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A General Theory of the Collective Bargaining Agreement

David E. Feller*

American law has never developed a definitive theory of the rights created by a collective bargaining agreement. Various analogies to other kinds of contractual relationships, principally the third-party beneficiary agreement, have been suggested from time to time,[1] sometimes in order to justify a particular result,[2] and at other times simply as

* Professor of Law, University of California, Berkeley. A.B., Harvard College 1938; LL.B., Harvard Law School, 1941. *See* note 718 *infra.*

1. The principal theories suggested in the past are: (1) the custom or usage theory [Hudson v. Cincinnati, N.O. & T.P. Ry. 152 Ky. 711, 154 S.W. 47 (1913)], and its modern variants [J.I. Case Co. v. NLRB, 321 U.S. 332, 334-35 (1944) and Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 210 F.2d 623 (3d Cir. 1954), *aff'd* 348 U.S. 437 (1955)], under which the agreement is regarded as incorporated into the employees' individual contracts of hire; (2) the agency theory, under which the agreement is regarded as one between the employer and the employees acting through the union as their agent, [Mueller v. Chicago & N.W. Ry., 194 Minn. 83, 85, 259 N.W. 798, 799 (1935)]; (3) the third party beneficiary theory, under which the agreement is regarded as one between the union and the employer for the benefit of the employees [Springer v. Powder Power Tool Corp., 220 Ore. 102, 348 P.2d 1112 (1960)]. All were proposed primarily to provide a contractual basis for the right of an employee to bring suit directly against his employer for the benefits specified in a collective agreement, a right which I will argue in Part II should not exist. Archibald Cox has suggested that the agreement be compared to a trust under which the union holds the employer's promises as a fiduciary for the individual employees, though finally rejecting that theory as well as the others, as a basis for decision in particular cases. Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 21 (1958).

2. *See* cases cited in note 1 *supra.* The custom or usage theory was, in a sense, both rejected and accepted in UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) in which the Supreme Court held that a union could bring suit on a collective agreement to recover employee benefits but that the suit could be barred by the statute of limitations applicable to oral agreements because recovery depended "upon proof of

a point of departure for a conclusion contrary to the one suggested by the analogy.[3] Particular answers have been provided in suits between unions and employers, between employees and employers, and between unions and employees; but no unified theory has developed that would relate these particular answers to each other in a coherent fashion.[4] The purpose of this Article is to set out such a theory based on an analysis of the functions performed by the collective agreement in the American industrial system.

A legal theory is important, of course, only if solutions to particular problems can be derived from it; it is sound only if the solutions it produces are more satisfactory than those which would result without it; and it is supportable only if it conforms, at least in large measure, with the principles followed by the courts in the decided cases. The scheme of presentation here is derived from these considerations. I will begin with a particular problem which, I believe, illustrates the difficulties created by the absence of a unified legal theory. That problem, or set of problems, arises when an individual employee sues to redress an alleged violation of a collective bargaining agreement containing a grievance and arbitration procedure, claiming that his failure to use that procedure is excused by breach of the union's duty of fair representation. The questions presented by such a suit are among the most interesting and commented on in the field of labor law.[5] The emphasis in recent years has been on the nature of and

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the existence and duration of separate employment contracts between the employer and each of his aggrieved employees." *Id.* at 706. *See* text following note 187 *infra.*

3. *See, e.g.*, Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960).

4. Until Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) established that federal law governed collective agreements affecting interstate commerce, judicial theorizing as to their nature was a matter of state law, and different states adopted different views, although almost all concluded that they were enforceable as contracts. *See* Note, *The Ability of an Individual Employee to Sue His Employer on a Collective Bargaining Agreement*, 3 BUFF. L. REV. 270 (1954); Lenhoff, *The Present Status of Collective Contracts in the American Legal System*, 39 MICH. L. REV. 1109 (1941). The English view, until the Industrial Relations Act of 1971, was to the contrary. O. KAHN-FREUND, LABOUR AND THE LAW 124, 131 (1972). The Third Circuit, in Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 210 F.2d 623 (1954), attempted to construct a federal theory. The result in that case, but not the theory propounded, was affirmed by a hopelessly divided Supreme Court. 348 U.S. 437 (1955). This lead to Archibald Cox's seminal article, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956). *Lincoln Mills* was followed by two Cox articles, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958) and *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959) in which the governmental nature of the agreement was emphasized in language subsequently adopted by the Court in the Steelworkers Trilogy. *See* text accompanying notes 138 *et seq. infra.* Thereafter, the effort to construct a legal theory following conventional contract lines was largely abandoned.

5. *See, e.g.*, Aaron, *The Union's Duty of Fair Representation Under the Railway Labor and National Labor Relations Acts*, 34 J. AIR L. & COM. 167 (1968);

the standards defining the union's duty. Here, however, the problem of defining the appropriate judicial remedy for a claimed breach of that duty will be used to illustrate the consequences of the judicial failure to develop a consistent conception of the collective agreement. In part I, a recent First Circuit case, *Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO*[6] will be explored in detail as an exemplar of the problems presented by the individual suit. This will be followed by a more or less chronological description of the course of decision in the United States Supreme Court which led to the particular rules governing the collective agreement the lower courts attempted to follow in *Figueroa.* I will describe the significant holdings of the Court as they relate to the legal relationship created by the collective bargaining agreement both under the Railway Labor Act[7] and under the National Labor Relations Act[8] and indicate some of the significant areas in which the law is still uncertain.

Having thus set the legal stage, I will attempt in part II to analyze the function performed by collective bargaining agreements and the adjudicative mechanisms they establish in order to derive from this institutional analysis a series of legal propositions concerning the rights created by a collective bargaining agreement which conform in major measure, although not entirely, with the results actually reached by the Court. I believe that this will provide a sound basis for resolving the problems presented in the individual suit and, as well, a number of other unresolved questions suggested in part I. These propositions will then be applied to *Figueroa*, the case with which we began.

Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO STATE L.J. 39, 63 (1961); Blumrosen, *Duty of Fair Representation*, 15 LAB. L.J. 598 (1964); Blnmrosen, *Employee Rights, Collective Bargaining, and Our Future Labor Problem*, 15 LAB. L.J. 15 (1964); Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy*, 13 RUTGERS L. REV. 631 (1959); Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Controls of the Worker-Union Relationship*, 61 MICH. L. REV. 1435 (1963); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 COLUM. L. REV. 731 (1950); Ferguson, *Duty of Fair Representation*, 15 LAB. L.J. 596 (1964); Hanslowe, *The Collective Agreement and the Duty of Fair Representation*, 14 LAB. L.J. 1052 (1963); Hanslowe, *Individual Rights in Collective Labor Relations*, 45 CORNELL L.Q. 25 (1959); Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, SUP. CT. REV. 81 (1967); Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 MO. L. REV. 373 (1965); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1962); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958). Additional articles are cited in THE DEVELOPING LABOR LAW 726 (Morris ed. 1971).

6. 425 F.2d 281 (1st Cir. 1970), *cert. denied*, 400 U.S. 877 (1970).

7. 45 U.S.C. §§ 151-88 (1970).

8. 29 U.S.C. §§ 151 *et seq.* (1970).

Part I

A. Figueroa

Rosa Figueroa[9] is one of the more recent additions to the long list of plaintiffs who by seeking judicial relief without the concurrence of their unions on claims under a collective agreement have provided significant raw material for legal controversy. Rosa Figueroa, like J. D. Conley,[10] C. W. Moore,[11] Charles Maddox[12] and Niles Sipes,[13] before her, eventually recovered nothing. But because her suit against both her employer and her union was tried and eventually resulted in relief for some of the plaintiffs, it presents in concrete form many of the problems implicit but unexplored in her predecessors' suits. The case contains a veritable school of red herrings. Since the case really arose because Rosa's union, the Syndicato de Trabajadores Packinghouse, AFL-CIO, fished for them rather than for a smaller but more easily caught species, it is necessary to set them out in some detail.[14]

Rosa Figueroa was employed by the Puerto Rico Telephone Company as an operator in Mayaguez, Puerto Rico. Her union also represented the company's construction and installation workers, and the controversy really began with them. In 1958 the company began a major expansion and reorganization program involving the subcontracting of a substantial amount of construction and installation work. Although this subcontracting had not adversely affected the company's permanent work force when the contract came open in 1962, the union proposed a clause that would have limited the company's right to subcontract. The company refused and an agreement without any

9. The usual confusion as to the appropriate reference to and indexing of labor cases is compounded here by the existence of a Spanish surname. I have chosen to refer to Señora Rosa Figueroa de Arroyo as Rosa Figueroa, and to the case as the *Figueroa* case, in accordance with what I believe to be the customary practice, *see* J. MICHENER, IBERIA 41 (1968) and, as well, the preference she indicated at the trial. The Supreme Court reporter apparently agrees and indexes the case under "F." 400 U.S. xxv. West Publishing Company cannot make up its mind. *Compare* De Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO 425 F.2d xxiii (1st Cir. 1970) *with* Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, 302 F. Supp. xxiii (D.P.R. 1969).

10. Conley v. Gibson, 355 U.S. 41 (1957).

11. Humphrey v. Moore, 375 U.S. 335 (1964).

12. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

13. Vaca v. Sipes, 386 U.S. 171 (1967).

14. The description of the case which follows is drawn from the opinions in *Figueroa* and the Joint Appendix filed in that case in the Court of Appeals for the First Circuit [hereinafter cited as *Joint Appendix*], supplemented by the reported opinions of the National Labor Relations Board in Puerto Rico Tel. Co., 149 N.L.R.B. 950 (1964), *enforced in part*, Puerto Rico Tel. Co. v. NLRB, 359 F.2d 983 (1st Cir. 1966), and the decision of the Supreme Court of Puerto Rico in Puerto Rico Tel. Co. v. Puerto Rico Labor Relations Bd., 92 P.R.R. 247 (1965).

subcontracting clause was signed on November 8, 1962.[15] The next day, the company began terminating installers, linemen, splicers and similar workmen. Within five months, 277 had been permanently laid off. Each was told that his layoff was "due to a reorganization."[16]

The union reacted by filing grievances. Under the collective agreement, an employee who claimed his layoff was "unjust" was required to first submit his grievance to the union. If the union concurred, it had three days from the notice of layoff to file a grievance. If no grievance was filed within that period, the agreement specified that "the case shall be regarded as closed."[17] If a grievance was filed and was not resolved, it was referred to a bi-partite grievance committee. If that committee did not reach an agreement, the Puerto Rico Mediation and Conciliation Service[18] was to be brought in, and, if there was still no settlement, a neutral was to be appointed and the dispute settled by majority vote.

When the layoff grievances reached the committee level, the company insisted that they be handled one-by-one and would only consider whether the proper employees had been terminated, not whether the decision to make terminations had been proper.[19] That decision, in its view, was a management prerogative and not subject to the grievance procedure at all. The union, interested in rolling back the terminations, demanded an enormous mass of economic information concerning the company's business, its subcontracts, the number of layoffs, the value of the subcontracts, and the amount saved by them, before it would discuss the individual cases. The company refused to provide the information, and the union requested that the conciliation service intervene. The company was unwilling to join in that request; in its view the union's complaint was beyond the jurisdiction of the grievance committee and the request was, in any event, premature because there had been no case-by-case disagreement. With the matter thus at impasse the union filed charges with the National Labor Relations Board claiming that the company had violated section 8(a)(5) of the National Labor Relations Act by subcontracting without bargaining and by refusing to provide information.

In September 1963, 43 additional workers were terminated and the same sequence of grievances, demands and refusals followed. In this instance, however, the union sought to break the impasse by

15. 149 N.L.R.B. at 952.

16. *Id.* at 956.

17. *Joint Appendix, supra* note 14, at 310.

18. Laws of Puerto Rico Annotated title 3, § 320 (1965).

19. Puerto Rico Tel. Co. v. Puerto Rico Labor Relations Bd., 92 P.R.R. 247, 251-58 (1965); *Joint Appendix, supra* note 14, at 167-68.

using a contract, rather than a refusal to bargain, theory. The Puerto Rico Labor Relations Board, unlike the NLRB, has jurisdiction to enforce collective bargaining agreements,[20] and the union filed charges with it, seeking to compel compliance with the agreement's provisions for intervention of the Mediation Service and the appointment of a neutral.

Among those terminated in the September group covered by the union's grievance was a Mayaguez telephone operator, Elsie Lugo Bernier. She had received a letter, identical to the others, stating that her termination was "due to a reorganization." Although it subsequently appeared that her dismissal was unrelated to the subcontracting but occurred because the company was converting to direct distance dialing, the union and the company treated her case as identical with the others.

In April 1964, the company terminated six more Mayaguez operators, including Rosa Figueroa, while retaining some operators with less seniority than those laid off, again assigning "reorganization" as the reason. The six operators complained to the union, as required by the agreement, but no grievances were filed. The union's president told the operators that successful completion of the two pending labor board proceedings would also provide relief for them and that, in any event, the company would do nothing until those proceedings were concluded.[21] The operators did not object.[22]

For a time the union appeared to be faring well with its litigation strategy. In the NLRB proceeding a trial examiner in February 1964 concluded that the company had violated the Act by its unilateral subcontracting and by its refusal to provide information. The examiner recommended that the company be directed to reinstate those employees laid off as a result of the subcontracting between November 1962 and March 1963. In November 1964, the NLRB adopted his recommendations.[23] In May 1964, the Puerto Rico Labor Board, to which the union had repaired with respect to the September 1963 layoffs (which included that of one operator) ordered the company to meet, in grievance committee, to discuss the cases and to permit an officer of the conciliation service to participate in the discussions.[24]

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20. L.P.R.A. tit. 29, §§ 69(1)(f), 70 (1966). In this it is similar to the Wisconsin Board. *See* WIS. STAT. ANN. §§ 111.06(f), 111.07 (1957). The law to be applied in such a forum is the federal substantive law developed under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1970). Tecumseh Products Co. v. Wisconsin E.R.B., 23 Wis. 2d 118, 126 N.W.2d 520 (1964).

21. *Joint Appendix, supra* note 14, at 65, 162, 204.

22. *Id.* at 201.

23. Puerto Rico Tel. Co., 149 N.L.R.B. 950 (1964).

24. *See* Puerto Rico Tel. Co. v. Puerto Rico Labor Relations Bd., 92 P.R.R. 247, 256 (1965).

In the spring of 1965 the tide began to turn. The Supreme Court of Puerto Rico set aside the Puerto Rico Board's decision on the ground, among others, that the September layoffs were but "a minor incident which was part and parcel of the basic problem involved which was under the National Labor Relations Board's consideration."[25] And the company sought review of the National Board's decision in the First Circuit.

At the same time, the operators began to realize that their cases were indeed separable and to question the assumption that the pending litigation would protect them. In February 1965, they again confronted the union president, who replied that he was certain that the company would refuse to act on their dismissals until the court of appeals had decided the pending Labor Board case dealing with the earlier dismissals and that he would await that decision before going forward on the later cases.[26] Dissatisfied, Rosa Figueroa, the other operators, and some other union members laid off at the same time, hired a lawyer and brought suit in November 1965 against the union and the company in the United States District Court for the District of Puerto Rico. Asking for reinstatement with back pay and punitive damages, they alleged that their dismissals violated the seniority provisions of the agreement, that the pending litigation did not involve them or affect their rights in any way, and that the union had breached its duty of fair representation by failing to file grievances on their behalf.

Several months later the First Circuit affirmed the Board's order requiring that information be supplied, but refused enforcement of the order for reinstatement of the construction and installation workers, finding no evidence of any relationship between the subcontracting and the November 1962—March 1963 layoffs.[27]

The union's position was now in total disarray. Its attempt to roll back the terminations through the two Labor Board proceedings had now collapsed and it was being sued, along with the company, because it had failed to protest the company's choice of employees to be terminated. Belatedly, it now sought to do so. In November 1966, it demanded that the company now process the plaintiffs' seniority grievances to arbitration.[28] The company refused. The union then sought to file a cross-claim in the *Figueroa* action alleging that the company was responsible for the failure to process the grievances and demanding that it now process them.[29] By this time, however, the pleadings

25. *Id.* at 263.
26. *Joint Appendix, supra* note 14, at 195-200.
27. Puerto Rico Tel. Co. v. NLRB, 359 F.2d 983 (1st Cir. 1966).
28. *Joint Appendix, supra* note 14, at 335.
29. *Id.* at 24-32.

had been completed and the district court denied leave to file as untimely since "the co-defendant unions can probably secure the desired relief" by "asking the jury, in the event of a verdict in favor of plaintiffs, to assign the percentage of fault" of the respective defendants.[30]

The operators' case went to trial. There were two principal issues as to liability: (1) Whether the company had complied with the seniority provisions of the agreement and (2) whether, if it had not, the union had breached its duty of fair representation in not processing grievances on the plaintiffs' behalf. The district court decided to have separate jury trials of the two major issues, the second jury also determining and apportioning the damages if both the company and the union were found liable.

On the first issue, it was clear that the company had retained some operators in Mayaguez who were junior to the seven plaintiffs. This was not, however, necessarily determinative. The collective agreement did not make seniority the exclusive, or even the primary, determinant of the order of layoffs. Rather, it provided that seniority should govern only "if the qualifications of all the employees to be considered are equal." The negative implication of this provision was made clear by the added provision that seniority should not be used against any employee whose "ability, competence, efficiency and better service record proves to be more useful" than that of an employee who had "merely been employed for a longer period of time."[31] The plaintiffs' rights thus depended upon a comparison of abilities. This was the issue tried before the first jury.

The plaintiffs sought to meet what the court assumed to be their burden of proof by having each plaintiff testify as to her own satisfactory performance and by having a former assistant to the chief operator testify that, in her judgment, each of the plaintiffs was as useful, or more useful, than less senior operators who had not been laid off.[32] The company objected to the plaintiffs' self-serving testimony and attempted to impeach the testimony of the former assistant by confronting her with a series of adverse reports which had been made about Rosa Figueroa's performance as an operator.[33] Defendant's only affirmative evidence was the testimony of the chief operator at Mayaguez who testified that she had made the decision to terminate the plaintiffs after a conference in which the records of all of the operators had been discussed and compared.[34] No testimony was of-

30. *Id.* at 40.
31. *Id.* at 312.
32. *Id.* at 93-102.
33. *Id.* at 103-18.
34. *Id.* at 123-24.

fered by the company as to the comparative performances of particular operators. The jury was instructed that the plaintiffs had the burden of proving, by a preponderance of the evidence, that they were equal in qualifications to the operators who were retained. They were also asked to determine whether the company had acted in good faith or "arbitrarily and capriciously" and to return special verdicts as to both questions. Both issues were decided in favor of the plaintiffs.[35]

A second jury was then empaneled to determine whether the union had violated its duty of fair representation by failing to process the grievances and to determine and then apportion damages. The testimony before this jury showed that the union through its president, a long time member of the Puerto Rican legislature, had engaged in strenuous efforts to stop and even roll back the terminations. In addition to the two labor board proceedings, he also instigated a Senate Labor Committee investigation, complained to the Puerto Rican Department of Labor, and made personal appeals to the president of the company. The testimony also showed, however, that the union had failed to press any claim based on the relative seniority of those employees terminated and those retained even though in Miss Lugo's case a grievance had been filed. The union president testified he believed that pressing the claims would undercut the effort to reverse the entire program of layoffs and that, in any event, the protection offered by the seniority provision was weak.[36]

The second jury was instructed that it had already been determined that the plaintiffs' seniority grievances had merit, but that the union was, even so, not necessarily liable for failure to file or process them. It was asked to return special verdicts as to whether the union acted "arbitrarily or discriminatorily or in bad faith" in failing to process Elsie Lugo Bernier's grievance and failing even to file grievances for the other plaintiffs. It was also told to determine the losses each of the plaintiffs had sustained from the date of layoff up to February 29, 1968 (the date the trial was concluded) and to apportion these damages between the company and the union. On this point it was instructed that:

> The proportion of the total loss of earnings sustained by each plaintiff because the union acted arbitrarily, discriminatorily or in bad faith in connection with her grievance would be that proportion which would represent the increase of her loss of earnings because of such conduct. You will determine on a percentage basis what proportion of the loss of earnings of each plaintiff would properly be attributable to the union's wrongful conduct.[37]

35. *Id.* at 149.
36. *Id.* at 180-84.
37. *Id.* at 248-49.

The jury found that in each case, except Miss Lugo's, the union had acted "arbitrarily or discriminatorily or in bad faith." In those six cases it found that the union was responsible for 40 per cent of the lost earnings and the company 60 per cent; in Miss Lugo's case, the company was found to be responsible for 100 per cent of the loss.

After the verdicts were in, the trial court addressed itself to post-trial motions. Both defendants contended, among other things, that the plaintiffs were barred by the statute of limitations, since the suit had been filed more than 19 months after the terminations. Puerto Rico has a one-year statute for tort claims[38] and the National Labor Relations Act has a six-month statute.[39] The district court held, however, that neither was applicable: the plaintiffs' claim was basically for breach of contract and therefore the applicable statute was Puerto Rico's 15-year contract statute.[40] The plaintiffs' principal complaint was with the limitation of damages to pay lost up to the time of trial: they asked that the court either order reinstatement of the plaintiffs or award damages for loss of future earnings. They also sought attorneys' fees. The court denied both requests and entered judgment in the amounts and proportions found by the jury, including a judgment against the company for 100 per cent of Miss Lugo's loss, saying that the judgments thus rendered "were in accord with the law as established by *Vaca v. Sipes* . . . ."[41] Everybody appealed.

The union argued before the First Circuit that there was no basis for finding that it had breached its duty of fair representation. The court agreed that there was no possibility whatever of subjective bad faith, hostility, discrimination or dishonesty: the record showed that the union president was indeed "a dedicated Union leader and legislator of manifold responsibilities."[42] But it found this insufficient to meet the charge that the union under his direction had been guilty of arbitrary and perfunctory handling of the plaintiffs' grievances. According to the court, the evidence showed that the grievances had been mishandled: the union had not investigated or made any judgment concerning the merits of the plaintiffs' seniority claims. Instead it had inexplicably relied upon an NLRB proceeding which could not possibly have helped them. The Supreme Court, the court of appeals stated, had held in *Vaca v. Sipes* that "a union may not arbitrarily

38. L.P.R.A. tit. 31, § 5298 (1968).

39. National Labor Relations Act, as amended, § 10(b), 29 U.S.C. § 160(b) (1970).

40. Figueroa v. Sindicato de Trabajadores Packinghouse, AFL-CIO, 302 F. Supp. 224, 232 (D.P.R. 1969).

41. *Id.* at 231.

42. De Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 284 (1st Cir. 1970).

ignore a meritorious grievance or process it in perfunctory fashion."[43] This meant that the union had a duty "akin to, though less rigorous than, the duty of due care."[44] There was sufficient evidence to warrant the jury's finding that, in relying on the labor board proceedings, the union had violated that duty in all of the cases except that of Elsie Lugo Bernier. As to her, the jury had not found any breach of duty and she was, therefore, not entitled to recover anything.[45]

The court of appeals accepted the union's second contention—that the suit against it was barred by the tort claim statute of limitations. The suit against the union was a suit for breach of the duty of fair representation, according to the court, not a suit on the contract; violation of that duty being similar to negligence, all recovery against the union was barred by the one-year tort statute.

The company contended on appeal there was insufficient evidence to support the first jury's special verdict that the discharges were in violation of the seniority clause. It argued that the former assistant chief operator, the sole witness who had testified as to the comparative merit of the individual operators, had been totally discredited. The court of appeals concluded that she was discredited only as to Rosa Figueroa. The witness had testified that there were never any complaints about Rosa, whereas the records showed such complaints and indeed critical comments by the witness herself, as well as complaints after the witness had left the company. Given this evidence, the court concluded that the jury's verdict as to her was unsupported by evidence.[46] As to the others, the court conceded that the evidence was not "precise," but it was nevertheless sufficient.

Having thus sustained the jury's verdict as to five of the seven plaintiffs, the court of appeals then turned to the allocation of damages. *Vaca* taught, the court said, that the company was liable for damages attributable to its breach of contract while the union was chargeable only with the " 'increases if any in those damages caused by the union's refusal to process the grievance. . . .' "[47] In the present case, there was no suggestion that the union participated in the discharge. Nor, the court said, was there any "evidence that but for the Union's conduct the plaintiffs would have been reinstated or reimbursed at an earlier date. . . ."[48] The court therefore concluded that the company should be liable for the entire loss.

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43. *Id.* at 284.
44. *Id.* at 287.
45. *Id.* at 284 n.3.
46. *Id.* at 289.
47. *Id.* at 289, *quoting from* Vaca v. Sipes, 386 U.S. 171, 197-98 (1967).
48. 425 F.2d at 290.

This brought the court to the plaintiffs' appeal. Plaintiffs were clearly right, the court said, in arguing that the damages should not be cut off as of the date of trial. Some form of prospective relief, either reinstatement or an award of damages for future loss of earnings, should have been given. The case therefore should be remanded for a redetermination of damages and decision whether, in view of the six-year delay since the discharges, reinstatement should be ordered. As to attorneys' fees, the court reasoned that an award might be appropriate against the union, since its failure to use the grievance procedure necessitated the law suit and there was no substantial evidence that the company impeded efforts to use the grievance machinery. But the union was immune from liability because of the statute of limitations. The denial of attorneys' fees by the district court was therefore proper, even if for the wrong reason.

The plaintiffs and the company sought review by the Supreme Court. The company urged, among other things, that the court of appeals had applied the wrong standard to the union: that the union had not breached its duty to the plaintiffs in the absence of a showing of hostility, bad faith, or discrimination.[49] The plaintiffs urged that the court of appeals had applied the wrong standard in determining whether a breach of the collective agreement had occurred in Rosa Figueroa's case.[50] The Supreme Court denied certiorari.[51] Then, after the Second Circuit decided—contrary to the First—that the statute of limitations applicable to a claim against a union for breach of the duty of fair representation in failing to process a breach of con-

49. The company sought to demonstrate the vigor with which the union had attempted to protect the plaintiffs against the company. The statement in the company's petition begins: "Union leader Armando Sanchez was vitally interested in saving the jobs of all of his members who were employed by Puerto Rico Telephone Company." It continues:

> Faced with hundreds of employee terminations Sanchez and his Union first used the grievance procedure to obtain reinstatement of all, but were hampered by its weak provisions; and they realized that, even if successful under the seniority article, the result would not be reinstatement of all, but only substitution of junior employees for senior employees who had been terminated. Sanchez turned to the Puerto Rico Department of Labor and the Puerto Rico Senate Labor Committee without success. The Union twice resorted to the Puerto Rico Labor Relations Board. Both cases were appealed to the Puerto Rico Supreme Court which declared that the processes of the National Labor Relations Board, and the charges that the Union had also filed with that agency, were the Union's best hope. Indeed, that is also what Sanchez's lawyers told him, and he nurtured his Union's case with success through the Trial Examiner's decision and the Board only to meet failure before the Court of Appeals.

Petition for Certiorari at 3-4, Puerto Rico Tel. Co. v. Figueroa, No. 385, Oct. 1970 term. The union filed no counter statement!

50. Petition for Certiorari at 9-13, Figueroa v. Puerto Rico Tel. Co., No. 522 Oct. 1970 term.

51. Figueroa v. Puerto Rico Tel. Co., 400 U.S. 877 (1970).

tract claim was the state's contract statute,[52] the Court denied petitions for rehearing.[53]

The story, which thus ends at the court of appeals level, illustrates virtually every unresolved problem raised by the Supreme Court's opinion in *Vaca v. Sipes*.[54] *Figueroa* makes it clear that a claim of breach of the duty of fair representation for failure to process a grievance involves much more than a definition of that duty; it necessarily requires an inquiry into the fundamental nature of the legal rights created by a collective agreement, and the appropriate remedies for their enforcement. The court in *Figueroa* mechanically applied the doctrine of *Vaca v. Sipes* without such an inquiry. The result, to say the least, was odd. One plaintiff recovered nothing on her contract claim because the union filed a grievance for her, although on the wrong grounds. Five others recovered in full because the union did not file grievances for them, although there is no basis whatsoever for assuming that, if it had done so, the result would have differed in the slightest. The defendants were charged with at least seven years' back pay (and the possibility of future damages presumably measured by the plaintiffs' life expectancy) based on contract claims on which no grievances were filed, although the contract sued upon specified that if no grievance was filed within three days "the case shall be regarded as closed."[55] And this liability, which the union was not required to share because of the statute of limitations, was shifted totally to the company because, the court of appeals said, there was no evidence that the union's failure to act "'increased or contributed" to the plaintiffs' loss.[56]

Equally distressing is the process by which these results were reached. By first deciding the merits of the plaintiffs' seniority grievances, the trial court made inevitable the second jury's decision that the union had breached its duty by failing to process those grievances. More disturbing is the process by which the validity of the grievances were decided. "Equal ability" seniority cases are common, and although the questions are concededly sometimes difficult to decide, they are, more than most, "grist in the mills of the arbitrators,"[57] requiring "judgments [which] may indeed be foreign to the

52. Abrams v. Carrier Corp., 434 F.2d 1234 (2d Cir., 1970), *cert. denied*, 401 U.S. 1009 (1971).

53. Puerto Rico Tel. Co. v. Figueroa, *rehearing denied*, 400 U.S. 953 (1970), *motion for leave to file second petition for rehearing denied*, 401 U.S. 926 (1971).

54. 386 U.S. 171 (1967).

55. *Joint Appendix, supra* note 14, at 310.

56. 425 F.2d at 290.

57. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 584 (1960) (footnote omitted).

competence of the courts."[58] It was an arbitrator's judgment that was bargained for by the parties to the agreement.[59] Nevertheless five plaintiffs recovered in full as a result of a jury's judgment and Rosa Figueroa received nothing after judicial review of that judgment. Finally, there is the curious role displacement graphically illustrated by the company's petition for certiorari: the employer, whose liability depends upon a showing that the union breached its duty to the employees, is cast as the defender of the union's vigor and good faith in attacking it.[60]

B. How We Got There: From Moore to Vaca and Beyond

Vaca v. Sipes,[61] the case the First Circuit scrupulously sought to follow in *Figueroa,* was an imperfect attempt to accommodate the governmental and the contractual conceptions of the nature of the legal relationship established by a collective bargaining agreement: conceptions the Supreme Court has vacillated between over the years as different aspects of that relationship were successively presented to it in suits by unions and employees, first under the Railway Labor Act[62] and later under section 301 of the Labor-Management Relations Act.[63] The starting points provided by the two statutes were poles apart and, at the outset, the bodies of law the Court fabricated on the separate statutory foundations were wholly unrelated to each other. But, as time went on, the Court began to borrow from one line of cases to create new doctrine for the other, and in the end sets of rules were developed which, with appropriate changes in terminology, are substantially interchangeable. And both, unfortunately, exhibit the same confused duality of conception. This section will sketch out briefly the development of those rules and their relationship to each other.

1. The First Beginnings: Suits by Unions and Employees Under the Railway Labor Act.

The story begins, almost adventitiously, with a case arising under the Railway Labor Act which the Court failed to recognize even raised a question as to the nature of the relationship created by a collective bargaining agreement.[64] The Railway Act, as first passed in

58. *Id.* at 581.

59. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 594 (1960).

60. *See* note 49, *supra.*

61. 386 U.S. 171 (1967).

62. 45 U.S.C. §§ 151-88 (1970).

63. 29 U.S.C. § 185 (1970).

64. *See* text accompanying notes 72-85 *infra.*

1926, imposed upon rail carriers and employees the duty to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements. . . ."[65] But it said nothing about the enforcement of the agreements or about the rights created by them. It did, however, provide for the resolution of disputes over the interpretation of the agreements. Carriers and their employees were required to establish adjustment boards to deal with "disputes . . . growing out of grievances or out of the interpretation or application of agreements" which were not settled "in the usual manner," and the Act specified that the decisions of these boards should be "final and binding on both parties."[66] This scheme proved unsatisfactory and in 1934 the Act was amended[67] to provide a bipartite National Railroad Adjustment Board, with provision for appointment of a neutral in the case of deadlock, to which disputes unsettled at the carrier level might be referred. The decisions of the Board were to be "final and binding, except insofar as they shall contain a money award."[68] Provision was made for suits in the federal courts to compel compliance by carriers with Board awards in which the findings and order of the Board would be "prima facie evidence of the facts therein stated."[69] But, even in the 1934 amendments, there was no provision for suits for breach of the agreements per se, nor for enforcement of the decisions of the system of regional boards the Act also authorized the parties to create to decide disputes that would otherwise be referred to the National Board. The situation was the same with respect to airlines, which were included in the Act's coverage in 1936. They were exempted from the Adjustment Board procedure, but directed, as were the rail carriers under the 1926 Act, to establish their own boards of adjustment.[70]

Nor, as of this period, was there any clear conception in the state courts of the nature of the rights conferred by a collective agreement. As a contemporary study put it:

> To attempt to write about . . . the law of the collective bargain as

65. 45 U.S.C. § 152 First (1970).

66. Railway Labor Act, Act of May 20, 1926, ch. 347, § 3, First (i, m), 44 Stat. 578.

67. 48 Stat. 1189 (1934).

68. Railway Labor Act, Act of June 21, 1934, ch. 691, § 3, First (m), 48 Stat. 1189. The history and purpose of the 1934 amendments is set out in some detail in Chief Justice Warren's opinion in Brotherhood of Railroad Trainmen v. Chicago River & I.R.R., 353 U.S. 30 (1957).

69. *Id.*, § 3, First (p), 48 Stat. 1189. This provision was changed by the 1966 amendments to the Act (80 Stat. 208) to specify, to the contrary, that the findings and order "shall be final and binding upon both parties." 45 U.S.C. § 153, First (m) (1970).

70. Railway Labor Act, 49 Stat. 1190, 45 U.S.C. 184 (1970).

> it applies to the individual employee is to attempt to write about . . . something which does not exist. True, there are cases, perhaps a hundred or so all told. But there is no body of doctrine, in any sense of the word, to which reference can be made to predict the outcome of as yet unsettled questions. It can hardly even be said that there are standards, let alone a frame of reference.[71]

It was in this setting that *Moore v. Illinois Central Railroad*[72] came to the Supreme Court in 1941. The litigation was a fascinating one, presenting in embryonic and largely unperceived form many of the problems the Court was to deal with in later years. The litigation arose because Moore's employer, the Alabama & Vicksburg Railway, leased its tracks in 1926 to a subsidiary of the Illinois Central. The Alabama & Vicksburg had operated under an agreement with the Switchman's Union of North America. Under that agreement Moore was number 37 on the switchmen's seniority roster. Switchmen on the Illinois Central were represented by a rival union, the Brotherhood of Railroad Trainmen, and within a few months of the lease a new seniority arrangement was negotiated between the BRT and the Illinois Central.[73] As a result, Moore's seniority position was reduced from number 37 to number 57. In 1932 he brought suit, claiming that the Illinois Central was bound by the agreement between the Alabama & Vicksburg and the Switchmen's Union, and that he had therefore been deprived of his seniority in violation of the agreement.[74]

He lost.[75] After three years of litigation, the Mississippi Supreme Court held that, even if it were assumed that the Switchmen's contract would otherwise be binding, the new seniority roster constituted an offer of a new contract in place of one allegedly breached. By failing to object seasonably Moore had waived any rights under the old contract.

Moore lost more than his seniority; he also lost his job. Four months after the seniority suit was filed, the railroad discharged him as an "unsatisfactory employee." The reason he was unsatisfactory, it was later established, was because he had brought the seniority suit. He requested a hearing under the procedure established by the agreement but failed to appeal. Then, within a few months after the seniority suit was finally dismissed, he sued again, this time complaining about his discharge and relying now on the Illinois Central contract.

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71. Witmer, *Collective Labor Agreements in the Courts*, 48 YALE L.J. 195, 238 (1938).

72. 312 U.S. 630 (1941).

73. Illinois Cent. R.R. v. Moore, 112 F.2d 959, 962 (5th Cir. 1940). A representative of the Switchmen's Union tried to attend the meeting but was excluded.

74. A similar problem existed in Humphrey v. Moore, 375 U.S. 335 (1964). *See* text accompanying notes 163-68 *infra*.

75. Moore v. Yazoo & M.V.R.R., 176 Miss. 65, 166 So. 395 (1936).

The railroad defended on a number of grounds, among them that Moore had abandoned his appeal under the contract and that the suit was barred by Mississippi's three-year statute of limitations applicable to contracts not in writing. The trial court sustained the defenses, but on appeal the Supreme Court of Mississippi reversed and remanded for trial, holding that the suit was one on a written contract, the collective agreement, and that Moore was not required to pursue his contractual remedies because, having been discharged, he was entitled to regard the contract as having been breached and sue for damages.[76] Moore then amended his complaint to enlarge the damages claimed and the railroad removed to federal court on diversity grounds. A jury found in Moore's favor. The Fifth Circuit reversed.[77]

When viewed from the perspective of thirty years of later legal development Judge Sibley's opinion for the Fifth Circuit may be subject to some criticism, but for 1940 it was truly remarkable. The first question, he said, was "what law determines the validity and meaning of railroad union contracts, and the remedies applicable to them."[78] *Erie Railroad v. Tompkins*[79] was not dispositive; the collective agreement being sued on was national in scope, dealt with a relationship extensively regulated by Congress and, indeed, was entered into pursuant to legislation which specified the procedures for resolving disputes over the interpretation and application of collective agreements. A federal court was free, then, to exercise an independent judgment. Exercising that right and conscious of the "practical consequences of the holding that for so long a period as six years a discharged employee may sit quiet without the pursuit of the special remedies in the contract or under the Acts of Congress and then by suit recover back pay for that time"[80] he concluded that Moore's suit, properly analyzed, was not a suit on the collective agreement at all but on his parol contract of hiring which could be said to have adopted its terms. Since there was no federal statute of limitations, it was permissible to apply Mississippi's. But given the nature of the contract, the appropriate Mississippi statute to apply was the three-year statute governing contracts not in writing.

For the Supreme Court which had so recently decided *Erie* this apparently was an intolerable result. As Mr. Justice Black stated for the Court, "the Circuit Court of Appeals applied a Mississippi statute of limitations contrary to the Mississippi Supreme Court's application

76. Moore v. Illinois Cent. R.R., 180 Miss. 276, 176 So. 593 (1937).
77. Illinois Cent. R.R. v. Moore, 112 F.2d 959 (5th Cir. 1940).
78. *Id.* at 963.
79. 304 U.S. 64 (1938).
80. Illinois Cent. R.R. v. Moore, 112 F.2d 959, 963 (5th Cir. 1940).

of the same statute to the same plea in the same case."[81] This would have been wrong, according to the Court, even before the decision in *Erie*.[82] Having thus reprimanded the court of appeals without even addressing the considerations it had dealt with, the Court then turned to the railroad's claim that Moore had abandoned his grievance, which it described as a contention that "Moore's suit was prematurely brought because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act."[83] The contention was rejected. Those statutory procedures, the Court concluded, were not based on a philosophy of compulsion but were intended to be "voluntary."[84] Hence Moore did not have to use them. Accordingly, the court of appeals was reversed and Moore's judgment for damages was reinstated.[85]

The next case involving rights under a railroad agreement,[86] *Elgin, Joliet & Eastern Railway v. Burley*,[87] confirmed with emphasis the assumption in *Moore* that a collective agreement constituted a contract enforceable by individual employees without regard to the procedures of the Adjustment Board. *Burley* is usually regarded as dealing with the question of whether a union can, without authoriza-

81. 312 U.S. 630, 631 (1941).

82. *Id.* at 634.

83. *Id.*

84. *Id.* at 636.

85. Moore, having won his judgment, thereafter brought yet another suit against the railroad, claiming damages for loss of employment subsequent to trial. He lost, the court finding that the first verdict was intended to cover both past and future losses attributable to his discharge. Moore v. Illinois Cent. R.R., 136 F.2d 412 (5th Cir. 1943), *cert. denied*, 320 U.S. 771 (1943).

86. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944), which came between *Moore* and *Burley*, had only a peripheral bearing on the remedies available for breach of a collective agreement although it was, of course, enormously significant for the development of the duty of fair representation in enforcing claims for such breach. The Court held that the Railway Labor Act's grant to a labor organization of the exclusive right to represent all members of a craft or class imposed an affirmative duty upon that organization not to discriminate against any member of the craft or class in making a collective agreement. Although the suit was not one to enforce an agreement, but on the contrary to enjoin performance of one, the Court did consider the question of whether the plaintiffs should be required to seek relief from the Adjustment Board. After first noting that there were no "differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board" [*id.* at 205] the Court went on to conclude that no remedy before the Board was available since the Board, although authorized to hear "disputes between an employee . . . and a carrier . . . growing out of grievances" [*id.*, quoting 45 U.S.C. § 153, First, (i) (1970)], had consistently declined to hear any complaints by individuals. Even if a hearing were available before the National Board, or a regional board, it would not be adequate since such boards were made up exclusively of union and carrier representatives and it was precisely against their joint action that the plaintiffs were complaining. *Cf.* the discussion in the text accompanying notes 664-76 *infra*.

87. 325 U.S. 711 (1945), *aff'd. on rehearing*, 327 U.S. 661 (1946).

tion, settle the accrued monetary claims of employees under a collective agreement, and Mr. Justice Rutledge, writing for the Court, did state that to be the "ultimate" issue.[88] Actually, the case involved that question only indirectly. The dispute arose out of a claim by trainmen that the carrier was scheduling the starting times of certain switching crews contrary to the rules. Grievances were duly filed and processed to the Adjustment Board by the union after being duly authorized to do so by the complaining employees. A settlement was then reached under which the railroad agreed to change its scheduling practices. The union then filed a second claim, alleging that the settlement looked only to the future and did not relieve the carrier of liability for "penalty time" which the grievants had requested for the improper scheduling. The carrier disagreed. The Adjustment Board deadlocked and a neutral referee was appointed.[89] He decided that the claims for accrued pay had, indeed, been disposed of by the settlement in the first case and therefore denied them.[90] The employees then brought suit in federal court for the accrued pay claimed to be due them under the collective agreement.[91]

When the case reached the Supreme Court, the issue was whether the Adjustment Board's decision that the employees' claims for penalty pay had been settled barred suit on them. Over vigorous dissent, the Court held that in the absence of a showing that the employees had authorized the union to act for them in the second Adjustment Board proceeding,[92] its result did not bind them. Neither the majority nor the dissenters even raised the question, despite 62 pages of opinion dissecting and redissecting the Act, whether the plaintiffs had any business in court at all, whether or not there had been a prior Adjustment Board decision. Both sides assumed that the issue was whether the Adjustment Board decision that their claims had been settled bound the plaintiffs in the absence of notice to them or authorization from them, not whether the claims themselves, assuming them to be unsettled, were adjudicable in the courts rather than before the Board.[93]

88. 325 U.S. at 712.

89. *Id.* at 717.

90. *Id.* at 718.

91. *Id.* Jurisdiction was based on diversity.

92. *Id.* at 738.

93. Petitions for rehearing and amicus briefs were filed by the railroad unions, the railroad employers, the CIO, and the United States, 326 U.S. at 801-02 (1945), pointing out that an insistence upon individual authorization for every settlement of a grievance pending before the Adjustment Board would effectively destroy that Board's usefulness. After rehearing the Court announced that it would "adhere" to its decision but made it clear that authorization could be found in the usages and customs of the industry, the union's constitution, the fact of knowledge that the grievance was being processed and settled or in any other manner, thus effectively destroying any practical impact of its original decision. Elgin, J. & E. Ry. v. Burley, 327 U.S. 661, 663-65 (1946).

