CAN UNIONS WAIVE INDIVIDUAL EMPLOYEES' CLAIMS OR WHOSE RIGHTS ARE THEY ANYWAY?

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I. INTRODUCTION

A body of law is beginning to develop in the context of plant closings and shutdowns that is very different from the viewpoint of individual employees in unionized workplaces. Employers and unions are being permitted effectively to divest employees of any right to challenge such closings or shutdowns by executing a "Plant Clos Agreement" that allegedly supersedes the collective bargaining agreement. Some such agreements may allow the employer and union to agree to a broad waiver of potential statutory claims that may have existed against the employer and union arising out of the plant closing.

Employees adversely affected by a plant closing or shut down have a wide range of potential claims against their employer and/or union. Perhaps the most likely claims by the employees include allegations of discrimination and ERISA violations in the employer's decision to select a particular plant to close. In addition, there may be limitations upon the employer's right to close a facility contained within the Collective Bargaining A
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Historically, unions have not represented their individual members in statutory age discrimination or claims, and other possible claims against an employer. Those types of claims have largely been handled by attorneys pursuing those causes of action independent of the grievance procedure. Thus, union representatives little or no experience with regard to those claims, and yet at times agree to broad releases of claims in Plant Agreements that divest employees of their rights under a wide variety of federal and state statutes.

Courts have also permitted unions to effectively avoid liability for a breach of the duty of fair representation by entering into Plant Closing Agreements because Section 301 claims require proof of a violation of a collective bargaining agreement. Some courts have held that, since a Plant Closing Agreement purports to supersede the collective bargaining agreement, no such Section 301 Claim can be brought.

While unions generally have an interest in protecting their members in plant closing situations, there times when a union has no such interest either for financial reasons or because of relationship issues with the employer. In these circumstances, employees must be very wary of the Union's conduct in regard to a plant Closing Agreements, and a review of basic duty of fair representation law.

II. Sample Case Law - Pro Union and Employer - Under Plant Closing Agreements

A. Plant Closings

The Court of Appeals for the Sixth Circuit has made it very clear that courts should generally not evaluate the legitimacy of closing agreements, even when they supersede prior collective bargaining agreements. In Teledyne, Inc., 21 F.3d 1381, 146 L.R.R.M. 2288 (6th Cir. 1994), the court stated: "[A] district court lack[s] jurisdiction under § 301(a) over questions of the validity of collective bargaining contracts." 126 L.R.R.M. citing Heussner v. National Gypsum, 887 F.2d 672, 676, 676, 132 L.R.R.M. 2726, 2729 (6th Cir. 1989). The court also held that "[b]ecause the [Plant Closing] Agreement superseded the... collective bargaining agreement there was no breach...that would support a §301 claim [against the company]." 146 L.R.R.M. at 2291. Findi
valid "Plant Closing Agreement precludes plaintiffs' §301 claim against [the company]," Id., the Court held that
§301 claim against the Union as part of the plaintiffs' hybrid claim, "must also be dismissed because... plaintiff
cannot satisfy the part of a §301 test requiring a showing of a breach [by the company] of a collective bargai
agreement." Id. at 2292.

These decisions are the natural development of the fair-representation law that has been developed over
years by the Supreme Court and the Sixth Circuit. The Supreme Court has held that a union is not obligated to pursue every grievance to arbitration (Vaca v. Sipes, 386 U.S. 191 (1967). In Int'l Brotherhood of Electrical Works v. Foust, 442 U.S. 42, 51 (1979), it held that "union dis
essential to the proper functioning of the collective bargaining system." Id. The Supreme Court has extended
same reasoning to the collective-bargaining process, holding that a union necessarily has a wide range of dis

The range of union discretion in the typically-difficult plant shutdown situation becomes even broader it
should be noted that the shutdown of an operation by an employer is not inherently unlawful, either as a labor practice or otherwise. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). In the case of Fr:
Magic Chef-Food Giant Markets, Inc., 324 F.2d 853 (1963), the Sixth Circuit discussed a plant closing situa
detail. The Court stated:

The question then arises as to whether the collective bargaining agreement, which is the subject of this action, is a contract of employment. In J.I. Case Co. v. NLRB, 321 NLRB, 321 U.S. 332, the Court said, at p. 334, 14 LRRM 501:
"Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment."
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Rights of employees under a collective bargaining agreement presuppose an employer-employee relationship. A collective bargaining agreement, in ordinary usage and terminology, does not create an employer-employee relationship nor does it guarantee the continuance of one. Employees' rights under such a contract do not survive a discontinuance of business and a termination of operations.

54 LRRM at 2760

The Fraser case involved a collective bargaining agreement with a management rights clause which contained no express "provision for or reservation of the right to discontinue business."

