

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| JOSEPH N. BERG                                | : | CIVIL ACTION |
| vs.   | : |              |
| UNITED STEELWORKERS OF<br>AMERICA, LOCAL 3733 | : | NO. 98-308   |
|   | : |              |

**ORDER AND MEMORANDUM**

**ORDER**

AND NOW, to wit, this 8<sup>th</sup> day of April, 1998, upon consideration of defendant United Steelworkers of America's, Local 3733's ("Union") Motion to Dismiss (Document No. 5, filed Oct. 20 1997 in the Middle District of Pennsylvania), defendant Union's Memorandum In Support of Union's Motion to Dismiss (Document No. 6, filed Oct. 20 1997 in the Middle District of Pennsylvania), and Plaintiff's Reply to Motions to Dismiss Filed by Defendant "Union" and Defendant "Employer" and Brief in Opposition to Motions (Document No. 13, filed Nov. 25 1997 in the Middle District of Pennsylvania), for the reasons set forth in the accompanying Memorandum, **IT IS ORDERED** that defendant Union's Motion to Dismiss is **DENIED WITHOUT PREJUDICE** to defendant's right to address the issues raised, after completion of discovery, by motion for summary judgment and/or at trial.

**MEMORANDUM**

Background. Except where indicated, the following brief recitation of facts is based on the allegations of plaintiff's Complaint which are assumed to be true for purposes of this decision. Plaintiff is a member of defendant Union and was employed by Dana Corporation ("Dana") at all times relevant to this litigation. During the course of his

employment at Dana, a foot injury received while working for another employer was aggravated and required surgery. As a result of the surgery, plaintiff became disabled and was no longer able to work at Dana. Pursuant to an agreement, plaintiff's Worker's Compensation benefits were paid by his earlier employer and plaintiff's other benefits – including health insurance, vacation time and accrual of seniority – were paid by Dana. Dana's payment of benefits to plaintiff was governed by a Collective Bargaining Agreement (“CBA”).

Dana and the Union negotiated an amended Collective Bargaining Agreement (“amended CBA”) – superceding the CBA governing Dana's payment of benefits to plaintiff – which became effective on October 26, 1994. Under the terms of the amended CBA, after a certain period, defendant became ineligible for the benefits being paid by Dana. On January 6, 1997, plaintiff received notice from his insurer that his health insurance coverage had been terminated pursuant to the terms of the amended CBA. After learning of the termination of benefits, plaintiff repeatedly complained to the Union and sought their representation in grievance proceedings.

On February 28, 1997, plaintiff filed a charge of unfair labor practices with the National Labor Relations Board (“NLRB”). The charge is attached as Exhibit A to defendant Union's Memorandum in Support of Union's Motion to Dismiss and was neither attached to nor referenced in plaintiff's Complaint. In his charge filed with the NLRB, plaintiff claimed “that the union knowingly and willingly failed to represent and pursue [him] in union negotiation of the contract in 1994.” Def. Mem. Ex. A. On April 2, 1997, plaintiff was told by a Vice President of defendant Union that he should seek private counsel to pursue his grievance on his own because there was “nothing which the

Union could and/or would do.” Complaint ¶ 18.

On September 30, 1997, plaintiff filed a Complaint in the Middle District of Pennsylvania. He named both the Union and Dana Corporation as defendants in the suit. Count I of the Complaint appears to state claims against Dana and alleges that the CBA, which took effect on October 26, 1994 (the amended CBA) was “discriminatory, retaliatory, in bad faith and is invalid,” Complaint ¶ 20, that the termination of benefits was a violation of the CBA (presumably the original CBA, although that is not clear from the Complaint) and “wrongful and unlawful.” *Id.* at ¶ 21. No statutory basis is asserted for the claims in Count I. In Count II, plaintiff alleges that the “arbitrary and bad faith failure and refusal of the Defendant ‘Union’ to properly and timely represent Plaintiff with regard to Plaintiff’s grievances as to the unlawful termination of benefits by Defendant ‘Company’ represents a blatant and willful breach of the ‘Union’s’ duty to fairly represent Plaintiff . . . .” *Id.* at ¶ 23. The statutory bases asserted for the claim in Count II are 29 U.S.C. §§ 158(b)(1)(A) and 159(a).

Plaintiff filed this case in the Middle District of Pennsylvania and it was assigned to Honorable Thomas I. Vanaskie. Judge Vanaskie treated plaintiff’s claims as a “hybrid” § 301/duty of fair representation claim brought pursuant to the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 141 *et. seq.* Such a claim is one in which it is typically alleged that there was a breach of a collective bargaining agreement by an employer and a breach of a union’s duty of fair representation for failing to represent the employee in appealing the employer’s breach. Applying the venue provisions of the LMRA, 29 U.S.C. § 185(c), Judge Vanaskie determined that venue was properly laid in the Eastern District of Pennsylvania. By Order dated January 16, 1998,

Judge Vanaskie transferred the case to this District.

