

Duty of Fair Representation

Sec. 301 Breach of Contracts Outline

Labor Law II

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Union vs. Employer (Breach of Contract)

(1) What is the substantive law of Section 301?

Lincoln Mills establishes that **Federal Common Law** governs suits under Section 301. The court needed to interpret Section 301 this way in order for it to be constitutional. Federal jurisdiction extends to federal question or diversity suits; but there is no federal law in Section 301 other than the grant of jurisdiction itself, so court establishes federal common law of the collective bargaining agreement, avoiding the constitutional problem. Most of the rest of this course is the development of the common law of the collective bargaining agreement, usually arising under Section 301.

(2) Where can Section 301 cases be heard?

Charles Dowd Box Co. (cb4-6) held that Sec. 301 does not oust state courts of jurisdiction for suits involving collective bargaining agreements; but *Lucas Flour Co.* (cb4-7) held that federal law must be applied and *Avco Corp.* (cb4-15) held that an action for an anti-strike injunction can be removed to federal court.

(3) Can employer get an injunction against the union?

Sands Manufacturing (cb4-4) holds that Sec. 7 does not protect a strike in breach of a no-strike clause; *Lucas Flour* (cb4-7) holds that a no-strike clause will be presumed when contract is silent; *Gateway Coal* (cb6-1) holds that the agreement to arbitrate and no-strike duty are coterminous; and *Boys Markets* (cb5-1) held that a strike in breach of a no-strike clause over an arbitrable grievance may be enjoined if equity favors the injunction, overruling *Sinclair Refining* (cb4-14), notwithstanding Norris-LaGuardia prohibition on injunctions in labor disputes.

Injunctions in strike cases are very important because damages are hard to collect on and don't help employer at time of unlawful strike.

Note, however, that strikes to protest an unfair labor practice remain protected under

Mastro Plastics (cb4-5). It is unclear whether the union can waive this right.

(4) Can the union get an injunction to force the employer to arbitrate or follow an arbitrator's decision?

This is the central issue of the *Steelworkers* trilogy, and the “kingpin” of Federal Labor Policy—grievance/arbitration as a *quid pro quo* for no-strike promise during the term of the contract. *American Manufacturing Co.* (cb2-1) held that an employer must go to arbitration, even if claim is “patently frivolous” **so long as the claim on its face is governed by the contract**; *Warrior & Gulf Navigation Co.* (cb2-4) established a **strong presumption in favor of arbitrability**; the “*Warrior & Gulf* presumption” says that the party resisting arbitration must present “**forceful evidence**” that the matter was excluded from arbitration; and *Enterprise Wheel & Car Corp.* (cb2-11) established a very limited standard of review for arbitrator's decisions; if the decision “**draws its essence**” from the contract then it should be enforced.

It is important to note that just because the union can force the employer to go to arbitration, the arbitrator can still then rule that the union's claim isn't covered by the contract. So the Supreme Court's treasured “quid pro quo” of arbitration for no-strike promise isn't exactly equal: going to arbitration doesn't necessarily get you anything unless the arbitrator determines that your claim is covered by the contract and that it is meritorious, while the no-strike promise is almost “absolute.”

If the employer resists an arbitrator's award on the basis of “**public policy**,” it must show that the award itself violates an explicit, well-defined, and dominant public policy, under *Misco* (cb3-7). A policy like “not operating dangerous machinery while smoking marijuana” isn't the kind of well-defined explicit policy that will qualify; it must be more like a violation of the Civil Rights Act. *See Also Eastern Associated Coal* (cb3-13) (marijuana/truck driver case, same holding).

Important Quotes

- “It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.” *Lincoln Mills* (cb1-11)
- “Yet, to repeat, the entire tenor of the history indicates that the agreement to arbitrate grievance disputes was considered as quid pro quo of a no-strike agreement.” *Lincoln Mills* (cb1-11).

- “It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.” *American Manufacturing Co.* (cb2-2)
- “For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.” *Warrior & Gulf Navigation Co.* (cb2-5)
- “A collective bargaining agreement is an effort to erect a system of industrial self-government. ...the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government.” *Warrior & Gulf Navigation Co.* (cb2-6)
- “...only improvident, even silly, factfinding is claimed. This is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts.” *Misco* (cb3-9, p[8])

Employee vs. Employer (Breach of Contract)

(1) Can the employee bring a Sec. 301 claim for breach of contract against the employer under a collective bargaining agreement?

There are many obstacles to bringing a breach of contract claim against an employer. The underlying question to all of this is “are there individual rights under a collective bargaining agreement, or only representational rights?”