The Court found that, absent an express limitation on the right to discontinue business, that right was contained in the general language of the clause.

We agree with the statement of the trail judge: "While it is true that a management rights clause cannot be used to destroy rights granted by other provisions, it is also true that the clause is never intended as a comprehensive enumeration of the rights of management whose effect is to forfeit by silence any rights not expressly reserved. This would place an intolerable burden upon the draftsman of the agreement. Its operation is the reverse of that proposition."

There is no merit to the argument of the appellant that because the Company was not given the express right to discontinue operations in this clause of the contract the right did not exist.

54 LRRM at 2759

The same holding was reached in Wien Air Alaska, Inc. v. Bachner, 865 F.2d 1106 (9th Cir. 1989) which stated:

Further, it is well established that a collective bargaining agreement cannot bind an employer to continue in business. "Collective bargaining ... results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone." J.I. Case Co. v. NLRB, 321 U.S. 332, 334-35, 64 S. Ct.

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1. "ARTICLE X. MANAGEMENT. The management of the works, the direction of the working forces and affairs of the Company, including the right to hire, suspend or discharge for cause, and the right to relieve employees from duty because of lack of work, or other legitimate reasons, such as material shortage, failure to observe shop rules and regulations, machine breakdowns, are vested exclusively in the Company; provided that this will not be used for the purpose of discrimination against any member of the Union, and provided further, that the matter of relieving employees from duty because of lack of work and rehiring shall be in accordance with Article VIII covering seniority; provided that the right to rehire, suspend or discharge for cause shall be subject to Article IX.

54LRRM at 2759
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576, 578-79, 88 L.Ed 762 (1944; see also Fraser v. Magic Chef-Good Giant Markets, Inc. 324 F.2d 853 (6th Cir. 1963).
865 F.2d 1106 at 1112

The Fraser decision was followed in Wimberly v. Clark Controller Company, 364 F.2d 225 (1996), where the Sixth Circuit held that an employer did not violate its collective bargaining agreement by closing its Cleveland, Ohio, plant and transferring operations previously performed there to a South Carolina plant. The Court stated:

364 F.2d at 228

The Fraser rationale was also followed by Abbington v. Dayton Malleable, Inc., 561 F. Supp. 1290 (holding that an employer did not breach its collective bargaining agreement by closing its Columbus, Ohio plant before the expiration of that agreement, and that the union representing employees did not breach its duty of representation by negotiating a closing agreement. The Court stated:

It is clear, however, that neither the collective bargaining agreement dated December 26, 1988, nor the Memorandum of Agreement required DMI to keep the Columbus Foundry open. The seminal case in this area is the Sixth Circuit's decision in Fraser v. Magic Chef-Food Giant Markets, Inc., 324 F.2d 853 (1963). The facts of the Magic Chef case parallel the facts of this case very closely. In Magic Chef the company and union entered into a new collective bargaining agreement when the company experienced financial difficulties. This new agreement superseded the old agreement. Prior to the expiration of the new agreement, the company closed its plant. The employees sued claiming the company had an obligation to continue operations for the duration of the new collective bargaining agreement. The Sixth Circuit rejected plaintiff's claims noting that an employer has the right to cease operations even when business is discontinued during the life of a collective bargaining agreement. Magic Chef, 324 F.2d at 855-6. See also Wimberly v. Clark Controller Co., 326 F/2d 225, 228 (6th Cir. 1966); Heheman v. E.W. Srippps Co.,
III. HOW EMPLOYEES CAN CHALLENGE RELEASES IN PLANT CLOSING AGREEMENTS

In order for an employee to challenge a release of claims contained in a plant closing agreement, the employee must challenge the Union's right to enter into such an agreement. Such challenges generally involve that the union breached its duty of fair representation. To do so, the employee should bring a hybrid Section 301 claim and a Section 9(a) claim.

A. Hybrid Section 301 Claim

Under a hybrid Section 301 claim, Plaintiffs must establish a violation of the collective bargaining agreement by the Employer and a breach of the Union's duty of fair representation. Hines v. Anchor Motor Freight, Inc. U.S. 554, 570 (1976); Walk v. P.I.E. Nationwide, Inc., 958 F.2d 1323, 1326 (6th Cir. 1992). To prove a breach of duty of fair representation, Plaintiffs must show that the Union's actions were either arbitrary, discriminatory or in bad faith. Dushaw v. Roadway Express, 66 F.3d 129 (6th Cir. 1995). The standard is a tripartite one:

The three named factors are three separate and distinct possible routes by which a union may be found to have breached its duty. In other words, a plaintiff need only show that the union's actions could be characterized in any one of these three ways.


In the words of the seminole case on this doctrine, the duty of fair representation requires the union to "serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

Id. (quoting Vaca v. Sipes, 386 U.S. 171, 177, 17 Led.2d 842, 87 Sup. Ct. 903 (1967)).