On March 4, 1998, plaintiff filed a Motion pursuant to Federal Rule of Civil Procedure 41(a)(1) (Document No. 5, filed March 4, 1998 in the Eastern District of Pennsylvania), seeking to dismiss Dana from the case. That Motion was granted by agreement by Order dated March 9, 1998.

**Discussion of Federal Rule of Civil Procedure 12(b)(1).**

In a Rule 12(b)(1) motion, the court's jurisdiction to hear a claim is at issue. As a result, “the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.” Mortensen v. First Federal Savings and Loan, Assn., 549 F.2d 884, 891 (3d Cir.1977). Defendant argues that because plaintiff fails to cite 28 U.S.C. § 1337 in his Complaint as the basis of this Court’s jurisdiction, the Court lacks subject matter jurisdiction and may not hear plaintiff’s claim.

<sup>1</sup> For this proposition, defendant cites Heussner v. Nat’l Gypsum Co., 887 F.2d 672 (6<sup>th</sup> Cir. 1989), in which the court stated that because the plaintiff in that case “repeatedly alleged in his complaint that Section 301(a) was the sole basis for district court jurisdiction, we affirm the dismissal of his fair representation claim.” Id. at 677.

As filed, plaintiff presented the Court with a “hybrid” § 301/duty of fair representation claim. Since filing the Complaint, however, plaintiff has voluntarily dismissed his employer – Dana. The only claim which remains, therefore, is that defendant Union has breached its duty of fair representation. As defendant argues, “[j]urisdiction over a claim that a union has breached its duty of fair representation is

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<sup>1</sup> Under 28 U.S.C. § 1337, district courts have original jurisdiction over “any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies . . . .” 28 U.S.C. § 1337.

based on 28 U.S.C. § 1337(a) (1988) (covering ‘any civil action or proceeding arising under any Act of Congress regulating commerce’). Felice v. Sever, 985 F.2d 1221, 1226 (3d Cir. 1993) (citing Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 83 (1989)).<sup>2</sup>

In the statement of jurisdiction portion of his Complaint, plaintiff alleges that the instant case “presents special federal questions under and jurisdiction is therefore founded upon Section 301 of the Labor Management Relations Act . . . .” Complaint ¶ 3. As defendant notes, plaintiff does not cite 28 U.S.C. § 1337 and on this issue, plaintiff argues only that he need not “set out the actual statutory reference to federal question jurisdiction (28 U.S.C. § 1331).” Plaintiff’s Reply to Motions to Dismiss Filed By Defendant “Union” and Defendant “Employer” and Brief in Opposition to Motions, 10.

While the holding in Heussner would appear to support defendant Union’s argument that jurisdiction is lacking in this case, the Court is not bound by a decision of the Sixth Circuit and it concludes that plaintiff has – if only barely – satisfied the minimal standards of Federal Rule of Civil Procedure 8(a)(1). That rule requires only that a plaintiff set forth “a short and plain statement of the grounds upon which the court’s jurisdiction depends . . . .” Fed. R. Civ. P. 8(a)(1). The rule does not require plaintiff to cite the specific statute which gives the Court jurisdiction; it is clear from the face of the Complaint that the Court does have jurisdiction over plaintiff’s remaining claim under 28 U.S.C. § 1337. Therefore, the Court will not dismiss that claim for lack of subject matter jurisdiction.<sup>3</sup>

<sup>2</sup> In contrast, jurisdiction over an employee’s claim against his employer for breach of a collective bargaining agreement is properly founded upon “section 301(a) of the LMRA, 29 U.S.C. § 185(a) (1988).” Felice, 985 F.2d at 1226.

<sup>3</sup> At most, plaintiff has failed to satisfy the standards of Federal Rule of Civil Procedure 8(a) by not setting forth more clearly the grounds upon which this Court may exercise

**3. Discussion of Federal Rule of Civil Procedure 12(b)(6).**

**a. Standard**

When considering a Motion under Federal Rule of Civil Procedure 12(b)(6), “the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case and exhibits attached to the complaint may also be taken into account.” 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, Civil 2d § 1357 (1990); see also Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808, 812 (3rd Cir.1990).

Generally, the court must accept as true the facts alleged in the complaint and must draw all reasonable inferences from those facts in the light most favorable to the plaintiff. See, e.g., Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3rd Cir.1990).

