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type of test would drastically curtail the authority of the judiciary, it would effectuate the various policy considerations embraced thus far by the Supreme Court in outlining its position on the arbitration process. It would also give the contracting parties the arbitrator's decision for which they have contracted. Finally, it would make the arbitration process a more effective instrument for creating industrial peace with maximum fairness and minimum interruption by forcing the courts to abide by the decision of the arbitrator in all but the most extreme cases.

In dealing with the question of arbitrability, the Supreme Court was able to make its position sufficiently unequivocal to compel the judicial system to yield to the arbitration process.[42] The Court must now make its position on judicial review of arbitration awards similarly clear and unequivocal. It is incumbent upon the Supreme Court to effectuate more fully the policies it announced in the *United Steelworker* cases by limiting arbitration reviewability along the lines indicated above.

Labor Law: Union Member Expelled for Failure To Comply with Union Exhaustion of Remedies Rule

Plaintiff filed an unfair labor practice charge with the National Labor Relations Board, ignoring the union's constitutional provision requiring members to exhaust intraunion remedies before resorting to tribunals outside the union. The General Counsel of the N.L.R.B. dismissed the complaint. Plaintiff was then expelled by the union for failure to comply with this provision. Plaintiff subsequently initiated a proceeding with the N.L.R.B. claiming that the union had violated section 8(b)(1)(A) of the Labor-Management Relations Act[1] by coercing him in the exercise of rights guaranteed by section 7 of the Act. The Board found the union guilty of the alleged violation. On appeal of the Board's order, the federal circuit court denied the Board's

42. While the judiciary uniformly followed the Supreme Court's directive on arbitrability, its compliance was not always gracious. For an example of one of the more spirited protests see Volunteer Elec. Cooperative v. Gann, 46 L.R.R.M. 3049, 3056 (Tenn. Ct. App. 1960).

1. Labor-Management Relations Act § 8(b)(1)(A), 29 U.S.C. § 158 (b)(1) (1964), provides in part:

> It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of their rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . . .

petition for enforcement *holding* that unions may require members to exhaust reasonable hearing procedures for four months and that expulsion of members for failure to comply with such requirement is permitted by section 8(b)(1)(A) of the L.M.R.A. and section 101(a)(4) of the Labor-Management Reporting and Disclosure Act.[2] *Marine & Shipbuilding Workers v. NLRB*, 379 F.2d 702 (3d Cir.), *cert. granted*, 36 U.S.L.W. 2008 (1967).

Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act gives a union member the right to institute court or administrative agency action subject to the provision that he may be required to exhaust reasonable intraunion hearing procedures, not to exceed a four-month lapse of time.[3] The courts have disagreed as to the proper interpretation of this section. For example, in *Smith v. General Truck Drivers Union, Local 467*,[4] plaintiff, who was issued a withdrawal card by the Local because he no longer worked within its jurisdiction, later applied for and was denied reinstatement. He bypassed available union appellate procedures, claiming they would be "futile" due to union prejudice, and filed suit in federal district court alleging that the union had unjustly refused to reinstate him. The court dismissed the action as premature, interpreting section 101(a)(4) as directing the *courts* to require the exhaustion of four months of appeals as an absolute prerequisite to suit in federal court.[5] On the other hand, the court in *Sheridan v. United Brotherhood of Carpenters, Local 626*[6] suggested that section 101(a)(4) provides that the *union* can require exhaustion of four

2. The Labor-Management Reporting and Disclosure Act of 1959 § 101(a)(4), 29 U.S.C. § 411(a)(4) (1964), provides in part:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency . . . : *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations . . . .

3. *Id.*

4. 181 F. Supp. 14 (S.D. Cal. 1960). For other cases dealing with this problem, *see, e.g.*, Long Island City Lodge 2147 v. Railway Express Agency, Inc., 217 F. Supp. 907 (S.D.N.Y. 1963); Mendez v. District Council for Ports, 208 F. Supp. 917 (D.P.R. 1962); Acevedo v. Bookbinders Local 25, 196 F. Supp. 308 (S.D.N.Y. 1961).

5. It is difficult to understand how the court could have interpreted the permissive phrase "may be required" in the proviso to § 101(a)(4) to impose an absolute duty upon the courts to demand four months exhaustion of union remedies before hearing a case.

