargain through representatives who will be bound by a duty of fairness. Thus, the union's duty of fair representation became a § 7 protected right. Since § 8(b)(1) prohibits

tended this theory to reach the type of union activity involved in the principal case: arbitrary or discriminatory refusal to process a grievance.[14] Thus, if the *Miranda* rationale were applied to the principal case, the subject matter of the plaintiff's claim would arguably be an unfair labor practice, and, as such, subject to the pre-emptive rule of *Garmon*. The Board's new theory, however, has not yet been generally construed by the courts as necessitating a strict rule of pre-emption in all fair representation cases.[15] The Supreme Court has on three occasions noted the existence of *Miranda*, but each time it has expressly refused to pass upon its validity.[16] Theoretically, until the Supreme Court ultimately rules on *Miranda*, the lower courts may avoid its pre-emptive implications by relying

restraint of § 7 rights, it was an easy second step to find that any breach of the duty of fair representation is a violation of § 8(b)(1) and consequently an unfair labor practice. For a discussion of the implications of *Miranda*, see generally Murphy, *The Duty of Fair Representation under Taft-Hartley*, 30 Mo. L. Rev. 373 (1965); Comment, 73 Yale L.J. 1215, 1234-38 (1964); Comment, 45 B.U.L. Rev. 141 (1965).

In deciding whether a union has, in fact, breached its duty, the Board will look to the true purpose of the union's actions. If the true purpose is deemed legitimate, incidental injurious effects on a particular member's rights will not be sufficient to establish a breach. See Pacific Maritime Ass'n, 1965 CCH NLRB ¶ 9760. The union must make an honest effort to serve all fairly without hostile discrimination to any, but the union must also be allowed a wide range of reasonableness within which to carry out its duties as bargaining agent. See Local 12, United Rubber Workers Union, 150 N.L.R.B. 312 (1964). Applying this broad standard of fairness, the Board has been reluctant to find that a union's actions were sufficiently arbitrary or irrelevant to constitute a breach of duty. See, *e.g.*, Local 10, Chicago Fed'n of Musicians, 1965 CCH NLRB ¶ 9456; Local 87, Houston Typographical Union, 145 N.L.R.B. 1657 (1964); Local 820, Armored Car Chauffers & Guards Union, 145 N.L.R.B. 225 (1963); Local 6, New York Typographical Union, 144 N.L.R.B. 1555 (1963). *But see* Local 12, Rubber Workers Union, 150 N.L.R.B. 312 (1964); Local 1, Metal Workers Union, 147 N.L.R.B. 1573 (1964).

14. Local 1, Metal Workers Union (Hughes Tool Co.), 147 N.L.R.B. 1573 (1964); Local 12, Rubber Workers Union, 150 N.L.R.B. 312 (1964). In both cases, Negro employees charged their union with having discriminatively refused to process their grievances. See generally Sherman, *Union's Duty of Fair Representation and the Civil Rights Act of 1964*, 49 Minn. L. Rev. 771 (1965); Comment, 45 B.U.L. Rev. 141 (1965). Subsequent board applications of the *Miranda* theory have made it clear that the theory is not confined to racial discrimination cases. Pacific Maritime Ass'n, 1965 CCH NLRB ¶ 9760; Local 10, Chicago Fed'n of Musicians, 1965 CCH NLRB ¶ 9456.

15. The Board's order in *Miranda* was denied enforcement by the Second Circuit. NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963). Of the three judges writing opinions, only one expressly rejected the Board's reasoning. *Cf.* NLRB v. Local 294, Teamsters Union, 317 F.2d 746 (2d Cir. 1963). *But see* Cafero v. NLRB, 336 F.2d 115 (2d Cir. 1964). The Board has made it clear that it will continue to follow *Miranda* until the Supreme Court rules otherwise. See Pacific Maritime Ass'n, 1965 CCH NLRB ¶ 9760; Local 12, United Rubber Workers Union, 150 N.L.R.B. 312 (1964).

The commentators have not agreed on the legal validity of *Miranda* or its policy justification. *Compare, e.g.*, Blumrosen, *supra* note 5, at 1504-23, Cox, *supra* note 5, at 172-73, *and* Comment, 2 Houston L. Rev. 373 (1965) (legislative history as support for *Miranda*), *with, e.g.*, Comment, 45 B.U.L. Rev. 141 (1965), Comment, 112 U. Pa. L. Rev. 711 (1963), Note, 63 Mich. L. Rev. 1081 (1965), *and* Comment, 9 Vill. L. Rev. 306 (1964).

16. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965); Humphrey v. Moore, 375 U.S. 335, 344 (1964); Local 100, Plumbers Union v. Borden, 373 U.S. 690, 696 (1963).

upon the existing Supreme Court precedents for section 9 judicial jurisdiction.[17] However, in light of the Board's continued adherence to the *Miranda* theory, it does seem that a union's breach of its duty of fair representation should be regarded as, at least, "arguably" an unfair labor practice.[18] There is some judicial authority to this effect.[19] Particularly relevant to the principal case is *Chasis v. Progress Mfg. Co.*,[20] wherein a federal district court held that the wrongful refusal of a union to process fully a discharged employee's grievance was arguably an unfair labor practice and consequently within the exclusive jurisdiction of the NLRB.

In the principal case, the Missouri Supreme Court avoided whatever pre-emptive force *Miranda* may presently have by finding that the plaintiff's claim fell within an established exception to the general pre-emption doctrine.[21] The Supreme Court has recognized three such exceptions: (1) when the subject matter of an action in-

17. See notes 8-10 *supra* and accompanying text. If the courts follow this approach, suits brought under § 9 of the NLRA to enforce the duty of fair representation may become an additional exception to the general pre-emption doctrine. However, the recent decision of the Supreme Court in Humphrey v. Moore, 375 U.S. 335 (1964), indicates that the Court itself does not believe that *Miranda* can be avoided or discredited solely through reliance upon the pre-*Miranda* precedents for judicial jurisdiction. In *Humphrey*, the Court found it necessary to construe an action for breach of the duty of fair representation as one arising under § 301 of the LMRA in order to by-pass the pre-emption questions raised by *Miranda*. Had the majority been willing simply to follow a § 9 theory, as was Mr. Justice Goldberg in dissent, there would have been no need to create an entirely new construction of § 301. See Chasis v. Progress Mfg. Co., 54 CCH Lab. Cas. ¶ 11398 (E.D. Pa. 1966), wherein the court reasoned that since the § 9 theory had been developed prior to the existence of an administrative remedy, that theory should now be displaced by the *Miranda* rationale.

18. The Section on Labor Relations Law of the American Bar Association reported in 1965 that:

> violations of the duty of fair representation are arguably subject to sections 7 or 8 of the Act. . . . [C]onsequently, unless court actions brought to enforce the NLRA's duty of fair representation are exempt from *Garmon* for some reason, the courts may no longer entertain them.

Report of the Section of Labor Relations Law, 1964 A.B.A. REP. 147-48 (1965).

19. See Mendicki v. UAW, 61 L.R.R.M. 2142 (D. Kan. 1965); Stout v. Construction & Gen. Laborers Council, 226 F. Supp. 673 (N.D. Ill. 1964); Knox v. UAW, 223 F. Supp. 1009 (E.D. Mich. 1963); Goni-Moral v. Marley, 58 L.R.R.M. 2037 (N.Y. Sup. Ct. 1964); *cf.* Young v. United Steelworkers, 420 Pa. 132, 216 A.2d 500 (1966); McCaul v. Local 107, Highway Truck-Drivers & Helpers Union, 47 CCH Lab. Cas. ¶ 18137 (Pa. C.P. 1963).

Some judicial support for *Miranda* may arguably be found in the recent fair representation cases in which § 301 of the LMRA has been employed to sustain jurisdiction. In relying on § 301 for this purpose the courts appear to be tacitly recognizing the potential pre-emptive force of *Miranda*. See, *e.g.*, Humphrey v. Moore, 375 U.S. 335 (1964); Falsetti v. Local 2026, UMW, 355 F.2d 658 (3d Cir. 1966); Mandel v. Local 707, Teamsters Union, 246 F. Supp. 805 (S.D.N.Y. 1964); Tully v. Fred Olson Motor Serv., 27 Wis. 2d 476, 134 N.W.2d 393 (1965); notes 43-50 *infra* and accompanying text.

20. 54 CCH Lab. Cas. ¶ 11398 (E.D. Pa. 1966).