In this case, defendant contends that plaintiff’s claims are barred by the statute of limitations. Normally, “a 12(b)(6) motion should not be granted on limitations grounds unless the complaint facially shows noncompliance with the limitations period.” Clark v. Sears Roebuck & Co., 816 F.Supp. 1064, 1067 (E.D. Pa. 1993) (citing Morgan v. Kobrin Securities, Inc., 649 F.Supp. 1023, 1027-1028 (N.D.Ill.1986)). As stated, however, on a Rule 12(b)(6) motion – even one based on the statute of limitations – a court may consider “matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case.” Oshiver v. Levin, Fishbein, Sedran & Berman, 38

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jurisdiction. That failure would not mean that the Court does, in fact, lack jurisdiction. Were the Court to dismiss for failure to meet the pleading standards of Rule 8(a), it would do so with leave to amend, and plaintiff could simply insert language referring to 28 U.S.C. § 1337 into an amended complaint. This would be a hollow exercise when it is abundantly clear from the facts alleged in the Complaint that § 1337 provides a basis of this Court’s jurisdiction.

F.3d 1380, 1384 n.2 (3d Cir. 1994) (citing 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, Civil 2d § 1357 (1990)); accord Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied, 510 U.S. 1042 (1994).

**b. Statute of Limitations Applicable to Case**

The first question for the Court is which statute of limitations applies to plaintiff's claims. Defendant contends that plaintiff's claims are barred by the six month statute of limitations of the National Labor Relations Act, § 10(b), as amended, 29 U.S.C. § 160(b). Defendant makes this contention based on its assertion that plaintiff has brought a "hybrid" § 301/duty of fair representation claim – a claim in which it is typically alleged that there was a breach of contract by an employer and a failure of the union to fairly appeal the employer's breach. In his reply, plaintiff does not argue that another statute of limitations applies to the instant case.

Because plaintiff has voluntarily dismissed Dana as a defendant, the only claim left in the case involves defendant Union's duty of fair representation. The case is therefore no longer strictly a "hybrid" § 301/duty of fair representation claim.

<sup>4</sup> The Court will therefore determine whether the six month statute of limitations continues to govern a case in which only a duty of fair representation claim remains.

In DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151 (1983), the Supreme Court held that where a plaintiff alleges both a breach of contract by an

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<sup>4</sup> Although plaintiff has dropped Dana from the case, he must still establish that there was a breach of the collective bargaining agreement in order to succeed in his claim against defendant Union. See DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 165 (1983); see also Edwards v. International Union, United Plant Guard Workers of America, 46 F.3d 1047, 1052 (10<sup>th</sup> Cir. 1995).

employer and a failure of the union to fairly appeal the employer's breach, the two claims are so intertwined that, "the case is the same whether he sues one, the other, or both." Id. at 165. This is typically referred to as a "hybrid" § 301/duty of fair representation claim and, in such a case, a plaintiff must prove not only that there was a breach of contract by the employer "but must also carry the burden of demonstrating breach of duty by the Union." Hines, 424 U.S. at 570-71. Normally, where a federal cause of action lacks an express statute of limitations, a federal court applies the appropriate state limitation. In DelCostello, however, the Court found state limitations to be inappropriate because they could allow "disputes involving critical terms in the collective-bargaining relationship between company and union" to remain unresolved for long periods. DelCostello, 462 U.S. at 168-69. This danger, the Court concluded, warranted application of the six month statute of limitations contained in the National Labor Relations Act, § 10(b), as amended, 29 U.S.C. § 160(b), to "hybrid" § 301 actions.

Because plaintiff has voluntarily dismissed Dana Corporation – his employer – from this suit, however, DelCostello does not directly answer the question in the instant case: does that same six month limitation period apply to a duty of fair representation claim alone? The duty of a union to fairly represent its members was derived by the Supreme Court from the policies underlying the National Labor Relations Act, see Vaca v. Sipes, 386 U.S. 171 (1967); Hines v. Anchor Motor Freight Inc., 424 U.S. 554 (1976), but there is no federal statute of limitations governing actions alleging a breach of this duty. However, the Supreme Court stated in DelCostello that "the case is the same whether" plaintiff sues the employer, the union, or both, id. at 165 – which suggests that the statute of limitations should be the same regardless of the parties actually named in

the suit. Cf. Felice v. Sever, 985 F.2d 1221, 1226 (3d Cir. 1993) (“A plaintiff who has a viable ‘hybrid’ claim against both the employer and the union may opt to bring only the section 301 claim against the employer or the breach of duty of fair representation claim against the union. . . . Either claim standing alone can be brought in federal court because each has an independent jurisdictional basis.” (citation omitted)). DelCostello’s scope, however, was limited by Reed v. United Transportation Union, 488 U.S. 319 (1989).