6. 306 F.2d 152 (3d Cir. 1962); *accord*, Harris v. International Longshoremen's Ass'n, Local 1291, 321 F.2d 801 (3d Cir. 1963); Ryan v. International Bhd. of Elec. Workers, 241 F. Supp. 489 (N.D. Ill. 1965), *aff'd*, 361 F.2d 942 (7th Cir.), *cert. denied*, 385 U.S. 935 (1966).

months of hearing procedures, and that courts and the Board are bound to require compliance with these exhaustion requirements. However, a court may at any time review a case to determine whether or not such hearing procedures are reasonable. If it is determined that they are unreasonable, the court may hear the case prior to the exhaustion of the four months of appeals.

Two further decisions have had a significant impact in this area. The district court in *Detroy v. American Guild of Variety Artists*[7] dismissed as premature plaintiff's charge that the union had unjustly disciplined him because he had not exhausted four months of available union hearing procedures. On appeal the circuit court reversed,[8] granting an injunction and damages, reasoning that section 101(a)(4) was directed to the courts and the Board, enabling them, not the union, to require exhaustion of remedies for a maximum period of four months. The court *may*, in its discretion, require exhaustion of remedies for a maximum period of four months, but after that period it must accept jurisdiction. In *Local 138, Operating Engineers v. NLRB (Skura)*,[9] the Board was concerned with whether the union could punish[10] members for filing unfair labor practice charges with the N.L.R.B. before exhausting intraunion remedies. Admitting that section 8(b)(1)(A) was not intended to interfere with the union's administration of internal affairs,[11] the Board held that union rules which limited a member's access to the N.L.R.B. were against public policy and therefore not internal affairs protected by the proviso to section 8(b)(1)(A). Thus, the Board construed sections 7 and 8(b)(1)(A) as granting an absolute right of access to the Board, free from union restrictions, to union members who felt that any right protected by the Act had been violated.[12]

7. 189 F. Supp. 573 (S.D.N.Y. 1960), *rev'd*, 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961).

8. *Accord*, Burris v. International Bhd. of Teamsters, 224 F. Supp. 277 (W.D.N.C. 1963); Deluhery v. Marine Cooks Union, 199 F. Supp. 270 (S.D. Cal. 1961).

9. 57 L.R.R.M. 1009 (1964).

10. The question of forms of punishment permitted under § 8(b)(1)(A) is dealt with by the Supreme Court in NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175 (1967).

11. The Board acknowledged an earlier opinion, Local 283, UAW, 145 N.L.R.B. 1097 (1964), which held that unions were not prohibited by § 8(b)(1)(A) from fining members who violated lawfully established production quotas for this was an internal disciplinary procedure with which § 8(b)(1)(A) was not concerned.

12. The Board granted a cease and desist order against further union restraint without ever finding that the conduct for which the plaintiff was originally fined was explicitly protected by § 7. *Accord*,

The court in the instant case criticized as unjust the interpretation by prior courts that section 7 provides a general right of access to the Board for union members alleging any unfair labor practice under the Act. Indeed, section 7 says nothing about a right to file charges with the Board. The court determined that section 8(b)(1)(A) protected only those union members who were coerced in the exercise of rights explicitly guaranteed by section 7. Furthermore, even if a section 7 right has been violated, the union may require its members to allow the union a reasonable time to correct its mistakes, for such rules are protected by the proviso[13] to section 8(b)(1)(A). Thus, only by alleging an act which violates section 7 and exhausting union procedures for a reasonable time does a union member acquire a right of access to the Board. This interpretation decreases the number of cases before the Board and does not impair the right of the member ultimately to bring charges before the Board.

Both the court in *Marine* and the Board in *Skura* attempted to strengthen their interpretations of section 8(b)(1)(A) by illustrating its compatibility with their interpretation of section 101(a)(4). However, this technique is unpersuasive, for it calls into question the proper interpretation of section 101(a)(4), which is equally unsettled. The wording of both statutes gives little assistance,[14] and the legislative histories provide a basis

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Roberts v. NLRB, 350 F.2d 427 (D.C. Cir. 1965).