While negligence will not support a claim of unfair representation against a union, if the union's behavior is so far outside a "wide range of reasonableness" so as to be irrational, the union can be found to have acted in O'Neil, 499 U.S. 67. If the union acts in bad faith or unreasonably, it is a matter of course that such conduct
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be considered reasonable. Black, 15 F.3d at 585 n. 18; see also Ackley v. Local Union 337, Int'l Bd. of Tear 948 F.2d 267, 267 (6th Cir. 1991).

As an alternative to showing that a union acts in an arbitrary fashion, the union can also be shown to breached its duty of fair representation if it is shown that the union discriminated against plaintiffs. To break of fair representation, a union must discriminate against its members in a manner deemed "invidious." See & Pilots Ass'n Int'l v. O'Neill, 499 U.S. 65 (1991). Bad faith requires a showing of fraud, or deceitful or dishon action. Aguinaga v. United Food and Commercial Workers Int'l Union, 933 F.2d 1463, 1470 (10th Cir. 199: Offering differing explanations as to not pursuing arbitration is evidence of bad faith. Ade v. Johnson Contr 831 F.2d 293 (6th Cir. 1987).

A union must exercise care in disposing of its members' grievances, since the Collective Bargaining Agreement provides the union with the exclusive authority to pursue such grievances. Del Costello v. Intern Board of Teamsters, 462 U.S. 151 (1983). Where a union fails to take a grievance seriously and there is evic suggest that the union never confirmed the company's version of events, a jury may find a breach of the duty representation. Schoonover v. Consolidated Freightways Corp. of Delaware, 147 F.3d 492 (6th Cir. 1998). acts arbitrarily if "it handles a grievance in a perfunctory manner, with caprice or without rational explanatio v. Budd Co., 706 F.2d 181, 183 (6th Cir. 1993). Likewise, where the union processes the grievance in a care manner; or the union inadequately handles the grievance because it is ignorant of contract provisions having bearing on the case, a breach of the duty of fair representation can be found. Ryan v. General Motors Corp., 1105, 1109 (6th Cir. 1989)(emphasis added).

Unexplained action by a union, which substantially prejudices a member's grievance, may be sufficie arbitrary to constitute a breach of duty. Farmer v. ARA Services, 660 F.2d 1096, 1103 (6th Cir. 1981). See Armstrong v. Chrysler Corp., No. 96-CV-60251-AA, 1997 U.S. Dist LEXIS 107512, at *12 (E.D. Mich. Jul 1997) ("to comply with its duty, the union must conduct some minimal investigation of grievances brought t
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attention"), quoting, Tenorio v. NLRB, 680 F.2d 598, 601 (9th Cir. 1982) ("[T]he duty of fair representation that, before assessing the merits of a grievance, a union must have an ample basis upon which to make such assessment," at 602).

B. Section 9(a) Claims

Pursuant to §9(a) of the National Labor Relations Act (29 U.S.C. §159(a)), a Union may also breach of fair representation to Plaintiffs by utterly failing to take any action on Plaintiffs' behalf in negotiating and a Plant Closing Agreement.

As the United States Supreme Court has recognized: "A fair representation claim is a separate cause action from any possible suit against the employer" because of the independent relationship between the Uni members, without regard to the employer and/or the collective bargaining agreement. Breininger v. Sheet M Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 84 (1989). The Sixth Circuit has also acknowledged th under §9(a) is a separate cause of action, independent from any claims against the employer. See Story v. Lo International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, 759 F.2d 517 (6th Cir. 19:

In the case of Storey v. Local 327, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, 759 F.2d 517 (6th Cir. 1985), the Court was asked to determine whether the Defendant Union breac duty of fair representation during negotiations with the employer over a Collective Bargaining Agreement. to the Plaintiffs, the Union breached its duty of fair representation to them when it bargained away substanti benefits.

The Sixth Circuit in Storey recognized that such a claim could exist against a union independent of t existence of a collective bargaining agreement. As the Court recognized:

The duty of fair representation does not arise out of a collective bargaining agreement; it flows from the union's statutory position as exclusive representative and exists both before and after the execution of an agreement.

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Id. at 522. See also Humphrey v. Moore, 375 U.S. 335, 342 (1964) (duty of fair representation arises directly from Section 9(a) which makes representatives chosen by employee majority exclusive representative for purposes of collective bargaining); Breninger v. Sheet Metal Workers Int'l Assn. Local Union No. 6, 493 U.S. 67 (1989)

Under this case law, a union may violate its duty of fair representation to Plaintiffs in the negotiation and ultimate execution of the Plant Closing Agreement. This claim does not depend upon a collective bargaining agreement breach for its validity.