In Reed, the Supreme Court held that a claim – involving the right of free speech – brought by a union member against his union under 29 U.S.C. § 411(a)(2) should be governed, not by the NLRA’s statute of limitations, but by the appropriate state statute of limitations. The Third Circuit has interpreted Reed as meaning that “the interest in the rapid resolution of labor disputes does not outweigh the union member’s interest in vindicating his rights when, as here, a dispute is entirely internal to the union.” Brenner v. United Brotherhood of Carpenters & Joiners, 927 F.2d 1283, 1295 (3d Cir. 1991) (emphasis added).

In analyzing the meaning of “entirely internal,” Judge O’Neill of the Eastern District of Pennsylvania held that the six month statute of limitations continues to apply to duty of fair representation claims alone where the breach alleged involves the union’s conduct “vis-à-vis the employer.” Stokes v. Local 116 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Civ. A. No. 92-3131, 1993 WL 23895, \*7 (E.D. Pa. Feb. 2, 1993) (citing cases); see also Edwards v. International Union, United Plant Guard Workers of America, 46 F.3d 1047, 1052 (10<sup>th</sup> Cir. 1995) (“it is clear [plaintiff’s] suit against the Union cannot exist independently of his underlying wrongful discharge grievance against [his employer]. We find the district

court correctly held [plaintiff] could not avoid the six-month statute of limitations applicable to both elements of a ‘hybrid’ claim under DelCostello by suing only the Union.”).

In the instant case, plaintiff has alleged in Count II that the defendant Union breached its duty of fair representation by failing to file a grievance on behalf of plaintiff when Dana unlawfully breached the collective bargaining agreement. The dispute between plaintiff and defendant Union is thus not “entirely internal” because these allegations involve the Union’s conduct “vis-à-vis the employer.” The appropriate statute of limitations period is therefore the six month provision contained in § 10(b) of the NLRA. See Stokes, 1993 WL 23895 at \*7. The Court will, therefore, apply the six month statute of limitations in this case.

**c. Application of the Statute of Limitations**

In breach of duty of fair representation claims the statute of limitations “begins to run when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation.” Stokes, 1993 WL 23895 at \*6 (citing Hersh v. Allen Products Co., 789 F.2d 230, 232 (3d Cir. 1986)). Defendant argues that the breach in this case occurred at the moment the amended CBA was signed on October 26, 1994. The Court determines, however, that on the face of the Complaint it cannot conclude when plaintiff “should have become” aware of the clause which affected his benefits. The CBA is lengthy and the clause at issue occupies only a small portion of the whole and is written in somewhat technical language. Moreover, it is apparent from the facts alleged that plaintiff was not stripped of his health insurance coverage immediately after the new clause went into effect. Indeed, he was not informed until

January 6, 1997 that his coverage had been terminated.<sup>5</sup>

In light of these alleged facts, which the Court accepts as true, it concludes that plaintiff did not discover, nor should he have discovered, the acts constituting his claims at the time of either the alleged unlawful act of amending the CBA or the alleged breach of the CBA. Instead, plaintiff discovered the alleged breach on January 6, 1997 when he was notified of the termination of his benefits. Cf. National Labor Relations Board v. United Hoisting Co., 198 F.2d 465, 468 (3d Cir. 1952) (holding that an employee's charge with National Labor Relations Board "did not spring from the execution of the addenda [to a collective bargaining agreement] more than six months before but directly from the application by the respondents only three days previously of the unlawful security clause in consequence of which [the employee] was discharged").

The conclusion that, for statute of limitations purposes, plaintiff became aware of the alleged unlawful act and breach serving as the basis of his claims on January 6, 1997 does not end the Court's inquiry. With respect to plaintiff's claim in Count II that defendant Union failed to act on his behalf by refusing to file a grievance, the "relevant statute of limitations question . . . is not only when [plaintiff] knew, or should have known, that the employer breached the contract but also when he knew, or should have known, that further appeals to the Union would be futile." Vadino v. A. Valey Engineers, 903 F.2d 253, 260 (3d Cir. 1990). This period of futility is not, however, an unlimited one in which a union member may make repeated requests to the union: "If repeated requests to a union to institute a grievance were to perpetually toll the statute of

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<sup>5</sup> According to the Complaint, he was "notified by Blue Cross/Blue Shield that 'Company' had terminated his coverage." Complaint ¶ 18.

limitations, despite the employee's belief that such requests were futile, the statutory time bar would be illusory.” Id. at 262; see also D’Orazio v. McGraw Edison Power System Division, 802 F.Supp. 1297, 1307 (W.D. Pa. 1992); Nicely v. USX, 709 F.Supp. 646, 648 (W.D. Pa. 1989).