21. The *Miranda* theory was relied on by the union as grounds for pre-emption. See Brief for Respondents, pp. 18-22. The court apparently rejected this argument: "[W]e do not think it could reasonably be argued that the conduct of the defendants constituted an unfair labor practice." Sipes v. Vaca, 397 S.W.2d 658, 665 (Mo. Sup. Ct. 1965).

volves union conduct that threatens or constitutes physical violence or other breaches of the peace;[22] (2) when a suit is brought under section 301 of the Labor Management Relations Act (LMRA);[23] and (3) when the subject matter of an action is a purely internal union matter which does not directly involve the employment relation.[24] A suit falling within any of these categories is not subject to pre-emption and may be maintained in a state or federal court even if the activity involved is concededly protected by section 7 or prohibited by section 8 of the NLRA.[25] In the principal case, judicial jurisdiction was sustained on the ground that the subject matter of the suit fell within the third exception to the pre-emption rule. This exception was originally formulated prior to *Garmon*, in *International Ass'n of Machinists v. Gonzales*.[26] In *Gonzales*, an individual employee, wrongfully expelled from his union, sued the union for restoration of membership and incidental damages. The Supreme Court recognized that the union's conduct might conceivably have constituted an unfair labor practice, but upheld state jurisdiction on the ground that the danger of conflict with national labor policy was too remote to justify depriving the plaintiff of a judicial remedy.[27] A year later, when the Court decided *Garmon*, it described *Gonzales* as a suit whose subject matter was merely a "peripheral concern of the LMRA," and indicated that such suits would constitute an exception to the general pre-emption rule.[28] This rather vague and potentially broad exception was subsequently substantially limited and given its present narrow definition in *Plumber's Union v. Borden*.[29] The *Borden* Court described *Gonzales* as a

> suit focused on purely internal union matters, *i.e.*, on relations between the individual plaintiff and the union, not having to do

22. UAW v. Russell, 356 U.S. 634 (1958); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

23. Humphrey v. Moore, 375 U.S. 335 (1964); Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

24. Local 100, Plumbers Union v. Borden, 373 U.S. 690 (1963); International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

25. See generally Smith & Clark, *Reappraisal of the Role of the States in Shaping Labor Relations Law*, 1965 WIS. L. REV. 411, 418-21.

26. 356 U.S. 617 (1958).

27. The state court was empowered to award both reinstatement and damages. The NLRB could not order reinstatement but might have been able to award back pay if the union had been found to have wrongfully caused the discharge. See National Labor Relation Act § 10(c), 49 Stat. 453 (1935), 29 U.S.C. § 160(c) (1964). However, even if the board could award back pay, it could not impose punative damages nor give compensation for mental suffering.

28. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959).

29. 373 U.S. 690 (1963). In *Borden*, an individual member sued his union for damages arising from the union's wrongful refusal to refer him for employment. The member admitted the presence of that which might arguably be an unfair labor practice but relied on *Gonzales* to support state jurisdiction. The Court found the *Gonzales* rationale inapposite on the ground that the crux of the member's complaint was interference with employment opportunities, not injury to internal union rights.

directly with matters of employment, [in which] . . . the principal relief sought was restoration of membership rights.[30]

Application of the criteria developed by the Supreme Court in *Borden* to the facts of the principal case indicates that the disposition of the plaintiff's claim should not be controlled by the *Gonzales* exception. The failure of the union to process fairly the plaintiff's grievance did deprive him of his rights as a union member and, to this extent, the suit does directly involve the relationship between the aggrieved individual and his union. However, the focus of the plaintiff's claim is not this purely internal union matter. Restoration of membership rights was not the principal relief sought. Rather, the petition for relief reveals that the measure of actual damages claimed against the union is the loss of salary incurred by the plaintiff as a result of his discharge.[31] Thus, the gravamen of the complaint is not the denial of membership rights but the resulting injury to the employment status. Clearly, it cannot be maintained, as would be necessary to satisfy the criteria articulated in *Borden*, that the focus of the suit is "the relation between the individual plaintiff and the union not having directly to do with matters of employment."[32]

Judicial authority since *Borden* reinforces the conclusion that the *Gonzales* exception is not applicable to the principal case. The exception has been most frequently invoked as a bar to pre-emption in cases involving facts essentially similar to those in *Gonzales*: an expelled or suspended union member suing the union for damages or reinstatement. Prior to *Borden*, *Gonzales* was generally found to control such cases.[33] In more recent decisions, governed by the *Borden* criteria, the courts have refused to apply the exception unless it was absolutely clear that the principal relief sought was restoration of membership rights.[34] Consequently, where the expelled

30. *Id.* at 697. See also Local 207, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers v. Perko, 373 U.S. 701 (1963). In *Perko*, which was decided with *Borden*, an individual employee sued his union for damages, claiming that the union had conspired with his employer to bring about his discharge. Applying the criteria announced in *Borden*, the Court found that the real focus of the complaint was "interference with the plaintiff's existing or prospective employment relations." *Id.* at 705. Thus, the suit was held to be within the exclusive jurisdiction of the NLRB.