Given this history, the next cases, *Slocum v. Delaware, Lackawanna & Western Railroad*[94] and its companion *Order of Railway Conductors v. Southern Railway*[95] appear, at first glance, astonishing. There, only four years after *Burley*, the Court, through Mr. Justice Black, who had written *Moore* and been in the majority in *Burley*, announced the "paramount importance of having [the Adjustment Board] adjust grievances and disputes."[96] The 1934 amendments to the Railway Labor Act, the Court said, represented an effort to provide "effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements."[97] The Board members "understand railroad problems and speak the railroad jargon."[98] Hence, the Court concluded, the Board's jurisdiction was exclusive and no court, state or federal, had power to adjudicate a controversy as to the proper interpretation of a railroad collective agreement; the state courts that had not required prior resort to the Adjustment Board were reversed. *Moore* was distinguished as involving only a "common law or statutory action for wrongful discharge."[99] If, in that kind of a suit, the Court now said, a court would have to consider (apparently incidentally) some provision of a collective bargaining agreement, the court's interpretation would "of course" have no binding effect.[100]

The explanation for this startling change in emphasis apparently lies in the difference in the parties before the Court. In *Moore* and *Burley* employees were seeking, independently of their unions, to assert rights against employers. The disputes in *Slocum* and *Southern Railway*, on the other hand, were between employers and unions—precisely the disputants for whom Congress had established the Adjustment Board. In *Slocum*, the issue was whether certain work which the railroad had assigned to members of the Railway Clerks should, under the agreement the railroad had signed with the Telegraphers, have been assigned to members of the latter union. The railroad sought to resolve the dispute by suing both unions in order to obtain a judicial interpretation of the agreement. Because it involved, in a loose sense, a jurisdictional dispute[101] between two unions, it was

94. 339 U.S. 239 (1950).
95. 339 U.S. 255 (1949).
96. Slocum v. Delaware, L. & W. R.R., 339 U.S. 239, 243 (1950).
97. *Id.*
98. *Id.*
99. *Id.* at 244.
100. *Id.*
101. The sense is very loose. The Telegraphers were not making a claim based on their jurisdiction as a union but one based on their contract with the employer. It is perfectly possible for an employer to agree to assign the same work to members of two different unions. And the Telegraphers did not seek the work but simply damages for breach of contract.

perhaps easy to perceive a distinction between *Slocum* and the kinds of claims involved in *Burley*. But this was not so in the companion case, *Southern Railway*. There conductors, like the trainmen in *Burley*, claimed that under the collective agreement they were entitled to extra pay for performing certain switching duties. The railroad refused to pay and brought suit for a declaratory judgment as to the meaning of the agreement. The understanding of "railroad problems" and "railroad jargon"[102] required to resolve the dispute was no greater than that which would have been required to resolve the underlying dispute on which suit had been brought in *Burley*. But, now faced for the first time with cases in which the controversies over the interpretation of railroad agreements were between employers and unions, the Court held that federal law required that they be resolved only by the Adjustment Board.

The distinction actually drawn by the Court in *Slocum* was, of course, not put in those terms. *Burley* was ignored. The Court now said *Moore* was distinguishable because of the relief sought. Moore had not been required to use the Adjustment Board procedures because he had not sought reinstatement but had, rather, accepted the railroad's discharge as final, thereby ceasing to be an employee. His suit for breach of contract did not, therefore, the Court said, involve questions of future relations between the railroad and its other employees.

The Court next made it clear that the option of terminated employees to sue for breach of contract, which was permitted by the federal act, existed only if state law also permitted it, since "the requirements of the cause of action, the interpretation of the contract and the measure of damage to be applied"[103] were still state questions. Hence, the Court held in *Transcontinental & Western Air, Inc. v. Koppal*,[104] if the state required exhaustion of administrative remedies before an employee could bring suit "under his contract of employment . . . ,"[105] the *Moore* option was foreclosed even in discharge cases.

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102. Slocum v. Delaware, L. & W. R.R., 339 U.S. 239, 243 (1950).

103. Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653, 656 (1953).

104. *Id.*

105. *Id.* at 657. Relying on a Missouri intermediate appellate decision and an Eighth Circuit decision, the Court found that Missouri did require exhaustion and Koppal lost. Unnoticed was a decision by the Supreme Court of Missouri holding that resort to the procedures established by the Railway Labor Act was not required. Wilson v. St. Louis & S.F. Ry., 362 Mo. 1168, 247 S.W.2d 644 (1952). The *Wilson* case demonstrates that the reference to state law, if not circular, was at least spiral. There was, in fact, very little state law with respect to the requirement of exhaustion under collective agreements other than that found in the decisions of state courts in railroad cases. Many of those courts, including the Supreme Court of Missouri, believed before *Koppal* that the question of whether the Railway Labor Act required resort to the

Subsequent decisions tied the option down even more tightly. In 1959 the Court held that a retired employee could not litigate pay claims accrued prior to his retirement,[106] and that a discharged employee could not exercise his option to sue for breach of contract after unsuccessfully pursuing the Adjustment Board alternative.[107] In so holding the Court again emphasized the necessity for uniform interpretation of railway collective agreements by specialized tribunals. This time speaking through Mr. Justice Frankfurter, the Court said:

> We can take judicial notice of the fact that provisions in railroad collective bargaining agreements are of a specialized technical nature calling for specialized technical knowledge in ascertaining their meaning and application. Wholly apart from the adaptability of judges and juries to make such determinations, varying jury verdicts would imbed into such judgments varying constructions not subject to review to secure uniformity. Not only would this engender diversity of proceedings but diversity through judicial construction and through the construction of the Adjustment Board. Since nothing is a greater spur to conflicts, and eventually conflicts resulting in strikes, than different pay for the same work or unfair differentials, not to respect the centralized determination of these questions through the Adjustment Board would hamper if not defeat the central purpose of the Railway Labor Act.[108]

In none of these post-*Burley* cases constricting the right to sue for breach of a railroad collective agreement was there any apparent conflict between the individual employee bringing suit and the union that represented him. Where such conflict did exist and, indeed, was made the basis for the suit, the gates were opened wider. The Court had held, in a series of cases going back to *Steele v. Louisville & Nashville Railroad*,[109] that the Railway Labor Act's grant of the exclusive right to represent all members of a craft or class imposed an affirmative duty upon the labor organization not to discriminate against any member of the class in the making of a collective agreement. Accordingly, performance of an agreement discriminating against blacks could be enjoined by virtue of federal law in either a state court, as in *Steele*, or in a federal court,[110] and against either the employer[111] or

Adjustment Board was a matter of interpretation of a federal statute and read *Moore* and *Burley* as declaring that no such exhaustion was necessary. This, in turn, became the state law which the Supreme Court now held to be determinative in discharge cases. *See* Newborn, *The Strange Career of Moore v. Illinois Central Railroad*, 23 LAB. L.J. 361 (1972).

106. Pennsylvania R.R. v. Day, 360 U.S. 548 (1959).
107. Union Pac. R.R. v. Price, 360 U.S. 601 (1959).
108. Pennsylvania R.R. v. Day, 360 U.S. 548, 553 (1959).
109. 323 U.S. 192 (1944). *See* note 86 *supra*.
110. Tunstall v. Brotherhood of Firemen, 323 U.S. 210 (1944).
111. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

the union[112] executing the discriminatory agreement.

Thirteen years after *Steele*, in *Conley v. Gibson*[113] the Court was faced for the first time with a claim by individual employees against a union based on alleged racial discrimination in the application of a nondiscriminatory collective bargaining agreement. The details of the case are uncertain since, as the Court noted, the complaint failed to set forth the specific facts supporting its general allegations of discrimination. The dispute, however, appears to have been one over seniority: the railroad, it was alleged, had purported to abolish 45 jobs held by the petitioners and other blacks all of whom were either discharged or demoted. In fact, it was alleged, the railroad had not abolished the jobs but had filled them with whites.[114] The union, it was claimed, had discriminated against the black employees in violation of their right to fair representation by doing nothing to protect them. Only the union was sued. The relief requested was a declaratory judgment, injunction and damages.

The lower courts dismissed,[115] holding that so long as there was no charge that the bargaining agreement was itself discriminatory, the function of determining the rights arising under it was to be performed by the National Railroad Adjustment Board under *Slocum*.[116] The Supreme Court reversed.[117] Justice Black, again writing for the Court, reasoned that the Railway Labor Act provisions for the settlement of disputes involving interpretation and application of a collective bargaining agreement simply did not apply. This was not a dispute like *Slocum* between employee and employer, but a claim by employees to enforce their statutory right to fair representation. The Adjustment Board had no power to protect plaintiffs against such discrimination, and the contract between the union and the railroad would, at most, be "only incidentally involved in resolving this controversy."[118] On the merits, the Court declared that the duty to represent fairly, established by *Steele*, was as applicable to the process of resolving disputes under existing agreements as it was to the negotiation of new agreements. To the union's contention that under the Act

112. Graham v. Brotherhood of Firemen, 338 U.S. 232 (1950); Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952). The same principles were held to be applicable to agreements in industries subject to the National Labor Relations Act in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) and Syres v. Oil Workers Local 23, 350 U.S. 892 (1955).

113. 355 U.S. 41 (1957).

114. *Id.* at 43.

115. Conley v. Gibson, 138 F. Supp. 60 (S.D. Tex. 1955); *accord*, Hettenbaugh v. Airline Pilots Ass'n, 189 F.2d 319 (5th Cir. 1951), *and* Hayes v. Union Pac. R.R., 184 F.2d 337 (9th Cir. 1950), *cert. denied*, 340 U.S. 942 (1950).

116. 339 U.S. 239 (1949).

117. 355 U.S. 41 (1957).

118. *Id.* at 45.

the plaintiffs could process their own grievances to the Adjustment Board and could also, as discharged employees, sue the employer for breach of contract, the Court answered that even so the union could not discriminate in refusing to represent them.[119]

Insofar as *Conley* decided that the duty of fair representation established by *Steele* applied to the processing of grievances as well as the negotiation of agreements, it is straightforward enough. But the Court at least appeared to be saying something more. The plaintiffs did not seek only to compel the union to represent them against the railroad; the relief they requested was that the union be enjoined "from allowing plaintiffs' jobs to be abolished" and that damages be awarded for their discharges.[120] Granting such relief would necessarily entail a judgment whether the alleged job cutback violated the collective agreement, a decision which clearly came within the *Slocum* rationale. Yet the Court found *Slocum* inapplicable because in *Conley* the dispute was between the plaintiffs and their bargaining representative.[121]

2. *The Second Beginning: Union and Employee Suits Under Section 301.*

While this development was taking place under the Railway Labor Act, the Court also began to develop doctrine under a quite different statute: section 301 of the Labor-Management Relations Act of 1947.[122] The Railway Labor Act amendments of 1934 had pro-

119. *Id.* at 47.

120. Record at 15-16, Conley v. Gibson, 355 U.S. 41 (1957).

121. The Court's blindness to the existence of two questions—whether there was discrimination by the union in failing to process the plaintiffs' claims of violation of the collective agreement and whether those claims were valid—is emphasized by its explicit disapproval of Hayes v. Union Pac. R.R., 184 F.2d 337 (9th Cir. 1950), *cert. denied*, 340 U.S. 942 (1951), in the same footnote in which *Slocum* was said to be inapplicable. The employer had been joined in *Hayes* and relief was sought directly against it on the claim of contract violation. *See* Hayes v. Union Pac. R.R., 88 F. Supp. 108 (N.D. Cal. 1950). The Ninth Circuit dismissed on *Slocum* grounds, a result which the Supreme Court now said was incorrect.

The existence of two questions would, of course, have been revealed if the case had gone to trial. When the case went back to the District Court, however, it was discovered that the named plaintiffs had lost neither time, nor pay, nor seniority and, further, that plaintiff J.D. Conley, had simply walked off the job without explanation while the suit was pending. Accordingly, the suit was dismissed. Conley v. Gibson, 29 F.R.D. 519 (S.D. Tex. 1961).

122. Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185 (1970). Technically the appropriate reference is to section 301(a). Subsections (b) through (e) of section 301 implemented the basic grant of jurisdiction by specifying that a union could be sued as an entity, insulating members from liability for money judgments entered against the organization as such, locating venue, permitting service upon a union by serving an officer or agent and modifying the ageney rule of section 6 of the Norris-LaGuardia Act. I will follow the usual practice of describing section

vided administrative machinery to adjust claims of violation of the rules established by collective bargaining but had not spoken to the status of the agreements as contracts. The chronologically comparable statute for other industries, the 1935 National Labor Relations Act,[123] did not deal with the enforcement of collective bargaining agreements at all. But in 1947 Congress amended the National Labor Relations Act[124] and, in doing so, spoke to that question, although in quite different fashion than in the Railway Labor Act. Rather than providing administrative machinery to deal with disputes arising under collective agreements, it decreed, in section 301 of the amending statute, that the agreements should be enforceable as contracts in the federal courts by providing that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ."[125]

The Supreme Court's first encounter with section 301 was in *Westinghouse Salaried Employees v. Westinghouse Corp.*[126] There a union sued under section 301 in its own name to collect wages claimed to be due to 4,000 of its constituents under a disputed interpretation of the collective agreement. The agreement did not require arbitration of such disputes but permitted the union to strike after taking the question through the grievance machinery. Instead the union chose to sue.

As counsel put the case, the Court was faced with a host of difficult, unresolved questions as to the nature of the collective agreement, the interests the agreement created in the union and the individual employees, the right of the union to enforce the interests of the employees, and, above all, whether these unresolved questions were to be governed by state or federal law. It was too much for one swallow or, indeed for one opinion. In three separate opinions, none of which could get the support of more than two additional justices, the Court refused to answer any of the questions put to it except the last one. A majority concluded that suits to enforce those terms of a collective agreement providing (in Mr. Justice Frankfurter's words) "individual rights,"[127] or (in Chief Justice Warren's words) rights which were "uniquely personal,"[128] or (as Mr. Justice Reed put it) rights which arose from the "separate hiring contracts"[129] of individual employees,

301(a) as simply section 301 except where particular reference is made to the provisions of section 301(b).

123. 29 U.S.C. §§ 151 *et seq.* (1970).
124. 61 Stat. 136 (1947).
125. 29 U.S.C. § 185(a) (1970).
126. 348 U.S. 437 (1955).
127. *Id.* at 460.
128. *Id.* at 461.
129. *Id.* at 464.

were governed by state law and could not be brought under section 301. Justices Black and Douglas dissented.

Then, in 1957, with Mr. Justice Black out and Mr. Justice Douglas writing for the Court, the direction was reversed. In *Textile Workers Union v. Lincoln Mills*[130] the Court held that the simple jurisdictional language of section 301 should be construed as authorizing the Court to devise a federal substantive law to govern collective agreements subject to the Act. As in *Westinghouse*, the suit was a union suit designed to secure individual rights embodied in a collective agreement, but the relief sought from the judiciary was not direct enforcement of those rights but only enforcement of the employer's promise to arbitrate the individual claims. The question was whether such enforcement could be granted as a matter of federal law, despite the contrary Alabama rule that agreements to arbitrate were not specifically enforceable. The Court answered affirmatively without facing directly the difficult problems that had been presented to the Court in *Westinghouse*.[131] But by resting its answer to the simple question before it on the broad premise that the law of the collective agreements was to be federal, the Court assured that the problems it had avoided in *Westinghouse* would eventually return to it. Still to be decided, although clearly foreshadowed, was the corollary that the federal law created by the simple jurisdictional words of section 301 was substantively preemptive: suits brought in state courts for breach of collective agreements would be governed by federal law[132] and could be removed to the federal courts under 28 U.S.C. 1441(b).[133]

Lincoln Mills created enormous apprehension that the federal courts would use their newly created power to interfere with the autonomous relationships unions and employers had created without in-

130. 353 U.S. 448 (1957).

131. Union counsel, learning from *Westinghouse*, deliberately avoided the unsettling questions of individnal rights with which this new federal law would have to deal. It should not be assumed, however, that the Court was unaware of them. Mr. Justice Frankfurter, in dissent, pointedly referred to the "vast problems" which his opinion in *Westinghouse* had discussed and the "prickly and extensive problems" involved in the regulation of contracts between employers and unions. 353 U.S. at 462, 464. The Court's only reference to these problems was a footnote reservation (citing with a "*cf.*" *Westinghouse, Moore, Slocum* and *Koppal*) as to "whether there are situations in which individual employees may bring suit in an appropriate state or federal court to enforce grievance rights under employment contracts where the collective bargaining agreement provides for arbitration of those grievances. . . ." *Id.* at 459 n.9.

132. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962). *Lincoln Mills* thus, curiously, made the jurisdictional words of section 301(a)—its only words—redundant, since federal jurisdiction could now be grounded on 28 U.S.C. §§ 1331 and 1337 (1970).

133. Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968).

terference from the law.[134] Only a few months before *Westinghouse*, Dean Shulman, in the 1955 Holmes Lecture at Harvard, had pleaded eloquently that "the law stay out" and argued persuasively against the thesis that "the law which provides remedies for breach of contract generally should also provide remedies for breaches of collective agreements."[135] Arbitration, he said, was "an integral part of the system of self-government"[136] established by the collective agreement and intrusion of the courts could "seriously affect the going systems of self-government."[137]

Although the courts were required by section 301 to hear suits for breach of collective agreements, the damage to the arbitration mechanism would be minimized if in such suits the courts would, whenever possible, compel the parties to utilize the autonomous instruments of self-government established by the agreements and enforce the results of that institution's workings. And this is precisely what the Supreme Court next did in the Steelworkers' trilogy,[138] laying to rest the fears aroused in many by *Lincoln Mills*.

"A collective agreement," the Court now said, "is an effort to erect a system of industrial self-government."[139] The agreement is "more than a contract; it is a generalized code" which "covers the whole employment relationship" and calls into being a "new common law—the common law of a particular industry or a particular shop."[140] Arbitration is at the heart of this system of government. It is "the means of solving the unforeseeable by molding a system of private law."[141] An arbitrator performs functions which are not normal to the courts and must have qualities which "the ablest judge cannot be expected to bring."[142] It followed, therefore, that in determining whether arbitration should be ordered in a section 301 suit, the courts had no business in inquiring as to the merits of the claim or even "whether there is particular language in the written instrument which will

134. *See, e.g.*, Aaron, *On First Looking Into the Lincoln Mills Decision* and Cox, *Arbitration in the Light of the Lincoln Mills Case* in NAT'L ACADEMY OF ARBITRATORS, ARBITRATION AND THE LAW, PROCEEDINGS, 12TH ANNUAL MEETING 1, 24 (1959). *See also* Feinsinger, *Enforcement of Labor Agreements—A New Era in Collective Bargaining*, 43 VA. L. REV. 1261 (1957); Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635 (1959).

135. Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1001 (1955).

136. *Id.* at 1024.

137. *Id.*

138. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

139. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580 (1960).

140. *Id.* at 578-79.

141. *Id.* at 581.

142. *Id.* at 582.

support" it.[143] So, in *American Manufacturing*, the court held that under an agreement providing for arbitration of all disputes concerning the interpretation and application of the agreement, a claim—however frivolous it might appear—that the agreement was violated was arbitrable. In *Warrior & Gulf* it decided that a more ambiguous clause should be liberally construed and arbitration ordered unless it could be said "with positive assurance" that the clause was not "susceptible to an interpretation that covers the asserted dispute."[144] And, in *Enterprise*, it held that the product of this autonomous institution, the award, should be enforced without review, unless it was "apparent"[145] from the face of the award that the arbitrator had acted, as it were, unconstitutionally, basing his award upon something other than the agreement.

All of this was so, of course, only if the parties had voluntarily agreed to a system of arbitration. Unlike the Railway Labor Act, the National Labor Relations Act did not establish or require the parties to establish a system for adjudication of disputes over the meaning and application of collective agreements. If the parties had not agreed to such a system and suit were brought directly on the contract, what then were the rights of the parties? In 1962 in *Smith v. Evening News Association*,[146] the Court first looked at that question.[147] Employees who were not permitted to work when another union struck their employer, claimed that this action violated a provision in the collective agreement prohibiting discrimination against any employee because of his membership in the union. The union supported the claim. In accordance with the suggestions of a majority of the Justices

143. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

144. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-83 (1960).

145. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960).

146. 371 U.S. 195 (1962).

147. Omitted from this account are Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 195 (1962) and the three decisions of June, 1962, in which the Court dealt with employer suits under section 301: Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962); Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962); and Drake Bakeries Inc. v. Local 50, Bakery Workers, 370 U.S. 254 (1962). The decisions are significant to a description of the Court's conception of a collective agreement but are more conveniently discussed separately. *See* text accompanying notes 240-71 *infra*.

Omitted also is a detailed discussion of Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) in which the Court held that section 301 did not deprive state courts of jurisdiction to hear suits governed by it. *Dowd Box* could have been interesting, since the suit was a class suit brought by union officers on behalf of the members of the union in which judgments were entered for the individual employees against the company for wages due them under the collective agreement. There had been no recourse to the grievance procedure although the contract provided one. The only issue raised in the Supreme Court, however, was whether section 301 precluded state court jurisdiction.

in *Westinghouse*, it elected to bring suit for breach of contract in a Michigan court in the names of the individual employees. The employer successfully moved to dismiss on the ground that the contract claim essentially duplicated a claim which would make out an unfair labor practice under the National Labor Relations Act. In *San Diego Building Trades Council v. Garmon*[148] and earlier cases[149] the Supreme Court had established that the jurisdiction of the Labor Board was exclusive: conduct that was arguably prohibited by the National Labor Relations Act was not subject to the imposition of state remedies. Since the claimed discrimination in violation of the collective agreement would also have constituted an unfair labor practice, the Michigan court held in *Smith* that the preemption doctrine ousted it of jurisdiction.[150]

The Supreme Court reversed.[151] Speaking through Mr. Justice White, who was to become the Court's principal spokesman on matters involving collective agreements,[152] it held that *Garmon* had no application to section 301 suits, whether such suits were brought in federal or state courts. The question then was whether this suit was one which could have been brought under section 301. In *Westinghouse* a majority of the Justices had concluded that a union's suit to vindicate individual employee rights arising from a collective bargaining contract was not comprehended within the coverage of section 301. But, the Court now said, the course of decision since *Westinghouse* had laid the ghost of that case: individual claims are at the heart of the grievance and arbitration machinery compliance with which the Court had compelled in the *Lincoln Mills* and the trilogy. Excluding them from the ambit of section 301 "would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law."[153]

But what, then, about arbitration? No one had even raised that question. Rather than point that out and remand for consideration of the issue on a fuller record, the Court simply took the issue out of the case by a footnote asserting: "There was no grievance arbitration procedure in this contract which had to be exhausted before recourse could be had to the courts."[154] Then, however, at the

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

149. Garner v. Teamsters Union, 346 U.S. 485 (1953); Weber v. Anheuser-Busch Inc., 348 U.S. 468 (1955).

150. Smith v. Evening News Ass'n., 362 Mich. 350, 365, 106 N.W.2d 785, 793 (1961), *cert. granted*, 369 U.S. 827 (1962).

151. Smith v. Evening News Ass'n., 371 U.S. 195 (1962).

152. The Justice staked out the field early. His first opinion for the Court was Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962) discussed *infra* at notes 253-54.

153. 371 U.S. at 200.

154. *Id.* at 196 n.1.

end of the opinion appears the following, again in a footnote: "The only part of the collective bargaining contract set out in this record is the no-discrimination clause. Respondent does not argue here and we need not consider the question of federal law of whether petitioner, under this contract, has standing to sue for breach of the no-discrimination clause nor do we deal with the standing of other employees to sue upon other clauses in other contracts."[155] The Court, in other words, was not deciding what it said was a question of federal law: whether individual employees had rights which they could enforce under a collective agreement.[156] It only decided, a la *Bell v. Hood*[157] that there was jurisdiction under section 301 to hear a claim for such rights.

An opportunity to resolve the question apparently left open in *Smith* came quickly. In *Truck Drivers Local 89 v. Riss & Co.*,[158] a union and six of its members sought enforcement of a grievance settlement of a seniority issue. The settlement was contained in a decision of a joint committee consisting of representatives of the union and of a group of employers. The Court held that the action could be brought under section 301, but avoided the questions of the right of individual employees to bring suit and of whether Norris-LaGuardia might impose some limit on the equitable powers of a federal court. The Court, per curiam, treated the "award" of the joint committee as an arbitration decision and held it enforceable under *Enterprise*.

3. Convergence.

To this point the developments under the Railway Labor Act and section 301 had proceeded independently. The two began to converge because of an omission in the earlier statute. Section 3 of the Railway Act,[159] which established the National Railroad Adjustment Board, also provided for suits to enforce awards of that Board. When

155. *Id.* at 201 n.9. The cautionary note was well advised. Contrary to the opinion's earlier note, the agreement in fact did contain a provision for the arbitration of grievances (as anyone familiar with the contracts of the American Newspaper Guild would have assumed), a fact not known to the Court since, as the later note acknowledged, only the no-discrimination clause had been set out in the complaint and no one had even addressed the issue posed by the Court. Agreement Between Evening News Association and Newspaper Guild of Detroit, dated September, 1954, and effective Jan. 11, 1964-Dec. 31, 1965, Article IX.

156. The Court in fact had, less than a year earlier, affirmed a judgment in favor of individual employees in a suit claiming wages due under a collective agreement brought in a state court. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962). But there, as in *Smith*, the attention of the parties focused entirely on other issues. *See* note 147 *supra*.

157. 327 U.S. 678 (1946).

158. 372 U.S. 517 (1963).

159. 45 U.S.C. § 153 (1970).

Congress extended the act to the airlines,[160] however, it did not make section 3 applicable to them, but instead required the parties to establish their own boards for the purpose of resolving disputes over the interpretation and application of collective agreements.[161] It neglected, however, to provide any judicial avenue for enforcement of the awards of such boards. For airline agreements, therefore, there was neither an express grant of federal jurisdiction over suits for breach of contract comparable to section 301, which could be used as in *Enterprise* to enforce awards, nor was there the specific provision for the enforcement of awards which the Railway Labor Act provided for railroads.

In *International Association of Machinists v. Central Airlines*[162] the Supreme Court filled the gap. The agreement in that case provided that an award of the system board of adjustment provided for by it should be "final and binding." The question was whether a union could bring suit in a federal court in the absence of diversity of citizenship to enforce such an award. The Court held that it could. The Railway Labor Act, the Court said, required the parties to engage in the system of collective bargaining and to establish a system for adjusting grievances stemming from the collective agreements reached through that bargaining. The Act must be read, therefore, as making the agreements themselves, and the boards provided by them, creations of federal law which should be governed by federal law. Hence, a suit to enforce a board award was a suit arising under federal law, specifically, under an act of Congress regulating commerce, and the federal courts had jurisdiction under both 28 U.S.C. §§ 1331 and 1337.

The reasoning in *Central Airlines* was thus the converse of *Lincoln Mills*. *Lincoln Mills* had proceeded from jurisdictional language to substance, while *Central Airlines* proceeded from substance to jurisdiction. The result, however, was the same: In both cases there was now federal jurisdiction and the governing law was federal, wherever suit was brought.

This brings us to 1964 and *Humphrey v. Moore*,[163] the first case under section 301 in which the Court dealt explicitly with the assertion of individual rights under a collective agreement in opposition to the union involved.[164] The factual situation which gave rise to the case was complex, but can be briefly summarized. A joint man-

160. 49 Stat. 1189 (1936).
161. 45 U.S.C. §§ 183-85 (1970).
162. 372 U.S. 682 (1963).
163. 375 U.S. 335 (1964).
164. *Charles Dowd Box, supra* note 147 and *Smith, supra* note 151, were suits brought in the names of individuals but both were, in fact, sponsored by the union and sought to vindicate claims supported by the union.

agement and union committee made a decision during the term of a collective bargaining agreement the effect of which was to reduce drastically the plaintiffs' seniority rights. They successfully brought suit in a Kentucky court to enjoin enforcement of the committee's decision, contending that the conditions specified in the agreement—absorption or merger with another company—which alone gave the committee authority to make the decision under the agreement did not exist and, also, that the union had breached its duty of fair representation in agreeing to the change.

The Supreme Court unanimously agreed that the decision should be reversed. It divided sharply, however, over the rationale. Mr. Justice White, speaking for a bare majority of five, said that the suit was one by individual employees to enforce their seniority rights under the agreement. Such a suit could be brought under section 301, he said, under *Smith v. Evening News.* Treating the committee which had decided the seniority question, as in *Riss*,[165] as if it were an arbitration tribunal, the opinion concluded that the decision to alter seniority was within its power since there had been an absorption of the kind which gave it authority to act. Treating the claim of breach of duty of fair representation as if it were a claim that the union had unfairly represented employees in the prosecution of a contract claim, the Court found that on the facts there was no breach of duty.

Justices Goldberg and Brennan disagreed vigorously with this approach, although they reached the same result.[166] The suit was not a section 301 suit at all, they argued, since it was brought not to enforce a collective agreement but to upset one. While an arbitrator might be limited to the terms of a collective bargaining agreement, the parties are not. The decision of the joint committee was an attempt by the parties to solve a dispute and was itself an agreement. Whether or not the solution adopted was in accordance with the prior agreement was immaterial as long as the union was not guilty of a breach of its duty of fair representation; that duty derived from the National Labor Relations Act and not from the collective agreement. They concurred in the finding that no such breach had been shown.[167]

165. Truck Drivers Local 89 v. Riss & Co., 372 U.S. 517 (1963).

166. 375 U.S. at 351.

167. There were two other opinions. Mr. Justice Harlan agreed with the Court that an employee could "step into the shoes of the union and maintain a § 301 suit himself" [*Id.* at 359] if the settlement of a grievance went beyond the terms of the collective agreement but said that he agreed with Justices Goldberg and Brennan that the duty of fair representation did not arise from section 301 but from the National Labor Relations Act. That being so, he would have set the case for reargument on the question of whether a claim that the duty was breached was pre-empted as within the primary and exclusive jurisdiction of the Labor Board. *Id.* at 359-60. Mr. Justice

For present purposes, the significant holding of *Humphrey v. Moore* was that an individual could maintain an action to enforce his rights under a collective bargaining agreement. The concluding footnote in *Smith v. Evening News* was ignored. For the first time since *Moore v. Illinois Central Railroad* the Supreme Court explicitly said that an action could be maintained, at least under certain circumstances, by an individual to obtain relief from an employer based upon a claim of violation of a collective agreement. Indeed, in *Humphrey v. Moore*, the Court went much further than in its 1941 decision. The first Moore had sued only to recover damages caused by his discharge and he was permitted to do so only on the assumption that he did not seek to reinstate the employment relationship. The second Moore, however, sought an injunction requiring both the union and the employer to conduct the employment relationship in the future in accordance with the view which he espoused as to the proper meaning of the collective agreement. The Court, although it decided against him on the merits, appeared not to doubt at all the propriety of granting the relief requested if a proper showing had been made.[168]

When there was no apparent union-member conflict, however, the Court continued to stress the autonomous nature of the internal adjustment procedures, as established by statute in the railroad industry, or by agreement in other industries, and to reduce the use of contract notions which would lead to judicial interference with that system of government. The erosion of contract reached its high point in 1964 with *John Wiley & Sons, Inc. v. Livingston*.[169] There the Court, without dissent, held that the purchaser of a business was required to arbitrate employee and union claims arising after the sale based on a collective bargaining agreement executed by the seller, whether or not the purchaser would be so bound on conventional contract principles, if there were "substantial continuity of identity in the business enterprise before and after"[170] the change in ownership.[171] A collective

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Douglas noted that he agreed with Goldberg that the litigation was properly brought in the state court but concurred with the court on its reasons for disposing of the issues on the merits. *Id.* at 351.

168. Without, it may be added, even appearing to consider whether the Norris-LaGuardia Act [29 U.S.C. §§ 101-15 (1970)] might be applicable.

169. 376 U.S. 543 (1964).

170. *Id.* at 551.

171. The obligation actually enforced by the Court was the obligation to arbitrate, not the substantive provisions of the agreement. Others have, therefore, read the result as justified by the Court's reference to "the central role of arbitration in effectuating national labor policy." But arbitration, the Court had earlier said in *Warrior v. Gulf*, was a matter of contract and, in any case, what was sought to be arbitrated in *Wiley* was a claim for substantive rights under the agreement, accruing after the change in ownership. For a further explication of my views with respect to *Wiley*, see Feller, *The Successor and the Collective Agreement* in LABOR LAW DEVELOPMENTS 1967,

agreement, the Court said, is "not in any real sense the simple product of a consensual relationship",[172] it is not simply a contract, but a code to govern the relationship between those functioning in the capacity of employer and employee, and its continued existence should not be affected by changes in the identity of either.[173] Grievance arbitration was thus visualized not as a method of resolving disputes between contracting parties but as the system of implementing and interpreting this code.

Wiley also disposed of another unsettled point. The Steelworkers' trilogy had established that the question of substantive arbitrability was for the courts to decide. What about the procedural prerequisites of arbitration? If the agreement specified that a grievance could be arbitrated only if filed and processed within specified time limits, should a court order arbitration if the employer asserted that these conditions had not been complied with? The answer was yes. Procedural questions were intimately interrelated with the substantive disposition the parties had agreed to leave to an arbitrator. Whether there was procedural noncompliance and whether it should operate to bar arbitration altogether or merely limit or qualify an award should also, the Court held, be decided by the arbitrator.[174]

The next development was *Republic Steel Corp. v. Maddox*.[175] *Maddox*, although not a discharge case, was essentially *Moore v. Illinois Central Railroad*[176] under the National Labor Relations Act. Maddox's claim, on which he brought suit without even attempting to use the grievance procedure in the agreement, was for severance pay, pay due precisely for termination. If there was any juice left in the principle that a claim arising from the termination of employment could create an individual right to sue on the collective agreement Maddox would have prevailed, as he did in the Alabama courts. But the Supreme Court refused to apply *Moore*. It could have based the refusal on the fact that Maddox, unlike Moore, was suing on a contract which itself contained the complete adjudicative machinery and which should, therefore, be interpreted to require exhaustion of the remedies pro-

PROCEEDINGS OF THE SOUTHWESTERN LEGAL FOUNDATION 13TH ANNUAL INSTITUTE ON LABOR LAW 1 (1967). *But see* NLRB v. Burns Int'l Security Services Inc., 406 U.S. 272 (1972).

172. 376 U.S. at 550.

173. Ironically, it was precisely this question that gave rise to the Supreme Court's first exposure to the area. *Moore v. Illinois Central*, it will be recalled, happened because Moore had filed a lawsuit (decided adversely to him by the Mississippi courts on conventional contract reasoning) claiming that the Illinois Central was bound by the collective agreement which its predecessor in ownership had executed.

174. *But cf.* De Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 285 n.5 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970).

175. 379 U.S. 650 (1965).

176. 312 U.S. 630 (1941).

vided in it before bringing suit. Instead the Court declared that the federal labor policy expressed in *Lincoln Mills* and the Steelworkers' trilogy required that in all cases an employee claiming a violation of a collective bargaining agreement at least *attempt* to use the procedures established by the agreement before bringing suit, unless the agreement expressly provided otherwise.[177] If the union should refuse to "or only perfunctorily" press the employee's claim then "differences may arise as to the forms of redress . . . available,"[178] the Court noted, but those differences would have to wait for another day.

Mr. Justice Black, who had written many of the opinions for the Court in this area, dissented. To him the suit filed by Charlie Maddox was "an ordinary, common, run-of-the-mill lawsuit for breach of contract"[179] and the preference expressed by the Court for arbitration in *Lincoln Mills* and the Steelworkers' trilogy had nothing to do with the case. Those cases, he said, involved "broad conflicts between unions and employers with reference to contractual terms vital to settlement of genuine employer-union disputes,"[180] while this was simply an effort by an individual employee to enforce his wage claim, a claim which he should be able to enforce just as the first Moore was entitled to enforce his wrongful discharge claim. The Court, he said, "raised the overruling axe [over *Moore*] so high that its falling is just about as certain as the changing of the seasons."[181]

Before getting to that question, however, the Court took another step toward conforming the results under the two Acts. *Enterprise* had made arbitrator's decisions virtually unreviewable. The Railway Labor Act, however, contained an open invitation to judicial interference in the provision that awards of the National Railroad Adjustment Board against carriers which involved money should only be "prima facie evidence of the facts therein stated"[182] when suit was brought to enforce them. In *Gunther v. San Diego & Arizona Eastern Railway*[183] the Court revoked the invitation. The lower courts had

177. 379 U.S. at 652.

178. *Id.* at 652.

179. *Id.* at 659.

180. *Id.* at 666. They didn't. *Lincoln Mills* involved a claim for back pay. *American Manufacturing* and *Enterprise Wheel & Car* involved claims for reinstatement and back pay by discharged employees. Mr. Justice Black's restatement of the nature of these cases is perhaps understandable since he did not participate in them.

181. *Id.* at 667.

182. Act of June 21, 1934, Ch. 691, § 3 First, (p), 48 Stat. 1185 (1934), *as amended* 45 U.S.C. § 153 First, (p) (1971).

183. 382 U.S. 257 (1965). Gunther, an engineer, was removed from service because the railroad's doctor had found him to be physically disabled. He filed a grievance and the matter was taken to the National Adjustment Board, which appointed a tri-partite medical committee to examine him. When the committee found him physically qualified, the Board ordered him reinstated with back pay. The railroad refused

there refused to enforce an Adjustment Board order of reinstatement with back pay for an engineer, who had been removed from service for a disability the Board found nonexistent, because they found no provision in the agreement dealing with terminations for disability. In so doing, the Court now said—again speaking through Mr. Justice Black—they were "[p]laying strict attention only to the bare words of the contract and invoking old common law rules for the interpretation of employment contracts."[184] To prevent that, the policy of the Act required that a Board decision have the same finality that a decision of arbitrators would have. The statutory language making awards only prima facie evidence when money was involved should therefore be construed as applying only to the determination of the amounts of money due, assuming the Adjustment Board's decision on the merits of the grievance to be correct.

The next two cases, each in its own way, were replays of the principal remaining discrepancy—*Moore.* The question which brought *Moore* to the Supreme Court concerned the choice of statute of limitation.[185] Assuming that Moore could sue, the issue was whether his claim of contract violation was governed by the Mississippi statute applicable to the written collective agreement or the shorter statute applicable to his individual oral hiring. Judge Sibley, for the Fifth Circuit, had held in *Moore* that the periods, six and three years respectively, in the state statutes could be used but that the choice between them was a federal question and he opted for the shorter period.[186] The Supreme Court soundly rebuked him for suggesting that the federal court had any choice in the matter. Now, twenty-five years later, in *UAW v. Hoosier Cardinal Corp.*,[187] the same question arose under section 301, and the Court adopted what had been essentially Judge Sibley's position. The case involved a claim brought in a federal district court for vacation pay alleged to be due terminated employees. The plaintiff was the union. Indiana provided a twenty-year limitations period for written agreements and a six-year period for oral contracts. The limitations question was which of these periods ap-

to comply and a suit was brought to enforce its award. The lower courts refused. The Ninth Circuit found no provision in the agreement limiting the railroad's right to terminate the employment of one whom the road had found, in good faith and by the application of reasonable standards, to be unfit. The provisions governing discharges, the court said, covered disciplinary cases, not cases of physical disqualification; in the absence of bad faith or arbitrariness there was nothing in the agreement which limited the employer's right to terminate an employee whom it had found to be physically disqualified. Gunther v. San Diego & A.E. Ry., 336 F.2d 543, 547 (9th Cir. 1964).

184. 382 U.S. at 261.

185. *See* text accompanying notes 79-85 *supra.*

186. Illinois Cent. R.R. v. Moore, 112 F.2d 959 (5th Cir. 1940).

187. 383 U.S. 696 (1966).

plied or, alternatively, whether the Court should create its own limitations period, perhaps based on the six-month period provided for unfair labor practice charges under section 10(d) of the National Labor Relations Act.[188]

The Court held, first, that the suit was one properly brought under section 301. *Smith*[189] had recognized the propriety of a section 301 action to enforce individual rights arising from a collective agreement. In *Smith* the plaintiffs were individual employees; here the plaintiff was the union. But, the Court said, now squarely reversing *Westinghouse*, there was every reason to recognize the union's standing to enforce in its own name the rights of the individuals it represented. Second, the Court held that although the section 301 suit was governed by federal law and the limitations question was a federal one, creation of a federal limitations period would require too "bald a form of judicial innovation."[190] The characterization for the purpose of selecting the appropriate period was a federal question, but the state's characterization, if reasonable and not inconsistent with national labor policy, could be used.[191] Applying these principles the Court concluded that, since the individual contracts of the employees would have to be taken into account in proving both breach and the amount of damages, and since the state statutes applicable to such oral contracts are generally shorter than those applicable to written contracts, it was permissible to use them—if not unusually short or long—and the claim was barred.[192]

The next case involved the other holding in *Moore*: that a discharged employee could ignore the Adjustment Board machinery and sue for breach of contract. The essential premise of *Moore*, was that the individual's claim was governed by state law, which governed not only the limitations question but also the question whether use

188. 29 U.S.C. § 160(b) (1970).

189. *See* text accompanying notes 143-57 *supra*.

190. 383 U.S. at 701.

191. *Id.* at 706.

192. It appears (from a suggestion in respondent's brief in the Supreme Court) that the agreement did contain at least a grievance procedure which required that any complaint of violation of the agreement be submitted within five days(!) after the grievant or the union became aware of the act on which the grievance was based. The agreement itself, although annexed to the complaint, was not reproduced in the record provided either for the Court of Appeals or the Supreme Court, since—until the suggestion was finally made by the respondent in the Supreme Court—it had never even been suggested that there was any issue as to the prior exhaustion of the grievance procedure. The only issues presented by the employer's motion to dismiss, which the District Court eventually sustained, were 1) jurisdiction and 2) the statute of limitations. The existence of an unnoticed contractual provision requiring claims to be filed within five days served as an ironic background to the ponderous judicial controversy as to whether suit on those claims had to be brought within six or twenty years.

of the grievance procedure was mandatory. This essential premise had been destroyed by the holding of *Central Airlines* that airline agreements under the Railway Labor Act were governed by federal law. The provisions relied upon in *Central Airlines* applied equally to railroads, and *Maddox* had now established that federal labor policy required at least an attempt to use the grievance procedure. It would seem to follow that *Moore* was dead. And this is what the Fourth Circuit concluded in *Walker v. Southern Railway*.[193] But the Supreme Court reversed per curiam,[194] although over the vigorous dissent of three Justices. *Moore* was still alive.

Its rationale, however, was dead. The Court no longer spoke of the traditional common law right to sue for breach of contract. Instead, it pointed to the lengthy delays in the Adjustment Board procedure, delays which had persisted so long that in 1966 Congress amended the Act to permit either party to a grievance not disposed of within a year after docketing with the Board to require the appointment of a special tri-partite board to decide it.[195] But, the Court said, this expedited procedure was not available to Walker, since he had been discharged in 1957. Hence, *Moore* would remain, at least for a while, like baseball's exemption from the antitrust laws,[196] as an anomaly explainable only by history, not logic.

4. Vaca v. Sipes.

The stage was now set for *Vaca v. Sipes*.[197] To this point, the Court had established that a collective agreement was an agreement enforceable under section 301 against the employer either by an employee *(Smith* and *Humphrey)* or the union *(Hoosier Cardinal)*. If the agreement contained a grievance and arbitration procedure, however, federal labor policy required that an employee claiming rights under it at least attempt to utilize that procedure before bringing suit *(Maddox)*. Under the Railway Labor Act, a similar exhaustion requirement was federally imposed *(Slocum)* except in discharge cases *(Moore)*, where the question remained one of state law *(Koppal)*. If the union elected to process the claim and the employer resisted, arbitration would be ordered under section 301 unless the claim was

193. 354 F.2d 950 (4th Cir. 1965).