Defendant has attached to his Memorandum in Support of Union’s Motion to Dismiss, a charge submitted by plaintiff to the National Labor Relations Board (“NLRB”) which is dated February 28, 1997. In this charge of unfair labor practices, plaintiff makes the claim that defendant Union failed to represent plaintiff when it negotiated the provision of the amended CBA which stripped plaintiff of his benefits. Defendant argues that the statute begins to run, at the latest, from the date of this filing. Plaintiff argues that this Court may not take note of the filing since it was not attached to the Complaint and in deciding a Rule 12(b)(6) motion, a court is limited to the allegations made in the complaint and any attachments thereto.

Although it is correct that a Court in deciding a Rule 12(b)(6) motion is ordinarily limited to the allegations set forth in the Complaint, a Court may nonetheless take notice of public records in deciding a motion to dismiss under that rule. See 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, Civil 2d § 1357 (1990) (noting that “matters of public record . . . may also be taken into account.”); see also Oshiver, 38 F.3d at 1384 n.2. The Third Circuit has not ruled on the question whether a charge made before the NLRB may be considered in a Rule 12(b)(6) motion, but the Eighth Circuit has recognized that “it is appropriate to take judicial notice of [an] unfair labor practice charge . . . .” Gustafson v. Cornelius Co., 724 F.2d 75, 79 (8<sup>th</sup> Cir. 1983). In the instant matter, the Court will take judicial notice of the charge filed by plaintiff

with the NLRB since it is a matter of public record.

Notwithstanding the Court's conclusion that it may take note of plaintiff's charge filed with the NLRB when considering a Rule 12(b)(6) motion, it agrees with plaintiff that in this case it is not proper to measure the six month statute of limitations from the date of filing the charge. In so deciding, the Court is guided by the rule that normally, "a 12(b)(6) motion should not be granted on limitations grounds unless the complaint facially shows noncompliance with the limitations period." Clark v. Sears Roebuck & Co., 816 F.Supp. at 1067 (citation omitted). From the face of the Complaint, it is apparent that even after filing his charge with the NLRB, plaintiff continued to ask the Union to represent him in a grievance proceeding. The NLRB charge does not allege the Union's failure to file a grievance on plaintiff's behalf but only "that the union knowingly and willingly failed to represent and pursue [plaintiff's interests] in union negotiation of the contract in 1994." Def. Mem. Ex. A. It is simply not apparent from the Complaint that after filing the NLRB charge, plaintiff knew or should have known that repeated requests to the Union would be futile.<sup>6</sup> Furthermore, plaintiff alleges in the Complaint that it was not until April 2, 1997 that he was told by a representative of the Union that

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<sup>6</sup> Defendant argues that plaintiff should have known that further appeals to the Union would be futile because the amended CBA – which is attached to the Complaint – provides that "[s]hould differences arise between the company and the Union as to the interpretation, application of, or compliance with the provisions of this Agreement . . .," amended CBA, Art. 10, § 2(a), a "grievance must be reduced to writing on a written form provided by the Union and submitted within twenty-one (21) days of occurrence." Amended CBA, Art. 10, § 3(a). Plaintiff was notified on January 6, 1997 of the termination of benefits, thus under the amended CBA, the Union had until January 27, 1997 to file a grievance. When it did not do so, it should have been clear that further appeals were futile. Plaintiff does not respond to this contention, but the Court rejects it for the same reasons it did not conclude that plaintiff should have been aware of the original breach at the moment the amended CBA was signed in 1994: The amended CBA is lengthy and the clause at issue occupies only a small portion of the whole and is written in somewhat technical language.

there was “nothing which the Union could and/or would do.” Complaint ¶ 18.

The Court concludes that for statute of limitations purposes, based on the allegations of the Complaint, April 2, 1997 is the date on which the plaintiff knew or should have known that “further appeals to the Union would be futile.” Vadino, 903 F.2d at 260. Thus, on the present state of the record, the Court will measure the six month statute of limitations from April 2, 1997. Because less than six months passed between April 2, 1997 and September 30, 1997 – the date the Complaint was initially filed – the Court will not dismiss the claim alleged in Count II as barred by the statute of limitations. This ruling is without prejudice to defendant’s right to address the issues raised, after completion of discovery, by motion for summary judgment and/or at trial.

**BY THE COURT:**

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**JAN E. DUBOIS**