31. The complaint initially charged the employer, who was not a defendant, with having wrongfully discharged the plaintiff, thereby causing the plaintiff to lose earnings totalling $6,500. This same sum was then claimed as the actual damages sustained by the plaintiff as a result of the union's arbitrary refusal to process fully his grievance. Complaint of Plaintiff, pp. 3-4.

32. Local 100, Plumbers Union v. Borden, 373 U.S. 690, 697 (1963).

33. See, *e.g.*, Bussy v. Local 13, Plumbers Union, 286 F.2d 165 (10th Cir. 1961); Lockridge v. Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees, 84 Idaho 201, 369 P.2d 1006 (1962); Lowery v. International Bhd. of Boilermakers, 241 Miss. 458, 130 So. 2d 831 (1961).

34. Local 2, Int'l Organization of Masters v. International Organization of Masters, Inc., 414 Pa. 277, 199 A.2d 432 (1964), wherein the expelled members' complaint was purposely patterned to fall within the modified *Gonzales* exception. The principal

member has demanded pecuniary damages as either his sole[35] or primary[36] remedy, *Gonzales* has been rejected. Once beyond the facts of *Gonzales* and into the area of fair representation, there appears to be little precedent for applying the doctrine of that case.[37] When, as in the principal case, an individual employee has sought damages for his union's failure to represent him fairly in the grievance procedure, *Gonzales* has been either rejected or ignored.[38]

relief sought was restoration of membership rights, and damages were claimed only as an incidental remedy. The court sustained judicial jurisdiction on the ground that *Gonzales* was controlling precedent and that this case fit within its limited confines. *But see id.* at 285, 199 A.2d at 436 (dissenting opinion arguing that *Gonzales* is no longer good authority).

35. Spica v. International Ladies Garment Workers Union, 420 Pa. 907, 218 A.2d 579 (1966); Directors Guild v. Superior Court, 64 Cal. 2d 42, 409 P.2d 934 (1966); Johnson v. Serbenta, 210 N.E.2d 861 (Ind. Ct. App. 1965); *cf.* Knox v. UAW, 223 F. Supp. 1009 (E.D. Mich. 1963).

36. See Wax v. International Mailers Union, 400 Pa. 173, 161 A.2d 603 (1960), in which the expelled member claimed both reinstatement and damages, but the court refused to follow *Gonzales* on the ground that the principal relief sought was compensation for injury to the employment relation. The court declared that "*Gonzales* will at most be limited to its facts." *Id.* at 608. *Compare* Bussy v. Local 3, Plumbers Union, 286 F.2d 165 (10th Cir. 1961) *with* Bussy v. Local 3, Plumbers Union, 412 P.2d 907 (Colo. Sup. Ct. 1966). When *Bussy* was originally heard by the Tenth Circuit, *Borden* had not yet been decided and the expelled member sought only damages. The federal court, following *Gonzales*, sustained judicial jurisdiction. By the time the suit finally worked its way back up to the Colorado Supreme Court, *Gonzales* had been modified by *Borden* and the plaintiff had accordingly amended his complaint to add a demand for reinstatement. However, the state court held that *Gonzales* would not prevent pre-emption because, despite the last minute amendment, the principal relief sought by the plaintiff was still the damage remedy.