194. Walker v. Southern Ry., 385 U.S. 196 (1966).

195. Act of June 20, 1966, Pub. L. No. 89-456, § 1, 80 Stat. 208. The amendment also, in section 2, confirmed *Gunther* by eliminating the distinction between monetary and nonmonetary awards and the "prima facie" language and providing for extremely limited review of Adjustment Board decisions.

196. *See* Federal Baseball Club v. National League, 259 U.S. 200 (1922); Toolson v. New York Yankees, 346 U.S. 356 (1953); Flood v. Kuhn, 407 U.S. 258 (1972).

197. 386 U.S. 171 (1967).

clearly excluded from the process by the agreement (*Warrior & Gulf*). Under both Acts, once the tribunal appealed to had decided, its decision was virtually unreviewable (*Enterprise* and *Gunther*). And under both Acts, the union had a duty to represent the employees fairly, both in the negotiation of the collective agreement and in the processing of claims under it. (*Conley* and *Syres*). Not yet decided under either Act were the questions noted in *Maddox* and finally posed in *Vaca*: the remedies available to an employee whose attempts to use the grievance procedures established by the agreement are unsuccessful because the union "refuses to press or only perfunctorily presses"[198] his claim.

The plaintiff in *Vaca*, Benjamin Owens, had been hospitalized for hypertension and heart disease.[199] After his discharge from the hospital his doctor certified that he was able to return to work. The company, however, refused to take him back on the ground that its doctor's report showed that his condition made it unsafe for him to perform his physically demanding job. Owens filed a grievance which the union processed through the step before arbitration. The company at that step said that it would not reconsider its decision unless a complete physical examination showed that Owens was physically able to do his job. The union decided to get additional evidence. It sent Owens, at its expense, to a specialist of his choosing. That specialist reported that Owens's blood pressure was so high that any work would be hazardous and, indeed, that he was eligible for total disability benefits under Social Security. The union decided to proceed no further.

Owens then sued the union for refusing to take his case to arbitration, asking compensation for his loss of wages to the date of trial and punitive damages. At trial he sought to show the jury that his health was good, as evidenced not only by doctors' certificates but also by evidence of the strenuous activity he had engaged in since his discharge. The union offered no evidence on the state of Owens's health but rested on its showing of the basis upon which it had decided not to arbitrate. The jury returned a verdict for the full amount claimed. The trial court set the verdict aside on the ground that Owens's claim was subject to the exclusive jurisdiction of the National Labor Relations Board.[200] On the appeal prosecuted by Owens' administrator (Owens died of a "cardiovascular accident due to hyper-

198. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965).

199. The description of *Vaca* which follows is drawn from the record as printed for the Supreme Court, as well as from the published opinions.

200. The trial court's action is unreported. There was an intermediate appeal to the Kansas City Court of Appeals which affirmed the trial trial court. Owens v. Vaca, 59 L.R.R.M. 2165 (1965).

tension" after the trial was over) the Supreme Court of Missouri reinstated the verdict,[201] holding that the union's refusal to process Owens' grievance was not an unfair labor practice and that the evidence was sufficient to support the conclusion that he had been healthy enough to work.

The case, once the Supreme Court decided to hear it, presented clearly the question whether a union which had acted reasonably in determining not to process an employee grievance to arbitration could be held judicially responsible in damages if it were later determined at trial that the grievance was, in fact, meritorious. The answer to that question directly involved at least four subsidiary questions. The first was the source of the law defining the union's duty to process an employee's grievance, and governing the remedy for its breach. The Missouri courts had assumed this to be a matter of state law probably arising, as alleged in the complaint, out of the employee's status as a member of the union.[202] If the relevant law was federal, the second question was whether the jurisdiction of the National Labor Relations Board was exclusive. Contrary to the Missouri court's belief, the NLRB had held, by a 3-2 vote, that it was an unfair labor practice for a union to fail to process a grievance in violation of its duty of fair representation.[203] Assuming that the duty was federal and judicially enforceable, the third question was the nature of the remedy available against the union where a breach was found: were the merits of the employee's grievance against the employer to be tried and, if so, what was the measure of the damages recoverable against the union? Finally, the remaining question was whether the Missouri court had applied the proper standard in determining if the evidence was sufficient to support the jury's verdict. Inextricably implicated in the answers to those questions, although not directly presented, were the parallel questions as to the nature of the employer's liability, if any, on the claim for breach of the collective agreement.

Justice White's opinion for the Court spoke to all of these issues. On the first question, it held that the union's duty was the duty of fair representation imposed by the National Labor Relations Act, a duty both created and defined by federal law. The union was not under a duty to process all grievances or even all grievances that a court would later find to be meritorious. Its duty was breached only if the refusal to proceed was "arbitrary, discriminatory or in bad faith,"[204] a standard testing the basis upon which the union decided not to pro-

201. Sipes v. Vaca, 397 S.W.2d 658 (Mo. 1965).

202. *Id.* at 664.

203. Miranda Fuel Co., Inc., 140 N.L.R.B. 181 (1962); *enforcement denied,* 326 F.2d 172 (2d Cir. 1963).

204. 386 U.S. at 190.

ceed rather than the merits of the underlying grievance. On the preemption issue the Court held, with three justices disagreeing, that a judicial remedy for breach of the union's duty was available even on the assumption that the breach was also an unfair labor practice remediable before the Labor Board.[205] On the third question it decided that if a union breach of duty was shown, a court could (although it need not) proceed to try the merits of the grievance and to award damages. If the grievance was found meritorious, however, the union was to be held responsible only for the increase in the employee's damage caused by its refusal to process the claim; the portion of the loss attributable to the employer's breach of contract was to remain solely the responsibility of the employer.[206] It followed, in answer to the final question, that the Missouri court would have to be reversed. It had looked only at the merits of the grievance, not the basis for the union's refusal to process the grievance further, and it had imposed on the union responsibility for all the loss Owens incurred as a result of the employer's breach of contract.[207]

As to the employer, the Court said that the exhaustion rule expressed in *Maddox* barred the plaintiff from recovering on his breach of contract claim, even though the plaintiff had attempted to use the grievance procedure, unless he could first show that the union's failure to press the grievance was in violation of its duty of fair representation.[208] If such a showing were made, however, the plaintiff could recover directly from the employer the damage attributable to the employer's breach of contract.[209]

Mr. Justice Fortas, and two others, concurred in the reversal but on the ground that the union's duty of fair representation was enforceable only through the Board's procedures and these were exclusive.[210] They deplored the Court's discussion of the remedies available against the employer, since, in their view, that subject was entirely unrelated to the appropriate remedy for a union breach of the duty of fair representation.[211] The questions were separable because any plaintiff would satisfy the *Maddox* requirement by attempting to use the grievance procedure; if the union controlling the procedure refused to proceed, he would be entitled to bring suit against the employer for breach of contract. Thus the question whether the union had breached its duty of fair representation would be irrelevant in such a suit.

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205. *Id.* at 178-83.
206. *Id.* at 195-98.
207. *Id.* at 188-95.
208. *Id.* at 183-87.
209. *Id.* at 197.
210. *Id.* at 198-99 (Fortas, J., concurring in the result).
211. *Id.* at 199-203 (Fortas, J., concurring in the result).

Mr. Justice Black alone disssented. He had opposed the exhaustion principle imposed by *Maddox*. But even conceding that principle, he argued in dissent, the Court's present holding meant that a plaintiff who had been injured by an employer's breach of contract and who did all that was in his power to invoke the contractual procedures was to be denied relief against anyone because the union's failure to process his valid claim was not in bad faith.[212]

If one accepts Mr. Justice Black's premise—that an employee's claim that an employer has breached a collective agreement is a claim "for breach of contract"[213]—his argument seems irrefutable: there must be some forum in which the employee can obtain an adjudication as to the merits of his claim. It may be that the employee is required to attempt to obtain that adjudication in the arbitration procedure provided in the contract. But if the union controls access to that procedure and refuses to proceed, then the exhaustion requirement is more than satisfied and the employee should have a right to have the claim heard judicially, and to recover if it is meritorious. The same premise would equally support Mr. Justice Forta's thesis. Whatever one's views on the preemption question, the proposition that the employee's claim against the union for breach of the duty of fair representation is entirely separable from his claim to relief against the employer appears sound if the latter is based on a contract of employment.

Although it did not put the issue precisely in these terms, the Court's rejection of the Fortas and Black views is supportable only by rejection of the contractual premise which underlies them. Such rejection was consistent with the Court's decisions in suits involving controversies between unions and employers. In those cases the Court had adopted a noncontractual view of the nature of the relationships created by a collective agreement, a view which applied identically whether the agreement was one containing a grievance arbitration system voluntarily adopted, or one under the Railway Labor Act with its procedure imposed by statute. The Court had said that the collective agreement was a "generalized code"[214] which calls into being a "new common law."[215] The adjudicatory mechanism provided by the agreement was "the means of solving the unforeseeable by molding a system of private law."[216] The grievance procedure was described as

212. *Id.* at 203-10 (Black, J., dissenting).
213. Republic Steel Corp. v. Maddox, 379 U.S. 650, 659 (1965) (Black, J., dissenting).
214. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578 (1960).
215. *Id.* at 579.
216. *Id.* at 581.

"a part of the continuous collective bargaining process."[217] Arbitration, the end point of the process, was not simply a method of adjudicating a contract claim but "a vehicle by which meaning and content are given to the collective bargaining agreement."[218] Collective agreements were to be interpreted by those "peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist,"[219] both in the railroad and the industrial worlds.

Given this view of the nature of the agreement and the essentially governmental function performed by the grievance and arbitration procedures, the exhaustion requirement is not simply a requirement that the procedures provided for by contract be resorted to before enforcement of that contract can be had in court.[220] Nor, it would follow, would a showing that the individual had attempted to exhaust those procedures and had been turned down by the union be sufficient to permit assertion of a contractual claim against the employer. To the contrary, the judicial inquiry in such a case must be directed not to the contractual correctness of the union decision—because decisions made in the process are not to be judged by "old common law rules for the interpretation of private employment contracts"[221]—but by showing that the individual had been denied fair access to the governmental process or fair treatment within it.[222] In the absence of such a showing, the disposition of a grievance, either by decision of the arbitrator or Board or by settlement or withdrawal by the union, is final without regard to the result which might have been reached in a suit for breach of contract.

Vaca's holding that an employee had no right to an adjudication of a grievance in the absence of any showing that the union's refusal to process it was illegitimate was thus the logical extension of the governmental view of the collective agreement which had been expressed in the earlier union—employer suits. There remained, however, the

217. *Id.* at 581. *See also* Wiley & Sons v. Livingston, 376 U.S. 543, 549-50 (1964).

218. 363 U.S. at 581.

219. Gunther v. San Diego & A.E. Ry., 382 U.S. 257, 261 (1965).

220. As the Court later explicitly recognized with respect to the Railway Labor Act in Andrews v. Louisville & N.R.R., 406 U.S. 320, 325 (1972): "It is clear . . . that at least in some situations the Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another."

221. Gunther v. San Diego & A.E. Ry., 382 U.S. 257, 261 (1965).

222. The contrary view would use this test for determining the validity of a claim against the union for breach of the duty of fair representation, but separate that claim entirely from the question of employer liability, or even from the question of whether the individual's grievance was a meritorious one under the agreement. The Fourth Circuit seems to have done just that in Griffin v. United Automobile Workers, 469 F.2d 181 (1972).

problem of how to handle a case in which the necessary showing of improper denial of access to the adjudication machinery had been made. One solution was to assume that no difficulty existed; that is, that there is no problem of interpretation or application of the governing code, which is properly the province of the autonomous machinery, if the employee shows that the union has wrongly refused to invoke the provisions of the agreement. That was the *Conley*[223] method. It was possible for the Court to avoid facing this problem in cases like *Conley* (and later *Glover*[224]) because those cases came to it on pleadings asserting that the only reason the plaintiffs had not received their due under the agreement was that the union simply did not present their claims. But when *Vaca* came to the Court, this myopic vision was no longer acceptable: the case had been tried and it seemed clear that there was, indeed, an additional issue—whether the right the plaintiff claimed was properly his under the collective agreement.

The solution adopted in *Vaca*, inconsistently with the necessary premise of the Court's disagreement with the dissenting and concurring Justices, was to retreat to the notions of *Moore* and *Burley*, and to treat the collective agreement as indeed creating an employment contract upon which an employee could bring suit—but to condition his right to do so on a showing that the self-governmental processes for settling the dispute had failed as a result of a union breach of the duty of fair representation. The employer thus became, because of the union's breach of duty, subject to judicial adjudication of the employee's claim of breach of contract—an adjudication presumably under "old common law rules for the interpretation of employment contracts"[225] and subject to the statute of limitations governing such contracts.[226] Damages were to be recoverable as in any other breach of contract case, with only the modification made necessary by the fact that the union was also responsible in damages for breach of its duty in not fully prosecuting the employee's contract claim: they were to be allocated as between union and employer in accordance with the contribution each made to the employee's loss. This was essentially the result reached in *Vaca*, and faithfully implemented in *Figueroa*.

There is, of course, a third solution: the Court could fully accept the implications of the cases involving union-employer controversies, and entirely abandon the notion that a collective agreement constitutes a contract judicially enforceable between employee and em-

223. Conley v. Gibson, 355 U.S. 41 (1957).

224. Glover v. St. Louis-S.F. Ry., 393 U.S. 324 (1969). *See* text accompanying notes 227-31 *infra*.

225. Gunther v. San Diego & A.E. Ry., 382 U.S. 257, 261 (1965).

226. Moore v. Illinois Cent. R.R., 312 U.S. 630, 632-33 (1941).

ployer. It will be urged in part II, below, that this is the solution that most faithfully accords with the intention of the parties and the values the Court should seek to preserve. First, however, the picture of the present law should be completed by sketching out the developments since *Vaca* and by looking briefly at the other side of the picture: the employer's suit against either the union or the employees.

5. Conformity: Post-Vaca Developments.

Vaca arose in an industry governed by the National Labor Relations Act. Any doubt that its principles would be held applicable to cases arising under the Railway Labor Act was dispelled by the three post-*Vaca* cases which brought the doctrines under the two Acts into substantial conformity. The first was *Glover v. St. Louis—San Francisco Railway.*[227] The employees in that case claimed that the railroad and the union had agreed sub rosa to deprive them of their seniority rights under a collective agreement. The plaintiffs sued both the railroad and the union, asking for damages and for injunctive relief requiring the railroad to comply with the seniority provisions of the collective agreement. The Court held the suit could be brought, thus combining the *Conley* holding that the union could be sued by the employees with the *Central Airlines* holding that the employer could be sued by the union. To the objection that the meaning of the collective bargaining agreement should be decided by the Adjustment Board and that, unlike the situation presented in *Vaca*, the employees could appeal to that tribunal individually without union concurrence, the Court responded that the dispute here was "in essence" between the plaintiffs and their union.[228] Resort to the Adjustment Board, which was established to deal with controversies between unions and carriers and which was, in large part, chosen by the defendants, was therefore unnecessary. To the objection that the plaintiffs had not even attempted to use the grievance procedure anterior to the Adjustment Board the Court responded that they had met the *Maddox* requirement by complaining orally to company and union officials and that the futile formality of filing grievances was unnecessary.[229]

227. 393 U.S. 324 (1969).

228. *Id.* at 329.

229. *Id.* at 330-31. The "futility" exception, if accepted literally in the terms put by the Court would, in effect, overrule *Vaca*, since futility is shown *a fortiori* where the employee in fact files a grievance and the union refuses to process it. Mr. Justice Black, who wrote *Glover*, had urged precisely this result in dissent in *Vaca*, but it seems clear that the remaining members of the Court had no intention of now concurring in that view. A more reasonable reading of the somewhat disjointed opinion of the Court would seem to be that a plaintiff satisfies the *Maddox* requirement that he attempt to use the grievance procedure if he orally seeks the union's assistance and is told that it would be futile to file a grievance. So read, *Glover*

As Mr. Justice Harlan's concurrence emphasized, the employer in *Glover* could be joined as a defendant only because it was alleged that the wrong to the plaintiffs occurred as a result of an understanding between the union and the employer that was in breach of the union's duty of fair representation.[230] The next case, *Czosek v. O'Mara*,[231] contained no such allegation. The claim there was that the railroad had misapplied the seniority provisions of the agreement and that the union, in breach of its duty of fair representation, had failed to protest that action. The facts alleged in *Czosek*, in short, precisely paralleled those in *Vaca*. Both the carrier and the union were sued in federal court in the absence of diversity. The Second Circuit, one month after *Glover*, held that the claim against the union was maintainable but that, in the absence of an allegation that the Railroad had actively participated in the union's breach of duty, the claim against it must be dismissed because it was essentially a claim for violation of the collective agreement of the kind which "under federal law" must be submitted to the Adjustment Board.[232]

The union obtained review in the Supreme Court. The Court, again speaking through Mr. Justice White, had no difficulty affirming the Court of Appeals' holding that the plaintiffs had a right to bring suit against the union for breach of the duty of fair representation. The only issue of substance in the case appeared to be whether the dismissal of the employer was proper. The plaintiffs, however, had not sought review, and therefore the Court said it would not decide whether "under federal law, which governs in cases like these, the employer may always be sued with the union when a single series of events gives rise to claims against the employer for breach of contract and against the union for breach of the duty of fair representation. . . ."[233]

The Court did, however, touch on the issue. The union challenged the dismissal of the railroad on the ground that, with the railroad out of the suit, the union might be forced to pay damages for the employer's breach of contract. Those fears, the Court said, were groundless. *Vaca* specified that the union in a suit for breach of the duty of fair representation could be held only for the damages that flowed from its own conduct.[234] If the employer had breached the

constitutes only minor embroidery on the *Maddox* theme and leaves intact the second hurdle, imposed by *Vaca*, that the union's failure to proceed be in breach of its duty of fair representation.

230. *Id.* at 331 (Harlan, J., concurring).

231. 397 U.S. 25 (1970).

232. O'Mara v. Erie Lackawana R.R., 407 F.2d 674 (2d Cir. 1969).

233. 397 U.S. at 29-30.

234. 386 U.S. at 197-98.

agreement and the union had independently, but discriminatorily, refused to process grievances against this breach, the union would therefore not be responsible for damages for the loss of employment caused by the employer's independent action; damages would be recoverable against the union only "to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer."[235]

But if the employer could not be joined in the law suit absent a showing that it had participated in the union's breach of its duty of fair representation (the Court of Appeals holding the Court refused to either accept or reject) how was the collecting to be accomplished? More importantly, how was it to be determined whether the employer had in fact violated the agreement so that there would be some "collecting" to do? Must this decision be made by the Adjustment Board as the Court of Appeals had held? If so, was the court to delay the trial of the action against the union until the Adjustment Board decided whether the plaintiffs could collect on their individual grievances? What if the Adjustment Board decided that the employer had not violated the agreement? Could the plaintiffs collect from the union because of the "difficulty and expense" of not collecting from the employer on a meritless claim? If, contrariwise, the Adjustment Board found for the plaintiffs and awarded them back pay (as it presumably would if it sustained their contractual position) what was then to be recoverable against the union in the lawsuit, attorney's fees and court costs for having brought a lawsuit that decided nothing?

Alternatively, perhaps, in the light of *Vaca* the Court meant that the plaintiffs need not repair to the Adjustment Board at all, but should proceed to an adjudication of the contract question in the suit against the union, even with the employer absent. But what then? If they lost on the contract obviously there would be no "collecting" to be done. Even if they succeeded in persuading the court that the absent employer had acted wrongfully, they could not, the Court explicitly said, collect damages for that wrong from the union; having proven that the employer violated the agreement they could recover from the union only the costs which they had incurred in *not* recovering from it.[236]

None of these alternatives, all of which assume that the employer could not be sued for breach of contract, make sense. The appropriate conclusion to draw, it seems to me, is that the Court was prepared to hold, and indeed implicitly assumed, that the Second Circuit was

235. Czosek v. O'Mara, 397 U.S. 25, 29 (1970).
236. *Id.*

in error: when the failure to use the Adjustment Board procedure was due to the union's breach of its duty of fair representation, the employer became judicially accountable for the employees' claim that it breached the agreement and could be joined as a defendant in the lawsuit, or could even be sued alone, just as if there were a section 301 in the Railway Labor Act. This conclusion is fortified by the Court's reliance on *Vaca* for the limitation on the union's liability and, as well, by the strong language in *Vaca*, dealing with the preemption question, against any system of remedies that would require plaintiffs to seek separate remedies in different forums against the union and the employer.[237]

If that holding is assumed, the only remaining discrepancy was *Moore*: except for it, the the rules governing employee suits under the Railway Labor Act and section 301 were now interchangeable. Total conformity was achieved in May of 1972 when the court, in *Andrews v. Louisville & Nashville Railroad*[238] decided that the case for insisting on resort to the remedies provided by statute under the Railway Labor Act was even stronger than that for insisting, under section 301, that resort be had to arbitration procedures voluntarily contracted for. This was not, the Court now said, merely a requirement that remedies be exhausted in one forum before resorting to another. To the contrary, the jurisdiction of the Adjustment Board over disputes arising out of a railroad's collective bargaining agreement was exclusive. At long last, *Moore*, the case with which the development began, was dead: the Court specifically overruled it.[239] Although the case has not arisen, presumably *Figueroa*, our exemplar of the problems presented in industries subject to the National Labor Relations Act, could today be replicated under the Railway Labor Act.

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237. Vaca v. Sipes, 386 U.S. 171, 183-87 (1967).

238. 406 U.S. 320 (1972).

239. *Id.* at 326. Mr. Justice Douglas alone dissented. In the Douglas view, the employee's claim for damages for wrongful discharge was not based on the collective agreement at all but rested on the Georgia law of employment, law which he conceded in a footnote amounted to "a set of common law axioms of construction to fill in the ambiguities in employment contracts and employment relationships." *Id.* at 327 n.2. It is doubtful that Georgia, or any other state, requires just cause for discharge of an employee apart from contract. *See* Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416 (1967). The cases cited by the Justice, indeed, all involved individual contracts of employment. If the dissent is therefore read as arguing for the enforceability of restrictions on discharge to be implied by states into individual contracts of employment wholly apart from the provisions on the subject in the collective agreements governing the employment, it contradicts not only J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) but also Mr. Justice Douglas' previously expressed views in the Steelworker's trilogy, two cases of which in fact involved discharges.

6. Employer Suits.

The description so far has concerned itself with only one side of the question: the remedies available to unions and employees against employers. There is, of course, another side: the employer suit. It is commonly said that the only value of a labor agreement to an employer is the union's commitment not to strike during its term.[240] Whether this be wholly true or not—and I will argue in Part II that it is only partially true—some insight into the Supreme Court's conception of the collective agreement could, one would expect, be obtained by examining the course of its decisions in enforcing that commitment.

There is, however, little there. As to the railroads governed by the older statute, the Railway Labor Act,[241] the reason is simple: there is, at least on the railroads, typically no contractual commitment not to strike.[242] The agreements usually contain just the agreed upon procedures for processing claims of violation of the rules. The 1934 amendments to the Act established the Adjustment Board as the last step, available to either party, for a dispute not settled by those procedures, but said nothing about strikes over such disputes. The

240. "The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of an agreement, there is little reason why an employer would desire to sign such a contract."
S. REP. No. 105, 80th Cong., 1st Sess. 16 (1947).

"All of the provisions of the contract, save one, are promises by the employer. The *sole* commitment which the Union makes is that it will not strike." *Report of Special Atkinson-Sinclair Committee, Management Members,* A.B.A. SECTION OF LABOR RELATIONS LAW, 1963 PROCEEDINGS 228 (1963) (emphasis in original).

241. 44 Stat. 577, *as amended* 48 Stat. 1185, 45 U.S.C. § 151 *et seq.* (1970).

242. Nor is there, indeed, even the coucept of a collective agreement for a fixed term. Section 6 of the Act [45 U.S.C. § 156] prescribes the procedure for "changing rates of pay, rules and working conditions" and, unlike the later provisions of Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), contains no requirement limiting the timing of proposals for such changes. The procedure, once a proposal is made by filing a section 6 notice, is "formalized, complex and excessively lengthy." [Explanatory statement accompanying S. 560, 92d Cong., 1st Sess., 117 Cong. Rec. 1544 (Feb. 3, 1971)]. Instead of the negotiation of a complete agreement which is then settled for a specific period of time, individnal issues can separately be made the subject of section 6 notices. If agreement is then reached on the particular issue or issues, it may be, and often is, coupled with a "moratorium" pursuant to which the issues settled may not be subject to section 6 notices for a specified period. A "moratorium" on the filing of a section 6 notice achieves the same stabilizing effect on the particular issues covered as an agreement for a term but without the notion of a total contract expiration so common in industries subject to the NLRA. The "Emergency Public Interest Protection Act" proposed by President Nixon in 1970 and again in 1971 would revise section 6 so as to require termination dates and restrict renegotiation to such dates as presently is done by Section 8(d) of the NLRA. *See* H.R. 16226, 91st Cong., 2d Sess. (1970); S. 560, 92 Cong. 1st Sess. (1971).

principal focus of disagreement, therefore, has not been over the nature of any contractual no-strike commitment by the union, for there is none, but on the question of whether the statutory procedures implied a duty not to strike and the availability of an injunctive remedy to enforce that duty in the light of Norris-LaGuardia.[243]

In 1957 (during the same Term in which the Court in *Lincoln Mills* decided that grievance arbitration was federally enforceable under section 301) the Court, in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad*,[244] held that the creation of the Adjustment Board in 1934 constituted an implied statutory prohibition of the strike as an alternative to resort to the Board as a method of settling a grievance which had been unsuccessfully prosecuted through the procedures established in the agreement.[245] It also held that the prohibition against strike injunctions in the earlier statute, Norris-LaGuardia, must be accomodated to the later.

Chicago River was eventually extended to strikes to enforce Adjustment Board awards.[246] Extension backward to strikes over grievances not yet before the Board was more difficult. The statutory duty being enforced was derived from the establishment of the Adjustmeant Board as the last step after exhaustion of the procedures established by agreements which did not forbid strikes. At least in 1957,

243. 29 U.S.C. §§ 101-15 (1970).

244. 353 U.S. 30 (1957).

245. The Court thus treated as compulsory the procedures which it had described in *Moore* as voluntary. The contrast was promptly noted by Judge Brown for the Fifth Circuit in Cook v. Missouri Pac. R.R., 263 F.2d 954, *cert. denied*, 361 U.S. 866 (1959). This was a *Moore* type suit for wrongful discharge in which the defendant railroad, grasping the opportunity offered by the NRAB procedures, took the dispute there and obtained an award sustaining the discharge while the employee's suit was pending in the District Court. The District Court held that the award (which did not involve the payment of money since the employee lost) was "final and binding" under the Act and dismissed the suit. On appeal, the railroad contended that *Chicago River* made the procedures of the Board "compulsory" and thus, at least where the Board decided the matter first, precluded the judicial remedy. It lost. After describing the conflict between the employee's right to sue given by *Moore*, and the railroad's right to have disputes resolved by the Adjustment Board declared by *Chicago River*, as an "impossible impasse" which should not be resolved by chronological priority, the court held, in accordance with *Moore*, that if the employee elected to sue for damages rather than seek reinstatement no action by the railroad or the Adjustment Board could preclude a judicial determination.

246. Brotherhood of Engineers v. Louisville & N.R.R., 373 U.S. 33 (1963). This extension, it should be noted, really concerned the exclusivity of the judicial procedures to enforce Adjustment Board awards rather than the exclusivity of the Board's procedures, and it drew a dissent based on the non-finality of decisions of the Board upholding claims involving the payment of money, a problem which was later resolved in Gunther v. San Diego & A.E. Ry., 382 U.S. 257 (1965). The opinion in *Louisville & Nashville* unlike *Chicago River* did draw upon the earlier decisions (*Slocum, Day* and *Price*) in which the Adjustment Board procedures were held to be the exclusive method of dealing with employee grievances. *Moore*, however, was ignored.

the Court was only prepared to find an implied statutory duty not to strike if the dispute was before the Board. Hence, simultaneously with *Chicago River*, it vacated per curiam a state court injunction against a strike over a dispute not yet submitted to the Adjustment Board, "without prejudice" to that court's right to reinstate the order if either party should thereafter submit the case to the Board.[247] That decision has not yet been overruled by the Court. But the lower federal courts, understandably perplexed by a state of the law which forbids a union to strike after it has processed a grievance to the Adjustment Board but appears to permit it to do so if it refrains from processing the grievance through the necessary preliminary steps, have simply applied *Chicago River* in the latter situation on the theory that it is necessary to do so to protect the ultimate jurisdiction of the Board.[248]

Chicago River's postulate that the establishment of a terminal procedure for the resolution of grievances implied a prohibition against strikes as an alternative was paralleled under section 301 three years later, although as a matter of contract rather than statutory interpretation. In *Teamsters Local 174 v. Lucas Flour Co.*,[249] the collective agreement provided for arbitration of grievances and prohibited strikes during arbitration, but contained no explicit provision banning strikes as an alternative method of resolving disputes. The Court interpreted the agreement to arbitrate as implying an obligation not to strike, and held that damages could be recovered if that duty were breached.

For a time it appeared that, although the substantive obligations not to strike under the two acts were the same, at least where there was an agreement to arbitrate, the remedies—injunction to enforce the Railway Labor Act and damages for breach of contract under section 301—would remain different and mutually exclusive. In *Sinclair Refining Co. v. Atkinson*,[250] decided during the same term as *Lucas Flour*, the Court held that Norris-LaGuardia barred an injunction against a strike in a section 301 action. The Court distinguished *Chicago River* as the implementation of a statutory obligation. Eight years later, however, in *Boys Market, Inc. v. Retail Clerks Local 770*,[251] as a result of a change in the membership of the Court and in the mind of Mr. Justice Stewart, the Court reversed itself and made injunctions

247. Manion v. Kansas City Terminal Ry., 353 U.S. 927 (1957).

248. *See, e.g.*, Louisville & N.R.R. v. Brown, 252 F.2d 149 (5th Cir. 1958), *cert. denied*, 356 U.S. 949 (1958); Railroad Carmen Local 429 v. Chicago & N.W. Ry., 354 F.2d 786 (8th Cir. 1965); Itasca Lodge 2029 v. Railway Express Agency, 391 F.2d 657 (8th Cir. 1968).

249. 369 U.S. 95 (1962).

250. 370 U.S. 195 (1962).

251. 398 U.S. 235 (1970).

against a strike over an arbitrable grievance also available under section 301.[252]

More pertinent to the present inquiry than the availability of an injunction, which is essentially a Norris-LaGuardia question, are the questions as to the nature of the damage remedy which were also at issue in the *Sinclair* litigation. Sinclair had sued in three counts, only the third of which sought an injunction. The first count sought damages against the union under section 301. The second count, in which jurisdiction was based on diversity of citizenship, sought damages against 24 individual employees who were also committeemen in the local union. Each of them, it was alleged, had both breached his contractual obligation not to strike and also committed the tort of inducing the other employees to participate in a breach of contract.

The issues thus presented were disposed of by the Supreme Court, separately from the issue of the availability of an injunction, in *Atkinson v. Sinclair Refining Co.*[253] On the first count, the union defended on the ground that the claim seeking damages against the union should have been referred to arbitration. The Court, speaking for the first time through Mr. Justice White, disagreed and held that the employer claim for damages was not arbitrable because the language in the agreement specifically stated that the arbitration board should consider "only individual or local employee or local committee grievances."[254] On the same day, however, it came to the opposite conclusion in *Drake Bakeries, Inc. v. Local 50, Bakery Workers,*[255] where the arbitration provision covered not only all "complaints, disputes or grievances"[256] involving questions of interpretation of the agreement but also "any act or conduct or relation between the parties."[257]

252. The result in *Boys Market* was in a very real sense a consequence of *Lincoln Mills* and the trilogy. *Lincoln Mills,* in which the court had found power to issue an injunctive order directing arbitration, required that Norris-LaGuardia be hurdled—although the hurdle of section 7 there involved was tiny compared to the flat prohibition of injunctions against peaceful strikes contained in section 4. More importantly, *Lincoln Mills* and the trilogy were premised on the notion that grievance arbitration, unlike commercial arbitration, was a substitute for the strike weapon rather than an alternate form of litigation. Because of the strong policy in favor of this substitution which the conrt fonnd to exist, and the central role played by arbitration in effectuating national labor policy, the Court had said in *Warrior & Gulf* that doubts as to arbitrability should be resolved in favor of coverage. 363 U.S. 574, 583. That same policy, it seemed to Mr. Jnstice Brennan, dissenting in *Sinclair* and writing for the majority in *Boys Market,* required that the quid pro quo for the agreement to arbitrate, the no-strike clause, also be specifically enforceable.

253. 370 U.S. 238 (1962).

259. *Id.* at 243.

255. 370 U.S. 254 (1962).

256. *Id.* at 257.

257. *Id.*

The Court expressly disavowed any resolution of the sharp differences in the various circuits as to whether an employer's claim under the no-strike clause should be regarded as a grievance under a contract providing for the arbitration of all grievances,[258] and the opinion left open the question whether the presumption of arbitrability which the Court, in the Steelworkers' trilogy, had applied to employee grievances would also be applied to employer claims of damage for violation of the no-strike clause. If the principle underlying the Steelworkers' trilogy is "the importance of arbitration as an instrument of federal policy,"[259] it would seem that, as a number of the circuits have held,[260] the same principles that govern the resolution of the arbitrability question for union claims would also apply to employer claims. But, for some unarticulated reason, the Court was not prepared to go quite that far.[261]

The same kind of uneasy difficulty was evidenced in the *Atkinson* opinion's disposition of the state claim for damages against the individual employees in count II. The Court noted that the damages there alleged were the same as those which were alleged in the claim against the union in count I. Furthermore, count II alleged that the individual defendants had, in breaching and inducing others to breach the collective bargaining agreement, acted as officers and agents of the union. It followed, the Court said, that the only wrong charged in the complaint was the union's breach of contract and that the individuals were being sued only for their actions as agents of the union. This brought into play section 301(b) of the Act, which permits a judgment against a union to be collected only from the union, not from its members. The policy there expressed, the Court said, would

258. The conflicting cases were reviewed in Yale & Towne Mfg. Co. v. Local 1717, IAM, 299 F.2d 882 (3d Cir. 1962) in which the presumption of arbitrability set forth in the trilogy was applied to an employer claim for damages.

259. Boys Market, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 243 (1970).

260. Johnson Builders, Inc. v. Carpenters Local 1095, 422 F.2d 137 (10th Cir. 1970); Erie Basin Terminal Warehouse Co. v. Int. Longshoremen's Ass'n., 404 F.2d 613 (2nd Cir. 1968), *aff'g* 292 F. Supp. 688 (S.D.N.Y. 1968); Howard Electric Co. v. Electrical Workers Local 570, 423 F.2d 164 (9th Cir. 1970); *cf.* Stillpas Transit Co. v. Ohio Conference of Teamsters, 382 F.2d 940 (6th Cir. 1967). Where the agreement unambiguously permits only employee grievances, arbitration of an employer claim for damages is not required, notwithstanding the presumption. G.T. Schjelclahl Co. v. Machinists Local 1680, 393 F.2d 502 (1st Cir. 1968); Boeing Co. v. UAW, 370 F.2d 969 (3d Cir. 1967); Old Dutch Farms, Inc. v. Teamsters Local 584, 359 F.2d 598 (2d Cir. 1966), *cert. denied*, 385 U.S. 832 (1966).

261. The Court did quote language from *Lincoln Mills* and *American Manufacturing* as to the desireability of enforcing arbitration under collective agreements. Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. 254, 263 (1962). It did not quote or rely on the language in *Warrior & Gulf* requiring that doubts be resolved in favor of arbitration. Only Mr. Justice Harlan, in dissent, squarely faced the issue. He concluded that the reasons underlying *Warrior & Gulf* were simply inapplicable to an employer's claim for damages. *Id.* at 267-68.

be circumvented if the individual employees could be held responsible for actions they took as agents of the union.[262]

The Court expressly did not decide, however, whether individual employees could be held for damages if their action in striking and inducing others to strike was individual and unauthorized. This open question was stated, without explanation, to be one of federal law. In the case before it the company's claim against the individuals, as the Court read the complaint, was solely for union breach of contract. It plainly followed that it was governed by section 301 and federal law. But that conclusion was certainly not self-evident when the claim was not so stated. Yet, without saying why, the Court specified that the open question whether individual employees could be held liable for unauthorized individual action was a question whether a claim against them would be "a proper section 301(a) claim."[263]

The result in *Atkinson* seems somehow right. But the reasoning won't wash. True enough, if the employees who directed and led the strike were acting on behalf of the union, they made the union responsible for breach of the union's contract. But in suits by employees the Court had seemed to treat the collective agreement as also embodying a contract between the individual employees and the employer. If the no-strike clause is intended to apply to individuals (as clearly it is), then the employees would seem, under conventional contract principles, to be jointly liable with the union. Even if the employees are third-party beneficiaries, rather than promisors, there still remained the claim of tort liability on the theory of *Lumley v. Gye*.[264] This could hardly be characterized summarily as a "section 301(a) claim," in the situation the Court left open: unauthorized individual action for which no union contractual responsibility was alleged.

Indeed it was not on a contract but on a tort theory that liability for damages has been found in the comparable situation under the Railway Labor Act. Today the Court could draw on the reasoning of *Lucas Flour*[265] and *Central Airlines*[266] to construct both an implied contractual commitment not to strike and a basis in federal law for

262. The Court drew on its earlier encounter with section 301(b) in Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960), in which it held that, in light of that section's intended purpose of insulating employees from damage claims against a union, an employer could not set off such a claim for breach of the no-strike clause against a claim by the jointly administered welfare fund for royalties due under the collective agreement. *Benedict* constitutes an admirable introduction to the thesis that a collective agreement is not to be treated uncritically as a third-party beneficiary contract.

263. 370 U.S. at 249 n.7.

264. 118 Eng. Rep. 749 (Q.B. 1853).

265. 369 U.S. 95 (1962).

266. International Ass'n. of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963).

enforcing that commitment. The easier path immediately after *Chicago River*, however, seemed to be to create a liability in tort for breach of the implied statutory prohibition against grievance strikes. This was, indeed, attempted in 1958 in the Fifth Circuit, in *Louisville & Nashville Railroad v. Brown.*[267] That court, however, refused to draw the inference, holding that implication of a statutory action for damages would require more explicit language from Congress. It did, however, permit tort claims against individual employees who had engaged in an unauthorized grievance strike to be tried on two state law theories: inducement of breach of contract and conspiracy to prevent the employer from carrying on its lawful business.

The Supreme Court has never explicitly passed on the damage issue under the Railway Labor Act. The only such case in that Court was *Denver & Rio Grande Western Railroad v. Brotherhood of Railroad Trainmen,*[268] in which it reinstated a damage judgment against a union which had called a strike to enforce an award of the Adjustment Board in the belief, perhaps justified at the time the strike was called,[269] that a strike for that purpose was permitted under the Act. The District Court had read the Fifth Circuit's decision in *Louisville & Nashville* as permitting damages to be recovered against a union and its officials for any unlawful strike and entered judgment against the union.[270] Counsel seemed to have assumed the correctness of the conclusion and appealed only on venue grounds. The Court of Appeals sustained the appeal and was, in turn, reversed by the Supreme Court.[271] There was absolutely no discussion either in the Court of Appeals or the Supreme Court as to the theory upon which liability was predicated.

If we assume Supreme Court concurrence in the judgment in *Den-*

267. 252 F.2d 149 (5th Cir. 1958).

268. 387 U.S. 556 (1967).

269. The grievance involved a claim for penalties for improper scheduling. It arose in March, 1952, and was finally decided by the Adjustment Board in favor of the employees in 1960. The union struck in May of that year to enforce compliance with the back pay provisions of the award. The Supreme Court did not hold until April of 1963 that a strike to enforce an award of the Adjustment Board came within the ambit of the *Chicago River* ruling. Brotherhood of Engineers v. Louisville & N.R.R., 373 U.S. 33 (1963).

270. The ruling as to liability came in the course of a decision dismissing without prejudice the road's claim for damages as a counterclaim to the union's suit to enforce the Adjustment Board award. Brotherhood of Railroad Trainmen v. Denver & R.G.W.R.R., 31 F.R.D. 297 (D. Col. 1962). The union eventually lost its suit. 338 F.2d 407 (10th Cir. 1964), *cert. denied*, 380 U.S. 972 (1965). The dismissed counterclaim was then re-filed as an independent suit. The final district court decision, Denver & R.G.W.R.R. v. Brotherhood of Railroad Trainmen, 58 L.R.R.M. 2568 (D. Colo. 1965) does not discuss the theory on which liability was predicated.

271. Denver & R.G.W.R.R. v. Brotherhood of Railroad Trainmen, 367 F.2d 137 (10th Cir. 1966), *rev'd*, 387 U.S. 556 (1967).

ver & Rio Grande Western, the result is that there today appears to be complete uniformity under the two statutes with regard to the relief, both injunctive and monetary, available to an employer against a union for engaging in a strike over a grievance subject either to statutory (in the case of the Railway Labor Act) or contractual (under the National Labor Relations Act) adjudicative machinery. With respect to employee liability, however, the situation under both statutes is uncertain. Employees who are union officials clearly may be enjoined under *Chicago River* and *Boys Market*. Equally clearly under *Atkinson* they may not, because of section 301(b), be held responsible in damages either on a contract or a tort theory. Whether the same result will be reached under the Railway Labor Act in the absence of a similar provision remains unclear. And the damage liability of employees for individual unauthorized strike action appears to be a completely open question under both statutes.

Part II

A.

The historical development sketched out in Part I constitutes, by any standard, a remarkable exercise in judicial creativity. Starting with only a bare grant of federal jurisdiction over suits for breach of agreements between unions and employers in the case of section 301, and without even statutory recognition that a labor agreement is a contract in the case of the Railway Labor Act, the Court has created and defined a set of substantially identical remedies and limitations under both. As Holmes said of the common law of torts, the Court "did not begin with a theory. It has never worked one out. The point from which it started and that at which . . . it has arrived, are on different planes."[272]

There are, almost inevitably, not only areas of uncertainty but also some inconsistencies in systems so developed. The principal inconsistency has been a difference in the conception of the collective bargaining agreement depending on which side of the controversy the union was on: where the union pressed the employee's claims, either by suing in its own name or by supporting the individual's suit, the agreement was viewed as an instrument of government; where the employee's claim was against both the union and the employer it was viewed as a contract. In *Vaca* the two views collided and the result was a compromise, not a resolution. The implications of that compromise were faithfully implemented in *Figueroa*: the governmental view determined the threshold question of access to the court but the contract-

272. O.W. HOLMES, THE COMMON LAW 77-78 (1881).

ual view determined the relief to be granted once the threshold criterion had been met.

In this second part, I shall attempt to develop a general theory of the collective agreement. That theory will, I believe, provide answers in the individual's suit which are consistent with those given by the Court in suits brought by unions. It will also indicate areas of inconsistency and shed some light on the unresolved problems disclosed by the review in part I of the Supreme Court's decisions concerning collective agreements.