- A breach of contract is **also** a ULP. Usually, the NLRB has exclusive primary jurisdiction over ULP's under *Garmon* preemption; however, *Vaca v. Sipes* (cb9-4; p [6]) held that a **Sec. 301 claim can be brought directly in federal court**. *Smith v. Evening News* (cb8-6) also noted that even when a breach of contract could be characterized as a ULP, it can still be brought in court.
- Where there is **no exclusive grievance/arbitration provision**, there is apparently **no problem with an individual** bringing a Sec. 301 claim against an employer under *Smith v. Evening News* (cb8-6), although this is extraordinarily rare.
- *Republic Steel Corp. v. Maddox* (cb8-16) held that under an **exclusive** grievance procedure, an employee must **exhaust** that procedure before bringing a Sec. 301 claim.
- Even if the employee exhausts the exclusive grievance procedure, *Vaca v. Sipes* (cb9-

1) still bars the employee from bringing a Sec. 301 claim **unless the union breached its duty of fair representation.**

- If the employee proves that the union breached its duty of fair representation, *Hines v. Anchor Motor Freight, Inc.* (cb9-25) permits the employee to sue the employer, **even if the collective bargaining agreement provides that grievance process shall be “final and binding.”** That is, the **employer** loses the benefit of the finality provision because the **union** breached its duty.

Employee vs. Union (Duty of Fair Representation)

(1) When does a union breach its duty of fair representation to an employee?

Steele v. Louisville & Nashville R.R. (cb7-1) held that invidious discrimination (i.e., racial) breached the duty of fair representation, but did not require the union to desegregate. In *James v. Marinship Corp.* (cb7-9), the California Supreme Court held that a **closed shop** could not also be segregated, which was ultimately codified in the NLRA as Sec. 8(a)(3).

Conley v. Gibson (cb7-13) establishes that the duty of fair representation extends to the administration of the contract as well as negotiation (i.e., grievances). *Humphrey v. Moore* (cb8-9) held that there was no breach of the duty of fair representation just because a union represented employees with antagonistic interests; there must be evidence of deceit, fraud, bad faith, or arbitrary discrimination. *Vaca v. Sipes* (cb9-1) held that the duty is breached only when the union's conduct towards a bargaining unit member is **arbitrary, discriminatory, or in bad faith**. *Retana v. Local 14* (cb10-24), a Circuit Court opinion, held that failure to provide a translator for a non-English speaking union member breached the duty.

(2) Is failing to pursue a meritorious grievance a breach of the duty of fair representation?

Vaca v. Sipes (cb9-1) holds that merely failing to pursue a meritorious grievance is **not** a breach of the duty of fair representation.

(3) Is “grievance swapping” a breach of the duty of fair representation?

In *Local 13, Int'l Longshoremen's & Warehousemen's Union* (cb10-3), a Circuit Court

opinion, the court held that “grievance swapping” was a breach, but this decision may have rested on a bad faith determination. In *Smith v. Hussmann Refrigerator* (cb10-9), another Circuit Court opinion, the court held that pursuing only seniority-promotion grievances and totally ignoring merit-promotion grievances was a breach. *See also* grievance swapping discussion on cb10-7 and 10-8.

(4) Who is responsible for backpay resulting from an employer's breach of contract and a union's breach of the duty of fair representation?

Bowen v. United States Postal Service (cb9-34) held that damages must be apportioned between the employer and the union: the union is liable for any **increase** in lost pay due to its breach; employer should be left in position it would have been in had union not breached the duty of fair representation.

Important Quotes

- “We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, *cf. J.I. Case Co. v. National Labor Relations Board, supra*, 321 U.S. 335, 64 S.Ct. 579, but it has also imposed on the representative a corresponding duty.” *Steele v. Louisville & Nashville R.R.* (cb7-4, p[11])
- “...the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.” *Vaca v. Sipes* (cb9-5, p[9])
- “The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.” *Ford Motor Co. v. Huffman* (cb7-19, p[11])
- The bargaining representative's duty not to draw 'irrelevant and invidious' distinctions among those it represents does not come to an abrupt end, as the respondents seem to contend, with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day

adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. *Conley v. Gibson* (cb7-14, p[9])

- “By virtue of this contractually derived status as the exclusive enforcer of the collective agreement, the union assumes a heavy responsibility to exercise its control on behalf of, rather than against the individual employee. The collective agreement creates rights in the individual employee which are enforceable under section 301. In the absence of a union controlled grievance procedure the individual can sue and enforce his rights in his own behalf. The effect of the contractual provision giving the union exclusive control over the grievance procedure is to deprive the individual of his ability to enforce the contract on his own behalf. The union, having deprived the individual of his ability to enforce his rights, has a special obligation to act on his behalf.” *Smith v. Hussman Refrigerator* (cb10-12, fn8) *citing* Summers position.