37. In Day v. Northwest Div. 1055, 238 Ore. 624, 389 P.2d 43 (1964), a member sued his union for damages in a state court, claiming that the union had maliciously procured his discharge. The court held that the state had no jurisdiction, declaring that "*Gonzales* which may have supported plaintiff's claim has now been substantially modified if not overruled by later cases." See Local 207, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers v. Perko, 373 U.S. 701 (1963); Union of Operating Engineers v. Cassida, 358 S.W.2d 817 (Tex. Civ. App. 1964). However, there is at least one area in which the Supreme Court has revived the *Gonzales* exception and given it new vitality. In Linn v. United Plant Guard Workers, 383 U.S. 53 (1966), the court held in the first of two alternative holdings, that a plant manager's suit for damages against a union, based upon the union's alleged libel of the plaintiff during an organization campaign, was "merely a peripheral concern of the LMRA" and thus, not subject to pre-emption by the NLRB. The court did not cite *Gonzales* to support its holding but relied upon the dictum in *Garmon* which exempted matters only peripherally concerned with the LMRA from the general pre-emption rule therein formulated. Since *Linn* did not involve union-member relations, it does not directly affect the disposition of the principal case. However, it does indicate that the exception which originated in *Gonzales* may not be as narrowly limited as the *Borden* decision appeared to suggest. *Compare* Linn v. United Plant Guard Workers, *supra*, *with* Blum v. International Ass'n of Machinists, 42 N.J. 389, 201 A.2d 46 (1964), wherein the court held that the alleged libelous activity was "not a peripheral concern as in *Gonzales*, even assuming that case to have survived *Borden* and *Perko*."

38. See Mendicki v. UAW, 61 L.R.R.M. 2142 (D. Kan. 1965); Webster v. Midland Elec. Coal Corp., 43 Ill. App. 2d 359, 193 N.E.2d 212 (1963); Goni-Moral v. Marley, 50 CCH Lab. Cas. ¶ 51226 (N.Y. Sup. Ct. 1964); Young v. United Steelworkers, 420 Pa. 132, 216 A.2d 500 (1966); McCaul v. Local 107, Teamsters Union, 47 CCH Lab. Cas. ¶ 18137 (Pa. C.P. 1963); Tully v. Fred Olson Motor Serv., 27 Wis. 2d 476, 134 N.W. 2d 393 (1965); *cf.* Mengus v. A.C.E. Freight, 53 CCH Lab. Cas. ¶ 11237

Thus, it could be reasonably argued that, as an exception to the *Garmon* rule, *Gonzales* has been limited to its facts.[39] However, such a conclusion is not a prerequisite for determining the inapplicability of the exception to the principal case. It is sufficient to say that when, as in the principal case, the sole relief sought by an aggrieved individual against his wrongdoing union is monetary compensation for injury to his employment status, the *Gonzales* exception is inapposite.

Since the Missouri Supreme Court was apparently unjustified in relying upon *Gonzales* to sustain judicial jurisdiction, the question of the proper forum for the plaintiff's suit remains open. The *Miranda* theory would seem to point to exclusive Labor Board jurisdiction. However, it is doubtful, at least from the standpoint of the individual, that a strict rule of pre-emption in all fair representation cases would be desirable.[40] Of course, the NLRB does offer several significant advantages: it is less expensive, more expedient and probably more expert; the common worker, unable to bear the expense of a lengthy judicial struggle, will be well served by an available administrative forum. On the other hand, administrative relief is contingent upon the General Counsel's discretion in issuing a complaint and, if relief is obtained, it will be narrowly restricted to an award for back pay. The opportunity offered by the judicial

(Ohio App. 1966). *Compare* the principal case *with* Owens v. Vaca, 51 CCH Lab. Cas. ¶ 19613 (Mo. Ct. App. 1965) (lower court decision in the principal case) wherein the *Gonzales* rationale was found inappropriate in light of the *Borden* modifications. See Note, 34 U. Mo. K.C.L. Rev. 121 (1966), in which the lower court decision is noted with approval. *But see* Bailer v. Local 470, Teamsters Union, 400 Pa. 188, 166 A.2d 343 (1960), cited by the Missouri Supreme Court to support its decision in the principal case. *Bailer* is now doubtful authority since it was decided prior to *Borden* and has apparently been disapproved in its own state. See Young v. United Steel Workers, 420 Pa. 132, 216 A.2d 500 (1966); McCaul v. Local 107, Teamsters Union, 47 CCH Lab. Cas. ¶ 18137 (Pa. C.P. 1963). Moreover, the *Bailer* court did not expressly base its decision upon *Gonzales* but relied on another Pennsylvania case to support its decision. Falsetti v. Local 2026, UMW, 400 Pa. 145, 161 A.2d 882 (1960). *Falsetti* had dicta to the effect that a member may sue his union for breach of the duty of fair representation in a state judicial forum. The case was subsequently retried in the federal courts on a fair representation theory. There, judicial jurisdiction was upheld not on the *Gonzales* rationale, but on the basis that the suit fell within § 301 of the LMRA. Falsetti v. Local 2026, UMW, 355 F.2d 658 (3d Cir. 1966); see Comment, 26 U. Pitt. L. Rev. 593, 616-17 (1965); notes 43-50 *infra* and accompanying text.