Any attempt to create a theory of the collective agreement must virtually begin with Archibald Cox's seminal 1956 article, *Rights Under A Labor Agreement*,[273] and its 1958 companion, *The Legal Nature of Collective Bargaining Agreements*.[274] Professor Cox rejected any "theoretical analysis" which attempts to fit collective agreements into the mold of contractual models created in other contexts and for other purposes. As he rightly observed, the general principles should "not be imposed from above; they should be drawn out of the institutions of labor relations and shaped to their needs."[275] Proceeding on this premise, he examined a number of typical problems arising out of collective agreements and drew some conclusions that can be briefly (and therefore somewhat unfairly) summarized. First, the law should recognize and give effect to the allocation of rights expressly set out in a collective agreement. Second, in the absence of an explicit allocation of rights, reliance must be placed on inferences drawn from the nature of the agreement. Third, collective bargaining agreements have evolved from simple documents, specifying only a union or closed shop, a wage scale and hours of work, but without a grievance procedure or protections against discharge and without provisions governing such matters as seniority, transfers, promotions, and job classifications, to much more complex instruments which are, in effect, basic legislation governing the lives of workers. Fourth, where there is no explicit provision to the contrary, it should be presumed that under the simple form of agreement the individual employee retains the right to sue for breach of the terms of the collective agreement and to settle claims of such breach; under the more complex form, and in light of the group interest in the resolution of questions of interpretation and application of such an agreement, it should be assumed, unless the contrary appears, that the union has the sole right to sue for breach of the agreement and to compromise and settle employee claims. Finally, resort to the procedures specified in the agreement should be regarded as a

273. 69 HARV. L. REV. 601 (1956).
274. 57 MICH. L. REV. 1 (1958).
275. Cox, *supra* note 273, at 605.

prerequisite to suit under a complex agreement; the union should not be required to process all claims through the procedure but should be held responsible, as a trustee, for proper performance of its fiduciary duty in making its determination whether any particular employee claim should be pressed.

Although I believe that most of Cox's conclusions are sound, I also believe that he placed too great an emphasis on the form of the agreement. If any generalization about collective bargaining agreements can safely be made, it is that until 1947, when Congress enacted section 301 to give "statutory recognition [to] the collective agreement as a valid, binding and enforceable contract,"[276] and indeed in most respects even after that, collective agreements were not negotiated with an eye to judicial remedies. The terms and the forms of such agreements represented a functional answer to the needs of the parties, formulated without any consideration of potential judicial intervention. The parties did not regard themselves as drafting agreements to be sued on by third party beneficiaries,[277] or specifications like those in a tariff[278] to be inserted into contracts of employment of individual employees, or any of the other contractual analogies which have, from time to time, been suggested.[279]

I believe that the appropriate place to begin is not with the language of the agreement, even considered, as Cox did, in the light of the practical problems and interests which are involved in the process of interpreting that langauge, but with a more fundamental question: what function does the agreement perform? Examination of that question will indicate that the two kinds of agreements discussed by Cox are a result not of differences in chronological development but of differences in approach, differences which can in fact persist over time. Each kind of agreement arises out of certain specific institutional characteristics. It is those characteristics which I propose to examine and, from them, to derive the appropriate legal principles.

B. The Function of Rules in Employment

Collective bargaining is often visualized as a process by which employees,[280] by the use of concerted economic force, obtain higher wages and other economic benefits than they would otherwise receive. The collective agreement, in this view, is merely the embodiment in written

276. S. REP. No. 105, 80th Cong., 1st Sess. 17 (1947).

277. *Cf.* Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960).

278. *Cf.* J.I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944).

279. Nor, it may equally be said, did they regard themselves as engaged "in an effort to erect a system of industrial self-government." United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580 (1960).

280. The term "employees" will be used throughout in accordance with the

form of the monetary concessions thus extracted. There can be no doubt that a desire for higher economic rewards is often the generating force leading to collective bargaining. The promise of higher wages and improved benefits was, and probably still is, one of the prime attractions offered by the union organizer. But it is equally true that one of the objectives of collective bargaining, and I would argue its larger significance, is the creation of a system of private law to govern the employer-employee relationship.

In this latter aspect, the collective bargaining agreement is commonly visualized as an intrusion on the prerogatives of an unrestrained management—a concession won by the work force from a resisting employer. This certainly is the image the trade union movement would like to foster. And it is one convenient for management when it seeks to assert a theory of management rights which encompasses the notion that it remains unrestrained in its dealing with employees except as its "reserved rights" have been explicitly relinquished in the agreement. There is a measure of truth in this conception of agreement. But the measure is less than half. Rules of the kind contained in a collective agreement have their genesis as much in the nature of modern industrial enterprise as in collective bargaining, and there are substantial reasons apart from coercion why some employers accept the incorporation of those rules in a collective agreement.

An industrial system must have what Kerr and Dunlop have called a "web of rules."[281] The system of rules is essential for at least three interrelated reasons. First, the enterprise simply cannot operate unless there are rules to guide the conduct of employees. Only the simplest kind of work—slaves pulling oars on a galley ship is the usual example[282]—can be performed under constant supervision and constraint. Productive effort in an industrial enterprise of any complexity requires, at a minimum, that employees know without being told in each instance what to do and when to do it. Workmen cannot come and go as they please, or perform only the tasks that they fancy. Nor on the other hand, is it practical to provide minute direction of each constituent part of the work. There must, therefore, be rules specifying which employee is to do what, and when. And since there is necessarily a re-

customary industrial relations usage and the definition in section 2(3) of the National Labor Relations Act to mean nonsupervisory employees. The terms "employer" and "management" will be used interchangeably to refer to those persons, today usually also employees in the generic sense, who manage a business enterprise in the interests of the owners.

281. J. DUNLOP, INDUSTRIAL RELATIONS SYSTEMS 13 (1958); C. KERR, LABOR AND MANAGEMENT IN INDUSTRIAL SOCIETY 317 (1964).

282. A. ETZIONI, A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS 80 (Free Press Ed. 1971).

lationship between the work performed and pay, the rules must also relate to wages.

The second reason for rules is related to the first. Because workers must be relied upon to act in expected ways, without minute direction, they must be at least minimally willing to cooperate. There was, perhaps, a time when coercive control was sufficient to secure compliance with the rules, whether that control was effected through physical restraints, such as were used in the early industrial revolution, or by the threat of discharge and subsequent starvation. Today efficient operation clearly requires at least a minimum reconciliation of the work force with the conditions of employment. That reconciliation cannot be achieved if employees are discharged or retained by whim, or if assignment, scheduling, or pay rates are perceived as irrational or unpredictable. Consistency in management, *i.e.*, the existence of rules, is a prerequisite of cooperation by the employees. This second reason for a system of rules is not, be it noted, a requirement that the rules be perceived by the employees as just. A rule requiring the discharge of any female employee who marries[283] may be regarded by the female employees, or even indeed by all employees, as unjust and its application may engender resistance. It is, nevertheless, a rule and its enforcement will undoubtedly receive less resistance than if the employer discharged employee *A* because she married while permitting employee *B*, similarly situated, to remain at work. A rule giving all employees, no matter what their length of service, just one week of vacation may be regarded as unjust. But that injustice is of a lesser degree than that which would be perceived if some employees were given one week's vacation and others three week's vacation, without any observable reason for the difference other than the employer's whim.

Modern industrial organization creates a third and distinct reason for the establishment and elaboration of rules governing the employment relationship. The industrial enterprise is, and must be, bureaucratically[284] organized. The use of complicated machinery and techniques, the progressive division of labor, the increasing specialization

283. *Cf.* Elliott Co. v. Unemployment Comp. Bd., 180 Pa. Super. 542, 119 A.2d 650 (1956).

284. The term is not here used perjoratively but, to the contrary, in the Weberian sense:

> Experience tends universally to show that the purely bureaucratic type of administrative organization . . . is, from a purely technical point of view, capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of carrying out imperative control over human beings . . . . The development of the modern form of the organization of corporate groups in all fields is nothing less than identical with the development and continual spread of bureaucratic administration.

M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 337 (Henderson & Talcott transls. 1947).

and the burgeoning size of industrial enterprises that characterize modern industrial development, all require a hierarchical ordering of authority and responsibility. For each level of the hierarchical organization there are rules which prescribe the limits within which the authority of those at that level may be exercised. In small organizations, such rules may be informal and reliance may be placed on an implicit understanding of the functions to be performed. As industrial organization becomes larger and more complex, the rules are enunciated more formally. But whether informal or formal, the organization needs rules governing not only the conduct of production and sales but also rules ordering management's relationship to the work force. Foremen are not usually permitted to set wage rates, or determine the amount of vacation employees are given. In a multi-plant operation, such questions sometimes cannot even be decided by the plant manager. Other rules, such as the day on which a holiday is to be observed, or the starting time of the plant can sometimes be delegated to the plant manager, but again, not to the individual foreman. The authority to hire or to discharge may be reposed in the foreman, under strict rules as to the manner in which that authority is to be exercised, or, more usually, it may be reserved to higher authority upon recommendation of the foreman. The exact locus of the decision-making authority, and the breadth of the discretion vested at the respective hierarchical levels of the organization, will vary enormously from one enterprise to another. What is significant, for present purposes, is that in every organization, except the simplest in which ownership and management are coterminous, there must be a set of rules and limits controlling the actions of subordinate members of management in dealing with the work force. And as industrialization advances and business organizations grow in complexity, these rules tend to become more detailed and explicit.[285]

It is for these reasons that those studying non-union enterprises frequently find formalized personnel policies setting forth rules covering much of the substance usually contained in a collective bargaining

285. The web of rules becomes more explicit and formally constituted in the course of industrialization. At the very early stages, individual incidents are confronted without regard to their more general implications. The continuing experience of the same work place tends to result in customs and traditions which begin to codify past practices. Eventually these may be reduced to writing in general form. Some rules may later emerge which anticipate problems rather than merely summarize past decisions. The statement of the rules then becomes more formal and elegant, particularly as specialists are developed in rule-making and administration. The process of industrialization thus brings more and more detailed rules and a larger body of explicit rules.

C. KERR, J. DUNLOP, F. HARBISON & C. MYERS, INDUSTRIALISM AND INDUSTRIAL MAN 169 (Galaxy ed. 1964). *Cf.* J. DUNLOP, INDUSTRIAL RELATIONS SYSTEMS 343 (1958).

agreement. Thus, studies of personnel practices in nonunion firms have found that an overwhelming majority specify such things as the application of seniority in layoffs, recalls from layoffs, and even promotions.[286] Typically, formal rules govern the discipline or discharge of employees and rates of pay are determined by elaborate systems of job description and evaluation. As one observer has put it, "managements, motivated by considerations of technical effectiveness in achieving organizational goals, have been impelled to systematize authority relationships, to differentiate functional specialties and to establish personnel regulations" the effect of which is to "limit significantly the arbitrary power of management."[287]

Collective bargaining is not, then, the occasion for introducing rules into the employment relationship. It is, rather, a method by which the employees participate in what would otherwise be a system of unilateral management rulemaking and administration. In the railroad industry, which has perhaps the most detailed set of rules in its collective agreements, the process began with oral working rules, which were superseded by written statements posted on bulletin boards, which were in turn succeeded by printed rule books to standardize the instructions throughout the system. It was these rules which, when unionization came, were the subject of collective agreements.[288]

C. *The Trade Agreement*

Collective bargaining is not the only method by which the work force can seek to influence the process of rulemaking and administration. To the contrary, the earliest, and until recently I believe the most common, form of employee influence upon wages and working conditions was the development and imposition by employees of a counter structure of rules. The classical model of bureaucratic organization visualizes the creation and administration of rules in a hierarchical organization in which authority descends from top to bottom through an ever widening range of subordinates operating under the scalar principle: each level being subordinate and responsible to only one higher level of authority.[289] Observation of the ways in which industrial organizations actually operate, however, discloses that in fact there are many rules of behavior imposed from below: working men develop patterns of conduct, to which they enforce conformity by other workers and acquiescence by management.[290] The most significant

286. See the studies reported in H. VOLLMER, EMPLOYEE RIGHTS AND THE EMPLOYMENT RELATIONSHIP 25 (1960).

287. *Id.* at 18, 35.

288. R. RICHARDSON, THE LOCOMOTIVE ENGINEER, 1863-1963, at 110, 152-55 (1963).

289. Massie, *Management Theory*, in HANDBOOK OF ORGANIZATIONS 396-97 (J. March ed. 1965).

290. Managerial response to this phenomenon has taken different forms. The

of such rules are restrictions on output,[291] which may exist wholly independent of formal employee organization, and indeed sometimes may, even apart from union organization, be established and changed by regular voting procedures.[292]

Although this kind of employee rulemaking clearly does exist, it is normally informal and surreptitious, and its scope and effectiveness are therefore necessarily limited. It was precisely to provide an effective method of imposing upon employers rules adopted by the employees that the first formal organization of employees in the United States took place. The cordwainers associations prosecuted in the beginning of the 19th century did not attempt to negotiate wage scale agreements with employers. Instead, they met with each other in secret societies, determined an appropriate "bill of prices," and agreed that none would work for any employer who did not recognize the scale thus unilaterally adopted.[293] The rules adopted by these early labor organizations included not only fairly complex schedules of piece work rates,[294] but also regulations governing such matters as security of employment, apprenticeship rules,[295] rotation of available work,[296] and, of course, the closed shop. Those who worked contrary to the rules were fined.

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scientific management movement of the early part of this century led by Frederick W. Taylor purported to eliminate the arbitrary character of management control by postulating that the rules governing the work place could be scientifically derived and should govern both managers and workers. *See* R. BENDIX, WORK AND AUTHORITY IN INDUSTRY 274-81 (1956); H. AITKEN, TAYLORISM AT WATERTOWN ARSENAL 45 (1960). The human relations school which grew out of the famous Hawthorne Relay Assembly Test Room experiments emphasized the necessity of developing cooperative attitudes and providing psychological conditioning. *Id.* at 308-19.

291. *See* S. MATHEWSON, RESTRICTION OF OUTPUT AMONG UNORGANIZED WORKERS (1931). The most carefully documented case of informal resistance to managerial control was the Bank Wiring Room portion of the Hawthorne study. *See* F. ROETHLISBERGER & W. DICKSON, MANAGEMENT AND THE WORKER 409-47 (1939). *See also* P. BLUMBERG, INDUSTRIAL DEMOCRACY: THE SOCIOLOGY OF PARTICIPATION, Ch. 2 (1969).

292. *See* J. KUHN, BARGAINING IN GRIEVANCE SETTLEMENT 132-33 (1961).

293. The principal source of information as to these early unions is found in the record of their prosecution on conspiracy charges growing out of their use of the only device available to enforce worker promulgated rules: the concerted refusal to work in any shop which did not acquiesce in them. These early cases are documented in volumes 3 and 4 of J. COMMONS & I. GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY (1910), [hereinafter cited as DOCUMENTARY HISTORY]. A listing of the cases between 1805 and 1836 is contained in the appendix to Nelles, *Commonwealth v. Hunt*, 32 COLUM. L. REV. 1128, 1166 (1932).

294. See the 1805 list of prices for shoemakers in N. CHAMBERLAIN, COLLECTIVE BARGAINING 13 (1951).

295. "[A]pprentices should not be employed to fit boots, nor the journeyman to make the feet." Pittsburgh Cordwainers Case (Pa. 1815), 4 DOCUMENTARY HISTORY, *supra* note 293, at 31.

296. "[T]he master workmen were each to keep a slate, and enter on it the

The modern counterpart of these earliest organizations is the American Federation of Musicians. With some exceptions, such as symphony orchestras, the union alone establishes the rules governing employment: the number of musicians who must be employed for a particular type of function, the rates at which they are to be paid, the rest periods which they are entitled to, and so forth, are determined not by collective bargaining but by union rule. Each local establishes a "Wage Scale and Price List," which is made part of its by-laws and governs the employment of musicians within its area[297] (except in symphony orchestras);[298] the international union establishes the rules governing "travelling engagements;"[299] members are forbidden to sign any form of contract other than that approved by the A.F.M.[300]

Until the turn of the twentieth century, most of the trades in which worker organization was successful did not engage, or even seek to engage, in collective bargaining. Their relationships with employers involved, rather, the attempt to secure acquiescence in the rules the members unilaterally established as the ones under which they would agree to work. Eventually the idea developed that the rules should be bargained over, rather than imposed unilaterally. But union rule-making persisted. The printers unions of the earlier era survived and today are part of the International Typographical Union. That union still re-

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names of their journeyman as they successively took out their jobs; no one was to take a job out of his turn, and no one to have a second job until all had been supplied, & C." Twenty Journeyman Tailors (New York City 1836), 4 DOCUMENTARY HISTORY, *supra* note 293, at 315-16.

297. *E.g.*, DISTRICT OF COLUMBIA FEDERATION OF MUSICIANS, BY-LAWS Local 161 art. XI (1964).

298. In symphony orchestras the terms of employment are established by collective bargaining. The difference led to an unsuccessful complaint under section 101 (a)(1) of the Landrum-Griffin Act [29 U.S.C. § 411(a)(1)] that the union members employed by symphony orchestras were denied equal rights because they did not have an opportunity, as a separate unit, to vote on the terms contained in the agreement. Cleveland Orchestra Comm. v. Musicians Local 4, 303 F.2d 229 (6th Cir. 1962). As the court there described the situation:

> This different treatment arises out of the fact that most of the members of the musicians' union work under, and are bound only by the wage scale agreed upon by the union members themselves. This wage scale is not a part of a collective bargaining agreement, but represents the determination of the members of the union that they will not work for less than the wages fixed in such scale, if anyone seeks their services for the categories of engagements specified therein. The "Wage Scale and Directory" are set forth in a booklet, which shows extensive schedules of rates of pay, by the hour and engagement, for almost every type of employment for musicians. . . .
> . . . [T]he symphony musician is employed under a comparatively long-term agreement; and the collective bargaining agreement executed by the union on behalf of the symphony musicians is not, in any sense, part of the union wage scale determined by joint action of the union members.

Id. at 231.

299. AMERICAN FEDERATION OF MUSICIANS, BY-LAWS art. 15-21 (1971).

300. *Id.* art. 13, § 33.

tains in some part the practice of unilateral rule-making. Although wages are determined by negotiation with the employers, many of the terms and conditions of employment, including, for example, the rules relating to discharge and seniority (called "priority") are set forth in the union's "General Laws," a set of rules governing employment which were until 1932 included in the organization's "Book of Laws" along with, and undifferentiated from, the rules governing the internal government of the organization.[301] The International's By-Laws, although permitting locals to enter into collective bargaining agreements, specify that such agreements must contain a section incorporating the General Laws.[302]

The essential characteristic of union-created rules is that they are part of union government. They therefore affect the employer's relationship with union members, not with employees generally. Definition of the kind of work to which the union's rules are applicable and to which the union's members are entitled, that is, "jurisdiction", is a central feature of the system.[303] The definition and the resolution of disputes

301. J. LOFT, THE PRINTING TRADES 233-34 (1944). The first nationally applicable rule limiting the right of foremen to discharge was adopted in 1888. In 1890 a general law was adopted specifying the four causes for discharge: (1) incompetency; (2) violation of the rules of the office, chapel or union; (3) neglect of duty; or (4) decrease in the work force. A. PORTER, JOB PROPERTY RIGHTS 36-37 (1954). This remains the rule of the union today, with the exception of the elimination of violation of chapel or union rules as a ground for discharge. General Laws, art. II, § 3, in I.T.U., BOOK OF LAWS 98 (1970). *See* 2 I.T.U., A STUDY OF THE HISTORY OF THE INTERNATIONAL TYPOGRAPHICAL UNION 89-90 (1967). The priority law was first adopted in 1892, repealed in 1893, then subsequently reenacted and amended from time to time. A. PORTER, *supra*, at 16-25. The current law is article V of the General Laws, I.T.U., BOOK OF LAWS 101-02 (1970).

302. Article VII, § 6, I.T.U., BOOK OF LAWS 35 (1970).

303. The notion of exclusive jurisdiction was central to the victory of the national unions and their federation, the A.F.L., over the Knights of Labor. The determination of jurisdiction was, essentially, a matter of interpretation of the charter granted by the federation, but the frequency of work assignment disputes (as distinguished from organizational disputes) within the building and construction industry led to the formation of the Building and Construction Trades Department of the A.F.L. in 1908. The participation of contractors in the settlement of jurisdictional disputes began later, in 1918. *See* Haber, *Building Construction*, in TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS 202 (1942). There have been, since then, a variety of plans for their resolution. *See* Dunlop, *Jurisdictional Disputes*, NEW YORK UNIVERSITY SECOND ANNUAL CONFERENCE ON LABOR 477, 494-98 (1949). The National Joint Board for Settlement of Jurisdictional Disputes was established in 1948 by agreement between the Building and Construction Trades Department and various contractors' associations and was therefore an exercise of joint authority. *Id.* at 496. That agreement was also, however, incorporated into the constitution of the Department and made binding on all affiliated unions without regard to employer participation. Dunlop, *Jurisdictional Problems in Construction Industry*, 40 L.R.R.M. 18 (1957). Awards are therefore made in disputes involving employers who are not parties to the Joint Board agreement. *See* NLRB v. Plasterers Local 79, 404 U.S. 116 (1971). The essential issue in that case, indeed, was whether section 10(k) of the

between unions over jurisdiction was, historically, a function of the labor movement; when the machinery failed the employer was often the innocent, and injured, bystander.

To the extent that the rules governing employment are union-created, the procedures for securing compliance with them, and the adjudicative mechanisms necessary to determine when they have been violated and, therefore, to construe and apply them, must also be internal to the union. Thus the constitution of the American Federation of Musicians gives each local the authority to try members, even of another local, for violations of local or federation law occurring within its territorial jurisdiction.[304] Fines, penalties, and, in extreme cases, expulsion may be imposed for violations, with an appeal to the International.[305] When an employment contract is involved, the International constitution requires that the contract specify that grievances or disputes over interpretation and application must be submitted for adjudication to the local in whose jurisdiction the services are to be or have been performed or, if the employment is of the kind governed solely by the International's by-laws, to the International Executive Board.[306] If a contract for an engagement is found not to comply with the union's rules all members may be forbidden, on pain of expulsion, from performing the engagement.[307] In the Typographical Union, disputed issues as to the proper application of the seniority principle are resolved, first at the local union level and then by appeal to the Executive Council of the I.T.U.[308] Under some of its agree-

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Taft-Hartley Act [29 U.S.C. § 160(k) (1970)] intended to exempt jurisdictional disputes resolved by the unions concerned without employer participation from Labor Board determination.

304. AMERICAN FEDERATION OF MUSICIANS, BY-LAWS art. 7, § 2 (1971).

305. *Id.* art. 8. "The normal method of enforcing the freeze rule, . . . is by way of the institution of charges . . . . [A]gents of Local 10, once they are made aware of a violation of the freeze rule do not, expressly or impliedly, request or demand that employment be terminated." Musicians Local 10, 153 N.L.R.B. 68, 80 (1965).

306. AMERICAN FEDERATION OF MUSICIANS, BY-LAWS art. 9, § 6; art. 34, § 3 (1971). A decision by the International Executive Board on a dispute between a musician and an employer has been held to constitute a final and binding arbitration award precluding suit against the employer. Allessandrini v. Columbia Broadcasting Sys., 64 L.R.R.M. 284 (S.D.N.Y. 1967). *See also* Allessandrini v. Musicians Local 802, 439 F.2d 699 (2d Cir.), *cert. denied*, 404 U.S. 851 (1971). In symphony orchestras, on the other hand, disputes are submitted to arbitration by a neutral. *See, e.g.*, Musicians Local 77 v. Philadelphia Orchestra Ass'n, 252 F. Supp. 787 (E.D. Pa. 1966); Musicians Local 4 v. Musical Arts Ass'n, 71 L.R.R.M. 2855 (N.D. Ohio 1969).

307. AMERICAN FEDERATION OF MUSICIANS, BY-LAWS art. 7, § 14; art. 10, § 7 (1971).

308. At least that's the way it used to be, and the way most writers have described it. Porter describes the process and reports on a number of seniority cases decided by the Executive Council. A. PORTER, *supra* note 301, at 25-35. Lipset, Trow and Coleman say that priority disputes (as well as discharges) "can be appealed

ments, the question of whether an employee may be discharged for incompetence is determinable in the same way.[309]

Fines and expulsion as sanctions can secure compliance with the rules governing employment only if union membership is a prerequisite of employment. The closed shop or its functional equivalent is therefore essential to the effectiveness of union regulation. An "open

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only within the political structure of the union." S. LIPSET, M. TROW & J. COLEMAN, UNION DEMOCRACY 24 (1956). It is true that the General Laws establish the priority rules and the by-laws provide that all contracts must recognize the General Laws as part of the contract. By-Laws art. VII, § 6, I.T.U. BOOK OF LAWS 35 (1970). The I.T.U. furthermore has in the past vigorously opposed any attempt to require arbitration (*i.e.*, neutral decision) of any of its laws. A by-law adopted in 1902 "imperatively ordered" the officers of the union not to submit any of its laws to arbitration and the national arbitration agreements between the union and the American Newspaper Publishers Association which were in effect from 1901 to 1922 exempted the international union's laws from arbitration. This policy came to an end because the publishers refused to renew the agreement on that basis. J. LOFT, *supra* note 301, at 239-50.

Over the years, however, a change has occurred which is illustrated by NLRB v. News Syndicate Co., 279 F.2d 323 (2d Cir. 1960), *aff'd*, 365 U.S. 705 (1961). The Labor Board in 1959 found that Local 6 violated sections 8(b)(1) and (2) of the Act because these provisions delegated control of seniority to the union. The Second Circuit denied enforcement. It pointed out that the agreement between Local 6 and the employer contained seniority provisions (which were, word for word, those contained in the General Laws) and provided for arbitration of all disputes arising under it. Furthermore, there was testimony that, in fact, all unsettled controversies dealing with seniority had been arbitrated. The current by-laws of the I.T.U. retain the 1902 "imperative" order, but go on to provide that subordinate unions may provide for arbitration "as to the applicability of the laws to the facts involved." By-Laws, art. VII, § 34, I.T.U. BOOK OF LAWS 39 (1970).

309. Roughly the same progression has occurred with respect to discharge cases. It has been, and remains, a fundamental of I.T.U. policy that foremen must be union members and until very recently this was specifically set forth in the General Laws. See the 1957 Laws quoted in NLRB v. News Syndicate, 279 F.2d 323, 327 (2d Cir. 1960), *aff'd*, 365 U.S. 705 (1961). The Laws also provided, and still do, for appeals in any discharge case first to the local union and then to the international. It was, essentially, "considered a controversy between two members of the union, a journeyman and a foreman." J. LOFT, *supra* note 301, at 118. Until 1908, if the local sustained the journeyman, the foreman (and the employer) were required to reinstate him pending further appeal. Under the "Denver Decision" of that year, however, the foreman did not have to reinstate until final decision by the Executive Council. The Denver decision was reversed by the I.T.U. convention in 1922 and the General Laws in effect from 1923 to date—with the exception of 1926 and 1927 when the Denver rule was reinstated—require immediate reinstatement on demand of the local union.

The General Laws, however, also specifically permit the local unions to contract for the reference of discharge cases to a "joint agency"—which means, where agreement is not reached, to arbitration. And, where this is provided, there is no reinstatement until the "joint agency," with or without a neutral, so directs. *See* I.T.U., A STUDY OF THE HISTORY OF THE INTERNATIONAL TYPOGRAPHICAL UNION 346-48 (1964). Thus, although there is a considerable case history of discharge disputes decided by the I.T.U. Executive Council, as described by Porter [A. PORTER, *supra* note 301, at 36-44], by 1944 the majority of agreements provided for impartial adjudication very much like that which occurs under the industrial form of agreement. *See* J. LOFT, *supra* note 301, at 117-19.

shop" which employs both union and non-union members is entirely compatible with a system under which rules applicable to all employees and administered by the employer are established by negotiation between the employer and the union.[310] It is incompatible with a system involving any substantial element of union rule-making or administration. Thus it is that the fight against unionization in the early part of the 20th century was labelled an "open shop" campaign and its most prominent theme was the authority of the employer.[311] Of similar origin is the "basic protest in trade union history"[312] against the employment of union and non-union men on the same job.

The government of at least some aspects of the employment relationship by union rule is not necessarily inconsistent with collective bargaining. Although the union may, as in the cordwainers cases a century and a half ago or in the employment of musicians today, simply adopt the terms on which its members will work, it will, more typically, bargain with the employer as to the content of the union's rule. Indeed, collective bargaining first developed in the printing trades as a result of a shift from unilateral promulgation of the terms of employment to negotiation.[313] A collective agreement which results

310. Commons, writing in 1913, set forth the three conditions which, he believed, were essential to the maintenance of a stable open shop agreement: "a strong and well-disposed association on each side; the same scale of work and wages for unionist and non-unionist; and the reference of all unsettled complaints against either unionist or non-unionist to a joint conference of the officers of the union and the association." J. COMMONS, LABOR AND ADMINISTRATION 94 (1913).

311. R. BENDIX, *supra* note 290, at 267-74.

312. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951) (Douglas, J., dissenting).

313. The progression in the I.T.U. is a fascinating one. During the first stage, the Secretary of the Typographical Society of Richmond, Virginia, reported in 1834: "The scale of prices was adopted on the 1st of February. A resolution passed requiring them to go into operation on the 10th of that month. The employers were furnished with a copy of the list of prices on the 3rd—very short notice. When the 10th arrived, the employers, without a single exception, gave the wages asked for." G. TRACY, HISTORY OF THE TYPOGRAPHICAL UNION 76 (1913). The first compendium of the General Laws of the National Typographical Union, as it was then called, "recommended" to subordinate unions that they "adopt some conciliatory method of making important changes in their Scale of Prices." 1 I.T.U. A STUDY OF THE HISTORY OF THE INTERNATIONAL TYPOGRAPHICAL UNION 171 (1964). At the 1859 convention it was reported, for the first time, that the local society in Philadelphia "invited a conference with the employers" before adopting a scale of prices. G. TRACY, *supra*, at 181. But in the 1860's it was still the practice in New York to "decree" a new wage scale. The employers in the book and job printing shops objected: "We were never consulted about the union rule and prices . . . . We hold that it takes two parties to make a bargain, and object to the enforcement of rules, in making which we have not even had the chance to express an opinion." G. STEVENS, NEW YORK TYPOGRAPHICAL UNION No. 6 at 300-01 (1911) [quoted in N. CHAMBERLAIN, *supra* note 294, at 32]. The first written contract with an employer was dated 1883. It was not until the closing years of the 19th century that bargaining became the established method in the trade for establishing wage scales. Brown, *Book*

from this kind of bargaining, however, is still an agreement upon the rules which will govern only the members of the union, rather than all employees, in their relationship with the employer. An agreement of this nature I will call a "trade" agreement.

The distinctive quality of a trade agreement is not necessarily evident from its substantive provisions. An agreement may, for example, say nothing about the grounds for discharge. This may mean that the employer is free to discharge for any or no reason. But it may also mean that the employer has acquiesced in union determination of the question. An agreement which specifies a ground for discharge—incompetence, for example—may nevertheless be a trade agreement, if the competency of a particular workman is to be determined, as it is in some I.T.U. agreements, by the local union, with an employer right of appeal to the international union.[314]

It may appear odd that a dispute over the proper application of the terms of an agreement between an employer and a union is to be resolved in the union hierarchy. It certainly appeared so to the Second Circuit which, in tones of astonishment, found no promise to arbitrate in an agreement of Local 6 of the I.T.U. specifying that certain unsettled controversies between it and the employer should be settled by appeal to the Executive Council of the I.T.U.[315] Once it is recognized, however, that the rule being applied is a union rule agreed to by the employer, the procedure is as straightforward as that under the more usual type of collective agreement.

The trade agreement in its pure form is a relative rarity today. It continues to exist primarily in industries where employment is intermittent, where there has been a history of early and very strong union organization, or where high skill requirements enable the union to exert economic force sufficient to compel acquiescence by employers. There are, however, sections of American employment in which substantial elements of the employment relationship remain subject to union control and administration. Undoubtedly the most important is the building and construction industry. Although hourly compensation in the industry is determined by negotiation with the employers culminating in a collective agreement, the rules governing the operation of much of what Dunlop has called the "internal labor market,"[316] the kind of

and Job Printing, in TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS 125 (1942).

314. *See* note 309 *supra*.

315. Morning Telegraph v. Powers, 450 F.2d 97 (2d Cir. 1971), *cert. denied*, 405 U.S. 954 (1972).

316. *I.e.*, the rules governing the movement of workers, security of employment and promotion. Dunlop, *Industrial Relations Systems at Work*, in ESSAYS IN INDUSTRIAL RELATIONS THEORY 32 (G. Somers ed. 1969).

work the employees will perform, and, in some cases, the pace at which they will work as well, are often determined by the union, although the agreement may not even mention union rules. The intermittent and short-term nature of employment in the industry means that job security depends not on limitations on the employer's right to discharge but on the right to re-employment. By providing for a closed shop or, since that form of agreement was outlawed by section 8(a)3 of the Taft-Hartley Act,[317] by providing for hiring through the union hiring hall, the employer effectively assigns to the union the power to decide who will work and in what order. Employees are hired for a particular short-term project, are simply terminated when it is completed, and return to the hiring hall to await reassignment. There is, therefore, typically no provision in such agreements for layoffs, or any limitation on the employer's right to discharge.[318] The employer's freedom to discharge an employee is balanced by the union's right to control the nomination of his successor. The employment security represented in factory employment by a clause in a collective agreement limiting the employer's right to discharge is provided not by contract with the employer, but by the member's relationship with his union and his position in the hiring hall.[319]

Similarly, building and construction industry agreements often do not include provisions dealing with promotions because the agreements cover only a narrow range of work and the only significant promotion is to journeyman. This, again, is normally determined not by the employer but by the union. The right to work in another location is governed not by agreement with employers but by the union's internal rules governing "traveling cards" or the right to transfer membership. The pace of the work may be determined by union rule or sometimes by collective bargaining. The use of particular tools may be forbidden by union rule. Whether employees will do a certain kind of work depends not on an employer decision but on the jurisdiction of the union and disputes as to jurisdiction are resolved in procedures established by the American Federation of Labor and its Building and Construction Trades Department.[320] Fringe benefits, such as pensions

317. For a demonstration of the relationship between the ban on the closed shop and the development of the hiring hall device see Ross, *Origin of the Hiring Hall in Construction*, 11 IND. REL. 366 (1972).

318. The two are not theoretically equivalent. Indeed, such equivalence is unlawful: the hiring hall may not, in theory, discriminate on the basis of union membership. In fact, of course, the avenue to employment *is* union membership. *See* Note, *Federal Remedies For Employment Discrimination in the Construction Industry*, 60 CALIF. L. REV. 1196, 1197 (1972).

319. *See* Ross, *supra* note 317, at 371-72; Meyers, *The Analytic Meaning of Seniority*, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, PROCEEDINGS OF THE EIGHTEENTH ANNUAL WINTER MEETING 194 (G. Somers ed. 1965).

320. *See* note 303 *supra*.

and insurance, may be specified in the agreement with the employer but are more usually dealt with by providing in the agreement for the payment of a specified number of cents per hour into a union welfare fund, the trustees of which determine questions of eligibility, and the precise contours of the benefits to be given.[321] In sum, many of the critical rules in the building and construction industry dealing with the employment relationship are in fact established and enforced by the union.

Collective bargaining relationships in which a significant portion of the rule-making authority is vested in the union may reflect that fact by the absence of any adjudicative machinery in the agreement. Thus, as Cox noted, there are thousands of agreements, principally in the building and construction industry, whose "chief function is to set up a wage scale and schedule of hours with provision for overtime" and which today may perhaps include some fringe benefits and "employer contributions to pension and health and welfare funds,"[322] but which "rarely contain a grievance procedure because there is little to administer."[323] Cox concluded that the absence of adjudicative procedures indicated that "only the individual has a strong interest"[324] in compliance with the terms of the employment relationship and that, therefore, the agreement should be regarded as one permitting individual suit to enforce its terms. The conclusion is erroneous. It is certainly not true that "the union feels little interest in being able to supervise claims of contract violation and little need for a single forum which will reduce the chance of discrimination and competition among individuals."[325] To the contrary, the absence of detailed rules dealing with "discrimination and competition among individuals" is, normally, an indication that this function has been delegated to the union. Nor is it correct to conclude from the absence of a grievance procedure that the union has little interest in compliance with those terms which are included in the collective agreement, principally the wage scale. The absence of a grievance procedure is an indication that the determination of compliance or non-compliance with the negotiated scale is a union function and that the enforcement mechanism is the one traditional to the trade agreement relationship: the withdrawal of labor.[326]

321. Such funds were traditionally union dominated. Section 302(c) of the Taft-Hartley Act required joint trustees and provision for a neutral in the case of deadlock. 29 U.S.C. § 186(c)(5)(B) (1970).

322. Cox, *supra* note 273, at 653. I have no reason to doubt Cox's "thousands" but it should be emphasized that the number of workers covered by agreements of this kind is extremely small. *See* note 350 *infra.*

323. Cox, *supra* note 273, at 605.

324. *Id.*

325. *Id.* at 653.

326. This is underlined by the fact that in most of the few agreements in the

Industrial relations systems in which any substantial part of the employment relationship is governed by union rule are essentially inconsistent with the National Labor Relations Act.[327] The statute, even in its original form, was designed to foster and protect an entirely different kind of collective bargaining relationship in which a union acted on behalf of employees, not members. Section 9(a)[328] specified that a union selected by a majority of employees in an appropriate bargaining unit should be the exclusive representative of all employees in that unit; section 8(5)[329] required that the employer bargain with the union on that basis; and section 8(3)[330] forbade discrimination in the terms of employment in favor of union members. The closed shop was permitted by the Wagner Act,[331] but only if the union first became the representative of a majority of the employees in the unit.

The Wagner Act, although inconsistent with systems in which unions acted by establishing and administering the rules under which their members would work, was not important to them since they could, and did, simply ignore it. The Labor Board adopted a "hands off" policy with respect to the construction industry.[332] Direct conflict came, however, with the Taft-Hartley amendments of 1947. They imposed a duty to bargain on unions,[333] prohibited the closed shop, and

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industry without a grievance procedure there is an explicit provision for a job or shop steward. *See* U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, BULLETIN NO. 1425-1, MAJOR COLLECTIVE BARGAINING AGREEMENTS: GRIEVANCE PROCEDURES 5 (1964) [hereinafter cited as BULL. 1425-1]. Dunlop argues that one of the principal explanations for the volume and persistence of jurisdictional disputes in the American building and constructiou industry, as compared with that industry in other countries, is the availability of a "large number of paid union officials . . . with direct supervision over members at the job site." J. DUNLOP, *supra* note 285, at 252.

327. They are equally inconsistent with the Railway Labor Act but no problem exists there since union rule making never developed on the railroads.

328. Wagner Act § 9(a), ch. 372, 49 Stat. 453 (1935).

329. Wagner Act § 8(5), ch. 372, 49 Stat. 453 (1935).

330. Wagner Act § 8(3), ch. 372, 49 Stat. 453 (1935).

331. *Id.*

332. Brown & Root, Inc., 51 N.L.R.B. 820 (1943); Johns Manville Corp., 61 N.L.R.B. 1 (1945). *See* Address of General Counsel Denham to the Associated General Contractors, Feb. 11, 1948, in 21 L.R.R.M. 44 (1948).

333. 29 U.S.C. § 158(b)(3) (1970). The conflict between union rulemaking of the traditional kind and the union's duty to bargain is illustrated by New York District Council No. 9 v. NLRB, 453 F.2d 783 (2d Cir. 1971), *cert. denied*, 408 U.S. 930 (1972). The union there, during the term of a collective bargaining agreement, enforced against its members a rule that no member should repaint more than 10 rooms a week. The question was whether this constituted an unlawful refusal to bargain. A majority of the court found that it did, on the peculiar ground that it was in violation of the agreement's specification that the work week should be 35 hours. Judge Hays, in dissent, argued that there was no violation because the employer retained the right to discharge employees who did not paint a satisfactory number of rooms. Both reasoned from the model of the industrial agreement. If, as may have been the case, the agreement was a trade agreement under which it was understood that union rules

conditioned the union shop in such a way as to completely separate (except as to the payment of dues) union membership and employment rights.[334] Further obstructions to systems of union rule-making and administration were created by the provisions prohibiting jurisdictional strikes and conferring on the Labor Board the authority to resolve disputes as to jurisdiction,[335] as well as by the secondary boycott provisions which made the traditional method of enforcing compliance with union rules—the refusal to work with nonunion men—unlawful in much of the building and construction industry.[336] The Labor Board, obedient to the manifest intention of Congress, attempted to apply the entire Act to the construction industry.[337]

The attempt to impose a statutory scheme designed around a different model of industrial relationships on these systems, which came into existence because peculiarly fitted to their institutional setting, has not been entirely successful and what are either wholly or partly trade agreements still exist. The equivalent of closed-shop conditions continue in the building and construction industry despite the ban of sections 8(a)(3) and 8(b)(2).[338] The International Typographical Union, although unsuccessful in its initial attempt to meet the new statute head-on by reverting to its 19th century practice of unilaterally promulgating the conditions of employment, has been able to maintain much of its control over the work place.[339] And the absence of any

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governed the work pace, and assuming such an agreement is permissible, the question would be whether the employer had waived its right to bargain over the content of the union's rule. If not, a change in the rule could be found to be a refusal to bargain as a unilateral change by the union in a mandatory subject of bargaining. *See* NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (2d Cir. 1952); NLRB v. C. & C. Plywood Corp., 385 U.S. 421 (1967).

334. 29 U.S.C. §§ 158(a)(3), 158(b)(2) (1970). *See* Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954).

335. 29 U.S.C. §§ 158(b)(4)(D), 160(k) (1970).

336. *See* NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951). *Compare* Local 761, IUE v. NLRB, 366 U.S. 667 (1961), *with* Markwell & Hartz, Inc. v. NLRB, 387 F.2d 79 (5th Cir. 1967).

337. Comment, *The Impact of the Taft-Hartley Act on the Building and Construction Industry*, 60 YALE L.J. 673 (1951). *See also* NLRB v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952), in which the Board unsuccessfully sought, after the 1947 amendments, to enforce in the construction industry the pre-1947 closed shop restrictions which it had enforced in other industries.

338. *See* Ross, *supra* note 317, at 379.

339. The I.T.U. initially sought to avoid the ban on closed shop agreements by refusing to sign any agreements and insisting on working only under "conditions of employment" established by the union and posted at the work place. When charges were filed claiming that this constituted a union refusal to bargain, the strategy changed and the International directed the locals only to sign agreements terminable on 60 days' notice. This tactic also was found to violate section 8(b)(3). International Typographical Union, 86 N.L.R.B. 951 (1949); Chicago Typographical Union No. 16, 86 N.L.R.B. 1041 (1949). Both decisions were ultimately enforced. American Newspaper Publishers' Ass'n v. NLRB, 193 F.2d 782 (7th Cir. 1951); *see also* Interna-

organized employer interest has left the unilateral rule-setting practices of the American Federation of Musicians virtually intact.[340]

The continued existence of trade agreements which essentially confirm employer consent to union-administered rules should not, however, obscure the fact that such agreements are atypical in modern industrial America. Any general theory as to the rights created by a collective agreement should take account of them and the special institutional factors which they reflect, but its major emphasis must be on the quite different functions which are performed by agreements consistent with our labor laws and the institutions which those laws both reflect and foster.