The Board noted that, in order to keep channels to the Board open, unions must not be allowed to restrict the rights of members to approach the Board for it is unable to initiate its own proceedings. It drew an analogy between the regulations imposed upon the conduct of employers and unions, holding that a union violates § 8(b)(1)(A) by restricting a member's access to the Board, just as an employer violates §§ 8(a)(1) and 8(a)(4) by restricting an employee's access to the Board. However, the Supreme Court recently rejected this analogy by holding that except to regulate certain types of union organizational activities and arbitrary actions by union officials, § 8(b)(1)(A) was not meant to govern the relationships between the members and the union. NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, 191-95 (1967). *But see id.* at 208-12 (dissent).

13. The court recognized the natural tension existing between the text of § 8(b)(1)(A) and the proviso. For example, if the proviso were given literal interpretation, unions could establish a rule forbidding union members from ever filing unfair labor practice suits with the N.L.R.B. simply by providing that infraction of the rule would result in loss of membership. The instant court noted that this type of union rule would obviously violate the purpose of the Act and would therefore be void.

14. In support of its interpretation of § 8(b)(1)(A) the *Marine* court noted that proposed § 8(c)(5) which forbade an organization "to

for several interpretations of each section.[15] However, the L.M.R.D.A. statement of public policy[16] and the legislative history of the Act[17] indicate that congressional concern over union abuses of union members was the chief reason for the L.M.R.D.A. This would suggest that the proper interpretation of section 101(a)(4) should, in cases of doubt, preserve the interests of the union member before those of the union. The instant court's interpretation of section 101(a)(4) permits the court to require further exhaustion of remedies even after four months have elapsed but only if the union appellate procedure is reasonable. Proponents of this rule frequently cite with approval the fact that it places no time limitations upon the court's power to require exhaustion. An intelligent application of the exhaustion rule[18] would reduce the number of cases plaguing the courts, provide the courts with the union's better reasoned interpreta-

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fine or discriminate against any member, or subject him to discipline or penalty, on account of his having criticised, complained of, or made charges or instituted proceedings against, the organization or any of its officers. . ." was considered but deleted from the first Act.

In Roberts v. NLRB, 350 F.2d 427 (D.C. Cir. 1965), the court suggested that proposed § 8(c)(5), which was much broader than its counterpart § 8(a)(4), was dropped because of its broadness and because Congress felt that discipline of union members for failure to exhaust intraunion remedies was already prohibited by § 8(b)(1)(A). 350 F.2d at 428 n.1.

15. For a comprehensive legislative history of the Labor-Management Reporting and Disclosure Act, see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851 (1960); Cox, *Internal Affairs of Labor Unions under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819 (1960); Rothman, *Legislative History of the "Bill of Rights" for Union Members*, 45 MINN. L. REV. 199 (1960).

16. 29 U.S.C. § 401 (1964).

17. "Improper practices," mentioned in the policy statement as one of the reasons for the Act, refer to the widespread corrupt labor practices discovered by the Senate Select Committee on Improper Activities in the Labor Management Field, established by S. RES. 74, 85th Cong., 1st Sess., 103 CONG. REC. 1264 (1957).

18. The exhaustion rule, referred to by one writer as "[o]ne of the favorite myths in the field of labor law," is the judicial policy of requiring union members to exhaust union hearing procedures before consenting to hear a case. Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1086 (1951).

Courts, however, have been hostile to the rule because it oftentimes would result in undue hardship to the union member if left undisturbed. In their efforts to protect the union members, courts have almost completely vitiated the rule with exceptions. Several of the most frequently utilized exceptions to the exhaustion rule are excessive delay, futility of appeal, and irreparable injury resulting from exhaustion. For a general discussion of these problems see Summers, *supra* at 1086-92; Vorenberg, *Exhaustion of Intraunion Remedies*, 2 LAB. L.J. 487, 492-93 (1951).

tions of the issues, and encourage the development of the union's judicial process by requiring exhaustion of remedies in all cases where it is practicable.[19]

Critics point out that the *Marine* interpretation of section 101(a)(4) allows unions to enforce exhaustion requirements, which may tend to subvert the policy of the exhaustion rule by prompting hostile courts to bring even more cases within one of the exceptions to the rule rather than allowing the union to discipline a member for violating exhaustion requirements.[20] A suggested remedy to this problem would be a stricter application of the exhaustion rule coupled with a more liberal exercise of the court's pendente lite injunction powers, thus holding in abeyance unduly harsh sanctions imposed by unions until the union appellate procedure has been exhausted. This approach would, under the *Marine* holding, eliminate a number of suits from the dockets while still preserving the right of union members to a fair hearing of their complaints.[21]

Further criticism of *Marine* arises from the hypothesis that where, through judicial determination, union hearing procedures are deemed to be reasonable and, as such, may result in the union member's expulsion,[22] the aggrieved member will be reluctant to bring his objections to court for he will have to risk his membership on the outcome of a judicial decision based on the inherently vague balancing of interests test which recent courts have adopted.[23] However, such a result would be directly contrary

19. *See* Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 207 (1960).