39. Some support for this contention may be found in the language of the Supreme Court. See Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96, 105 (1963), wherein the court described *Borden* as having held that "*Garmon* pre-empted the field where employees were suing unions for damages arising out of practices that were arguably unfair labor practices. . . ." Local 100, Plumbers Union v. Borden, 373 U.S. 690, 698 (1963) (Douglas, J., dissenting). See also Blumrosen, *supra* note 5, at 1519-20, suggesting that later developments have rendered the reasoning in *Gonzales* "obsolete"; Note, 40 Notre Dame Law. 112 (1964).

40. For discussion of the relative merits of the judicial and administrative remedies, see, *e.g.*, Blumrosen, *supra* note 5, at 1470-72, 1485, 1497, 1514-15; Cox, *supra* note 5, at 172-73; Rosen, *Individual Worker in the Grievance Procedure, Still Another Look at the Problem*, 24 Md. L. Rev. 233, 286-91 (1964).

forum for a worker to control his own suit, to plead his case to a jury, and to obtain an unlimited damage remedy may be very attractive to one who is seriously injured by his union's conduct. In the principal case, for example, a sympathetic jury awarded the plaintiff his full back pay plus $3,300 in punitive damages. Such a result would have been impossible if the NLRB were accorded exclusive jurisdiction.

Since both the administrative and the judicial forums afford certain unique advantages to the aggrieved individual, it would appear that a desirable solution to the principal question would be concurrent jurisdiction in cases involving questions of fair representation. Such a solution can be achieved only if the *Miranda* theory is retained as a source of Labor Board jurisdiction but is stripped of its potential authority as a mandatory pre-emptive force. In order to reach this result, it would be necessary to bring fair representation actions within an exception to the general pre-emption rule. The Missouri Supreme Court attained precisely this end in the principal case through reliance on the *Gonzales* exception. However, application of *Gonzales* in this manner is not only legally questionable, as was demonstrated above, but it is also undesirable as a matter of policy. The doctrine of pre-emption was designed to eliminate the assertion of jurisdiction by diverse state judicial forums which could frustrate the evolution of a uniform federal labor law. Under the *Gonzales* exception, the state courts are free to apply their own law.[41] It is true, of course, that if section 9 of the NLRA is regarded as the exclusive source of the duty of fair representation, federal law would govern in all forums. However, there is no certainty that a particular state court will not view the duty in terms of common law concepts of tort or contract.[42]

The recent decision of the Supreme Court in *Humphrey v. Moore*[43] suggests a possible solution to the principal problem which would assure the aggrieved individual access to both the administrative and the judicial forum while facilitating the development of a uniform federal labor policy. In *Humphrey*, an employee, threatened with discharge as a result of an agreement between his union and employer by which the seniority rights of employees of two

41. See Local 100, Plumbers Union v. Borden, 373 U.S. 690 (1963); Local 207, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers v. Perko, 373 U.S. 701 (1963).

42. See note 4 *supra*. In *Borden*, for instance, the injured member based his damage action against the union on state law and the state court relied on *Gonzales* to sustain judicial jurisdiction. On appeal, the Supreme Court indicated that such an application of state law was undesirable and, consequently, narrowed *Gonzales* to its present limited status. It is, in fact, unclear what law the Missouri court administered in the principal case. There was no mention of § 9 or of the duty of fair representation. In *Gonzales*, which the court found to control its decision, the state court had construed the member's suit to be based on a common law contractual theory and had applied state law.