D. The Nature of The Industrial Agreement

The kind of collective bargaining agreement which is envisioned by our labor laws and which is the typical American model proceeds upon an entirely different premise from the trade agreement. As stated earlier,[341] the organizational necessities of modern industrial enterprise require that there exist a set of rules governing the conduct of both workers and management. Collective bargaining of the kind visualized by our labor laws involves, essentially, bargaining about the content of those of management's rules which affect wages, hours and working conditions rather than attempting, as in the trade agreement, to establish a counter-structure of union rules. The agreement reached as a result of this bargaining becomes the rule governing the stated portion of the enterprise. It is not an agreement on the terms on which union members will work but an agreement on the rules which management will observe with respect to all employees.

This kind of an agreement I will refer to as an industrial agreement. It typically applies to a mill or factory in which there is a more or less permanent employment relationship, although it also includes employment under similar conditions in transportation and service industries in which there is no single stationary working place. It

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tional Typographical Union, 104 N.L.R.B. 806 (1953). An attack was also made on the provision of the I.T.U. General Laws requiring the setting of "bogus" type and the provision requiring foremen to be members of the union. The attack failed in both respects. American Newspaper Publishers' Ass'n v. NLRB, 345 U.S. 100 (1953); NLRB v. News Syndicate Co., 365 U.S. 705 (1961). The latter decision gave the victory to the I.T.U. (and, in effect, permitted the maintenance of what are in fact closed shop conditions). See the remarks of I.T.U. General Counsel Van Arkel, quoted in 1 I.T.U., A STUDY OF THE HISTORY OF THE INTERNATIONAL TYPOGRAPHICAL UNION, 381-84 (1964).

340. *See, e.g.*, Cutler v. NLRB, 395 F.2d 287 (2d Cir. 1968); *See* notes 298 & 305 *supra* as to symphony orchestras.

341. *See* text accompanying notes 281-88 *supra*.

is the kind of agreement with which the litigation described in Part I has been exclusively concerned.

1. Administration of the Rules Established by the Collective Agreement.

a. Rules regulating management action. The industrial agreement serves as a device by which at least some of the rules which would otherwise be established unilaterally by management are jointly established. These rules are of two kinds. The first, and predominant, category consists of rules specifying management action or limiting it. Rules with respect to the payment of wages and benefits are, of course, in this category. Rules setting hours of work or governing scheduling or manning also regulate management. Seniority provisions are rules governing management in the exercise of its function of determining which employee shall fill a vacancy and which employee to lay off when there must be a reduction in forces. Implicit in these rules is the essential characteristic of the industrial agreement: an acceptance of the authoritarian nature of the employment relationship. The rules contained in it are standards against which management's actions are to be measured, but management retains the right to act, to manage the business and direct the working forces. This means that management retains the exclusive power to administer the rules, not only those governing the productive process, but also those relating to wages, hours and working conditions. No matter how specific the rule, the initial determination of its proper application, and the right to insist on performance by the employees in accordance with that interpretation, remains with management, precisely as if the rules had been unilaterally adopted by it for the internal guidance of management personnel.

The principle of employer administration is often explicitly set out in the agreement in the form of a "management's rights" provision. This provision is sometimes in a short form, as exemplified by the basic steel agreements: "The Company retains the exclusive rights to manage the business and plants and to direct the working forces. The company, in the exercise of its rights, shall observe the provisions of this agreement."[342] In other agreements there is a more elaborate recital.[343] In still other agreements there is no management's rights pro-

342. Agreement between United States Steel Corporation and United Steelworkers of America (exp. 1974) § 3.

343. *See, e.g.*, Agreement between United Automobile Workers and Ford Motor Company (exp. 1973) art. IV:

> The Company retains the sole right to manage its business, including the rights to decide the number and location of plants, the machine and tool equipment, the products to be manufactured, the method of manufacturing, the schedules of production, the processes of manufacturing or assembling,

vision at all. But, irrespective of these differences it is the normal assumption of the parties that management administers the rules and interprets them in the first instance. This must, of course, necessarily be true with respect to the payment of wages; it is management that pays them and must therefore make the initial determination of the amount payable under the agreement. But it is equally true with respect to other matters in which that condition does not exist.

The agreement may contain, for example, provisions specifying the kind of work which different classes of employees shall perform. Suppose that the employer directs a particular employee to perform a task which the employee believes does not come within the agreed upon job description. The almost universal assumption under industrial agreements is that he should, nevertheless, perform the work as directed and refer the propriety of the order to later adjudication.[344] If a vacancy exists and the collective bargaining agreement specifies a principle which will govern the filling of that vacancy, such as seniority, but the employer directs an employee other than the one believed by the employees to be the appropriate person to fill the vacancy, it is nevertheless the obligation of the employee designated by the employer to perform the work as directed. Thereafter the correctness of the employer's action may be tested by the filing of a grievance. The relationship remains an authoritarian one insofar as administration is concerned.

A corollary of management's "right" to administer the agreement is the absence of any necessity to distinguish with precision in the agreement the matters that are intended to be subject to the joint rule-making authority and those that are to be governed solely by management's rule-making authority. In both cases, management acts in the first instance. Disputes as to whether particular actions fall within the area of joint control or within management's "prerogatives" arise when

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together with all designing, engineering, and the control of raw materials, semi-manufactured and finished parts which may be incorporated into the products manufactured; to maintain order and efficiency in its plants and operations, to hire, layoff, assign, transfer and promote employes, and to determine the starting and quitting time and the number of hours to be worked; subject only to such regulations and restrictions governing the exercise of these rights as are expressly provided in this Agreement.

344. There is one generally accepted exception, which is sometimes spelled out in the agreement [*see* 2 BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 95:242 (1971)] but which is almost uniformly found by arbitrators even in the absence of explicit provision: an employee is not obliged to obey management's order if to do so would expose him to a serious risk of physical harm. *See* Seward, *Grievance Arbitration—The Old Frontier*, in NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION AND THE EXPANDING ROLE OF NEUTRALS, PROCEEDINGS OF THE TWENTY-THIRD ANNUAL MEETING 158 (1970). A comparable provision in the Taft-Hartley Act (section 502) exempts from the definition of strike "the quitting of labor . . . in good faith because of abnormally dangerous conditions for work . . . ." 29 U.S.C. § 143 (1970).

management action is challenged through the adjudicative machinery. These disputes are, somewhat misleadingly, usually referred to as disputes as to "arbitrability." There also may be a controversy as to the extent to which the agreement should be regarded as embodying, without so specifying, rules unilaterally established by management but not mentioned in the agreement dealing with wages, hours and working conditions. This kind of issue is usually referred to as one concerning whether "past practice" should be regarded as incorporated into the agreement. Both kinds of issues arise as a result of the principle of employer administration.

The usual relationship between the management function and the collective agreement is illustrated by the "juniority" grievance. Many seniority provisions specify an "ability" factor: a senior employee is entitled to a vacancy, as against a junior applicant for the position, if his ability is relatively equal to the junior's. Occasionally, a grievance will be filed by a junior employee complaining that the senior employee to whom management has awarded a vacancy is less able than the grievant. Unions will, in my experience, usually refuse to process such a grievance. Where they do, the claim is normally, and correctly, rejected by the arbitrator without examining the claim of superior ability.[345] Underlying that rejection is the principle that the seniority provision does not constitute an allocation of job rights among the employees but is, rather, a limitation on management's right to fill the vacancy as it pleases. This seniority limitation is itself qualified by the ability element but if management chooses to ignore that qualification it does not violate the agreement. Given a junior employee with demonstrably superior ability and a collective agreement specifying that where abilities are relatively equal seniority shall govern, management can, without violating the agreement, fill a vacancy either with the superior junior employee or with a less qualified senior applicant. If it makes either choice, it will still remain within the limits placed upon its action by the collective agreement.[346]

b. Rules governing employee conduct. The rules thus far discussed are rules limiting management action. Industrial collective agreements often contain rules of a second kind: those governing employee con-

345. Bethlehem Steel Co., 28 Lab. Arb. 351 (1957) (R. Seward, Arbitrator). *Contra,* Mutual Telephone Co., 19 Lab. Arb. 270 (1952) (H. Roberts, Arbitrator), *vacated,* Local 1357, IBEW v. Mutual Tel. Co., 20 Lab. Arb. 524 (Hawaii 1953).

346. Failure to appreciate this essential characteristic of the collective agreement led a Canadian court to require that a junior employee selected by management for a vacant position on the basis of superior ability be given notice and made a party to an arbitration proceeding in which a senior employee's grievance claiming equal ability was heard, and to refuse enforcement of an arbitration award in the senior employee's favor where such notice was not given. *In re* Bradley & Ottawa Professional Fire Fighters, 2 Ont. 311, 63 D.L.R.2d 376 (1967).

duct. In part, employee conduct is indirectly governed by the conditioning of the payment of benefits or wages. Holiday pay, for example, may be payable only if the employee works "as scheduled or assigned" on the day before and the day after the holiday. Most rules governing employee conduct are not so tied, however, and are affirmatively established by management outside of the agreement. Management's right to control employee conduct may sometimes be expressly set out in the agreement but, like the right to manage generally, it is assumed even in the absence of language. In some cases, however, some of the rules governing employee conduct are included in the agreement itself. The agreement may, for example, specify when employees shall report for work, or what safety equipment they shall wear, or that smoking in parts of the plant is prohibited.

There is one rule governing employee conduct which, if applicable, is usually set out explicitly in the agreement: the no-strike clause. A rule forbidding strikes may have other uses,[347] but its primary function is to serve as a rule governing employee conduct in the same way as a rule directing at what hour the employee shall arrive at work or a rule specifying that employees shall wear safety equipment.

The principle of employer administration also applies to the rules governing employee conduct contained in the collective agreement. Rules governing employee conduct are, of course, observed or breached initially by employees, not management. The essentially authoritarian nature of the relationship, however, is preserved by the usual understanding as to the consequence of violation—the imposition of discipline by management. This, too, is usually subject to rule. The agreement may provide that employees may be disciplined only for "cause" or "just cause." Or it may go further and specify particular kinds of discipline for particular kinds of rule violations. In either case, however, again the authority to act in the first instance is management's. Management determines whether there has been a violation of a rule governing employee conduct and the appropriate penalty. Whether or not management has correctly applied the disciplinary rule, its orders must be obeyed.

2. *Adjudication and Enforcement: The Grievance Procedure*

Everything that has been said so far about the industrial agreement could be said, with almost equal accuracy, about the rules which most modern industrial enterprises establish unilaterally. Indeed it has been persuasively argued that:

> The rules which have developed with regard to selection, layoff and retention, promotion, and discipline and discharge have resulted in

347. *See* text accompanying notes 518-24 *infra.*

> significant limitations upon the arbitrary exercise of managerial prerogatives and power. These limitations are not simply the result of trade union pressures through collective bargaining; they are more in the nature of *self*-restraint which managements have imposed upon themselves as a result of organization needs for coordination, specialization, and personnel regulation . . . . [T]he very system and rules they have established have become commitments which have tended to bind the hands of the rulemakers themselves.[348]

There are, of course, differences between the rules unilaterally established by management and the commitments made in a collective agreement. The latter require the formalized consent of the employees through their bargaining representative, a consent which has to be bargained for and may have to be paid for in the content of the rules or increased wages and benefits. Of at least equal significance, I believe, is the system of adjudication and enforcement contained in the collective agreement.

Concededly, rules adopted unilaterally by the management bureaucracy tend to limit the arbitrary exercise of managerial power. They do so, however, only because lower members of the management hierarchy will, in most instances, exercise their discretion in accordance with the guidelines imposed by higher authority. Effective limitation on the arbitrary exercise of managerial power requires something more: a method by which the worker who considers himself improperly treated has recourse to an enforcement mechanism which can cause a reversal of the management action which allegedly violated the rules. This does not usually exist in the absence of a collective bargaining agreement.[349] Of course, the foreman who promotes a friend rather than the senior qualified employee, or who procures the discharge of a worker who has in fact performed his work satisfactorily may, if he is exposed, be himself disciplined or discharged. The threat of such discipline may greatly limit the frequency of such transgressions of management's rules. But this is a far different kind

348. H. VOLLMER, *supra* note 286, at 17-18.

349. The National Industrial Conference Board reported in 1954 that only 21.5 percent of companies studied had a formal grievance procedure for nonunion hourly personnel. P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 91 (1969). This is to be contrasted with the much higher percentage of nonunion firms in which a seniority rule was found to be applied in layoffs. *Id.* at 87. Although a 1962 survey of southern companies found that 54 per cent of nonunion firms had formal grievance procedures, the authors acknowledged that the distribution of the firms in which they existed suggested that "unions may be exercising a real, though indirect, influence on the use of grievance systems in nonunion plants." Steele & Fisher, *Effects of Unionism in Southern Plants*, 87 MONTHLY LAB. REV. 258, 265 (1964). None of the studies indicates how often these procedures terminate in adjudication by other than higher management. Except in the most extraordinary case it may be assumed that none do.

of limitation than is created by a system in which the employee who is improperly discharged, or who fails to receive the promotion due him under the rules, can seek to enforce against the lower levels of management the rules agreed to by higher management.

The enforcement mechanism, then, is the essence of the industrial collective bargaining agreement. The agreement does not represent the introduction of a system of rules to govern the employment relationship; such a system typically exists in American industry whether or not there is a collective agreement. The agreement's most significant function is to provide a system for the adjudication, at the instance of an aggrieved employee, of complaints that management, in exercising its power to direct the work force, has not complied with the rules jointly agreed to.

This system of adjudication and enforcement is the grievance procedure. It exists in almost every collective bargaining agreement,[350] and is the counterpart of management's conceded power to direct the working forces. It reflects and balances the essentially authoritarian and hierarchical nature of the business organization.[351] The central role it plays in the system of industrial relations is illustrated by the innumerable instances in which collective agreements adopt and make subject to the grievance procedure, sometimes simply by reference, the rules that management had unilaterally established prior to the existence of the collective agreement.[352] It has been my experience, indeed, that most initial collective bargaining agreements contain little more than rules governing employer conduct that correspond to existing employer policy or practice. It is only in succeeding agreements, as experience with the grievance procedure discloses problems or inequities in the application of the rules, or a need for additional rules, that the rules are amended, expanded, and clarified.

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350. BULL. 1425-1, *supra* note 326, at 5. This study included all collective agreements available to the Bureau which were in effect during 1961-62 and covered 1,000 or more workers, exclusive of railroad, airline and government agreements: 1,717 agreements covering 7.4 million workers. Only 20 agreements covering 50,000 workers, or a little over 1/2 of 1 percent contained no grievance procedure. Most of these were in the building and construction industry. The arbitration provisions in the same agreements are analyzed in U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, BULLETIN No. 1425-6, MAJOR COLLECTIVE BARGAINING AGREEMENTS: ARBITRATION PROCEDURES (1966) [hereinafter cited as BULL. 1426-6.] A smaller, but more up-to-date sample is covered by 2 BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 51 (1971).

351. Thus, "the whimsical nature of the sometimes repeated notion that the grievance procedure ought to be a two way street—management should have the right to bring up grievances just like the union. It should be obvious that a so-called management grievance is expressed in direct action by supervision in administering the work force." R. DUBIN, THE WORLD OF WORK 321 (1958). Compare the discussion accompanying notes 652-55 *infra*.

352. Every experienced negotiator is familiar with the following negotiating se-

The grievance procedure normally consists of steps. First, the aggrieved employee, or the union, raises the problem with the immediate supervisor. If the matter is not resolved, the union can appeal to the next higher level of supervision. Depending upon the size and complexity of the enterprise, the procedure may have three, four, or even five steps. If the union fails to appeal from management's decision at any step, the matter is considered settled on the basis of the decision last made. Even if there is no provision for arbitration or other form of appeal to a neutral at the end of the procedure, it is essentially a review procedure after the initial step. What is requested in a grievance is that higher levels of management review the action of its lower levels and determine whether that action is in accordance with the rules. The procedure thus appeals to management's control over its own bureaucratic delegation of powers: the grievance complains that some level in that structure has not complied with the rules agreed to at a higher level. The function of appeal is not simply to obtain an independent judgment; rather, its purpose is to bring into play the authority inherent in the hierarchical structure.

The process can, in some cases, involve all or most of the attributes of judicial procedure. This is particularly true in discharge cases. In the railroad industry, for example, the initial decision by lower-level management to discharge an employee is subject to a hearing procedure that is very similar to a formal judicial procedure. The employee is entitled not only to fair notice of the hearing but also to a fair statement of the issues that will be presented. The evidence against him must be presented in "open court" and subject to cross-examination. Briefs may be filed. The hearing is not before a neutral judge or an arbitrator, but before a duly designated representative of higher management who reviews the propriety of the actions of subordinate management personnel.[353] In the steel industry, the maximum discipline which may be imposed without prior hearing is a four-day suspension. If discharge or suspension for a longer period is contemplated, the employee is entitled to a hearing at which "the facts concerning the case shall be made available to both parties" before management determines what discipline shall be imposed.[354]

There is, however, another aspect of the grievance procedure which does not correspond to this model of successive interpretation

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quence: (1) union complaint against an allegedly unjust or inequitable management action, (2) company statement that the alleged conduct is contrary to company policy and either didn't occur or will not recur, (3) union demand that the stated policy be incorporated in the collective agreement.

353. *See* J. LAZAR, DUE PROCESS ON THE RAILROADS 1-58 (1958).

354. Agreement between United States Steel Corp. and United Steelworkers of America (exp. 1973) § 8(B).

of the rules and which is anything but judicial. The rules established by the collective agreement are necessarily incomplete. "There are too many people, too many problems, too many unforeseeable contingencies . . . ."[355] And even where the rules seem to be clear it is necessary to have play in the joints, flexibility to cope with particular situations, sometimes even contrary to rule, when unanticipated or unusual circumstances develop. Job rates, for example, may be established by a detailed manual, with specified factors and rates, but application of the manual to a new job involves questions of judgment on which there is no answer that is surely right. Finally, the parties are often unable to agree upon an enforceable standard, or have left the standards indefinite as to matters of critical importance, such as incentive standards in the steel industry, or production standards in the auto industry.

The grievance procedure, when applied to these questions, is therefore, particularly at the lower steps, very much part of the bargaining process, and solutions are likely to be ad hoc responses to particular situations. Because this is so, many grievance procedures are not limited to claims involving the interpretation and application of the agreement. The Bureau of Labor Statistics study of the major collective agreements in the United States in effect during 1961-62, found that in 47 percent of the agreements applicable to 52 percent of the workers covered, the grievance procedure was open to all disputes between the union or the employees and managment, whether or not involving matters of interpretation or application of the agreement.[356] Even where the procedure appears to be limited it is often used as a method of airing problems which do not involve questions of standards at all.[357]

This kind of bargaining within the grievance procedure is, however, largely confined to the lower steps. Once a grievance rises to the third or fourth step it becomes increasingly judicialized and the decisions are based on interpretation of the rules.[358] Even at this level,

355. Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498-99 (1959) [quoted in United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 579 (1960)].

356. BULL. 1425-1, *supra* note 326, at 6.

357. Kuhn, *The Grievance Process*, in FRONTIERS OF COLLECTIVE BARGAINING 252 (J. Dunlop & N. Chamberlain eds. 1967). Kuhn's earlier book presents a fascinating account of the process. J. KUHN, *supra* note 292. See particularly the description of the "hot tread" case in which the grievance which was appealed to arbitration involved a claim for extra pay for dealing with "hot treads" in a tire plant but the underlying dispute involved allowed time, a question on which the agreement was not controlling. *Id.* at 62-77. Kuhn calls the process "fractional bargaining." His analysis, unfortunately, does not explore the relationship between the incidence of fractional bargaining and the presence or absence of contractual provisions.

358. If it is apparent at the first step that a general question of interpretation is

however, the procedure reflects not only an individual interest but also a group interest. As Professor Cox demonstrated so clearly, many claims, even individual pay claims, carry implications for the group which may argue for a disposition adverse to the individual claimant; an interpretation of the agreement that will sustain one claim may have the opposite effect on a number of others. Other claims require the development of new rules to deal with unforeseen situations.[359] The process of grievance settlement thus often involves not only the settlement of the particular dispute but also interstitial rule-making. And the setting is one in which it is certain that there will be an enormous number of interstices. It is for these reasons that the grievance procedure at some point becomes a union, rather than an employee, procedure. In some agreements (as in the one litigated in *Figueroa*) the procedure is entirely union controlled. In others the individual employee may file a grievance and thus begin the process, or even appeal to the second step, but at some point the union, and only the union, decides whether the grievance will be pressed further or abandoned.

3. *Arbitration*

If, after the stepped review process is completed, higher management refuses to alter the decision originally made, the union under most agreements today has the right to appeal to impartial arbitration. There are various forms: a permanent "umpire," an ad hoc arbitrator chosen for the particular case by the parties or from lists supplied by the Federal Mediation and Conciliation Service or the American Arbitration Association, or a board composed of an equal number of representatives of each side with a neutral chairman entitled to cast the deciding vote.[360]

a. Characteristics. This kind of arbitration, it should be emphasized, is a recent phenomenon. It has been estimated that fewer than 8 to 10 percent of the agreements in effect in the early 1930's provided for arbitration.[361] In the others the accepted method of resolving disputes was the strike. And even in the agreements which did provide for arbitration it was essentially a mediation or agreement-making process

involved, the lower steps are often omitted. Alternatively the management representatives at the lower steps may seek advice from higher levels before answering so that the lower step is not a genuine review but a pro forma proceeding. S. SLICHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 728, 733 (1960).

359. Cox, *supra* note 273 at 605-15.

360. *See* Killingsworth & Wallen, *Constraint and Variety in Arbitration Systems*, in NATIONAL ACADEMY OF ARBITRATORS, LABOR ARBITRATION—PERSPECTIVES AND PROBLEMS, PROCEEDINGS 17TH ANNUAL MEETING 56 (1964).

361. S. SLICHTER, J. HEALY & E. LIVERNASH, *supra* note 358, at 739.

rather than one concerned with rights existing under an agreement.[362] Only with union organization of large-scale industry after the passage of the Wagner Act did the outlines of the system of grievance arbitration as we now know it become apparent. Initially both sides resisted an advance commitment to arbitration,[363] and acceptance came slowly.[364] Although the Director of the United States Conciliation Service[365] reported that 62 percent of the 1,200 agreements on file with the Service in 1941 contained some sort of provision for arbitration,[366] the real explosion in the number of provisions for grievance arbitration, and in large measure the forms which those provisions took, came as a result of the activity of the War Labor Board. The Labor-Management Conference called by President Roosevelt in December, 1941, agreed that there would be no strikes or lockouts for the duration of

362. R. FLEMING, THE LABOR ARBITRATION PROCESS 1-14 (1965). A detailed description of the arbitration procedures in the clothing, hosiery, printing and coal mining industries is contained in TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS (1942). Killingsworth and Wallen have described the clothing and hosiery systems as "impartial chairman" systems whose principal function was guided negotiation of particular problems rather than adjudication against standards. Killingsworth & Wallen, *supra* note 360, at 73. In printing, arbitration was primarily a substitute for the strike in the negotiation of new agreements. Only in coal mining did arbitration mean the adjudication of rights under an agreement, and this occurred only because the industry refused to accept the award of the anthracite Strike Commission in 1903 calling for a much broader form of arbitration. *Id.* at 61.

363. When the International Longshoremen's and Warehousemen's Union agreed in 1938 to industry-wide arbitration "on any question involving a basic interpretation of this agreement or any question of mutual concern not covered by contract relating to the industry," the immediately succeeding convention of the American Federation of Labor not only denounced the agreement but expressed its unalterable opposition to "compulsory arbitration clauses in agreements" and to any agreement providing for the "fixing of penalties for individual members for violation of agreements" as "in absolute violation of the constitutional rights of American workers and . . . of the principles of American trade unionism." *Arbitration of Labor Disputes*, 3 L.R.R.M. 1071, 1072 (1939).

364. The first agreement between General Motors and the United Automobile Workers, in 1937, provided for the exhaustion of the grievance procedure before the union could strike or resort to other interruptions of production, but disputes were referred to arbitration only by mutual agreement. The result was unsatisfactory to both parties. Only two cases were arbitrated between 1937 and 1940. By June 1940, the parties were ready to agree on the establishment of an umpire to whom complaints of alleged violation of most of the provisions of the agreement would be referred, coupled with a prohibition of strikes over those issues. United States Steel in its first 1937 agreement with the Steelworkers Organizing Committee established a four-step grievance procedure followed by arbitration. The arbitrator, however, was to be appointed only by mutual agreement and because the parties were reluctant to entrust decision to persons who "know nothing about the steel industry" few cases were arbitrated. Harbison, *Steel*, in TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS 508, 559, (1942).

365. Now the Federal Mediation and Conciliation Service.

366. Steelman, *The Work of the United States Conciliation Service in Wartime Labor Disputes*, 9 LAW AND CONTEMP. PROB. 461, 466 (1942).

the war and that the President should set up a War Labor Board to settle disputes. The strike could therefore no longer be tolerated as even an optional terminal point of the grievance procedure. And so, "the Board insisted, as a matter of paramount importance, upon arbitration as the final step of [the] grievance procedure."[367] As a result, the system of grievance arbitration as we now know it was created. The War Labor Board expired in 1945, but both management and labor found the form of grievance adjudication it had so strongly fostered highly desirable.[368] By 1952, 89 percent of all collective bargaining agreements provided for arbitration, and in 1966 the Bureau of Statistics, in a survey of all contracts covering more than 1,000 employees in effect during 1961-62, reported that 94 percent of the agreements covering 96 percent of the workers provided for arbitration.

This figure should not be taken to mean that all grievances under 94 percent of the contracts were subject to arbitration. In 30 percent of the agreements in effect in 1961-62 there were significant limitations.[369] The largest single category of exceptions consists of those agreements in which the grievance procedure is open to all disputes, without limitation, but the final step of arbitration is limited to grievances involving questions of interpretation, application, or violation of the agreement. There are other agreements in which one or more issues are specifically excluded from arbitration. Another major category consists of agreements excluding fringe benefit provisions covered by separate agreements between the parties. And there are a significant number of agreements which, at least as to some issues, retain the older system under which arbitration takes place only if both parties agree; if both parties do not assent, the union retains the right to strike after the final step of the grievance procedure.

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367. NATIONAL WAR LABOR BOARD, TERMINATION REPORT 113 (1948). Much of the character of the industrial agreement described in this article is reflected in the Board's directives. Thus the Board directed that unions agree to managements' rights clauses specifying that the operation of the plants and the direction of the employees, including the making and enforcing of reasonable rules be vested exclusively in management. *Id.* at 110. The now typical arrangement under which an employee can present his grievance to management, with or without union participation, in the first step of the procedure, but with the succeeding steps under the control of the union, was generally ordered by the Board. *Id.* at 113-19. Time limits were required. *Id.* at 121. And the Board "usually defined the arbitrator's jurisdiction to cover all grievances or disputes concerning the application or interpretation of the contract." *Id.* at 131.

368. 62 MONTHLY LAB. REV. 41-42 (1946).

369. Although the Labor-Management Conference convened by President Truman in October 1945 was unable to agree on many subjects, the conferees were unanimous in recommending that all collective bargaining agreements should contain provisions for the arbitration of disputes involving the interpretation and application of their terms. BULL. 1425-6, *supra* note 350, at 8.

When the agreements that limit the grievance procedure to claims involving the interpretation and application of the agreement and permit the arbitration of all unsettled grievances are lumped with those agreements that permit any complaint or request to be processed as a grievance but which place a comparable limitation at the arbitration level, the predominant pattern today is the one typically adopted by the War Labor Board:[370] mandatory arbitration of grievances involving claims that the employer has not complied with the regulations expressly or implicitly established by the collective agreement. Has the employer placed the wrong employee in a vacant job? Has he laid off, without a reason sufficient under the agreement, a senior employee while retaining a junior employee? Has he paid the appropriate wages? Was the denial of holiday pay to an employee who was late for work on the day after a holiday proper? The arbitrator's function is to resolve these questions by determining whether the employer in administering the rules governing the employee-employer relationship violated the limitations embodied in the collective agreement.

These limitations need not be express. The very nature of the agreement and the complex organization which it governs often require substantial implication, if only because of the impossibility of setting out in words all of the understandings and practices which the parties necessarily assume in executing it.[371] An agreement, for ex-

370. BULL. 1425-6, *supra* note 350, at 10, found the so-called broad form of arbitration, giving the arbitrator the unlimited right to resolve any dispute whether or not it involves a question of interpretation, application, or violation of the agreement, in 340 agreements, coustituting about 20 perceut of the 1,697 agreements studied containing grievance procedures.

371. *See* Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017, 1033-39 (1961). Compare, as to the judicial interpretation of collective agreements: "Courts . . . can declare implied obligations to exist only when there is a satisfactory basis in the express provisions of the agreements which make it necessary to imply certain duties and obligations in order to effect the purposes of the parties. Before an obligation will be implied it must appear from the contract itself that it was so clearly in the contemplation of the parties that they deemed it unnecessary to express it . . . or that it is necessary to give effect to and effectuate the purpose of the contract as a whole." Kellogg Co. v. NLRB, 457 F.2d 519, 524 (6th Cir. 1972) quoting Refmery Employees' Union v. Continental Oil Co., 160 F. Supp. 723, 730-31 (W.D. La. 1958) *aff'd* 268 F.2d 447 (5th Cir. 1959) *cert. denied* 361 U.S. 896 (1959). The quoted language was appropriate in *Kellogg*, which involved the judicial construction of a no-strike clause. The 1959 decision from which it came, however, was plainly wrong in using it with reference to an arbitrator's role in construing a collective agreeineut. The Fifth Circuit, while correctly noting that the same standards as to arbitrability need not be followed where the union may strike over a non-arbitrable dispute [*see* note 692 *infra*] erred in concluding that an arbitrator could not find an implied obligation to compensate with lost pay an employee deprived of an opportunity to work overtime in violation of the collective bargaining agreement provisions governing the allocation of overtime. Arbitrators often award that remedy, as one implied in the agreement, without a shred of language to support it, just as they almost always order back pay for a wrongfully discharged employee even though

ample, may have no provision limiting the employer's right to discharge employees. If, however, it contains seniority provisions which appear to grant security of employement and the right to preference in both the filling of vacancies and in the choice of employees for layoffs, an arbitrator may find that it implicitly contains an undertaking not to discharge an employee without proper cause.[372] Similarly, the agreement may contain no provision with respect to the contracting out of work. An arbitrator may nevertheless find that in some circumstances by contracting out certain types of work the employer has violated the implicit understanding not to undercut the wage or other provisions of the contract.[373] Note that in the latter case there often is no contention that contracting out is per se a violation of the agreement. Absent restriction, the employer clearly has the right to contract out as part of his right to manage the plant. The question is whether he has exercised that right "in such a way as to frustrate the basic purposes of the Agreement or make the Agreement impossible to perform."[374]

b. The nature of arbitral relief. It is in the nature of the relief available in grievance arbitration that its distinctive quality becomes evident.

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the agreement says nothing about that remedy. *See* notes 484-85 *infra* and accompanying text.

Classic examples of implication are provided in United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) and Vaca v. Sipes, 386 U.S. 171 (1967). Both cases iuvolved grievances by employees who sought to return to work after a period of disability. In ueither case did the agreement specifically confer such a right, or set forth the standards for determining eligibility for return, although both provided for abseuces due to illness. In *American Manufacturing*, the court of appeals assumed that such a right existed but that the standard was that set forth in the seniority provision, "ability and efficiency" equal to that of the employee who had replaced the grievant during his absence. 264 F.2d 624, 628 (6th Cir. 1959). In *Vaca*, the parties and the courts assumed, to the contrary, that the standard was ability to perform the job without danger to the grievant's health.

372. *See, e.g.*, Maclin Co., 52 Lab. Arb. 805, 809 (1969) (A. Koven, Arbitrator); R. Munroe & Sons Mfg. Corp., 48 Lab. Arb. 1209 (1967) (H. Sherman, Arbitrator). Cox argues that the implication of a limitation ou the right to discharge rests on the nature of the agreement rather than the seniority provisions. Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1502 (1959). The difficulty with this view is that it may lead to the implication of a "just cause" requirement into agreemeuts in the construction industry of the kind which Cox himself earlier recognized normally are not intended to place limitations on discharge. *Compare* Cox, *supra* note 273, at 603, *with* Huber, Hunt & Nichols, 52 Lab. Arb. 965 (1969) (D. Kabaker, Arbitrator) in which an arbitrator found such an implied limitation in a construction contract.

373. National Tube Co., 17 Lab. Arb. 790 (1951) (S. Garrett, Arbitrator). The cases are reviewed in Crawford, *The Arbitration of Disputes Over Subcontracting* in NATIONAL ACADEMY OF ARBITRATORS, CHALLENGES TO ARBITRATION PROCEEDINGS 13TH ANNUAL MEETING 51 (1960).

374. Bethlehem Steel Co., 30 Lab. Arb. 678, 682 (1958) (R. Seward, Arbitrator). If the agreement contains provisions concerning contracting out, of course, the question is whether the employer has complied with those provisions.

If the arbitrator determines that the employer's action has not violated the agreed upon rules, either because the action taken is in accordance with the rules or because it falls within an area ungoverned by the rules, that of course ends the matter.[375] But when he determines that the rules were violated, the question of remedy is presented. Since the collective agreement, unlike a contract to purchase or sell, consists of rules governing a continuing relationship, an arbitrator performs his intended function when he decides what action is required by the rules and directs that action. An employee discharged for an insufficient cause can be reinstated; an employee improperly denied a promotion, or whose job was improperly classified, can be given the job or the pay rate the agreement requires. An improper work schedule can be changed to one within the boundaries established by the agreement. There is little doubt that orders directing this kind of remedial action are what the parties intend the arbitrators to issue, and arbitrators will grant this kind of relief, usually without question, whether or not there is specific language in the agreement authorizing it.[376] Specific relief is the normal remedy rather than the exception. This leaves, however, a large gap: the period between the employer action violating the rules and the date the decision is implemented. The question is whether any monetary relief shall be awarded for this period. In nonrecurring situations this is, indeed, the whole of the remedial question.

Most collective agreements deal with this issue. The way in which they do so is highly significant. The issue of what monetary relief shall be provided for a past violation is usually referred to not as a damage question, but rather one of "retroactivity." Two-thirds of the collective agreements studied in detail by the Bureau of Labor Statistics contain rules relating to the retroactivity of arbitrators' awards.[377] These range from provisions stating that "the arbiters shall in their decision specify whether or not the decision is retroactive and the effective date thereof"[378] to separate provisions for determining the

375. As far as the arbitrator is concerned, that is. If the grievance is denied because the matter is ungoverned by the agreement, the employer's action may constitute a violation of section 8(a)(5) of the Act under the principles of NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (2d Cir. 1952), and NLRB v. C & C Plywood Corp., 385 U.S. 421 (1968). The Board's *Collyer* doctrine [Collyer Insulated Wire, 192 N.L.R.B. No. 150 (1971)] has the effect of making the 8(a)(5) question under the Act depend upon whether the arbitrator denies a grievance because management's action is in accordance with the rules or because it is within the ungoverned area—a distinction which the parties have not asked him to make and which is essentially superfluous to the function the parties have agreed he is to perform.

376. *See* Cox, *supra* note 372, at 1494.

377. BULL. 1425-6, *supra* note 350, at 77.

378. Agreement between Pacific Coast Shipbuilders and Pacific Coast Metal Trades Council and Teamsters (exp. 1965) [quoted in BULL. 1425-6, *supra* note 350, at 77].

effective date for adjustments of grievances relating to suspension and discharge cases, seniority cases, pay-rate cases, and specifying a method for implementing awards "involving the payment of monies for a retroactive period."[379] Some agreements require that "the award in all arbitration cases shall be retroactive to the date when the grievance arose,"[380] while others put a general limit on retroactivity by specifying that "no grievance shall be subject to retroactive pay more than 30 days prior to the date the grievance was written."[381] There are agreements which forbid retroactivity in general, by providing that arbitrators' decisions shall be effective as of the date of the decision, but then provide exceptions for particular cases, such as a direction that an arbitrator who finds that an employee was unjustly discharged shall order reinstatement with back pay.[382] Indeed, almost all agreements provide that in discharge cases there shall be full retroactivity, that is, back pay to the date of the event giving rise to the grievance, and arbitrators will assume that they have authority to give it even if it is not expressly stated.[383]

4. Time limits.

It is essential that the grievance and arbitration machinery operate with reasonable speed. From the workers' viewpoint, the acceptance of the principle that management's action stands until reversed, and the abjuration of direct response to what they perceive as management rule-breaking is tolerable only if the system of adjudication operates efficiently. If it does not, and grievances accumulate, the system becomes unacceptable. This, in turn, may lead to wildcat strikes or work-slowdowns. It is therefore also in management's interest to resolve grievances expeditiously. Furthermore, from management's viewpoint, there is always the possibility of substantial accruals of re-

379. Agreement between United States Steel Corp. and United Steelworkers (exp. 1974) § 7-G.

380. Agreement between Woven Label Companies of New York—New Jersey Area and United Textile Workers (exp. 1964) [quoted in BULL. 1425-6, *supra* note 350, at 78].

381. Agreement between Whirlpool Corp. and International Association of Machinists (exp. 1964) [quoted in BULL. 1425-6, *supra* note 350, at 78].

382. I/A Laundry Industry Master Agreement—New York Metropolitan Area with Amalgamated Clothing Workers of America (exp. 1966) [quoted in BULL. 1425-6, *supra* note 350, at 79].

383. *See*, e.g., Todd Shipyards Corp., 36 Lab. Arb. 333, 335 (1961) (J. Williams, Arbitrator), in which there was no provision for reinstatement or back pay but a provision that "the arbiters shall in their decision specify whether or not the decision is retroactive and the effective dates thereof." Compare Westinghouse Electric Corp., 30 Lab. Arb. 187 (1958) (M. Schmidt, Arbitrator), in which neither reinstatement nor back pay were awarded because arbitration took place only by mutual agreement and a formal submission agreement limited the arbitrator's jurisdiction to the determination of whether just cause existed for the discharge.

troactive liability if its initial action should prove to be impermissible under the rules. In particular, it is important that discharge grievances be filed and processed promptly because of their high potential for both emotional response and retroactive liability.

As a result of this desire for promptness on both sides, the grievance procedure will usually contain fairly rigorous time limits.[384] The time for initiation of ordinary grievances usually ranges from two days to two months; in discharge cases the normal limits vary from one day to a week.[385] Time limits for appealing may be provided at the intermediate steps and, correspondingly, answers from management may be required to be furnished within specified time periods. The most typical penalty for failure to meet the time limits is, in the case of initial filing, that the grievance shall not be considered at all, and at the subsequent steps, that it shall be deemed settled on the basis of management's response at the previous step. Management failure to answer within the required time usually results in immediate reference to the next higher step, although occasionally it is provided that grievances shall be granted if management fails to answer on time.

Time limits will, of course, simply push all grievances to the top step quickly if appeals by the union are made automatically or if denials by management are routine. If this occurs, the system simply breaks down. It is premised on the assumption that as grievances are processed they are systematically reviewed with the result that only those whose result is substantially in doubt are processed to the end.[386] Where this does not occur, as in the railroad industry, the system ceases to perform its function and becomes simply a depository for stale claims.

5. Control and screening of grievances.

On the management side the steps in the grievance procedure at least appear to correspond to the Weberian model of bureaucratic organization—each lower office is appointive and under the control and supervision of a higher one.[387] On the employee side, however, this is not true. Although a grievance usually can be filed by an indi-

384. Five out of every six agreements examined in detail by the Bureau of Labor Statistics contain time limits of some kind. BULL. 1425-1, *supra* note 326, at 37.

385. *Id.* at 38.

386. This is, of course, a simplification. There are undoubtedly some situations in which grievances are carried to arbitration even though the result is not in doubt. They are described in some detail in S. SLICHTER, J. HEALY & E. LIVERNASH, *supra* note 358, ch. 26. It remains true, however, that the objective is to resolve as many grievances as possible short of arbitration and that the failure to exercise reasonable screening procedures leads to a breakdown in the entire system. *Id.* at 912. *See also* Ross, *infra* note 392.

387. M. WEBER, *supra* note 284, at 331.

vidual employee, either at the initial or the next succeeding step, it is prosecuted by the union through the later steps. The union official involved, the shop steward or grievance committeman, is normally an elected official, responsible not to those higher in the grievance steps but to the members of the union in the particular department or shop. Union structures vary the personnel who will handle the grievance if it is not settled, *i.e.*, if management's answer at the lower steps is not satisfactory. Usually the grievance is considered at a meeting of a committee of stewards or of a grievance committee representing a larger constituency than the particular department or shop in which the grievance originated. Frequently their action is subject to review at a general meeting of the union membership. On the union side, therefore, the pyramid of authority is, at least in part, inverted. As the grievance rises through the procedure it becomes subject to the control of the membership at large. At some stage, however, a structure parallel to the management hierarchy may appear. The final step before arbitration in many cases is handled by appointed representatives of the international union who are not elected by the members of the local.

The usual problem with this structure, with its both upward and downward flow of authority, is not that meritorious grievances are not processed. On the contrary, because those who handle the grievances are elected, the tendency is to push claims having little merit. The grievant told by a man he has elected that management is right on a disputed issue is likely to remember on election day. The contrary answer may injure the process by overburdening it with unmeritorious claims, but this injury is not felt acutely by the grievant. For this reason it has been observed that the grievance rate usually rises near election time.[388] Sometimes, indeed, political considerations lead to the arbitration of grievances which it is hoped will be lost.[389] It is probably also true that in those unions in which appointed stewards, or business agents, have the responsibility for processing grievances the number processed tends to be lower than in the more common case of elected stewards.[390]

The consequence of these flaws, in the Weberian sense, in the union authority structure can be disastrous to the system. The railroad industry is an extreme example. Some 70,000 cases have been docketed with the National Railroad Adjustment Board since 1934. The delays in reaching decisions were so great that Congress in 1966 amended the statute to provide for the appointment of special boards

388. S. SLICHTER, J. HEALY & E. LIVERNASH, *supra* note 358, at 699.
389. *Id.* at 800.
390. *Id.* at 710. *See also* R. FLEMING, *supra* note 362, at 204-05.

of adjustment to decide cases pending before the national board for more than 12 months. Even this has apparently not eliminated the problem created by the fact that it is easier to send a dispute "to Chicago" than to settle it and thereby possibly alienate some constituents. The backlog in the First Division of the Board is still so great that about five years would be needed to clear it up even if no new cases were docketed.[391] Similar problems have arisen in other industries. At International Harvester during the five-year period 1954-1959, more than 48,000 grievances were appealed to arbitration, and at one point 12,000 were awaiting hearing.[392] When this happens in a system not financed by the government it simply breaks down and the parties must either drastically revise their practices or eliminate arbitration as the terminal point in the procedure.

A contrary example is provided by the General Motors-U.A.W. relationship. During the first 18 years of its existence, the office of the umpire decided, on average, less than 100 cases per year. During the second half of that 18-year period the average was 45 decisions per year. There was a substantial grievance load but, at the same time, effective settlement and screening procedures were developed. A majority of grievances were settled at the first step, about 30 percent were settled at the second step, and about 10 percent at the third step. The remainder were appealed to the umpire. Before hearing, however, they were further screened by both the company and the union. In this screening process, 55 percent of the appealed cases were dropped by the union and another 41 percent were disposed of jointly by an adjustment of some kind or referred back for further consideration. Only 4 percent of the cases appealed to the umpire were actually heard. In 1957, this amounted to 3/100 of 1 per cent of the grievances filed: 24 decisions out of 80,000 grievances.[393]

The ratio between grievances filed and cases arbitrated at General Motors is undoubtedly an extreme one.[394] But it illustrates the

391. Northrup, *The Railway Labor Act: A Critical Reappraisal*, 25 IND. & LAB. REL. REV. 21 (1971). Professor Northrup's figures have been suitably amended on the basis of the statistics contained in NATIONAL MEDIATION BOARD, THIRTY-SIXTH ANNUAL REPORT 75 (1970). For an earlier but more careful analysis of the problem see Mangum, *Grievance Procedures for Railroad Operating Employees*, 15 IND. & LAB. REL. REV. 474 (1962).