20. *See, e.g., Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 985, 1069-80 (1963); Comment, *Exhaustion of Remedies in Private, Voluntary Associations*, 65 YALE L.J. 369 (1956).

21. This solution, however is not a complete panacea for it would work effectively only in cases where the courts had confidence that an injunction would eliminate the hardships. Many judges in certain circumstances would be hesitant to adopt this suggested method, realizing that it would prove to be an inadequate safeguard against many subtle, hard to prove discriminations. Summers, *supra* note 19, at 178.

22. The United States Bureau of Labor Statistics reports that out of 158 unions studied, 64 unions contained provisions in their constitutions providing for sanctions to be applied to union members who fail to exhaust union hearing procedures before taking their claims to outside tribunals. DEP'T LABOR BULL. No. 1350, DISCIPLINARY POWERS AND PROCEDURES IN UNION CONSTITUTIONS 28 (1963) [hereinafter cited as DEP'T LABOR BULL. No. 1350].

23. *See, e.g.*, Libutti v. Di Brizzi, 337 F.2d 216 (2d Cir. 1964); Farowitz v. Associated Musicians, Local 802, 330 F.2d 999 (2d Cir. 1964); Detroy v. American Guild of Variety Artists, 189 F. Supp. 573 (S.D.N.Y. 1960), *rev'd*, 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961).

to the purposes of the L.M.R.D.A., both because it limits a union member's access to the courts and because it discourages the development of sound union hearing procedures.[24]

The *Detroy* interpretation of section 101(a)(4) seems to present a more reasonable alternative for it does not force a union member to risk his membership in order to have his rights determined. Furthermore, doubt has been cast upon the legitimacy of arguments that the *Detroy* interpretation unnecessarily deprives unions and the courts of the benefits thought to result from application of the exhaustion rule. There is no great risk of a sudden flooding of court dockets under the *Detroy* doctrine for both the expense of court suits and the union member's unfamiliarity with court proceedings will tend to keep members from filing suit outside of the union.[25] The danger of the courts' misconstruing union rules and constitutions is minimal. Also, recent studies indicate that the guaranteed federal forum provided by the *Detroy* decision has prompted the unions to trim appellate procedures to less than four months instead of discouraging their development.[26]

Although the *Marine* court correctly concluded that section 8(b)(1)(A) extends protection only to plaintiff's alleging violations of section 7, its decision that union rules requiring a reasonable period of exhaustion are protected by the proviso to section 8(b)(1)(A) is questionable. The proviso limits the substantive rights guaranteed by section 7 with the qualification that they are not to be interpreted to interfere with the union's right to prescribe its own rules relating to membership. However, because the Board is unable to initiate its own proceedings, section 10 by implication confers upon the union member a pro-

See also Note, *The Labor Bill of Rights and the Doctrine of Exhaustion of Remedies—A Marriage of Convenience*, 16 HASTINGS L.J. 590 (1965).

24. A solution to this problem was suggested in Ryan v. International Bhd. of Elec. Workers, 361 F.2d 942 (7th Cir.), *cert. denied*, 385 U.S. 935 (1966). Although apparently adopting the Sheridan v. United Bhd. of Carpenters, Local 626, 306 F.2d 152 (3d Cir. 1962), interpretation of § 101(a)(4), the *Ryan* court reasoned that Congress could not have intended that a union member be punished for exercising his right to a judicial determination of whether the procedures available were unreasonable, thus relieving him of the burden of complying with the union's exhaustion requirement. 361 F.2d at 946. However, this solution arguably does not comply with the words of the statute, for by dismissing the case the court is saying that the union procedures are reasonable. It follows that the union member has violated the rule requiring exhaustion of four months of reasonable hearing procedures.

25. Vorenberg, *Exhaustion of Intraunion Remedies*, 2 LAB. L.J. 487, 494 (1951).

26. DEP'T LABOR BULL. No. 1350, at 156-57.