43. 375 U.S. 335 (1964).

merging companies were to be dovetailed, charged that the union and employer had exceeded the powers granted them by the collective bargaining contract in negotiating the agreement and that the union, by acting dishonestly and discriminantly in the bargaining process, had violated its duty of fair representation. The Court observed that there are differing views as to whether breach of the duty of fair representation is an unfair labor practice but upheld its jurisdiction over the fair representation claim on the ground that even if a section 8 violation were present, the complaint stated a cause of action under section 301 of the LMRA and was, therefore, within an established exception to the general pre-emption doctrine.[44] Section 301 authorizes federal jurisdiction over suits for violation of contracts between a labor union and employer.[45] Thus, construing *Humphrey* most broadly, it could be inferred that the duty of fair representation is derived from the collective bargaining agreement and that, consequently, any breach of the duty will give rise to a section 301 action.[46] Since all section 301 actions, whether in a state or federal court,[47] are exclusively subject to federal law,[48] such a construction of *Humphrey* would represent an attractive solution to the principal problem. A fair representation suit could be maintained in a judicial forum, despite the existence of concurrent jurisdiction in the NLRB, and the decision of the court would necessarily be rendered in accord with federal labor policy. One federal district court has adopted this approach to sustain judicial jurisdiction in a situation similar to the principal case, holding that an unfair representation suit by an employee, based upon his union's refusal to process a grievance, states a claim under section 301.[49]

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44. See note 23 *supra* and accompanying text.

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

46. The majority opinion did not expressly advance the theory that the duty of fair representation is derived from the collective bargaining agreement. However, the concurring opinion of Mr. Justice Goldberg seemed to indicate that this may have been the majority rationale. Mr. Justice Goldberg, arguing that the plaintiff's claim could not be brought under § 301, asserted that the duty of fair representation is not derived from the collective bargaining agreement but implied from the federal labor statutes. He then proceeded to the merits of the case, thereby indicating that he does not consider *Miranda* to have pre-emptive effect. On the other hand, Mr. Justice Harlan, who agreed that no § 301 cause of action was stated, refused to consider the merits and suggested that the case be set for reargument on the pre-emption question. For strong criticism of the *Humphrey* decision, see Van Zile, *The Componential Structure of Labor Management Relations*, 43 U. DET. L.J. 321, 341-53 (1966).

47. It is established that state courts have concurrent jurisdiction with the federal courts to hear § 301 actions, Dowd Box v. Courtney, 368 U.S. 502 (1961), and that an individual may sue under § 301 to enforce the collective bargaining agreement, Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

48. Local 174, Teamsters Union v. Lucus Flour Co., 369 U.S. 95 (1962); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

49. Mandel v. Local 707, Teamsters Union, 246 F. Supp. 805 (S.D.N.Y. 1964); *cf.* Falsetti v. Local 2026, UMW, 355 F.2d 658 (3d Cir. 1966); Freedman v. National Maritime Union, 347 F.2d 167 (2d Cir. 1965); Tully v. Fred Olson Motor Serv., 27

This broad construction of *Humphrey*, bringing all fair representation actions under section 301, may not be totally warranted. The *Humphrey* court stressed heavily two factual matters which, if construed as limitations on the application of section 301 to fair representation cases, would significantly narrow the scope of the decision and would, arguably, preclude use of a section 301 theory to sustain judicial jurisdiction in the principal case. First, the court appeared to deem it necessary that the employer be implicated in the union's breach of duty.[50] However, the strained manner in which the court ultimately found employer complicity would seem to render this requirement insignificant; the employer was concededly a neutral in the union-employee dispute, was free from any charge of actual fraud, and was connected to the union's alleged misconduct only by the fact that he had continued to negotiate the agreement while on constructive notice of the union's bad faith.[51] It would appear difficult for the employer to escape this type of implication by any behavior short of clear opposition to the union's position.[52] The second factual matter stressed by the court was the existence of an actual breach of a specific provision of the collective bargaining contract brought about as a result of the union's breach of duty.[53] The court pointed out that the unfair representation, if proved, would render the dovetailing agreement a nullity and make any displacement of employees pursuant to the agreement a breach of contract. However, if the unfair representation alone is not a breach of contract, it hardly seems reasonable that a resultant or associated contract violation by the employer should transform the union's conduct into a proper subject for a section 301 action. Because of these unresolved factors, the precise scope of the *Humphrey* decision is presently unclear and will remain so until the Supreme Court faces a situation, like that in the principal case, in which an employee sues his union for breach of the duty of fair representation

Wis. 2d 476, 134 N.W.2d 393 (1965). See also Zeaner v. Local 107, Teamsters Union, 234 F. Supp. 901 (E.D. Pa. 1964); Addeo v. Dairymen's League, 47 Misc. 2d 426, 262 N.Y.S.2d 771 (Sup. Ct. 1965).