392. Ross, *Distressed Grievance Procedures and Their Rehabilitation* in NATIONAL ACADEMY OF ARBITRATORS, LABOR ARBITRATION AND INDUSTRIAL CHANGE, PROCEEDINGS, 16TH ANNUAL MEETING, 104, 127 (1963).

393. All figures are derived from Alexander, *Impartial Umpireships: The General Motors-UAW Experience*, in NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION AND THE LAW, PROCEEDINGS, 12TH ANNUAL MEETING 108, 129, 138 (1959).

394. At Ford, which has a very different history, there was an average of 435 cases per year decided in the same period. Platt, *Discussion: The Chrysler-UAW Umpire System* in NATIONAL ACADEMY OF ARBITRATORS, THE ARBITRATOR AND THE PARTIES, PROCEEDINGS, 11TH ANNUAL MEETING 141, 142 (1958). The Ford pattern

point. The grievance procedure is much more than a step in a litigation process—it is an integral part of the administration of the enterprise. In commercial transactions, resort to litigation is a sign of malfunction. In industrial relations, grievances are the norm; they are expected wherever there is an aggressive management and an alert and militant union. A grievance rate of 10 to 20 per 100 employees per year has been described as typical,[395] although both higher and lower grievance rates are often found.[396]

Essential, then, to the functioning of the grievance system is the existence of effective screening and settlement procedures. In their absence it becomes too expensive and too time consuming, placing demands on the arbitration process it simply cannot meet. But even so, it has been estimated that as many as 100,000 grievances are settled by arbitration each year.[397] Considering the enormous problems inherent in the interpretation and application of tens of thousands of differing sets of rules governing the working lives of millions of employees, the success of these autonomous systems of adjudication and the infrequency with which resort is had to the publicly financed adjudicatory mechanisms of the courts is astonishing.

6. *The No-Strike Clause*

There remains one final aspect of the industrial collective agreement which must be described and which is related in at least some respects to the provision for grievance arbitration: the no-strike provision. A ban on strikes, of one sort or another, is characteristic of virtually all industrial collective agreements, but the nature of that ban varies enormously.

No-strike provisions can be classified into three rough categories. The narrowest is implicit in the nature of the agreement and is, indeed,

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was reversed in 1958, and by May 1959, there were only 50 cases heard and decided by the umpire. The history is set forth (as "Company A") in S. SLICHTER, J. HEALY & E. LIVERNASH, *supra* note 358, at 777-81.

395. S. SLICHTER, J. HEALY & E. LIVERNASH, *supra* note 358, at 698. Such a rate would indicate a total grievance load per year of from one to two million grievances, if we assume ten million workers covered by agreements containing grievance procednres.

396. Althougb, generally speaking, abnormally high grievance rates mean that union-management relations are bad and low rates mean that they are good, there is no necessary correspondence. A low rate may mean that dissatisfactions are submerged and the union is too weak to do an effective job; a high rate may signify that there are an unusual number of technological or other problems. *Id.* at 702-03.

397. *Id.* at 752. The actual figure is, of course, unknowable. A much lower estimate of "upward of 10,000" was made by considering only the cases decided by members of the National Academy of Arbitrators. Jones, *The Role of Arbitration in State and National Labor Policy*, in NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION AND THE PUBLIC INTEREST, PROCEEDINGS, TWENTY-FOURTH ANNUAL MEETING 42, 45 (1971).

imposed by law. I have described the agreement as a device by which at least some of the rules management would establish unilaterally in the absence of collective bargaining are established by agreement. It incorporates the parties' basic understanding that management administers the rules and that the union exercises its functions during the agreement by processing through the machinery established by the agreement any claims that management has not complied with the rules in exercising its authority. Implicit in that description is an understanding that the rules agreed to are fixed until renegotiated and, usually, some understanding as to a period in which such renegotiation may not be insisted upon. Except in the railroad industry, this understanding is reflected in a fixed termination date. The termination date does not, however, signify any intention by the parties that their relationship, or the rules agreed to, will terminate at that time, but rather that neither party will use its economic power to compel changes in the rules before then.[398] In the railroad industry the same intention is signified in another, and more accurate, way. The termination nomenclature is not used, and the rules are set forth without limit of time. Any understanding that they are not to be renegotiated for a fixed period of time is embodied in an agreement for a moratorium on the filing of the section 6 notices which alone can initiate the "almost interminable process"[399] that must be completed before self-help measures can be used by either party.

The understanding that neither party has the right to insist on changes in the rules for a fixed period implies, on management's side, a commitment to maintain them in effect, and, on the union side, a commitment not to strike to compel changes. A prohibition against strikes to compel change in the agreement prior to the termination date is therefore an implicit part of every collective bargaining agreement. Indeed, that prohibition is so essential to the collective agreement that the law imposes it whether the parties express it or not. Section 8(d) of the National Labor Relations Act, in defining the duty to bargain, includes a duty to maintain in effect the terms and conditions expressed in an agreement,[400] without resort to strike or lockout,[401] for

398. This meaning of the termination date of the agreement is reflected in the usual colloquial usage which refers to it as the date when the agreement is "open." A provision permitting negotiation for changes before termination in some of the rules in the agreement is therefore customarily referred to as a "re-opener."

399. Detroit & T. Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 149 (1969).

400. 29 U.S.C. § 158(d) (1970). Even before this provision was inserted in the Act, a strike to compel changes in the agreement during the term was unprotected. NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939).

401. The lockout is not the proper correlative of the strike in this context despite the statutory language. Since the employer administers the rules, both those limiting employer action and, through the disciplinary process, those governing employee con-

the term of the agreement. And the Railway Labor Act has been construed judicially to prohibit strikes prior to the exhaustion of the procedures initiated by a section 6 notice, and hence to prohibit strikes during any moratorium period, as well as during the interminable process of negotiation initiated by such a notice.[402]

A second and broader form of prohibition against strikes exists as a direct counterpart to the grievance and arbitration provisions of the agreement. Except in the rare cases in which the union reserves the right to strike over claims of violation by the employer without any prior use of the grievance procedure, the establishment of that procedure impliedly, and usually expressly, prohibits the use of economic force, at least until the procedure has been exhausted. If the terminal point of the procedure is arbitration, as it is in the great majority of modern agreements, the commitment to arbitrate is the exclusive alternative to the strike.

The arbitration provision in the collective agreement has frequently been described by the Supreme Court as the quid pro quo for the agreement not to strike.[403] Although the characterization is accurate insofar as it reflects the historical development of arbitration from a method of avoiding strikes over what the terms of an agreement shall be to a substitute for a strike as a means of resolving claims of employer noncompliance during the period of an agreement, in only a few agreements does it describe an equivalence. An example is the agreement between the Aluminum Company of America and the United Steelworkers. It contains the usual grievance procedure, the terminal point being the Board of Arbitration. It specifies that the Board of Arbitration's sole function "is to interpret the provisions of the Agreement and to decide cases of alleged violation of such provisions." Specific subjects, such as contracting out, are excluded from arbitration. The agreement then provides that "as to any disputes subject to arbitration, the Union agrees that it will not cause nor cause its members to take part in any strike or work stoppage. . . ." As to other disputes, the grievance procedure, but not arbitration, is available and strikes are forbidden until five days after its exhaustion.[404]

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duct, he has the power to alter them unilaterally without resorting to a lockout. The employer obligation properly correlative to the no-strike obligation is therefore the obligation to maintain the agreed upon terms and conditions in effect and, where there is a dispute as to whether he has done so, to submit to and be bound by the machinery established by the agreement to adjudicate such questions.

402. Detroit & T. Shore Line R.R. v. United Transp. Union, 396 U.S. 142 (1969).

403. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 (1960).

404. Agreement between Aluminum Company of America and United Steelworkers of America (exp. 1974), § 54. The exclusion of contracting out has an in-

Under the Alcoa agreement the prohibition against strikes thus precisely balances the agreement to arbitrate. As to matters not coming within the negotiated rules, agreement is "open"; management can act and the union, after completing the negotiating process represented by the grievance procedure, is free to strike.

Only a small proportion of industrial agreements are of this kind. The great majority of industrial collective agreements contain a no-strike provision of a third type: a prohibition of strikes to protest any employer conduct, whether or not the conduct is limited by the rules contained in the collective agreement. Roughly half of the no-strike provisions analyzed by the Bureau of Labor Statistics were absolute bans.[405] Another substantial portion of the agreements studied permitted strikes only for specified employer actions, such as a refusal to arbitrate, comply with an arbitration award, or make payments to the union health and welfare fund. Other agreements, such as those in automobile manufacturing, permit strikes only over specified issues, such as production standards or safety disputes.[406] All such agreements, together totalling more than three-quarters of the agreements studied by the Bureau, can be said to be "closed" or "closed" with specified exceptions.[407] Railroad agreements are all "closed" by vir-

teresting history. In 1952 a grievance was processed complaining that some truck drivers lost their jobs as a result of the contracting out of ore hauling. The Board ruled that no provision of the agreement was violated and therefore the case was "beyond its jurisdiction." This meant, in effect, that the issue was a strikeable one. In 1962 the subject of contracting out was made a re-openable subject. No agreement was reached and the subject was returned to status quo, with the right to strike, by specifically listing contracting out as beyond the jurisdiction of the Board.

405. BULL. 1425-6, *supra* note 350, table 8, at 86.

406. *Id.* at 88-89.

407. The BLS figures, as given in the tables in BULL. 1425-6, *supra* note 350, at 86, can be restated in terms of percentages of the agreements containing no-strike provisions as follows:

TABLE 1

Type of Ban	Percent of Agreements	Percent of Workers
1. Absolute—no express exceptions	49.4	44.3
2. Absolute but waived if agreement violated	21.7	20.3
(a) by refusal to arbitrate or comply with award	15.2	not given
(b) by failing to comply with specified provisions, such as payment to health and welfare fund	3.3	not given
(c) in any way	3.2	not given
3. Limited to issues subject to arbitration	22.9	29.0
4. During processing of grievance	6.0	6.4

Category (2) has been divided in accordance with the percentages given in the text of BULL. 1425-6, *supra* note 350, at 88-89.

With the possible exception of category 2(c), all of the agreements in categories (1) and (2) can be said to be "closed" in the sense used here. Probably a substantial

tue of the status quo provisions of the Railway Labor Act. They can, however, be opened, in absence of a moratorium agreement, at any time by the filing of a section 6 notice.

Of the agreements that are closed, or closed with exceptions, there are some in which the closure is balanced by a grievance procedure and arbitration extending to all disputes of any kind between the parties.[408] On the railroads the closure is balanced by a prohibition against employer change in any of the "actual objective working con-

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portion of the agreements in category (3) are at least partially "closed," since BLS apparently included both agreements of the Alcoa type and agreements of the automobile manufacturing industry in this category. The latter group are "closed" with specific exceptions. Only 44 agreements in category (3) explicitly reserved the right to strike on all issues not subject to arbitration.

There were also 180 agreements in which there was no stated restriction on strikes. 161 of these contained grievance procedures and 143 provided for arbitration. On the assumption that, in accordance with Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962), a prohibition against strikes is to be implied to the extent that use of the grievance procedure or arbitration is available, these 161 agreements should be added to categories (3) and (4). Making this addition and assuming that only 44 of the agreements in category (3) are open as to all issues, the number and percentages of closed and open agreements can be restated as follows (percentages of workers are not given, since they are not available in the BLS study):

TABLE 2

	Closed Agreements	Agreements	Percent
1.	Absolute strike ban	757	44.1
2.	Ban waived in limited way by violation	284	16.5
3.	Right to strike on limited issues not subject to arbitration	307	17.9
4.	Other	4	.2
		1,352	78.7%
	Open Agreements	Agreements	Percent
5.	Ban waived, any violation	49	2.8
6.	Right to strike on any non-arbitrable issue	44	2.5
7.	Arbitration—implied ban	143	8.3
8.	Ban during proeessing of grievances	92	5.4
9.	Grievance procedure—implied ban	18	1.0
10.	No ban, no grievance procedure	19	1.1
		365	21.1%

408. Of the 1,352 agreements categorized as "closed" in Table 2, 315 could be said to balance the no-strike and the arbitration commitments: 154 of the agreements with an absolute strike ban and 64 of the agreements with a right to strike on limited issues not subject to arbitration also provided for "broad-form" arbitration not limited to interpretation and application of the agreement. BULL. 1425-6, *supra* note 350, at 91. This leaves a total of 1,037 agreements, or about 60 percent of the total number of agreements examined, in which the no-strike provision has the effect of withdrawing from the possibility of both arbitration and concerted action at least some matters relating to wages, hours aud working conditions not covered by the agreement. The imprecision of this figure should be emphasized. It is drawn from categorizations of uncertain accuracy made by BLS, and the stated assumptions as to the constituents of the BLS categories.

ditions and practices" in effect.[409] The Act not only prohibits the union from striking, it also prohibits "management from doing anything that would justify a strike."[410] In the majority of agreements, however, there is no such balance; strikes are forbidden, but arbitration is available only with respect to interpretation or application of the agreement, that is with respect to whether the employer, in administering the enterprise, has exceeded the restrictions on its authority set forth in the agreement. Since, except possibly in the railroad industry, the collective agreement does not usually contain all of the rules controlling the employer-employee relationship, or cover all matters which can be said to be within the scope of wages, hours, and working conditions, the no-strike provisions of most collective agreements constitute a *quo* considerably in excess of the *quid* of the agreement to arbitrate.

It is this fact more than any other which has created the tendency, already noted,[411] for arbitrators to find implied restrictions on management conduct within the agreement and which underlies the dispute over the extent to which past practices or rules not explicitly in the agreement should be deemed, sub silentio, to be embodied in it.[412] I do not propose to enter that controversy here. For present purposes it is important only to recognize as a characteristic of the industrial collective agreement that it usually does more than provide the specified limitations on employer conduct. It also serves, through the no-strike provision in its most common form, to impose a rule of conduct on the employees which would not exist in its absence.

E. The Functions of the Industrial Agreement

The above description of the industrial collective bargaining agreement and its procedural mechanisms helps to explain, I believe, the acceptance of collective bargaining by large segments of the American economy. The employees' interest seems plain enough. It is not only that collective bargaining offers, or at least appears to offer, a method of obtaining a larger share of the economic pie. Even

409. Detroit & T. Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 153 (1969).

410. *Id.* at 150.

411. *See* text accompanying notes 371-74 *supra.*

412. *Compare* Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement,* 63 HARV. L. REV. 1097, 1116-25 (1950), *with* Findling & Colby, *Regulation of Collective Bargaining by the National Labor Relations Board—Another View,* 51 COLUM. L. REV. 170, 177-181 (1951). The differences over the meaning of the agreement's silence arose out of differences over the duty to bargain during the term of an agreement. On the latter point, the Board's view expressed by Findling and Colby has prevailed. NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (2d Cir. 1952). None of the discussion in the text is intended to indicate that there may not be a duty to bargain as to "uncovered" subjects during the term of an agreement, even if strikes are forbidden.

where this is not so, as in the case of plants and industries which traditionally follow wage patterns set elsewhere, the collective agreement provides a system of law to govern matters much more important to the employee than those governed by most public law: his right to a job and to a promotion, the hours at which and the conditions under which he is required to work, his right to refuse or to share in the opportunity to work overtime, the length and scheduling of his vacations, and so forth. The establishment of a rule of law on all these matters, with its concomitant internal adjudicative mechanism, is not without cost to the individual worker. There are not only union dues to be paid and the risk of loss of income, or even of the job itself, in the economic conflicts which the system recognizes as the method of settling disputes as to what the rules shall be. There is also an implicit agreement to be bound by the majority as to the content of the rules. In many occupations, particularly white collar ones, the rules inhibit a free-form employment relationship which appears to have considerable attraction for some. But overall, the advantages seem real enough to most working men.

What needs explaining is management's acceptance of collective bargaining. Many employers do not now actively oppose organization and in many industries in which collective bargaining was bitterly resisted a generation ago management appears to be willing to retain the collective bargaining relationship even though there are major differences of opinion over the terms of that relationship. This is true even where management does not accept the union as a partner in the establishment of wages, hours and working conditions. The classic example is the General Electric Company. While General Electric has repeatedly demonstrated its view that it is the best judge of the views and interests of its workers and has been willing to sustain substantial costs and even extensive strikes to establish its primacy in the collective bargaining relationship, all of the evidence indicates that it has carefully avoided an attempt to destroy that relationship.[413] Even during the bitter strike of 1969-70, in which, for the first time since 1946, a settlement was reached that did not in substance amount to

413. Note particularly the position taken by the company after the totally unsuccessful I.U.E. 1960 strike. Although it clearly had the I.U.E. on the ropes once the union capitulated as to the terms of the agreement, the company agreed to continue to recognize check-off cards, included units in the agreement where decertificaiton petitions were filed during the strike, and reinstated the agreement in a manner to insure a contract bar against further petitions. *See* H. NORTHRUP, BOULWARISM 90 (1964). At only one small plant, with 69 employees in the unit, was there any replacement of strikers, and this was apparently at the initiative of the plant manager. *See* General Elec. Co., 150 N.L.R.B. 192, 255 (1964), *enforced,* NLRB v. General Elec. Co., 412 F.2d 512 (2d Cir. 1969). During the longer and even more bitterly contested 1969-70 national strike the company did not replace auy economic strikers.

a confirmation of the company's first, and final, offer, there was no attempt to eliminate the unions involved. Although the company kept its plants open and repeatedly urged its employees to disregard the union and return to work, it almost never attempted to replace the strikers, nor did it encourage decertification petitions in order to eliminate the union. Indeed, a review of General Electric's labor relations history leads to the conclusion that General Electric is at the least agreeable to the continued existence of the collective bargaining relationship. The struggle between General Electric and its unions is not over whether there should be a collective bargaining agreement, but only over the extent of the unions' participation in shaping the agreement.

This is but one of many examples. In the steel industry, there have been a number of new plants built within recent years. In no case, however, did the steel companies seriously attempt to defeat organization by the Steelworkers and the subsequent incorporation of those plants within the collective bargaining agreements of their respective companies. The can manufacturing industry is certainly one which has been characterized by the exercise of effective union economic power. Yet I was once assured by the vice president in charge of industrial relations from one of the larger can companies that the company would make no serious effort to impede the organization of new plants by the company as they were opened.[414] DuPont, the largest private employer in the United States not organized by unions affiliated with the AFL-CIO, provides another example. While vigorously opposing all of the almost uniformly unsuccessful attempts by national unions to obtain collective bargaining rights, DuPont has never opposed the organization of independent unions and, indeed, normally recognizes such a union without requiring it to go through the test of an NLRB election.[415]

These examples are sufficient to demonstrate what should be obvious in any event: Most modern American industries accept the notion of collective bargaining. This is not to say that there are not significant segments of American industry in which the contrary is true. One has but to look at the textile industry, or read the never-ending flow of Labor Board decisions dealing with employer attempts to defeat union organization, to recognize that in many segments of American industry, collective bargaining is resisted as vigorously today as it was several generations ago.

414. This statement was made, it should be added, in answer to a complaint against the company's policy of opposing the effort of the Steelworkers to organize the company's clerical employees.

415. Rezlar, *Labor Organization at Dupont: A Study in Independent Unionism*, 4 LAB. HIST. 178, 183 (1963).

The interesting question is why in many segments of American industry, particularly in the larger, more integrated and more complex industrial relationships, there is an acceptance of, and I would go as far as to say even in some cases a desire for, collective bargaining. There are some answers which quickly suggest themselves but which, on analysis, are incorrect. The most facile is that there is a conspiracy between labor and management and that collective bargaining is accepted, and even encouraged, because management believes that it can obtain a cheaper deal on wages, hours and working conditions than it could get if there were no union. There undoubtedly are "sweetheart" agreements in American industry; but the acceptance of collective bargaining in major industries like autos, steel, rubber, and electrical manufacturing certainly is not predicated on the notion that the collective bargaining agreement undercuts the interests of the workers.

Another possible answer is that collective bargaining is accepted simply because the law has declared it to be the preferred method of conducting labor relationships. The answer attributes more force to the National Labor Relations Act than I believe appropriate and is, in any event, contradicted by the fairly substantial weapons remaining available to employers who wish to resist organization or destroy collective bargaining. There is not only the right to use elaborate techniques of persuasion, a right vigorously exercised by those employers seeking to remain free of unionism.[416] There are also innumerable tactics available to an employer determined to avoid the consummation of an agreement,[417] tactics which can only ineffectually be remedied by the processes of the National Labor Relations Board.[418] And there

416. *See, e.g.*, Livingston Shirt Corp., 107 N.L.R.B. 400 (1953) (captive audience); Montgomery Ward & Co., 50 L.R.R.M. 1553 (NLRB, 1962) (same, at overtime rates); Storkline Corp., 142 N.L.R.B. 875 (1963) (letters, speeches, movies). A collection of extreme examples is contained in the statement of Isidore Katz in *Hearings Pursuant to S. Res. 140 Before the Subcomm. on Labor-Management Relations of the Senate Comm. on Labor and Public Welfare*, 81st Cong., 2d Sess., pt. 2, at 101-11 (1950). *See also*, Wirtz, *The New National Labor Relations Board; Herein of "Employer Persuasion,"* 49 NW. U.L. REV. 594 (1954); Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).

417. The simplest tactic, of course, is simply to engage in "hard bargaining" for a year after certification and then refuse to meet further on the ground that the union no longer represents a majority. *See, e.g.*, McCulloch Corp., 132 N.L.R.B. 201 (1961); NLRB v. Cummer-Graham Co., 279 F.2d 757 (5th Cir. 1960); Chevron Oil Co. v. NLRB, 442 F.2d 1067 (5th Cir. 1971).

418. *See, e.g.*, H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970); Tiidee Products Co., 194 N.L.R.B. No. 198, 79 L.R.R.M. 1175 (1972), *on remand from* I.U.E. v. NLRB, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970). The present Board, while conceding that the inadequacy of its remedies is "egregious" in some cases, has "reluctantly concluded" that the cure must come from Congress. Ex-

is, of course, the right of the employer to destroy a union by hiring replacements during the course of a strike or by resorting to a lock-out. There is no solid proof, but I believe it to be true that most employers who are really determined to resist or eliminate collective bargaining have the power to do so.[419]

Acceptance of collective bargaining is explainable, I suggest, not because the law requires it or because employers believe that they can achieve more favorable wages, hours, and working conditions through collective bargaining than otherwise, or even—a third possibility—because of a desire for certainty or stability with respect to labor matters. The real answer lies in the function the collective agreement performs in the government of a business enterprise. As has been said,[420] any industrial enterprise must have a system of rules, and the larger and more complex the enterprise, the greater the necessity for rules and their formalization. Collective bargaining can serve many useful functions for management in connection with the formulation and administration of these rules. First, it establishes a mechanism by which employee consent to those rules can be obtained. That consent not only extends to those rules established in the collective agreement but also to rules established by management in areas not covered by the agreement to the extent that the union, by not insisting upon participation in the formulation of those rules, can be said to have at least implicitly consented to management's authority to impose them.

Consent is important in a complex bureaucratized enterprise. As Reinhold Bendix put it: "Beyond what commands can effect and supervision control, beyond what incentives can induce and penalties prevent, there exists an exercise of discretion important even in rela-

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Cello-O Corp., 185 N.L.R.B. No. 20, 74 L.R.R.M. 1740, 1741 (1970), *remanded*, 449 F.2d 1046 (D.C. Cir.), *enforced*, 449 F.2d 1058 (D.C. Cir. 1971).

419. This is certainly true in the southern textile industry. Despite a mammoth union effort over several decades, the industry remains largely unorganized. *See* SUBCOMM. ON LABOR AND LABOR-MANAGEMENT RELATIONS OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, LABOR-MANAGEMENT RELATIONS IN THE SOUTHERN TEXTILE INDUSTRY, 82d Cong., 2d Sess. (1952); *Hearings on H.R. 11725 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. at 12-195 (1967). J. P. Stevens and Company received star billing in the 1967 hearings and vigorously defended the legality of its actions, which were then under review. *Id.* at 90-100. Four years and several cases later the Fifth Circuit referred to it as "unchastened by and impervious to judicial homilies." J. P. Stevens & Co. v. NLRB, 441 F.2d 514, 516 (5th Cir. 1971). Most recently the D.C. Circuit, in the twelfth of the Stevens unfair labor practice cases, described the Board's efforts as ". . . a quixotic effort to convince J. P. Stevens and Company to respect the rights conferred on its employees by . . . the National Labor Relations Act." Textile Workers v. NLRB, 82 L.R.R.M. 2471 (D.C. Cir. 1973).

420. *See* text accompanying notes 280-88 *supra*.

tively menial jobs, which managers of economic enterprises seek to enlist for the achievement of managerial ends."[421]

> Workers must be willing to do the work assigned with a degree of steady intensity. . . . [T]hey must be willing to comply with general rules as well as with specific orders in a manner which strikes some reasonable balance between the extremes of blind obedience and capricious unpredictability. And it is this last qualification which brings the general attributes of an ethic of work performance within the framework of an industrial organization; for under conditions of factory production the intensity of work, its accuracy, and the careful treatment of tools and machinery cannot remain the attributes of an individual's performance. Rather these qualities of work must be coordinated with production schedule, and that coordination depends to some extent on the good judgment of each worker in his every act of complying with rules and orders.[422]

Because of the necessity of consent, managements have over a period of 200 years developed changing ideologies to justify their authority and to create thereby the necessary ethic of work performance.[423] The establishment of rules in a collective agreement can serve as a substitute for such ideologies. And the process of collective bargaining, including periodic conflicts over the content of the rules, can serve to channel the natural desire of employees to exercise strategies of independence[424] into acceptable forms and to legitimize the result.

It is interesting, in this connection, to note the general correspondence of unofficial or "fractional" bargaining, both within the grievance procedure and outside it, and as well the incidence of wildcat strikes, with those issues which are not covered by adjudicable rules in the collective bargaining agreement. In Kuhn's study of bargaining in the grievance procedure, largely based on rubber industry practice, the most frequent issues were work loads, allowed time, and piece rates,[425] none of which were determinable under the agreements. In the basic steel industry the issue most typically involved in wildcat stoppages has been incentives;[426] in automobile manufacturing what would otherwise be a wildcat strike over "production standards" is legitimized by removing it from the no-strike provision.

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421. R. BENDIX, *supra* note 290, at 251.

422. *Id.* at 204.

423. *See generally id.*

424. *Id.* at 446.

425. *See generally* J. KUHN, BARGAINING IN GRIEVANCE SETTLEMENT (1961).

426. The statement is based largely on my own experience. There is unfortunately no good source of statistics as to the prevalence of wildcat strikes and the issues involved in them. The Bureau of Labor Statistics publishes annually a detailed analysis of work stoppages by industry and issue. It does not, however, indicate whether the stoppages are or are not in violation of contract. Nor does the published breakdown by issue relate to specific industry groups.

In both cases the parties have been unable, for one reason or another, to agree upon standards by which the disputes can be adjudicated.[427] In contrast, disputes over seniority, which once caused significant turbulence, ceased to cause problems as detailed rules have been negotiated and the parties have become accustomed to operating within that framework.[428]

The collective agreement serves a second function for the management of a complex enterprise: to the extent that rules are embodied in a collective agreement, the grievance procedure operates as a mechanism by which higher management polices compliance with its orders by the lower ranks in the hierarchy. Let me offer a few examples. The collective agreement between one of the country's major steel producers and the union provides that if an arbitrator finds that an employee has been discharged without proper cause he shall be reinstated with back pay. The agreement explicitly forbids modification of the penalty. The consequence of these provisions is that if the arbitrator finds that an employee engaged in conduct which warranted some discipline, but not discharge, he is compelled to find that the discharge was not proper and to order reinstatement with full back pay, even though he would have sanctioned a suspension or other disciplinary action if not restrained by the agreement. Any discharge case which goes to arbitration thus becomes an all-or-nothing proposition. An employee's suspension for 30 days could be sustained by the arbitrator, yet an employee discharged for identical conduct would receive full back pay, and thus no penalty at all, if reinstated by the arbitrator. The union for years sought to eliminate the provision forbidding the arbitrator to modify discipline and pointed out that as the provision was construed it in effect exonerated employee conduct which should have been subject to some disciplinary sanction. The company refused to change the provision. Although various reasons were given in negotiation, the real reason, privately stated, was that it provided the only means for top management to ensure enforcement of its discharge policies. It was company policy that lower level supervision should carefully consider all of the merits of a case and ex-

427. In steel, incentive questions are arbitrable but there is no agreement on the proper level of incentive compensation. The jointly negotiated inequity settlements which grew out of the War Labor Board originally included detailed rules as to job classification and specific standards to implement the contractual provision that incentives provide "equitable incentive compensation." The former were implemented in 1946 and now form the basis for the classification and hourly pay rates for all jobs in the industry. The union leadership, however, refused to accept the incentive standards which had been negotiated at the technical level because of the anticipated adverse membership reaction, and the problem remains one which the union and the industry have been unable to resolve satisfactorily.

428. S. SLICHTER, J. HEALY & E. LIVERNASH, *supra* note 358, at 668.

ercise its power of discharge only when fully satisfied that the penalty was warranted. The all-or-nothing provision prevented careless administration and the shifting of responsibility to higher levels since the consequence of over-zealous discipline was that the employee got off scot-free, to the embarrassment of the local management. Although there were inequitable results on occasion, the rule was justified nevertheless because it gave top management an enforcement weapon against lower management.

The major can companies have national master agreements which are supplemented by local agreements. Until 1955 the national agreement of one of the companies set forth the basic principle of seniority but permitted the detailed rules and the units in which it was to be applied to be negotiated locally between plant management and the local union. In 1955, however, the company agreed with the union on a supplemental unemployment benefit plan which provided benefits for employees who were laid off after two or more years of service. With the establishment of this program, the company resurrected an ancient union demand—which had been made in the confident assumption that management would never agree to it—and insisted that the local authority to negotiate seniority supplements be limited by a requirement in the national agreement that all layoffs be made on a plant-wide seniority basis. The objective was, of course, to minimize the number of employees with more than two years of service who would be laid off. Since the cost of the supplemental unemployment benefits would be charged to the local plants, one might think that plant management should decide whether the operating difficulties created by a system of plant-wide seniority would be sufficiently great to justify the additional unemployment benefit costs that would be incurred if seniority on a smaller unit basis were retained. Or, if the company thought that plant-wide seniority should be adopted in every case, this could have been accomplished by directing the plant officials to insist on plant-wide seniority in their local negotiations. The company, however, was fearful that local plant management, faced with the operating difficulties which such a system would entail and unwilling to make the necessary managerial changes to accommodate it, would not negotiate hard enough for plant-wide seniority. It therefore insisted, over union opposition, on putting plant-wide seniority in the national agreement.

A third example relates to a large manufacturing plant in Mississippi. The company hired a work force which included slightly more than 50 percent black employees. Whether because of laudable motives or simply because it was necessary to maintain a work force willing to perform efficiently, the company established very strict

rules forbidding discrimination by foremen and other lower level supervisors. Supervision was, however, entirely white and, at the lowest level, largely locally recruited. For this reason the company's antidiscrimination policy was simply ignored; predictably, the result was unrest and disaffection. The plant was eventually organized over strenuous company opposition. After organization the union attempted to negotiate a collective bargaining agreement. The company undoubtedly had the economic strength to resist the consummation of a satisfactory agreement and, at the outset, it clearly intended to do so. In the course of the negotiations, however, the union persuasively argued that an agreement containing a nondiscrimination clause would enlist the union as the enforcer of the company's nondiscrimination policy. An agreement was eventually reached, and I have no doubt that this was a critical factor.

Seniority provides an ideal example of both the employee consent and the management disciplinary functions of the collective agreement and illustrates both its advantages and disadvantages as a method of administering the industrial enterprise. There is undoubtedly an advantage in promoting the most qualified employees to vacant positions and in retaining the most efficient when layoffs are required. Judgments as to these matters, however, are not precise and when the decisions are made, as they must be, at a low level of the management bureaucracy there are enormous possibilities for favoritism or the use of improper criteria. Perhaps of more importance, there is usually no adequate method by which it can be demonstrated that the choice of persons to be promoted or laid off is not based on considerations unrelated to performance. And in dealing with questions of morale, an imagined injustice whose falsity cannot be demonstrated may be as real as an injustice in fact.

Length of service, on the other hand, can be objectively calculated by fixed, if sometimes arbitrary, rules.[429] Use of the seniority criterion thus both eliminates a possible source of employee resentment and ensures that lower elements in the managerial hierarchy do not misuse the authority given them. A strict seniority rule provides the greatest certainty, but at the greatest sacrifice of other values. Providing that seniority governs only if relative ability among applicants is equal decreases certainty, and therefore creates the occasions for grievances, but preserves some managerial flexibility. That the loss of certainty is sometimes regarded by management as not worth the resulting benefit is shown by the fact that in many industries that include this flexible standard in the agreement the practice nevertheless is to regard se-

429. For example, a rule that the relative seniority of employees hired on the same date shall be determined by the alphabetical order of the surnames.

niority as the governing factor, except on skilled work, unless it can be shown that the senior applicant is unable to perform the job.[430]

Even when the seniority principle and its relationship to ability and fitness are agreed upon there remain further problems. In what units are the principles to be applied? Is seniority to be counted from the date of hire by the company, or from the date of first employment in the plant or department, or on the particular job? Are the same rules and seniority dates to be used for promotions and for layoffs? Does an employee laid off from one seniority unit have any rights to a vacant job in another unit? How is the seniority of an employee who moves from one unit to another to be counted—from the date of transfer, or the date of hire, or both, depending on whether a promotion or a layoff is involved? These and the countless other necessary rules could be established unilaterally by the employer (although even then it is important that the rules be settled and stated in advance), but there are obvious advantages in involving the employees in the formulation of the rules or even, if protections are provided to ensure that the employees given jobs are qualified, allowing the employees to establish the rules themselves.[431] The problem is essentially one of choice between employees, and the stakes for them—the opportunity to earn a livelihood—are high. Particularly in periods of heavy layoff, those who are chosen out are almost certain to feel a sense of injury. The accruals to the essential ethic of the enterprise which arise from the fact that the set of rules by which the choices have been made owe their authenticity to the organization of those affected are obvious.

The collective agreement serves a third function for management. By defining the rights of employees it establishes with respect to those matters covered by the agreement certain management advantages which would not otherwise exist. In the absence of a collective bargaining relationship, management has the right to make and alter the rules and, indeed, to comply or not to comply with them, except perhaps as to "vested" rights based on past work performance. The employees, on the other hand, have a counterbalancing right, at least since the Wagner Act, to express their protest against a rule, or its

430. S. SLICHTER, J. HEALY & E. LIVERNASH, *supra* note 358, at 204-06. Compare the "official" management position as set forth in 1955 by the National Association of Manufacturers that "seniority as the sole criterion . . . serves neither the best interests of the employer nor the employee" with the comments by personnel and industrial relations directors (which themselves, I believe, understate the extent to which managements in fact rely on seniority), in N. CHAMBERLAIN, SOURCE BOOK ON LABOR 673, 675-78 (1958).

431. *See* C. GOLDEN & H. RUTTENBERG, THE DYNAMICS OF INDUSTRIAL DEMOCRACY 122-27 (1942), for dramatic illustrations of the conflicting employee interests involved and a persuasive argument for permitting the seniority rules to be developed "from the bottom."

application, by striking or engaging in other concerted activity until the protested decision is changed. The execution of a collective bargaining agreement alters the rights on both sides. To the extent that the agreement expresses rules governing the relationship between management and the worker, either expressly or by implicitly embodying existing rules, management loses the right to change those rules for the duration of the agreement, but the employees lose the legal right to exert economic force to compel changes.[432] The agreement specifies the benefits the employees are entitled to, but also, by negative implication, the benefits they are not entitled to, and they are held to that position for the term.[433] This, in itself, is of considerable value in a period of rapidly rising wage levels.

Of equal significance is the right, which the usual agreement confers on the employer, to be free of concerted action to protest management's administration of the rules. Under the typical American industrial agreement, management and union are not coordinate partners in administration. As already stated,[434] the agreement is understood as embodying the understandings that management acts and the worker obeys, and that coercive force will not be used to resolve disputes over whether management has complied with the rules. This is clearest where there is an absolute no-strike provision. It is partially true where the union retains the right to strike over a limited number of issues. And even in that minority of cases in which the union retains the right to strike on any issue after a claim has been processed through the grievance procedure, the agreement provides a time restraint and a guarantee of orderly procedure before the economic issue is joined.

When the two effects, the fixing of standards for a term, and management's right to act without the restraint of potential concerted reaction, are combined with arbitration limited to interpretation and application of the terms of the agreement, the agreement confers a substantial advantage upon management which it would not have in its absence. On matters covered by the agreement and within the limits imposed by it either expressly or impliedly, management is free to manage, without either immediate or ultimate restraint, in areas in

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432. *See* note 400 *supra.*

433. The statement as made is only partially true of railroad agreements. Notices of proposed changes can be served at any time under section 6 of the Railway Labor Act. With respect to wages, "moratorium" agreements generally achieve the same effect as agreements for a fixed term in other industries. As to other rules, stability is achieved not by preventing the issues from being opened at any time but by interposing "almost interminable" procedures between the proposed change and the freedom to resort to economic pressure. *See* Detroit & T. Shore Line R.R. v. United Transp. Union, 396 U.S. 142, at 149 (1969).

434. *See* text accompanying notes 342-44 *supra.*

which, in the absence of the agreement, it would have both a duty to bargain and the risk of concerted employee reaction in protest against its action. In return for agreement as to what the rules shall be, management gains a freedom to act it would not otherwise have.

The advantages a collective bargaining relationship provides for management are, of course, not purchased without cost or without dangers to the efficient operation of enterprise. There are the obvious costs of potentially higher wages and more expensive fringe benefits. There are the losses potentially incurred during periodic conflicts between management and its organized workers over the content of the collective agreement. There is the danger, exemplified by the railroad industry, that so many detailed rules will be incorporated in the agreement without allowance for changes in conditions that the ability of the enterprise to respond flexibly to such changes will be lost. And there is, finally, the cost to managerial flexibility and efficiency that any enforceable system of law creating standards of conduct imposes on the governors of a community: the inhibition of action management believes to be in accordance with the applicable standard but cannot demonstrate to be so. There is, for example, a vast difference in managerial freedom between a relationship in which management follows the principle that employees should be discharged only for just cause and one in which management is subject to an adjudicatory system permitting the discharge to stand only if that cause can be proven.[435]

Analysis of the circumstances in which the advantages of a collective bargaining system outweigh these costs, and explication of the characteristics of a healthy system of collective bargaining as opposed to one which imposes socially undesirable restrictions on management are beyond the scope of this Article. What is important for our present purpose is to recognize the nature of the regime established by industrial collective bargaining agreements and the values involved as a premise for the development of the legal rules to be applied to those agreements.

F. The Legal Rules: Introduction

The preceding description of the industrial collective bargaining agreement and its adjudicative processes would appear to indicate that

435. The classic example is the discharge for sleeping on the job. It has been said that "the only reliable means of substantiating guilt beyond a reasonable doubt is to lift the grievant from the chair in which he has been snoring and bounce him off the floor until he opens his eyes, blinks in confusion and angrily inquires, 'What's the big idea waking me up in the middle of a shift?' Otherwise the grievant may successfully claim that he was momentarily resting his eyes or that he was deep in meditation concerning the problems of the job." Ross, *Comments on Kadish, The Criminal*

the system contains, within itself, value to both of the parties such that it can ordinarily be expected to function without interference from the law. That conclusion conforms to the fact in most cases. In those industries in which the system has reached its most developed form there has been little or no resort to the courts. So far as I am aware there has not been, for example, a single instance in which a basic steel or major automobile manufacturing company, or the union representing its employees, has sought judicial decision as to the arbitrability of a grievance or review of an award. Nor, so far as I know, has there been a union-authorized strike in violation of the rules. However, as with every institution, there are always marginal cases in which, for one reason or another, the values of an autonomous system are insufficient to compel voluntary compliance with its rules. In 1947, Congress, receptive to the complaints of non-compliance, thrust the task of enforcing compliance in such cases upon the courts by enacting section 301 of the Labor Management Relations Act.[436] There is furthermore a category of third parties who may not be entirely agreeable to the results produced by the system—the dissatisfied employees. It may be assumed that the system and its operations are by and large agreeable to a majority of the workers since the union represents them and is responsive to their wishes. But sometimes the restrictions the system places upon concerted action by the employees can seem intolerable to them. And majority rule, no matter how effective the implementation of democratic principle, always leaves open the possibility of improper representation of minority interests. Hence, there have been both wildcat strikes and claims of failure to represent individuals fairly. And here too, as we saw in Part I, the courts have been open.

There must, therefore, be legal rules—principles of law defining the status of collective agreements and the rights created by them—that can be used by the courts when disputes arising from a malfunction or alleged malfunction in the system are brought to them for resolution. Those principles of law should conform to, rather than conflict with, the norms of the system except where it is consciously decided that these norms must be disregarded to safeguard otherwise unprotected interests. They should not encourage departures from a system which has on the whole worked exceedingly well and which Congress sought to reinforce rather than weaken. And the courts certainly should not, in the absence of a showing of a strong contrary public interest, pro-

Law and Industrial Discipline as Sanctioning Systems: Some Comparative Observations, in NATIONAL ACADEMY OF ARBITRATORS, LABOR ARBITRATION: PERSPECTIVES AND PROBLEMS, PROCEEDINGS, 17TH ANNUAL MEETING, 145 (1964).

436. 29 U.S.C. § 185 (1970).

duce results that conflict with the expectations of those who, by voluntary agreement, have produced the system.

The following propositions are offered in this spirit. Since the propositions are interrelated they will be stated as a group at the outset. Thereafter, I will seek to justify each of them at greater length. The first two set forth the basic legal principles which I believe best conform to the relationships established by a collective bargaining agreement and will be discussed initially without regard to the judicial precedents. Following that detailed discussion I will indicate the extent to which the Supreme Court cases discussed in Part I are consistent with the first two propositions. The third proposition describes the legal rule governing the relationship between union and employees in the administration of the agreement, and the final three spell out a scheme of remedies by which the respective obligations of union and employer can be enforced consistently with the earlier propositions. Since they concern the rules imposed by the courts, rather than principles solely derived from the institutional relationships, the discussion of these latter propositions will directly involve judicial precedents.

It should be emphasized that these propositions are not necessarily applicable to every collective bargaining agreement. They are offered initially as applicable only to the most typical American form of industrial agreement: one containing (a) a grievance procedure culminating in arbitration limited to questions of interpretation and application of the agreement (with or without express language limiting the arbitrator's authority by specifying that he shall have no right to add to or to detract from the provisions of the agreement), (b) an understanding (whether or not expressed in a management rights clause) that management shall have the right to direct the working forces, and (c) a provision barring strikes for the duration of the agreement. The question of whether any variations in the basic propositions are necessary because of variations in these assumptions will be discussed later.

The basic propositions are these:

1. The collective agreement is not a contract between the employer and any employee and neither may bring suit against the other for its breach.

2. The collective agreement is a judicially enforceable contract between the union and the employer. The primary obligation assumed by the employer is to comply with the grievance and arbitration machinery adopted in the agreement. The primary obligation assumed by the union is to refrain from striking during the term of the agreement.

3. The union has a judicially enforceable obligation to the em-

ployees it represents, derived from section 9(a) of the National Labor Relations Act, not to act arbitrarily or capriciously or abuse its discretion in exercising its contractual right under the collective agreement to process and settle employee grievances prior to arbitration.

4. Refusal or failure of a union to meet its obligation under proposition 3 should be remediable only in a suit to compel the union to proceed. (Such a suit is not properly termed a section 301 action since it does not derive from contract and cannot be barred by contract. Nor, since it also does not derive from union membership, is it subject to a requirement that internal union remedies be exhausted.) The primary issue triable in such a suit is whether the union has breached its duty.[437]

5. The employer should not be able to defeat or limit recourse to the adjudicative mechanism provided by the collective agreement because of the union's failure to comply with time limits, when such failure results solely from the union's breach of its statutory duty. To insure this result an employer may, therefore, be joined as a section 301 defendant in an employee's suit against the union for breach of that duty.

6. The employer's retroactive liability should not be increased by virtue of proposition 5 over what would have been due if the union had not breached its duty, nor should the employee's recovery be reduced. Any potential increase in the employer's retroactive liability or potential reduction in the employee's recovery occasioned by the breach should be chargeable to the union.

G. The Rights Created by the Agreement

Proposition 1: *The collective agreement is not a contract between the employer and any employee and neither may bring suit against the other for its breach.*

This proposition can be justified on two grounds. First, it corresponds to what the parties think they are doing, and second, the creation of a fictional contractual relationship serves no useful purpose and results in consequences for which there is no justification.

The first ground should be evident from what has gone before. In no sense do the parties to a collective bargaining relationship regard themselves as establishing a contract judicially enforceable between employer and employee. The rule-making process, whether engaged in unilaterally by management, or by agreement with the union, is just that, and not a contract. As the Privy Council put it in a 1931 decision describing a Canadian collective bargaining agreement:

437. Incidental relief may be required against the employer. See discussion of propositions 5 and 6 in text accompanying notes 611-29 *infra*.

> It appears to their Lordships to be intended merely to operate as an agreement between a body of employers and a labor organization by which the employers undertake that as regards their workmen, certain rules beneficial to the workmen shall be observed. By itself it constitutes no contract between any individual employee and the company which employes him.[438]

This is particularly clear in the railroad industry. What is elsewhere usually contained in something called a "contract" is embodied in the railroad "working rules." The parties make agreements, but those agreements are as to changes to be made in those working rules. The Railway Labor Act amendments of 1934, did not refer to these rules as contracts or provide for suits for their breach.[439] Instead, it provided a statutory machinery for resolution of disputes as to their interpretation and application.

The early American cases, nevertheless, sought by one device or another to create an enforceable contractual obligation out of a relationship not intended to be such. Some courts treated the collective agreement as a contract of employment executed by the union as agents for its members,[440] others viewed it as a usage or custom[441] or a mutual general offer to be deemed incorporated in the individual contract of employment.[442] The later cases characterized it as a third-party beneficiary agreement between the union and the employer but enforceable by the employee.[443] All these notions shared a single characteristic: they treated the substantive provisions of the collective agreement as existing independently of its grievance procedure. They were constructs imposed on the agreement in an effort to justify enforcement by the courts. This was understandable in the absence of other enforcement devices. Most of the early cases were railroad cases and it was not until 1934 that the Railway Labor Act was amended to provide for the Adjustment Board. The modern agreement, however, normally provides an internal system of enforcement in its grievance and arbitration procedure. That procedure is integral with the substantive rules established by the agreement. Management agrees to the restrictions on its right to establish and change the rules governing the employment relationship only as those restrictions on its rights

438. Young v. Canadian N. Ry., [1931] A.C. 83, 89 (P.C. 1930) (Man.).

439. *See* text accompanying notes 64-70 *supra.*

440. Mueller v. Chicago & N.W. Ry., 194 Minn. 83, 259 N.W. 798 (1935).

441. Hudson v. Cincinnati N.O. & T.P. Ry., 152 Ky. 711, 154 S.W. 47 (1913).

442. Yazoo & M. V. R.R. v. Webb, 64 F.2d 902 (5th Cir. 1933).

443. Woodward Iron Co. v. Ware, 261 F.2d 138, 140-41 (5th Cir. 1958). The earlier cases are collected in 18 A.L.R.2d 352 (1951) and the various theories summarized in the Third Circuit's opinion in Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 210 F.2d 623 (3d Cir. 1954), *aff'd on other grounds,* 348 U.S. 437 (1955).

may be interpreted and applied by an arbitrator in case of a disagreement. As will be demonstrated below, the difference between that undertaking and a promissory undertaking enforced judicially is not only a difference in forums and their expertise, but a considerable difference in substance.

An agreement may perhaps be treated by the courts as a contract even if not intended as such[444] when substantial policy reasons exist for reaching that result. There are no such reasons with respect to the standard type of collective agreement here assumed. Proposition 1 achieves directly what the exhaustion doctrine of *Republic Steel Co. v. Maddox*[445] achieved indirectly. There is a difference where the union is found to have breached its duty in making a settlement or in failing to process an individual grievance and that difference will be discussed in connection with propositions 3-6 below. Where the union has not breached its duty, however, proposition 1 produces the *Maddox* result, although on a somewhat different rationale. Under the traditional analysis Maddox lost because he did not attempt to exhaust the contractually specified procedure to obtain adjudication of his contract claim. Under the proposition here asserted, he lost because the only claim he had was to the use of that procedure.

Without anticipating the discussion of the problem presented when the failure to utilize fully the grievance procedure is attributable to union fault, the distinction between a rule of law requiring resort to one of two alternative methods of adjudication and the proposition that the only right conferred on an employee by the standard industrial agreement is to use the grievance procedure can be illustrated by comparing the rights of employer and employee under an individual contract of employment with those under a collective agreement.

It is a commonplace, of course, that the collective agreement obliges no employee to work.[446] Let us assume, however, that an employer does agree to hire an employee and executes a contract of hire containing the same terms as are usually included in a collective agreement. On this assumption conventional contract principles would lead to the conclusion that if the employee fails to comply with the terms of his agreement, he may be sued for consequential damages.[447] Thus if the agreement provides that the employee shall report for

444. Or, at least, not intended to be judicially enforceable.

445. *See* text accompanying notes 175-81 *supra.*

446. "No one is bound thereby to serve, and the employer is not bound to hire any particular person." Yazoo & M. V. R.R. v. Webb, 64 F.2d 902, 903 (5th Cir. 1933).

447. In colonial America, judgments for damages were not infrequently recorded against workmen for non-performance or poor workmanship. R. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 222-24 (Torchbook ed. 1965).

work at his assigned station by a specified hour, he presumably would be liable for breach of contract if he should fail to do so. If the agreement provides that the employee shall not smoke in designated areas because of the hazard of explosion and the employee does smoke and an explosion occurs, he would be liable for the resulting damages. If the collective agreement embodies a contractual relationship between employer and employee, in short, the rules negotiated by the parties governing employee conduct become promises enforceable against the employee. If the breach is serious enough, the employer may also have the right to terminate the contract—*i.e.* to discharge the employee. But, under conventional contract analysis, this right cannot exist unless there has been a failure by the employee to perform his part of the bargain and may not exist where there has been a breach justifying damages.

The opposite, of course, is true with respect to a collective agreement. The rules governing employee conduct, both those in the agreement and those the agreement permits management to impose unilaterally, are just that: rules, not promises. If the employee fails to comply with them, he has breached no promise and the anticipated result is not liability in contract but an exercise by management of its right to impose discipline, a right which is, in turn, subject to the restrictions put upon its exercise by the availability of review in the grievance procedure. That discipline may, but need not, be discharge. It can also be a warning, a suspension or probation. But it is never damages. The provisions frequently found in collective agreements specifying the kinds of discipline that may be imposed for various violations of the rules and the almost uniform absence of provisions for complaints against employees in systems providing for the adjudication of all disputes between the parties simply confirm the obvious: the rules governing employee conduct contained in a collective agreement are not thought of by the parties as promises for breach of which any remedy other than discipline is appropriate.

This consequence is particularly important with respect to the rule governing employee conduct which is most frequently found in collective agreements: the rule against participation in strikes. The usual no-strike provision in a collective agreement is a promissory one, but the promise is the union's, not the employee's. As to employees, the provision is a rule of conduct for violation of which the expected consequence, as with any other rule governing employee conduct, is the possible imposition of discipline. Imposition of damage liability upon individual employees would impart a promissory aspect to the rules of the collective agreement which is simply not intended.[448]

448. *See* text accompanying notes 580-84 *infra.*

Under a collective agreement an employer may sometimes properly impose discipline in circumstances which, were it an employment contract, might result in his being liable to the employee for damages. Consider, for example, the case in which an employee is given a direction to perform certain work. Suppose the order is improper, under his employment contract, because the work is outside of his proper job boundaries, because he has a contractual right to refuse overtime, or for any other reason. By hypothesis the employee's refusal to comply with the order cannot be made the basis for imposing a contractual liability on him, since he broke no promise. If the employee is discharged for his refusal, the employer is liable in damages to the employee for breach of contract.[449] The employee, of course, refuses to obey at his peril; his right to recover depends on a later judicial determination as to whether the order was improper. If the employment was governed by a collective agreement, the result is to the contrary. The understanding of the parties, and the almost universal ruling of arbitrators, is that an employee must obey an order so long as it poses no threat to his personal safety and that discipline may be imposed for failure to obey without regard to the propriety of that order under the agreement.[450]

The discharge case provides perhaps the most revealing distinction between the concept of contract and the concept of rule since it involves both the rules governing employee conduct and the rules limiting management. An employee terminated for failure to comply with the terms of his employment contract and who brings suit for violation of contract wins or loses on contractual principles. If the employee has violated the agreement, or a rule properly made by the employer under the agreement, he loses.[451] If not, he wins, in which case he is entitled to damages, not reinstatement. In a few jurisdictions, breach of contract damages are limited to those suffered up to the time of trial.[452] In most, however, the employee is entitled to the wages he would have earned during the term of the agreement,

449. Van Winkle v. Saterfield, 58 Ark. 617, 25 S.W. 1113 (1894); Mair v. Southern Minn. Broadcasting Co., 226 Minn. 137, 32 N.W.2d 177 (1948).

450. American Bus Lines, 14 P-H IND. REL. LAB. ARB. ¶ 73,368 (1968) (I. Feinberg, Arbitrator). *See* Continental Pacific Lines, 54 Lab. Arb. 1231, 1244 (1970) (D. Feller, Arbitrator); note 344 *supra*.

451. Taint v. Kroger Co., 20 Ohio Misc. 29, 247 N.E.2d 794 (C.P. 1967) provides a nice, if extreme, illustration. The court there found not actionable the discharge of a warehouse employee with 51 years of service and an apparently unmarred record because he violated company policy by stealing a sausage from one of the employer's stores.

452. Van Winkle v. Satterfield, 58 Ark. 617, 25 S.W. 1113 (1894). This was apparently the theory under which the plaintiff in *Vaca v. Sipes* sought damages against the union only for the loss of wages to the time of trial.

suitably discounted.[453] To the amount so calculated must be added compensation for any lost opportunity to learn a trade or to acquire a valuable reputation,[454] any expenses which the employee incurs in seeking other employment, and any other losses caused by reasonable attempts to mitigate damages.[455] From that amount there may be subtracted such earnings as the employee has received up to the time of trial, or would have received if he had made reasonable efforts to obtain other employment, and such amounts as he may be expected with reasonable diligence to earn during the balance of the term of the contract.[456] The employee is, however, under no duty to mitigate damages by taking employment of a different character than that from which he was discharged[457] nor even, on a strictly contractual view, by accepting an offer of reemployment unless that offer preserves his right to damages for breach of the original contract.[458]

In the few cases treating collective agreements as employment contracts and granting a damage remedy, principally railroad cases pursuant to *Moore*, the determination of the term of the contract for damage purposes is particularly difficult. An individual employment contract normally specifies a term, and damages can be based on that period. Where a collective agreement is treated as a contract, the term could be said to be the term of the collective agreement, and this approach has been taken in some of the cases.[459] Realistically, however, the agreement is expected to be renewed indefinitely with such changes as may be agreed upon at the termination date or, on the railroads, after the service of Section 6 notices. It is therefore more reasonable to consider the contract as one entitling the employee to continued employment so long as he is able to perform and work is available to which his seniority would entitle him. Accordingly, the appropriate term for measuring breach of contract damages in a discharge case may be the employee's working-life expectancy. This is the period used in most of the cases in which a collective agreement

453. *See* cases collected in Annot., 91 A.L.R.2d 682 (1963).

454. 5 A. CORBIN, CONTRACTS § 1095 (1964).

455. 5 S. WILLISTON, CONTRACTS § 1359 (Rev. ed. 1937).

456. Cornell v. T.V. Dev. Corp., 17 N.Y.2d 69, 215 N.E.2d 349, 268 N.Y.S.2d 29 (1966).

457. Tanning v. Star Publ. Co., 130 F. Supp. 697 (D. Del. 1955). The cases with respect to teachers are particularly numerous and are collected in Annot., 22 ALR 3d 1047 (1968).

458. 5 S. WILLISTON, *supra* note 455, § 1359.

459. Rentschler v. Missouri Pac. R.R., 126 Neb. 493, 253 N.W. 694 (1934); Dufour v. Continental S. Lines, Inc., 219 Miss. 296, 68 So. 2d 489 (1953); Woodward Iron Co. v. Ware, 261 F.2d 138 (5th Cir. 1958). In the railroad industry, where agreements normally carry no termination date but are subject to change after the service of notices and the conclusion of the prescribed bargaining process, the period would be the time taken by the prescribed procedures.

is treated as an individual contract of employment and damages for discharge are awarded.[460]

In the form of administration envisaged by the parties to a collective agreement, there is no such problem. Both the standards applied to determine the propriety of a discharge and the remedies available if the discharge is found improper are quite different. Discharge under a collective agreement is not a remedy for breach of contract but a form of discipline. And the applicable principles derive not from "the Law of Contracts but [from] modern concepts of enlightened personnel administration, sprinkled with elements of procedural due process in criminal cases."[461] In a discharge dispute there may, of course, be a question whether the employee has violated a rule embodied in the agreement or which the agreement authorizes. But under a collective agreement it is understood that this is only the first question and, in most cases, the least important one. The next, and most frequently disputed, issue is whether that violation is of such character as to justify the quantum of punishment imposed.[462] Discharge, which is frequently referred to as "industrial capital punishment," is only one of the possible forms of discipline. Taken into consideration in determining whether it or some lesser punishment is appropriate are such factors as the seriousness of the offense, the degree of culpability, the amount of damage to the employer, the employee's length of service, his prior disciplinary record, and the likelihood that the offense will be repeated. The predominant philosophy is that "capital punishment" should not be levied until it has been established that the employee will not respond to lesser penalties,[463] and there are obvious analogies to—as well as differences from—the punishment system of the criminal law.[464] Under most agreements, if the employer determines that discharge is the appropriate penalty, an arbitrator to whom the discharge is appealed has authority to

460. Thompson v. Brotherhood of Sleeping Car Porters, 243 F. Supp. 261 (E.D. S.C. 1965), *aff'd*, 367 F.2d 489 (4th Cir. 1966), *cert. denied*, 286 U.S. 960 (1967); Nichols v. National Tube Co., 122 F. Supp. 726 (N.D. Ohio 1954), *rev'd on other grounds*, United States v. Nichols, 229 F.2d 396 (6th Cir. 1956); Richardson v. Communication Workers, 443 F.2d 974 (8th Cir. 1971).

461. Ross, *The Arbitration of Discharge Cases: What Happens After Reinstatement*, in NATIONAL ACADEMY OF ARBITRATORS, CRITICAL ISSUES IN LABOR ARBITRATION, PROCEEDINGS, TENTH ANNUAL MEETING 24 (1957).

462. *Id.* at 31.

463. *Id.* at 27.

464. *See generally* Kadish, *The Criminal Law and Industrial Discipline as Sanctioning Systems*, in NATIONAL ACADEMY OF ARBITRATORS, LABOR ARBITRATION—PERSPECTIVES AND PROBLEMS, PROCEEDINGS, 13TH ANNUAL MEETING 125 *et. seq.* (1964). The analogy suggested by Professor Kadish evoked sharp controversy [*id.* at 144-64] but none suggested that the question of punishment was resolvable by a contract analysis.

modify the penalty and substitute one of the lesser forms of discipline, or to order reinstatement without back pay.[465] In the illustration previously given—an employee who refuses to obey a contractually improper order—discipline of some sort is almost always sustained, but discharges almost never.[466]

Furthermore, the remedy available for a discharge found improper under a collective agreement is entirely different from that provided by contract principles. The normal contract remedy is damages, giving the monetary equivalent of the "benefit of the bargain." The normal remedy under a collective agreement is restoration of status, *i.e.* reinstatement. Only the interval between action and adjudication is reduced to money terms and this in terms of retroactive relief—back pay, which may or may not be awarded.[467] Some agreements specify a deduction for actual earnings or unemployment compensation during the hiatus, and arbitrators sometimes find implied authority to make such deductions where there is no such express language,[468] but unless the parties so specify they do not usually provide for deduction of income which the employee might have reasonably earned, or on the other hand, add interest or compensation for expenses incurred in seeking other employment.[469] Under other agreements, no deduction is made.[470] In neither case are damage concepts controlling; the amount of back pay is determined by the retroactivity provisions in the agreement.

The differences between the treatment of a discharge case in a ju-

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465. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 422 (Rev. ed. 1960).

466. *See* Continental Pac. Lines, 54 Lab. Arb. 1231, 1245 (1970) (D. Feller, Arbitrator), in which the cases are reviewed.

467. In seventy percent of the cases reviewed by Ross [*supra* note 461] workers were reinstated with partial back pay or no back pay. *See also* Teele, *"But No Back Pay is Awarded . . .*", 19 ARB. J. 103 (1964).

468. Continental Can Co., 39 Lab. Arb. 821 (1962) (J. Sembower, Arbitrator); Caterpillar Tractor Co., 39 Lab. Arb. 910 (1962) (J. Larkin, Arbitrator).

469. *See* cases cited in note 468 *supra.* The award in United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), provided for the deduction of actual earnings but not that which could, by reasonable diligence, have been earned. *See* Enterprise Wheel & Car Corp. v. United Steelworkers, 269 F.2d 327, 331-32 (4th Cir. 1959). For a contrary view, adopting essentially the judicial approach, see Wolff, *The Power of the Arbitrator to Make Monetary Awards,* in NATIONAL ACADEMY OF ARBITRATORS, LABOR ARBITRATION— PERSPECTIVES AND PROBLEMS, PROCEEDINGS, 17TH ANNUAL MEETING 176, 178-79 (1964). My disagreement with the Wolff analysis is set forth in detail in the same volume at 193-201.

470. United States Steel Corp., 40 Lab. Arb. 1036 (1963) (C. McDermott, Arbitrator). Under the Railway Labor Act, the National Railroad Adjustment Board sometimes orders deductions from pay for "time lost" and sometimes does not, apparently depending on the terms of the particular rule involved. Sweeney v. Florida E. C. Ry., 389 F.2d 113, 116 (5th Cir. 1968). The question is, in any event, one of interpretation and application. United Transp. Union v. Patapsco & B. R. R.R., 327 F. Supp. 608, 616 (D. Md. 1971).

dicial proceeding for breach of contract and in arbitration are not simply the differences in remedies. There is also a difference in approach. The question presented in a discharge case under a collective bargaining agreement is not whether the discharged employee breached a promise made to the employer or a condition of his employment. Nor is the issue whether the employer violated its contract with the employee by discharging him and, if so, the damages to which the employee is entitled. The arbitrator in a discharge case determines whether the employer has properly administered the rules governing the employment relationship, not whether either the employer or the union has breached a promise. If he finds that the employer has not done so, he awards the remedy the parties have specified, expressly or implicitly, in the rules, not damages for breach of contract.

What is clearly true in the discharge case is equally, although sometimes not so clearly, true in other cases. Unlike courts, grievance arbitrators are not externally imposed agencies engaged in assessing damages for breach of a promise. They are agents of the parties, usually restricted to the determination of disputed issues of agreement interpretation and application. One of those issues is the remedy to be applied when management, in exercising its right to direct the working forces, has not complied with the agreed-upon rules limiting its action. Although many labor arbitrators are lawyers and hence tend to use damage terminology more appropriate for judicial processes, they do not usually award damages in accordance with legal principles exterior to the agreement. Rather they only apply the remedial principles expressed or implied within it. And, typically, collective agreements do not provide for damages but only for specific performance.

The performance required by the agreement may, of course, be the payment of money. If management has not complied with the rules governing the payment of wages, overtime, or holiday pay, the arbitrator will so determine and direct that payment now be made. This is not, however, an award of damages for breach of contract. It does not usually include interest,[471] and it is not normally reduced to a "judgment" in terms of dollars and cents. The arbitrator determines what the appropriate rule is as applied to the grievance and directs the employer to pay retroactively in accordance with it.[472]

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471. American Chain & Cable Co., 40 Lab. Arb. 312 (1963) (C. McDermott, Arbitrator); Ross Clay Products Co., 43 Lab. Arb. 159 (1964) (D. Kabaker, Arbitrator); Diamond National Corp., 41 Lab. Arb. 1310 (1963) (A. Koven, Arbitrator); *contra* General Electric Co., 39 Lab. Arb. 897 (1962) (E. Hilpert, Arbitrator); Reynolds Metals Co., 54 Lab. Arb. 1041 (1970) (T. Purdom, Arbitrator).

472. This has created problems for courts which treat arbitration awards as substitutes for judicial judgments. In Enterprise Wheel & Car Corp. v. United Steel-

That what may be called retroactive specific performance, rather than damages, is, almost universally, the only remedy that can be granted by an arbitrator for acts prior to the date of adjudication is seen most dramatically where the nature of the case will not permit a retroactive award. Consider, for example, a claim that an employer is violating the safety and health provisions of a collective bargaining agreement. Many agreements specify that the employer shall take reasonable precautions, consistent with the nature of the business, to protect employees from hazard. Some also provide accelerated grievance procedures to deal with claims of noncompliance. If an arbitrator sustains a grievance over an unsafe condition he will normally direct that the defect be remedied. Suppose, however, that as a result of an unsafe condition an accident has already occurred. Does the arbitrator, under these circumstances, have authority under the usual collective agreement to award damages? Most arbitrators hold that they do not. I have found no arbitration award under the usual form of agreement granting damages to an injured employee, but have found several denying damages where the failure to comply with the agreement caused damage to clothing or equipment.[473]

To take another example, suppose that an agreement specifies that employees shall be given a choice of vacation periods and that

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workers, 269 F.2d 327, 330 (4th Cir. 1959), the arbitrator had ordered the employer to reinstate the grievauts and to reimburse them for "all time lost from work . . . less the ten-day suspension period and less such amounts as each had received from other employment after the expiration of the ten-day period." The district court enforced the award. United Steelworkers v. Enterprise Wheel & Car Corp., 168 F. Supp. 308 (S.D. W.Va. 1958). The Fourth Circuit, which reversed as to the reinstatement order, also found that the failure to specify the amounts due made the backpay award incomplete. Rather than concluding that the award was therefore totally unenforceable, the court said that in the spirit of the *Lincoln Mills* decision it would direct that the parties "take steps to complete the arbitration so that the amounts due . . . will be definitely ascertained." 269 F.2d at 332. The Supreme Court reversed as to reinstatement but affirmed the circuit court's modification of the order as to back pay. Despite this, arbitrators uniformly continue to issue backpay orders in the form found "incomplete" in *Enterprise*. The reason, of course, is that grievance arbitrators are not accustomed to, and the parties do not expect them to, issue money judgments similar to those which courts issue in suits for damages for breach of contract. What the parties expect, and what grievance arbitrators provide, is a determination of whether the rules require performance and, if they do, an order specifying the rule to govern that performance. This is as true of "retroactive" awards requiring money payments as it is of prospective awards.

473. Curtiss-Wright Corp., 61-3 CCH LAB. ARB. AWARDS ¶ 8607 (1961) (D. Crawford, Arbitrator); Babcock & Wilcox Co., 22 Lab. Arb. 456 (1954) (H. Dworkin, Arbitrator). Compare Best Mfg. Co., 22 Lab. Arb. 482 (1954) (M. Handsaker, Arbitrator) in which the arbitrator ordered compensation for damaged clothing under a broad arbitration clause covering "all differences, disputes and grievances," saying that "[i]f we had the usual type of clause which limits the Arbitrator to interpreting and applying the contract, the case could not be arbitrated . . . ." *Id.* at 483. *But cf.* Singer Co., 48 Lab. Arb. 1343 (1967) (S. Cahn, Arbitrator).

vacations, once scheduled, shall not be changed except under specified circumstances. Further, suppose that an employer, having scheduled an employee for a particular two weeks of vacation, then changes that vacation period under circumstances not permitted by the collective agreement. Although by hypothesis the employer has breached the rules by changing the vacation period, nevertheless the employee is obliged to obey and appear for work during his originally scheduled vacation. He then files a grievance complaining that the employer's action violated the agreement. He need not allege that this violation caused him any particular damage. Indeed the change of vacation period may, in fact, be more than satisfactory. He is still entitled to file a grievance and obtain an adjudication that the employer violated the agreement. Suppose, on the other hand, that he has suffered damage of an entirely predictable kind: the deposit he paid on a vacation cabin was lost, the schedules of his wife and children had to be rearranged, and he was generally subjected to considerable inconvenience. Would an arbitrator, given those facts, assess the damages suffered and award them to the employee? Probably not. In the absence of some provision specifying that an arbitrator may, under such circumstances, award damages,[474] the arbitrator would normally conclude that he had no authority except to declare that the employer has violated the agreement.[475] In an egregious case, where the violation appears to be deliberate, the arbitrator may go further and declare that the employee's period away from work was not the vacation specified in the agreement but simply time off with pay at the direction of the employer. In that case the arbitrator can then determine that the employer should now do what the contract commanded: provide the employee with a vacation, or if the vacation period has passed and the agreement provides for pay in lieu of vacation, with vacation pay.[476] Again, however, the arbitrator has not awarded damages. He has directed the parties "to reconstruct the situation as best they can."[477]

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474. Such as the following provision: "Any employee agreeing to the request [for the changed vacation] who loses a deposit for reservations or similar purposes shall be reimbursed by the Company upon reasonable proof of such loss." [Milprint, Inc. and Papermakers; exp. 9/67] BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 91:110.

475. Bethlehem Steel Co., 31 Lab. Arb. 857 (1958) (R. Seward, Arbitrator). Alan Wood Steel Co., 36 Lab. Arb. 488 (1961) (L. Gill, Arbitrator).

476. Bethlehem Steel Co., 37 Lab. Arb. 821 (1961) (R. Valtin, Arbitrator).

477. Alan Wood Steel Co., 33 Lab. Arb. 772, 776 (1960) (R. Valtin, Arbitrator). In that case the violation consisted of changing a vacation schedule to a week that would otherwise have been a week of layoff due to operational constraints on the plant's manufacturing capability. The arbitrator refused to order another week of vacation but directed that the grievant be paid the money that he would otherwise have earned during the "forced vacation" week.

Suppose that an agreement contains a provision limiting the employer's right to change work schedules and that schedules are changed in violation of this provision. Again, the employees are obliged to work according to the new schedule even though the change ultimately may be found to violate the agreement. When the employees then file grievances and the arbitrator finds that management's action violated the rules, what relief can be given? In most cases, unless there is some provision in the agreement that can be read as covering the situation, the only remedy is a declaration that the employer has violated the agreement.[478] In some cases retroactive relief can be constructed. If an employee is not given sufficient notice of a change in schedule with the result that he misses work, or comes to work too early, the arbitrator can award pay for the missed work or waiting time.[479] If the agreement provides overtime for hours outside of the normal working hours and a change in schedule is improperly made, the arbitrator may find that under the agreement the hours worked instead of the previously scheduled hours should not be considered "normal working hours" and require the employer to pay the overtime specified in the agreement.[480] If the agreement has a reporting pay provision requiring that a minimum number of hours of work or pay be given to an employee who reports as scheduled, the arbitrator may find it applicable to a contractually improper change in schedule.[481] These remedies are, however, totally unrelated to any normal kind of "damage" computation based on the employees' loss.

Occasionally agreements provide specific penalties for violations of the rules. The absence of any authority to award damages is shown, conversely, in those cases by the routine award of such penalties without regard to the question of whether they can be said to constitute "liquidated damages," or whether there is any damage at all.[482] Indeed many of the rules governing compensation include

478. American Steel & Wire Co., 15 Lab. Arb. 557 (1950) (F. Harbison, Arbitrator); Acme-Newport Steel Co., 64-3 CCH LAB. ARB. AWARDS ¶ 9202 (1964) (M. Schmidt, Arbitrator); Sheller Mfg. Corp., 64-3 CCH LAB. ARB. AWARDS ¶ 9084 (1963) (V. Stouffer, Arbitrator).

479. American Oil Co., 37 Lab. Arb. 487 (1961) (M. Edelman, Arbitrator); Paasche Airbrush Co., 18 Lab. Arb. 813 (1952) (H. Abrahams, Arbitrator).

480. Food Machinery & Chemical Corp., 20 Lab. Arb. 594 (1953) (S. Bolz, Arbitrator).

481. Air Reduction Sales Co., 5 Lab. Arb. 295 (1946) (A. Lewis, Arbitrator).

482. Again, this has created problems for courts treating arbitration awards as damage determinations. *See* note 472 *infra*. In Railroad Trainmen v. Denver & R. G. R.R., 338 F.2d 407, 409-10 (10th Cir. 1964), *cert. denied*, 380 U.S. 972 (1969), the court refused to enforce an award of the National Railroad Adjustment Board of one day's pay for each individual claim filed against the railroad for a change in scheduling practices, on the ground that there was no provision for liquidated damages and no showing that the aggrieved employees had suffered any monetary loss for hardship from the violation of contract. Counsel for the Brotherhood had urged that there

penalties, and are negotiated as such: premium pay for hours worked on Saturday and Sunday, or before or after the normally scheduled hours, is often intended to penalize improper scheduling. The punitive character of these compensation rules is evidenced by the magnitude of such premiums as compared to the much smaller premiums paid for shift work, or by comparing the premiums paid for Sunday work in other industries with those provided in continuous-process industries or others where Sunday work is normally expected.[483]

The distinction between an award of damages for breach of a promise and an award specifying the conduct required by the collective agreement is obscured since on remedy questions, just as on questions of the substantive rules, the agreement is often silent; arbitrators must therefore frequently find the remedy by implication or from the practices of the parties. A remedy can be implied fairly easily if it is one commonly accepted in collective bargaining agreements which therefore can be assumed to have been contemplated unless specifically excluded. Reinstatement with back pay of an employee discharged in violation of a provision specifying that there shall be discharges only for just cause is such a remedy. Arbitrators normally supply it where no remedy is expressly provided for in the agreement unless the authority to do so is found to be beyond the agreed-upon scope of arbitration.[484] An employee who is laid off or who is denied a promotion in violation of the seniority provisions is routinely awarded the job he should have been given plus back pay, although most agreements do not spell out that remedy.[485] In so do-

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were more than 1,000 cases in which a day's pay was awarded by the Board for violation of a contract provision but the court found the argument unpersuasive.

483. The distinction is sometimes explicitly made in the agreement, as in Public Service Electric & Gas Co., 2 Lab. Arb. 2 (1946). Walter Gellhorn, the arbitrator there, offered the following definitions of "premium pay" and "penalty pay" as those terms were used in the contract:

> "Premium pay" may be defined as an extra wage granted for special effort; it is earned by that effort, as for example, by working overtime or on seven consecutive days or on a holiday. It is compensatory in purpose and effect. "Penalty" pay, on the contrary . . . is, rather, punitive in character, being an impost upon an employer in the nature of a fine for failure to carry out some undertaking.

Id. at 5.

484. *See* Todd Shipyards Corp., 36 Lab. Arb. 333 (1961) (J. Williams, Arbitrator); Westinghouse Electric Corp., 30 Lab. Arb. 187 (1958) (M. Schmidt, Arbitrator).

485. The classic example of a remedy derived from the practices of the parties is Willard Wirtz' 1947 decision in International Harvester Co., 9 Lab. Arb. 894. The agreement there provided that an employee assigned to a new and different job would be informed in advance of the piece work price to be paid for such a job. In violation of the rule, an employee was not informed of the piece work rate until 6 hours after being assigned to a different job. Wirtz found that the rule was an enforceable one and rejected the contention that no money award was permissible because no penalty

ing, however, the arbitrator is not awarding damages but enforcing a remedial provision which he finds implicit in the agreement.

The usual assumption that the arbitrator does not award damages for breach of contract, but provides the remedy expressed or implied in the agreement, is perhaps clearest in the cases where the rule the employer has violated is not for the protection of a particular workman but for the group as a whole. An agreement may provide, as many do, that foremen shall not perform bargaining-unit work except under certain defined circumstances. What is the remedy when an arbitrator finds that a foreman has violated such a provision? If he finds that the foreman's performance of work in fact deprived a particular employee of some period of paid time he would otherwise have had, he can order the employer to pay that employee for the time lost. Some agreements expressly provide for this,[486] and in others it is fairly easy to imply an obligation of this kind. But often no such finding can be made and the only award is a declaration that the foreman should not work.[487] To meet this problem some agreements provide

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was spelled out in the agreement. He then turned to the question of "damages." The employee did not in fact "make out" on the shift and received only the minimum occupational day rate, but it was not shown that the failure to supply the requisite information had any effect on his performance level, or that his piece rate earnings had improved after the information was supplied. However, in prior settlements, where there had been a delay in supplying price information, the company had paid the employee his prior average piece rate earnings. And this is what Wirtz ordered be paid in case before him, overruling the argument that "court precedents" required the showing of special damages.

486. *See, e.g.*, Agreement between Dravo Corp., Union Barge Line and Industrial Union of Marine and Shipbuilding Workers (exp. 1971), 2 BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 65:65.

487. The following passage from a speech by Ben Fischer, Director of the Contract Administration Department, United Steelworkers of America, puts the problem, and the indicated solution, quite forcefully:

> Management says: "Foremen won't work." And when they do work, management says: "That's wrong. We're going to look into this and do something about it." They do, and the foreman is told not to work—and this keeps going on and on until you go to arbitration, and then you've got a new kind of remedy. Now the arbitrator says that the foreman shouldn't work.
>
> And the way you implement this is by giving the foreman a copy of the award, and if he can read he knows he violated the contract. Perhaps management takes him aside, if he can't read, and explains it to him. But nothing happens. If you think it's a great deal of satisfaction to a union member to say, "We won!" when it costs us $1,200 to get this little lecture to the foreman, you are quite wrong. People are not that concerned with this sort of elusive victory.
>
> I don't know that this is the arbitrator's problem; I think it is the parties' problem. It seems to me that in responsible collective bargaining at this late date, if you're going to say that there is a rule, then you ought to say that there should be some penalty for its violation. When a member of the union violates a rule, there's a penalty; there's not much of a problem involved in that. When management violates a rule, there ought to be a penalty, and it is not primarily—in my judgment—the responsibility of the

specific penalties, such as the payment of a week's wages to the union,[488] or two hours' pay to the employee lowest on the overtime list,[489] or what is in effect double pay for the time involved to the employee who should have done the work, even though that employee lost no pay and, indeed, was relieved only of the necessity of working.[490] These are not damage provisions but penalty rules designed to punish management for permitting the violation to occur.

Some of the rules in a collective agreement are designed to protect a group interest which would be adversely affected if the employer gives employees benefits or money not provided by the agreement. An example of such a provision is a requirement that all vacations shall be taken within a specified period of the year unless consent is given by the union. The purpose of requiring union consent may be to concentrate time off so as to avoid the shifting of work to other employees or to protect individual employees against subtle but unprovable coercion to consent to out-of-season vacations. If, in the face of such a provision, an employee requests and is given a vacation outside of the specified period, the agreement has been violated, but the only damage is to the objective sought by the union. The absence of damage to an employee does not prevent the arbitrator from hearing and deciding the grievance. It may, however, prevent him from issuing a remedial order unless the parties have prescribed one or it can be implied into the agreement. A similar example is a provision forbidding the payment of piece rates in addition to the hourly wage. If violated, there is no damage to an individual employee. Indeed he has received a benefit—just as the workman who rests while the foreman works has received a benefit. But the parties may provide a penalty payable to the union.[491]

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arbitrator to fashion such a remedy. If he can do so, God bless him—and I'll help him if I can—but I'm not going to lose sight of the fact that it is the contract itself that really fashions the remedy.

Fischer, *Implementation of Arbitration Awards* in NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION AND THE PUBLIC INTEREST, PROCEEDINGS, TWENTY-FOURTH ANNUAL MEETING 126, 132 (1971).

488. Agreement between Dress Manufacturers Assn and International Ladies' Garment Workers Union (exp. 1970) reported in 2 BNA COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 65:65.

489. Agreement betweeu Kawneer Co. and Allied Industrial Workers (exp. 1970) reported in 2 BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 65:65.

490. Agreement between United States Steel Co. and United Steelworkers of America (exp. 1974) § 2A, R 2.5. It should be noted that this provision was inserted in the agreement in the negotiations immediately following the speech quoted in note 487 *supra.*

491. The agreement in California State Council of Carpenters v. Superior Court, 11 Cal. App. 3d 144, 89 Cal. Rptr. 625 (4th Dist. 1970) provided for payment of $250 for each employee for each week in which piece rates were paid. Although these payments were termed "liquidated damages," the amount indicates clearly the penal nature of the provision.

I do not mean to suggest that the parties to a collective agreement may not authorize an arbitrator to award what might be called "damages" to an employee or that an arbitrator may not find such authority implicit in the agreement. Certainly "damage" language frequently appears in arbitration awards.[492] But the remedies specified by most collective agreements and the remedies actually awarded by most arbitrators indicate that the provisions of the agreement are not regarded as promises, either by the employee or by the employer, but as rules governing their conduct. When it is found that the rules have been broken, either by an employee or the employer, the anticipated consequence is not an award, either by a court or an arbitrator sitting in place of a court giving the injured party the benefit of the bargain but an adjudication, under the principles set by the parties, of the appropriate consequences of a violation of rules established to govern a continuing relationship. Since these rules are designed to govern both conduct and compensation, the appropriate consequence sometimes involves a calculation similar to that made by a court which treats the violation as a breach of promise. But the calculation also may be quite different, and it may turn on factors which are irrelevant under accepted contract principles.

As indicated, if penalties are contained in the agreement, they are routinely enforced whether or not the employee has actually suffered any damage at all from the rule violation. This is as it should be: penalties are negotiated not as liquidated damages for the loss caused by a breach of promise but for their deterrent effect in a governmental system administered by the employer which accepts as a premise that management acts, and the employee's remedy is a grievance. Where no penalties are provided in the agreement, arbitrators will usually construct a remedy in the form of "retroactive pay" if the employer's rule violation resulted in a failure to make a payment specified in the

492. *See, e.g.*, International Harvester Co., 9 Lab. Arb. 894, 897 (1947) (W. Wirtz, Arbitrator); Glendale Mfg. Co., 32 Lab. Arb. 223, 226 (1959) (G. King, Arbitrator); Jeffrey Mfg. Co., 34 Lab. Arb. 814, 825 (1960) (A. Kuhn, Arbitrator); Mississippi Aluminum Corp., 27 Lab. Arb. 625, 628 (1956) (C. Reynard, Arbitrator); Mallinckrodt Chemical Works, 50 Lab. Arb. 933 (1968) (S. Goldberg, Arbitrator). There is a wide divergence of views among those few arbitrators who have attempted self-couscious analysis of what they actually do. The most uncritical acceptance of the view that monetary awards represent "damages" is Sidney Wolff. *See* note 142 *supra*. Those who take this view emphasize the authority that the courts have given to arbitrators. *See also* Stutz, *Arbitrators and the Remedy Power*, in NATIONAL ACADEMY OF ARBITRATORS, LABOR ARBITRATION AND INDUSTRIAL CHANGE, PROCEEDINGS, 16TH ANNUAL MEETING 54 (1963). Professor Fleming, after indicating that the courts are likely to permit arbitrators to award damages, concludes that in the absence of clear language authorizing such awards, it would be "wise policy . . . for the arbitrator to decline jurisdiction." Fleming, *Arbitrators and the Remedy Power*, 48 VA. L. REV. 1199, 1224 (1962).

agreement. In other cases, a remedy may be constructed where the rule violation seems deliberate, although no remedy would be given if it were inadvertent, or in good faith. In such cases, the constructed remedy is usually based on some measure internal to the agreement and totally unrelated to any calculation of the injury suffered by the employee. Thus in cases of violation of vacation scheduling provisions similar to those previously described, no remedy other than a declaration of violation was awarded where management's breach of the rules resulted from a good faith misinterpretation.[493] When, subsequently, the same violation occurred the arbitrator provided a monetary remedy to the employee for the deliberate breach. That remedy was not, however, based on a calculation of the employee's loss but was measured in terms of weeks of vacation pay.[494] Similarly, violations of work scheduling provisions not involving a loss in pay usually result in a simple declaration that the agreement was violated[495] but, if the violations appear to be deliberate, the arbitrator will occasionally award extra pay, at the overtime rates prescribed by the agreement. Even where there is a direct employee pay loss as the result of the violation of the agreement, if retroactivity is not mandated many arbitrators will make the question of whether there should be a monetary award turn on the employer's good faith or the reasonableness of its erroneous construction of the agreement.[496]

All of this is quite different from contract law, which purports—with some exceptions—not to distinguish between aggravated and innocent breach, and which is "not directed at *compulsion* of *promises* to *prevent* breach [but] aimed at *relief* to *promises* to *redress* breach."[497] The difference reflects neither ignorance of contract law by arbitrators nor a conscious determination by the parties to provide con-

493. Bethlehem Steel Co., 31 Lab. Arb. 857 (1958) (R. Seward, Arbitrator). *See* Philip Carey Mfg. Co., 37 Lab. Arb. 134 (1961) (L. Gill, Arbitrator). *Cf.* Alan Wood Steel Co., 33 Lab. Arb. 772 (1960) (R. Valtin, Arbitrator). *Contra,* Scovill Mfg. Co., 31 Lab. Arb. 646 (1958) (Jaffee, Arbitrator).

494. Bethlehem Steel Co., 37 Lab. Arb. 821 (1961) (R. Valtin, Arbitrator). *Cf.* Bethlehem Steel Co., 48 Lab. Arb. 223 (1966) (L. Gill, Arbitrator).

495. Norfolk Naval Shipyard, 54 Lab. Arb. 588 (1970) (B. Cushman, Arbitrator); Teleregister Corp., 31 Lab. Arb. 768 (1958) (L. Pollak, Arbitrator); Cannon Electric Co., 39 Lab. Arb. 93 (1962) (F. Myers, Arbitrator); Western Insulated Wire Co., 27 Lab. Arb. 701 (1956) (E. Jones, Arbitrator); United States Industrial Chemicals, Inc., 6 Lab. Arb. 124 (1946) (B. Kirsh, Arbitrator).