50. One federal district court has expressly adopted the view that a fair representation claim may not be based on § 301 if the employer is not joined in the action. Mendicki v. UAW, 61 L.R.R.M. 2142 (D. Kan. 1965). *But see* Mandel v. Local 707, Teamsters Union, 246 F. Supp. 805 (S.D.N.Y. 1964); Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining*, 15 HASTINGS L.J. 391, 413-14 (1964); Note, *Section 301 and the Union's Duty of Fair Representation*, 12 U.C.L.A.L. REV. 1238 (1965).

51. The majority opinion in *Humphrey* characterized the employer as considering "the dispute a matter for the union to decide" and Mr. Justice Goldberg in concurrence described the employer as having "not willfully participated in the alleged breach of the union's duty."

52. See Rosen, *supra* note 4, at 413-14.

53. International Ass'n of Machinists v. Sterling, 54 CCH Lab. Cas. ¶ 11430 (8th Cir. 1966), *affirming* Woody v. Sterling Aluminum Prods., Inc., 243 F. Supp. 755 (E.D. Mo. 1965); see Chasis v. Progress Mfg. Co., 54 CCH Lab. Cas. ¶ 11398 (E.D. Pa. 1966); *cf.* Longshoremen v. Kuntz, 334 F.2d 168 (9th Cir. 1964); Fuller v. Local 107, Teamsters Union, 233 F. Supp. 115 (E.D. Pa. 1964).

without joining the employer and without alleging any other breach of contract.[54]

The Supreme Court has granted certiorari in the principal case.[55] In view of the Court's narrow construction of the *Gonzales* exception in *Borden*, it would appear unlikely that the Missouri Supreme Court's broad interpretation of the exception will be approved. If the Court does, in fact, find *Gonzales* inapposite, it will then be faced with the problems raised by the *Miranda* decision. The Court might find that *Miranda* is legally unsound, in which case, the Missouri court's holding would be affirmed for lack of any theory upon which to base pre-emption. On the other hand, if the Court approves *Miranda* and construes it so as to make pre-emption mandatory in all fair representation cases, the Missouri court will necessarily be reversed. If the Court chooses to extend the *Humphrey* decision to its outer limits, bringing all fair representation actions under section 301, then two further alternatives are suggested: The Court could once again avoid passing upon *Miranda* by holding that section 301 creates a judicially cognizable cause of action regardless of the presence or absence of an unfair labor practice; or more satisfactorily, the Court could recognize *Miranda* as a viable source of labor board jurisdiction in fair representation cases but utilize section 301 to give the courts concurrent jurisdiction. The latter solution would provide the aggrieved individual with access to both administrative and judicial forms while assuring that all decisions are kept within a framework of uniform national labor policy.[56]

54. See Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 Mo. L. Rev. 373, 387 (1965).

55. 85 Sup. Ct. 186 (1966). Two distinct issues were certified: (1) whether the NLRB has exclusive jurisdiction over a union member's damage action against union officers; and (2) if the Board does not have exclusive jurisdiction, whether federal law authorizes a court or jury to give damages solely on the basis of testimony going to the merits of the grievance, in the absence of proof of bad faith or discrimination, or whether the courts are limited to directing the grievance to be arbitrated. *Id.* at 1863.

56. There is an alternative approach to the principal case which might arguably be employed to avoid the pre-emption problems created by an analysis in terms of the duty of fair representation. Section 9 of the NLRA provides that any individual employee shall have the right to have grievances adjusted without the interference of the bargaining representative as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement. Read literally, this provision would appear to give the employee an indefeasible interest in the grievance procedure. However, the courts have refused to so construe the section and have consistently denied the individual any right to make an employer hear his grievance or to enforce submission of a grievance to arbitration. See, *e.g.*, Black-Clawson v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962); Palnau v. Detroit Edison Co., 301 F.2d 702 (6th Cir. 1962); Rosen, *Individual Worker in the Grievance Procedure, Still Another Look at the Problem*, 24 Md. L. Rev. 233 (1964); Summers, *supra* note 5. *But see* Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963), wherein the New Jersey Supreme Court held that § 9 does give the individual a right to adjust his grievance, that this right is implicit in the bargaining contract, and that refusal by a union or an employer to honor the right is a breach of the contract giving rise to an action under § 301. If this approach were adopted, a member's suit against his union based upon the union's failure to process his grievance fully or to allow him opportunity to adjust his grievance would be clearly within judicial jurisdiction.