496. *See, e.g.,* Armco Steel Corp., 52 Lab. Arb. 108 (1969) (J. Sembower, Arbitrator); Fruehauf Corp., 52 Lab. Arb. 694 (1969) (W. Levin, Arbitrator); Universal Glass Products Co., 24 Lab. Arb. 623 (1955) (C. Duff, Arbitrator); Den-Ark Tool & Die Co., 20 Lab. Arb. 300 (1953) (M. Ryder, Arbitrator); Dayton Malleable Iron Co., 43 Lab. Arb. 959 (1964) (L. Stouffer, Arbitrator); Mallinckrodt Chem. Works, 50 Lab. Arb. 933, 938 (1968) (S. Goldberg, Arbitrator).

497. Farnsworth, *Legal Remedies for Breach of Contract,* 70 COLUM. L. REV. 1145, 1147 (1970) (emphasis in original).

sequences different than those ordinarily following from a breach of contract. It reflects, rather, the fact that the parties and their arbitrators do not regard the collective agreement as embodying a promissory relationship between employer and employee, either bilateral or of the third-party beneficiary variety, but a governmental system with its own adjudicatory machinery and remedies. Unless, therefore, the law is to impose an entirely different arrangement on the parties than they contemplate, the collective agreement should not be treated as creating a contractual relationship between employer and employee.

As already indicated,[498] this result is substantially achieved by the requirement, expressed in *Maddox*, that an employee claiming a breach of a collective bargaining agreement must seek redress for that breach under the procedures set forth in that agreement. That requirement, however, should be recognized as not simply expressing a rule requiring the exhaustion of remedies, or honoring the parties' choice of forum. It should be treated as what it is: a refusal by the courts to impose on the parties a contractual obligation which neither the employer nor the employee has assumed.

The difference between a contractual obligation and the kind intended by a collective agreement was, indeed, the reason behind the *Maddox* litigation. The question directly at issue in Maddox' suit was whether a shut-down had occurred such that he was entitled to severance pay under the collective bargaining agreement. Other employees situated similarly filed grievances under the agreement and were ultimately awarded the claimed severance pay. There was no substantial difference, either in result or in remedy, between the judicial route chosen by Maddox and the grievance route used by his fellow workers and it may have appeared somewhat picayune for Republic Steel to refuse payment because of Maddox' error in choosing the wrong forum. Republic Steel, however, had a much broader objective.[499] The Alabama courts had decided that an employee could bring suit for breach of a collective agreement without first attempting to invoke the grievance procedure in *Tennessee Coal and Iron Co. v. Sizemore*.[500] The plaintiff there had contracted silicosis and brought suit for breach of contract, claiming that the company was responsible in damages because it had violated a collective bargaining agreement provision that it would "make reasonable provisions for the safety and health of its employees." Following his victory, similar "*Sizemore*" suits were filed by a great many employees against other

498. *See* text accompanying note 445 *supra*.

499. It should be noted for this record, although it was not obviously noted in the record in *Maddox* itself, that Republic Steel was willing to pay severance pay to Maddox, and indeed did so after the lawsuit was concluded.

500. 258 Ala. 433, 62 So. 2d 459 (1952).

steel companies in the Birmingham area, including Republic.[501] What Republic Steel sought and obtained in *Maddox* was not simply a rule requiring the use of an arbitral rather than a judicial forum to determine the damages due on a claimed breach of contract but, rather, a bar against "*Sizemore*" suits in which a contractual right not intended by the parties was being enforced.[502]

Proposition 2: *The collective agreement is a judicially enforceable contract between the union and the employer. The primary obligation assumed by the employer is to comply with the grievance and arbitration machinery adopted in the agreement. The primary obligation assumed by the union is to refrain from striking during the term of the agreement.*[503]

I have so far argued only that the collective agreement should not be treated as creating a contractual relationship between employer and employee. It is plain however that, although it may be something more, it is intended to be a contract between the union and the employer. It is negotiated as a contract, is called a contract and is made enforceable as a contract by section 301 of the Taft-Hartley Act.

What has been said above, however, leads to a further conclusion as to the nature of that contract: the contractual obligations assumed by the employer are limited to those enforceable through the grievance procedure. When a union sues to compel arbitration of an employee grievance, or to compel compliance with an arbitration award, it is not suing to compel the use of an agreed-upon machinery to adjudicate

501. *E.g.*, Augustus v. Republic Steel Corp., 200 F.2d 334 (5th Cir. 1952). In Woodward Iron Co. v. Ware, 261 F.2d 138 (5th Cir. 1958) the federal court, applying Alabama law, affirmed judgments for damages to two employees discharged for instigating a wildcat strike.

502. It is perfectly possible, I concede, to meet many of the objections enumerated above to the characterization of the collective agreement as embodying contractual rights between employer and employee by saying that the contract is unlike others and should be interpreted and applied by the courts only within the context of its peculiar premises. Clyde Summers has argued somewhat to this effect. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525 (1969). There are two difficulties with this approach. The first is practical: the improbability of persuading courts not to look to the "specific legal rules, analytical tools and manipulative doctrines" of the law of contracts (which Summers concedes to be useless or worse, *id.* at 547) once the initial premise that the collective agreement creates a contractual relationship is accepted. The second is conceptual: the importation of a wholly fictional promissory relationship. It is simply not true that the parties intend that "the individual employees acquire legally enforceable rights" or that they regard arbitration as a "surrogate for the courts." *Id.* at 538, 536.

503. This proposition is not literally true under the Railway Labor Act, and the argument for it is not strictly applicable to railroad agreements. The legal relationship is, however, substantially the same but as a result of statute rather than contract. *See* text accompanying note 532 *infra*.

contractual liabilities to the employees; rather it is suing for specific performance of the only liability which the employer has agreed to assume.

This is shown most clearly in those cases in which the parties seek to make nonadjudicable and, hence, unenforceable, a rule set forth in the agreement. They normally do so by providing that a claim for violation of the rule shall not be arbitrable.

Examples abound. Collective agreements normally provide that no employee may be discharged except for just cause. Many also provide for a probation period, during which an employee is not entitled to file a grievance protesting his discharge. In some of the contracts of the Bell System this practice is highly refined. It is first provided that no employee may file a grievance protesting his discharge within the first 6 months of his employment. What the parties clearly mean to accomplish by this provision is that no claim may be made in any forum concerning such an employee's discharge. The agreement then provides that an employee with more than 6 months but less than 2 years of service may process a grievance against his discharge, but that such a grievance is not subject to arbitration.[504] The parties plainly mean that such an employee shall have the right to have his grievance considered by higher management but that, if it agrees with the discharge, no one shall have the right to reverse that decision. Only with respect to employees with two years or more of service has the employer agreed to comply with an adjudicable standard. Similarly, a provision describing the rules to be followed in distributing overtime but specifying that "a grievance concerning distribution of overtime . . . will be discussed between the company and the union through the first three steps of the grievance procedure but shall not be subject to arbitration"[505] is plainly not intended to permit judicial rather than arbitral decision on that subject.

The agreements in the automobile manufacturing industry specify that "production standards shall be established on the basis of fairness and equity consistent with the quality of workmanship, efficiency of operations, and the reasonable working capacities of normal operators."[506] This standard is no less precise than the usual collective bargaining provision that employees may be discharged only for "just

504. Agreement between Pacific Telephone and Telegraph Co. and Communications Workers of America (exp. 1966) quoted in BULL. 1425-6, *supra* note 350, at 18. In other companies of the Bell system the periods involved may be different. *See* Young v. Southwestern Bell Tel. Co., 309 F. Supp. 475 (E.D. Ark. 1969), *aff'd*, 424 F.2d 256 (8th Cir. 1970) (3 years).

505. Agreement between Allen-Bradley Co. and United Electrical, Radio and Machine Workers (exp. 1967), quoted in BULL. 1425-6, *supra* note 350, at 18.

506. Agreement between General Motors Corp. and U.A.W., (exp. 1973) ¶ 78.

cause," or the provision in the basic steel agreements that incentives shall provide "equitable incentive compensation."[507] But the automobile agreements specify that a grievance concerning production standards shall not be subject to arbitration. The parties plainly do not mean by this that disputes over compliance with standards in the agreement shall be adjudicable in other forums; they mean that they shall not be adjudicable at all. Similarly the provision in the Alcoa agreement that "contracting out" issues shall not be arbitrable does not mean that an individual employee's claim that his job was contracted out shall be heard judicially, but that it shall not be heard at all.[508]

This is clearest when the agreement is an "open" one[509] in which the limitation on the issues that may be arbitrated is coupled with a comparable limitation on the no-strike clause so as to permit resolution of the dispute by economic contest. The reservation of the right to strike is, however, not essential to the conclusion that the parties mean to foreclose adjudication. Thus, when the parties wish to make it clear that a substantive claim is barred for failure to process it within a specified time, they typically provide that a grievance will not be considered unless filed within that time. In so doing they do not mean to provide that if the time requirement is not observed the claim can be heard by a court, rather than in the grievance and arbitration procedure, but that it cannot be heard at all. Similarly, when the parties wish to impose some limitation on an employer's monetary liability, they normally do so by imposing a limitation on the arbitrator's right to issue a "retroactive" award; they do not mean that monetary claims thus barred from arbitration can be made the basis for suit.[510]

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507. Agreement between United States Steel Corp. and United Steelworkers of America (exp. 1974) § 9-C-3(d).

508. *See* note 404 *supra.*

509. *See* text accompanying notes 404-07 *supra.*

510. Lest the proposition here being argued be deemed so obvious as not to require demonstration, let me cite a few examples of the failure to recognize it. The most common is the use of a motion to stay judicial proceedings pending arbitration when a suit is brought claiming employee rights under a collective agreement. Such a stay assumes that arbitration is simply a step in the trial of an otherwise questionable claim, and if the claim is regarded as equitable the stay is not appealable. *Cf.* Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955). This may be a proper assumption under the usual contract. It is improper with respect to the arbitration of a grievance under a collective agreement. An employee suit under an industrial collective agreement should not be stayed pending arbitration; it should be dismissed. Another example is Zdanok v. Glidden Co., 288 F.2d 99 (2d Cir. 1961) discussed *infra* at note 516. *See also* Levy, *The Collective Bargaining Agreement as a Limitation on Union Control of Employee Grievances,* 118 U. PA. L. REV. 1036, 1043-44 (1970): "A decision by the arbitrator that he lacks jurisdiction gives the employee a determination which should enable him to vindicate his claim in court."

I do not intend to suggest that the union has no interest in compliance with the substantive provisions of the agreement. It clearly has an interest not only in provisions like the check-off and the union shop, but also in the provisions governing relations with the employees. My argument is, essentially, that where there is a dispute over management's compliance with the agreement, the only obligation intended to be enforceable is the obligation to submit the dispute to the adjudicative machinery, and abide by its results. To revert for a moment to the automobile industry, its agreements contain not only a statement of the principles to be used in setting production standards but a detailed description of a grievance procedure to be followed in resolving disputes. An employer's refusal to consider such a grievance in the prescribed way could be judicially remedied, but not a failure to comply with the substantive principles if the grievance were not settled.

Agreement limitations on the arbitrability of a grievance, therefore, are not intended as limitations on the competence or jurisdiction of the arbitral forum, even though sometimes phrased in jurisdictional terms; they are limitations on the substantive obligation of the employer. The failure to recognize this has led to much confusion. In other contexts an arbitrability question is one of forum: have the parties given the arbitrator the authority to resolve a claim of breach of contract that would otherwise be judicially cognizable. But when an employer argues that a grievance is not arbitrable he is usually arguing something quite different: that there is no claim cognizable in any forum.

The distinction is seen most clearly if one inquires, in a dispute in which the question of arbitrability is raised, whether the party claiming non-arbitrability could concede, consistently with that claim, that a court could render a judgment on the merits in favor of the party seeking arbitration. If so, the question is genuinely one of forum. Thus, in *Bernhardt v. Polygraphic Co.*,[511] the plaintiff brought suit for damages, claiming breach of an employment contract. The defendant moved for a stay, claiming the dispute was subject to arbitration. Neither party's claim on the arbitrability question was inherently inconsistent with an ultimate finding of liability. Or, in the converse situation, where a plaintiff seeks to compel arbitration of his contract claim, a defendant who successfully contends that the dispute is not within the arbitration provision could, consistently with his contention, concede the possibility that he might ultimately be found liable on the merits by a court. The dispute in either format is one "over which tribunal should determine the merits" of the case, merits

511. 350 U.S. 198 (1956).

which are "bound in the end to be resolved either by arbitration or by a judicial trial."[512]

The usual claim that a grievance is not arbitrable is of an entirely different character. It is essentially an argument that the management conduct complained of is not subject to restriction in the way claimed. It is wholly inconsistent with an adjudication in another tribunal sustaining the claim, either at the behest of the union or of an employee claiming a breach of contract. This is obvious in a case such as *American Manufacturing*,[513] in which the objection to arbitration is that the grievance is so patently without merit, although within the terms of the arbitration provision, as not to be "arbitrable." It is equally true in a case in which some limitation in the arbitration provision is relied on, such as a broad exclusion of matters which are "strictly a function of management" as in *Warrior & Gulf*[514] or one specifying in terms that the subject of "contracting out" is excluded from arbitration.[515] It is therefore nonsense to do what the Second Circuit did in *Zdanok v. Glidden*:[516] adjudicate in an employee breach of contract suit a claim which had previously been held not arbitrable.

None of the preceding discussion is meant to suggest that parties may not sometimes intend to create a contractual relationship between employer and employee independent of the grievance and arbitration procedure, nor that, if they do, there may not be a genuine arbitrability question, *i.e.*, one relating to the choice of forum. The argument is, rather, that the institutional function a collective agreement performs, coupled with the usual understanding of the parties as to what they are doing, leads to the conclusion that, unless the parties state it quite specifically, the intention to create such a relationship should not be assumed.[517]

512. Rederi A/B Disa v. Cunard S.S. Co., 389 U.S. 852 (1967) (Black, J., dissenting).

513. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

514. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960). *See* text accompanying note 144 *supra*.

515. *See, e.g.*, Agreement between Aluminum Company of America and United Steelworkers of America (exp. 1974) art. XV, § 51.

516. 288 F.2d 99 (2d Cir. 1961).

517. An example of such a specific provision may perhaps illustrate the point. Article XV of the collective agreement between Douglas Aircraft and the UAW deals at some length with the patent rights of the company and individual employees employed in certain classifications with respect to inventions made in the course of employment. In order to ensure that the usually intended consequence—the absence of any contractual relationship between employee and employer—will not be assumed, it provides that each individual employee in these classifications must, as a condition of employment, execute a patent contract with prescribed provisions. The agreement also provides that any dispute as to the interpretation or application of the agreement provision, or of the individual patent contract, shall be subject to the grievance procedure but shall not be subject to arbitration. In order to ensure that the usually

What has been said about the arbitrability question in relation to employee grievances is emphatically not true with respect to the no-strike provision in the usual industrial collective agreement. This provision has a dual aspect: it is both a rule governing employee conduct and a commitment by the union. The rule governing employee conduct is normally without exception: any employee who violates it is subject to discipline. The union's commitment, typically, is not to conduct, encourage, or induce any strike or similar interference with production during the term of the agreement. This is a promissory commitment, which is sometimes specifically limited by spelling out the conditions under which the union will not be held responsible. The agreement may require that the union post notices, or send telegrams, or otherwise urge or order the employees to terminate an unauthorized stoppage, and limit the liability of the union to cases in which these obligations are breached.[518]

When an employer presents a claim for judicial relief for a violation of the union's promise, there may be a genuine arbitrability question, quite different from that posed when a union seeks arbitration of a grievance. For employee grievances arbitration is the relief sought, not because the parties have agreed that an employee's claim is a claim for breach of contract that can be heard only in arbitration, but because the promise to submit the dispute to the adjudicative machinery is the only promise made. In the former case, however, the claim is based on a promise not to authorize or instigate a strike, and the question of whether a damage claim for breach of that promise is subject to arbitration is, as in the case of any contract, a question as to whether the parties have set up an alternative forum which must be resorted to rather than the courts.

It is important to be precise about the relationship between the employer's promise to comply with the adjudicative machinery established by the agreement, and abide by its results, and the union's promise not to strike. These are not reciprocal promises such that a breach by either party constitutes a material breach or a failure of considera-

intended consequence of that exclusion—that such a dispute is not subject to adjudication by any third party, arbitral or judicial—will not follow, it then concludes that "resort to the grievance procedure . . . shall in no way limit, affect or prejudice any cause of action arising out of such patent contract . . ." Master Agreement between Douglas Aircraft Co. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (exp. 1971) art. XV § 3.

518. See the agreements quoted in 2 BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 77:151. The Douglas agreement [*supra* note 517] provides a convenient example. Under article III any employee who engages in an unauthorized strike is subject to whatever disciplinary action the company may determine to take and its decision is final. The only grievance permitted is as to whether the employee did in fact engage in the prohibited conduct. The union, on the other hand, is absolved of any liability for an unauthorized strike if it takes certain specified steps designed to cause the employees to terminate it.

tion sufficient to justify nonperformance by the other. What has been said earlier about the function of the collective agreement should reveal the error of the proposition that "the chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement."[519] Certainly freedom from strikes is one of the advantages which accrues to the employer as a result of most agreements. But it is by no means the sole advantage. In any event, the union's promise not to strike is not the consideration for the execution of the agreement. The consideration for the contract is the acceptance by the employees of the system of rules contained in the agreement and the performance of work under that system, in return for which the employer assents to the agreement's system of adjudication.

It is therefore nonsense to say, as the Court of Appeals of the District of Columbia once did, that a strike by the union constitutes a material breach which justifies "the subsequent recission of the contract by the Company."[520] As between the employer and the employees, the no-strike provision is a rule, not a promise; and the consequence of a violation is discipline, not a release of the employer's promise to the union to arbitrate grievances. Nor is there any theoretical basis for the somewhat narrower view, expressed by Professor Corbin, that the employer should be relieved of his obligation to arbitrate because of strike action undertaken by the union, as opposed to individual action by an employee.[521] The necessary premise of that view is that the promise to arbitrate is one which can be terminated without impairing the contractual rights of individual employees arising under the agreement, thus transferring the forum for adjudication of employee claims to a court. If my argument is sound, however, the parties do not intend to create any such individual rights, and it would certainly do violence to their intentions to impose that result upon the employees as a result of breach by the union of its agreement not to conduct a strike.[522]

519. S. REP. No. 105, 80th Cong., 1st Sess. 16 (1947).

520. Electrical Workers Local 1,113 v. NLRB, 223 F.2d 338, 341 (D.C. Cir. 1955).

521. 6A A. CORBIN, CONTRACTS 436 (1962). Professor Summers, in dealing at length with the Corbin assertion, argues that it flows naturally from the distrust of arbitration as a method of adjudicating contract claims and argues that it is erroneous because of the special competence of arbitrators and the trust which the parties have in their judgment. Summers, *supra* note 502, at 546. While I quite agree with Professor Summers, I would argue that Professor Corbin's error was in considering collective agreements to be "contracts of employment" in the first place, A. CORBIN *supra*, at 346, and arbitration to be a method of adjudicating the claims of individual employees under such contracts. Once that error is rectified, the black letter law of contracts provides no problems.

522. Similarly, it is not true that an employer refusal to arbitrate should be re-

It follows, therefore, that a union's breach of its promise not to strike should not relieve the employer of his obligation to arbitrate (nor should a refusal to arbitrate relieve the union of its obligation not to strike).[523] The parties may, and sometimes do, provide otherwise. Thus the agreement between General Motors and the United Automobile Workers expressly gives the Company "the option of canceling the Agreement at any time between the tenth day after the strike occurs and the day of its settlement,"[524] an option the exercise of which would, I believe, be regarded as unthinkable by General Motors and most other managements. There are also a substantial number of agreements which, on the other side of the coin, permit the union to strike or cancel the contract if the employer refuses to arbitrate or refuses to comply with an arbitration award. But unless the parties specify those consequences, there is nothing in the relationship between them which requires that result.

What has been said so far with respect to Propositions 1 and 2 provides a conceptual framework for the Supreme Court decisions in suits brought by unions or employers over collective agreements: most of these holdings can be viewed as corollaries of the two propositions. On the Railway Labor Act side, if we disregard for the moment the cases in which there is a union-employee dispute, there is no problem at all. The cases from *Slocum*[525] through *Gunther*[526] are all consistent with, and indeed can be regarded as expressions of the principle that the col-

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garded as a material breach relieving the union of its promise not to strike. The consideration for the no-strike promise is the agreement itself, not just the promise to arbitrate, as is made clear by the fact that the no-strike promise is applicable to many non-arbitrable disputes. *See* text accompanying notes 405-08 *supra*.

523. There is one sense in which the agreement to arbitrate may be equated to the agreement not to strike. Since arbitration is an alternative to the strike as a method of resolving disputes over the interpretation and application of a collective agreement, it is entirely proper to conclude that the union may not pursue both methods of redress simultaneously. The necessity of keeping in force the agreement to arbitrate as a means of governing the continuing relationship between employer and employee, despite a breach by the union of its agreement not to strike, does not necessarily imply that a court should order arbitration while the union is striking. It is therefore entirely appropriate for a court whose aid is sought in enforcing the employer's promise to arbitrate to condition that aid upon termination of the union's breach of its promise not to strike.

524. Agreement between General Motors Corp. and United Automobile Workers of America (exp. 1973) ¶ 117. The Chrysler agreement has a similar provision; Ford does not. Cancellation clauses were found by BLS in 101 of 1,717 contracts studied. Roughly half specified a strike or lockout as the basis for cancellation. BULL. 1425-6, *supra* note 350, at 92.

525. Slocum v. Delaware L. & W. R.R., 339 U.S. 239 (1950). *See* text accompanying notes 94-102, 105-08 & 162 *supra*.

526. Gunther v. San Diego & A.E. Ry., 382 U.S. 257 (1965). *See* text accompanying notes 183-84 *supra*.

lectively bargained working rules are not to be regarded as contracts subject to "old common-law rules for the interpretation of private employment contracts,"[527] or, it might be added, third-party beneficiary contracts. The rhetoric about "railroad jargon" and the Supreme Court's attribution to the Adjustment Board of superior capacity to understand railroad problems is unnecessary because the decisions requiring resort to it, rather than the courts, and declaring contract principles irrelevant in the enforcement of Board decisions can be grounded very simply on the proposition that the Board is not enforcing a contract at all in resolving "minor disputes." Only *Moore v. Illinois Central*[528] and its progeny, *Koppal*[529] and *Walker*[530] did not fit, and their recent demise in *Andrews*[531] eliminated the discrepancy.

Proposition 2 has not been argued in Railway Labor Act terms but is readily translatable into them. The obligations Proposition 2 posits do not exist by virtue of contract, but by virtue of the statute. The employer's obligation to permit the submission of disputes over the proper interpretation and application of the working rules to the Adjustment Board and to comply with its awards is imposed by the Act, and the Court, in *Chicago River*,[532] found implicit in that commandment a corresponding union obligation not to engage in strikes over such disputes. The unsettled question of whether damages can be awarded for breach of this obligation is a question of statutory construction.

On the National Labor Relations Act side there is a reasonably good fit. *Lincoln Mills*[533] follows as a matter of course. The question presented was not, on the view here taken, whether arbitration of contract claims should be enforced over the objection that, under state law, a party who preferred adjudication in a judicial tribunal was entitled to that forum, but whether the only promise made by the employer was to be enforced. Since Congress had, in enacting section 301, declared its purpose to make collective agreements "equally binding and enforceable on both sides,"[534] the provision of a remedy for violation of the employer's promise naturally follows.

The Steelworkers trilogy[535] also follows from Propositions 1 and 2. If arbitration were only an alternative forum for adjudicating a

527. 382 U.S. at 261.
528. *See* text accompanying notes 72-85 *supra.*
529. *See* text accompanying notes 103-04 *supra.*
530. *See* text accompanying notes 193-94 *supra.*
531. *See* text accompanying note 238 *supra.*
532. *See* text accompanying note 243 *supra.*
533. *See* text accompanying notes 130-37 *supra.*
534. S. REP. No. 105, 80th Cong., 1st Sess. 15 (1947).
535. *See* text accompanying notes 138-45 *supra.*

contract claim, it is entirely conceivable that a court asked either to direct arbitration of that claim or to enforce an arbitrator's award should retain the power to determine whether the contract claim sought to be arbitrated, or the award to be enforced, is so preposterous that it should not be entitled to the aid of judicial enforcement, either before or after arbitration. This was essentially the *Cutler-Hammer*[536] doctrine, expressly disapproved by the Court in the Steelworkers trilogy. It did so relying on both a supposed national policy in favor of the arbitration of labor disputes and the superior expertise of arbitrators as opposed to courts. If the propositions here tendered are accepted, neither premise was necessary to the conclusion: the only questions presented when arbitration of a grievance is sought are whether there is an agreement containing a provision for arbitration of grievances and whether the grievance purports to come within the agreement. If so, it is "arbitrable" in the limited sense that it should be heard by an arbitrator. A court should not determine whether the grievance presents an arguably tenable claim for breach of contract, because arbitration is not being sought as an alternative forum for such a claim, but as the performance of the only promise made. The arbitrator, of course, may determine that the employer conduct complained of is not governed by the agreed-upon rules and that, in this second sense, the grievance is not "arbitrable."[537] Or he may decide

536. International Ass'n of Machinists v. Cutler Hammer, Inc., 297 N.Y. 519, 74 N.E.2d 464 (1947).

537. The two senses in which the term "arbitrability" has been used can be made clear by considering two arbitration cases: New Hotel Showboat, Inc., 48 Lab. Arb. 240 (1967) (T. Jones, Arbitrator) and Bell Telephone Laboratories, 39 Lab. Arb. 1191 (1962) (B. Roberts, Arbitrator). In *New Hotel Showboat* the agreement contained a standard grievance arbitration provision but no express limitation on management's right to discharge. Employees were discharged and the union sought arbitration of a claim that the agreement implied a prohibition against discharges except for just cause, and that there was no such cause in the particular cases. Management did not contest "arbitrability" in the courts. If it had, it is clear that a court should have found the grievance "arbitrable," in the sense that it should be heard by an arbitrator. When the case was heard by the arbitrator, he had considerable difficulty in deciding a different "arbitrability" issue: whether there was an implied limitation. He decided that there was and that the discharges were, accordingly, "subject to arbitration." 48 Lab. Arb. at 242. In the *Bell Telephone* case, the question was whether a grievance contesting the propriety of a demotion was arbitrable. The arbitrator agreed that it clearly was, in the sense used in the trilogy. But this, he concluded meant only that it was his expertise rather than a court's which was being called upon to determine whether the agreement was intended to limit management's discretion in making demotions. After examining the negotiating history he concluded that the parties intended no such limitation and that therefore the grievance was "not subject to arbitration under the collective bargaining agreement." 39 Lab. Arb. at 1207.

"Arbitrability" in this second sense may have been what was intended by the Supreme Court in making available, despite Norris-LaGuardia, an injunction against "a strike over an arbitrable grievance." Boys Markets, Inc. v. Retail Clerks Local

that the grievance is governed by the rules but that the conduct is within them. In either case, he will deny the grievance. The arbitrator may find that the rules have not been complied with and may specify the required remedial action. Whatever the result, his decision is, as it were, a "for instance" written into the agreement and, in the absence of fraud, is not reviewable in order to determine if it is at least arguably comparable to the result to which a court would come in a suit for breach of contract.

There is a limitation. The enforceable agreement between the employer and the union is to submit to binding arbitration grievances involving the interpretation and application of the collective agreement. If the award does not purport to rest on the agreement or any implied restriction on management action that the arbitrator reads into the agreement, the award is unenforceable just as a grievance which does not purport to be based on the agreement is not "arbitrable." But within that limitation, the arbitrator's decision stands, irrespective of what a court might do in a suit for breach of contract. This is, essentially, the result reached by the Court in the trilogy.[538]

So viewed, the trilogy is entirely compatible with the later holding of *John Wiley & Sons v. Livingston*[539] that the determination of whether the union has complied with the procedural requirements of the grievance and arbitration provisions, and of the effect of noncompliance, are for the arbitrator. This result is reached, however, not because of "the policies favoring arbitration and the parties' adoption of arbitration as the preferred means of settling disputes"[540] about otherwise justiciable claims, but because the grievance and arbitration agreement is the only enforceable agreement made, and the procedural

770, 398 U.S. 235, 254 (1970). A broader reading would permit an employer to obtain an injunction against any strike on the theory that it is conceivable that the union could file a frivolous, but nevertheless "arbitrable," grievance against the employer's conduct giving rise to the strike, even though the conduct was not governed by the agreement. The narrower reading has, of course, the difficulty that it requires a court to decide the kind of question which, under the trilogy, is to be decided by an arbitrator. The Fifth Circuit has "solved" the problem by adopting an "arguably arbitrable" standard which it applies to both arbitrability questions. *See* Southwestern Bell Tel. Co. v. Communications Workers, 343 F. Supp. 1165 (S.D. Tex. 1972), *on remand from* 454 F.2d 1333 (5th Cir. 1972).

538. It is inconsistent with the views since expressed extrajudicially by Judge Hays [P. HAYS, LABOR ARBITRATION: A DISSENTING VIEW 80 (1966)] and judicially by his brethren on the Second Circuit in Torrington Co. v. Metal Products Workers, 362 F.2d 677 (2d Cir. 1966), as well as by some commentators who have urged a broader scope of review at the enforcement stage than at the threshold of arbitration. *See, e.g.*, Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, 34 U. CHI. L. REV. 545, 553 (1967); H. WELLINGTON, LABOR AND THE LEGAL PROCESS 122 (1968). Those views are, in my opinion, simply wrong.

539. 376 U.S. 543 (1964). *See* text accompanying notes 169-74 *supra*.

540. *Id.* at 558.

rules cannot be separated from the rules the parties have established to govern the substantive conduct of management.

None of this is applicable to a claim for damages for breach of a no-strike clause. No such claim should be maintainable against employees because the no-strike clause is, as to them, a rule, not a promise. This is the basis upon which the dismissal of the claims against the employees in *Atkinson v. Sinclair Refining Co.*[541] should have rested. There was no need to rely on the fact that the defendants were also union officials or on any implications drawn from section 301(b). The question is, indeed, one of federal law since it relates to the proper construction of the collective agreement made federal by section 301(a), but the answer is simply that the agreement is not a contract between the employees and the employer. Neither a suit directly on the agreement or one in tort for inducing other employees to breach it is therefore proper.

The other holding in *Atkinson*, that the employer's claim against the union for damages was not arbitrable, is wholly consistent with the trilogy. Unlike a decision that a grievance need not be arbitrated, a holding that a damage claim need not be arbitrated is not a denial of the claim on the merits but merely a declaration that the courts are the appropriate forum for relief. The parties can and sometimes, although rarely, do provide for the arbitration of employer damage claims.[542] But the question whether they have done so is one which should be resolved without presumptions in the same manner that questions of a like nature are resolved in any other contract under which a true question of arbitrability is presented.

There is one critical distinction and one caveat, neither of which has been uniformly observed by the Court. The distinction is necessary where the employer resists arbitration not on the ground that his conduct is outside the area governed by the rules of the agreement, or is permitted by the rules, but on the ground that the rules simply do not apply to him, or that he is not bound by the agreement. *Dowd Box*[543] was such a case, as was *Wiley* with respect to the successorship question. In such cases the issue is whether any agreement binding on the defendant exists, not "arbitrability." That is a question for the courts, not for the arbitrator whose charter the agreement is and

541. *See* text accompanying notes 253-63 *supra.*

542. *See, e.g.*, Mason-Dixon Lines v. Teamsters Local 560, 443 F.2d 807 (3d Cir. 1971). ("Where a strike is in violation of the Agreement . . . all issues of liability shall be resolved pursuant to the grievance procedure." *Id.* at 808.) The current Teamster national freight agreement provides that the question whether the union violated the no-strike provision shall be subject to the grievance procedure, but if agreement is not reached, the employer involved may bring suit for damages. National Master Freight Agreement (exp. 1973) art. 8(a)(3)(b).

543. *See* text accompanying note 132 *supra.*

who must, therefore, assume its validity. Similarly to be distinguished is the case in which the employer claims that relief is barred by the statute of limitations. This, too, is a question for the courts and—I would argue—the applicable statute is the one governing contracts in writing because the agreement being enforced is not one which arises from any contract between the employer and the employee, oral or otherwise, but from the written agreement with the union to arbitrate.

When faced with such issues the court should, as it did in *Wiley*, decide them and, if it finds the agreement binding on the defendant and not barred by limitations, order compliance with the grievance and arbitration procedure. It should not also proceed to order the substantive relief which the union contends is due, as did the Massachusetts court which the Supreme Court affirmed in *Dowd Box*, or presumably as the Supreme Court thought it would have to do in *Hoosier Cardinal*[544] if the written agreements statute of limitations had been applicable. In *Dowd Box*, there was no dispute about the consequences which would follow if the agreement were binding. It would, accordingly, have been appropriate to declare the validity of the agreement and simply direct the employer to comply, leaving any possible questions as to the relief to which individual employees (*not* union members, the actual plaintiffs) were entitled, to the grievance procedure. In *Hoosier Cardinal*, the dispute was whether the passage of 7 years barred the claims of employees for vacation pay. The Court thought it had to decide that question—understandably, since it was the question the parties argued to it—and held that the 6-year period contained in the limitation statute applicable to contracts not in writing barred relief, since the employees' oral contracts of hire were necessarily involved. If, as appears to have been the case, the agreement was of the normal industrial type, the views expressed here would have led to a different result. Assuming that state law was to be looked to, the applicable period was the 20 years provided by Michigan for contracts in writing and the Court should have found that enforcement of the agreement was not barred. The order, however, should have been only that the employer receive and process employee claims for vacation pay under the grievance and arbitration provisions of the agreement. Whether there was a delay beyond the specified period for filing such claims and, if so, whether it was excused, should have been determined not by judicial application of the statute of limitations applicable to oral contracts of hire but by the standards for timeliness the parties had established for their own government, as interpreted and applied by an arbitrator.[545]

544. *See* text accompanying notes 187-92 *supra*.

545. This assumes that relief of this kind would be requested. If not, the suit

The caveat applies to *Westinghouse*[546] and *Smith v. Evening News*.[547] The discussion so far has assumed the existence of a grievance procedure terminating in arbitration and a no-strike provision covering at least those disputes subject to arbitration. The extent to which the propositions so far presented, as well as the succeeding ones, are properly applicable where those assumptions are untrue—as was the case in *Westinghouse* and was assumed to be the case in *Smith* and perhaps *Hoosier Cardinal*—are separately discussed below.[548]

First, however, we must consider the problem that arises when the system of self-government breaks down because the union fails to perform, or improperly performs, its function. Under the system, the rules are negotiated with the union but administered by the employer; the union shares in administration by using the grievance procedure to respond to employer action. The question is on what theory, and by which remedies, is a malfunction in the union's role in administration to be remedied. Propositions 3-6 deal with that question.

H. The Rights Created by Statute

Proposition 3: *The union has a judicially enforceable obligation to the employees it represents, derived from section 9(a) of the National Labor Relations Act, not to act arbitrarily or capriciously or to abuse its discretion in exercising its contractual right under the collective agreement to process and settle employee grievances prior to arbitration.*

This is a restatement of the "duty of fair representation" found in *Vaca v. Sipes*.[549] *Vaca* essentially adopted the position urged by Archibald Cox in 1956.[550] In that view the collective agreement establishes a contractual relationship in which the employees' rights under agreements containing a grievance procedure are entrusted to the union as a fiduciary. The union has the power to sue for breach of the obligations owed by the employer to the employee, to compromise and settle, or to reject such claims as unwarranted. Unless the union refuses to process the claim, its action binds the employee. If it does refuse, the employee-beneficiary can bring a suit against both the union and the employer, similar to the action which the beneficiary of a trust may maintain when the trustee fails to press a claim against a third

should have been dismissed since it requested actual payment to the employees, not an order directing the employer to process grievances.

546. *See* text accompanying notes 126-29 *supra*.

547. *See* text accompanying notes 146-56 *supra*.

548. *See* text accompanying notes 681-94 *infra*.

549. 386 U.S. 171 (1967). *See* text accompanying notes 197-225 *supra*.

550. Cox, *supra* note 273, at 601. A later article is concerned primarily with the negotiation of agreements. Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1967).

person. Cox was not entirely clear whether this fiduciary relationship giving rise to the suit is one based on "the character of the rights which the contract was intended to create"[551] or, as he elsewhere described it, the force of law imposed upon the parties.[552]

Basing the relationship on the rights intended to be created by the agreement seems to me to be plainly wrong. It contradicts Cox's brilliantly perceptive description of the group interest in the resolution of specific grievances, a description which he adduced in support of the proposition that the union should have the right to settle and compromise individual claims in order to protect those group interests, even to the prejudice of the interests of the individual grievant. If, to use his examples, the union may properly abandon an individual's claim for quadruple time because of its potentially adverse effect on other employees,[553] or press for a particular interpretation of a rate adjustment provision that benefits some workers at the expense of others,[554] it clearly is not acting as a fiduciary for each employee. Yet, as Cox persuasively argued, the parties clearly intend to give the union the power to take such action, and sound labor policy requires that this intention be given effect, whether it is realized through the settlement of a grievance at some step in the procedure or by the refusal to process it in the first place.

Indeed, if the key is the intention of the parties and judicial enforcement of a fiduciary duty were to be rested on the agreement's terms, it may be confidently predicted that agreements would be revised so as to eliminate any individual rights, just as the decision in *Burley*[555] was followed by changes in agreements and union constitutions which effectively voided its effects.[556] Such a development has already taken place. The agreement between General Motors Corporation and the U.A.W. provides that "the disposition or settlement, by and between the Corporation and the Union, of any grievance or other matter, shall constitute a full and complete settlement thereof and shall be final and binding upon the Union and its members, the employee or employees involved and the Corporation."[557] If this statement were not clear enough, the agreement goes on to specify that:

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551. Cox, *supra* note 273, at 645.

552. *Id.* at 632-33. *See also* Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 168 (1967).

553. Cox, *supra* note 273, at 606-08.

554. *Id.* at 609-10.

555. Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945). *See* text accompanying notes 86-93 *supra*.

556. *See* Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 459 (1955).

557. Agreement between General Motors Corporation and U.A.W., (exp. 1973) ¶ 53.

> No employee or former employee shall have any right under this Agreement in any claim, proceeding, action or otherwise on the basis, or by reason, of any claim that the Union or any Union officer or representative has acted or failed to act relative to presentation, prosecution or settlement of any grievance or other matters as to which the Union or any Union officer or representative has authority or discretion to act or not to act under the terms of this Agreement.[558]

Presumably similar provisions would be agreed to by unions and management generally if they were believed to be effective.

They should not be effective because the union's obligation to the employees is neither derivable from nor limited by the terms of the agreement between the union and the employer. The obligation derives instead from section 9(a) of the National Labor Relations Act[559] and the comparable provisions of section 2 of the Railway Labor Act.[560] In the line of cases beginning with *Steele v. Louisville & Nashville Railroad Co.*[561] the Court has inferred, from the grant of authority to represent all members of a bargaining unit given the representative chosen by the majority, an accompanying duty of fair representation both in the negotiation of a collective agreement and in the processing of grievances. This is, of course, hornbook law. It deserves emphasis, however, that the duty thus imposed does not arise from an attempt to enforce conformity to the institutional forms the parties have created. It is, rather, imposed from without. The delineation of the duty's contours and the appropriate remedies to be applied when it is breached are, therefore, not matters on which judicial determination need conform to the intention of the parties. That delineation should be consistent with the purposes of the statute as a whole and the needs of the institution that the statute is designed to both foster and regulate. But that is not to say that the duty arises from contract.

Having said all this, it must now be added that the Court itself has been unclear as to the source of the duty it has imposed. It said, in *Vaca*, that the duty is one derived from the National Labor Relations Act.[562] But in *Humphrey v. Moore*,[563] in *Vaca*, and finally in a preemption case, *Motor Coach Employees v. Lockridge*,[564] it also squarely rested jurisdiction over "a suit . . . by a union member against his union"[565] on section 301, thus treating the suit against the

558. *Id.*
559. 29 U.S.C. § 159a (1970).
560. 45 U.S.C. § 152 (1970).
561. 323 U.S. 192 (1944).
562. 386 U.S. at 177.
563. 375 U.S. 335, 343-44 (1964). *See* text accompanying notes 163-68 *supra.*
564. 403 U.S. 274 (1971).
565. *Id.* at 299.

union as one based on the collective agreement.[566] In this the Court was clearly wrong. The right conferred is one created by section 9,[567] and a suit to redress its violation should be maintainable not as a suit for breach of contract under section 301 but, under 28 U.S.C. section 1337, as a suit arising under a law of the United States regulating commerce.[568]

Delineation of the duty of fair representation as applied to the negotiation of agreements and their substantive content is beyond the scope of this Article. It is important to note, however, that the duty imposed by implication from section 9 concerning the processing of grievances is limited to the negotiating authority granted by section 9: the authority to act as the exclusive representative of the employees for the purposes of collective bargaining with respect to terms and conditions of employment. That bargaining is defined in the implementing obligation imposed by section 8(a)(5)[569] and by 8(d),[570] to include "the negotiation of an agreement, or any question arising thereunder." In terms of the analysis presented earlier,[571] the collective bargaining process is the negotiation of a set of rules limiting employer and employee conduct and the provision of a system for the administration of those rules. The statutory duty derived from section 9 is therefore limited to the negotiation and administration of those rules. In those situations in which the union assumes a unilateral rule-making or rule-administering function,[572] the question whether the rules are fairly drawn or fairly administered does not arise under section 9. The union may have fiduciary duties to its members arising out of its constitution, or the members' payment of dues, but breach of those duties is not breach of the duty of fair representation derived from section 9. Thus a complaint that a union has unfairly administered a hiring hall which refers members to employment is not properly cognizable under

566. This has confused some courts into searching for a good faith provision in the agreement in order to sustain a suit for breach of the duty of fair representation [Hall v. Pacific Maritime Ass'n, 281 F. Supp. 54, 59 (N.D. Cal. 1968)], or holding that the duty must be implied into the agreement [Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1000 (9th Cir. 1970); *accord*, Richardson v. Communications Workers, 443 F.2d 974, 980 (8th Cir. 1971)]. Other courts routinely recite that a claim against a union for breach of the duty of fair representation is a section 301 suit, even though the employment is subject only to the Railway Labor Act. *E.g.*, Bazarte v. United Transp. Union, 305 F. Supp. 443 (E.D. Pa. 1969), *rev'd on other grounds*, 429 F.2d 868 (3d Cir. 1970).

567. Or, in a case arising under the Railway Labor Act, section 2 of that Act.

568. *See* Retana v. Elevator Operators Local 14, 453 F.2d 1018 (9th Cir. 1972), which expressly predicated jurisdiction on 28 U.S.C. § 1337, reciting the substantial number of cases, both before and after *Vaca*, which have so held.

569. 29 U.S.C. § 158(a)(5) (1970).

570. 29 U.S.C. § 158(d) (1970).

571. *See* text accompanying notes 280-88 *supra*.

572. *See* text accompanying notes 293-340 *supra*.

the rule of *Vaca*,[573] nor is a claim by a member against a minority union, which is vested with no rights by section 9.[574] The union may be judicially accountable in those situations, but not by virtue of the duty of fair representation.

The critical issue with respect to the duty of fair representation is the standard to be applied to the union's conduct. Proposition 3, as stated, may or may not impose a broader duty than that stated in *Vaca*. The court there held that a union breaches its duty when its conduct is "arbitrary, discriminatory or in bad faith."[575] After noting suggestions that the union should be subject only to a duty to refrain from "patently wrongful conduct such as racial discrimination or personal hostility," the opinion rejected them and accepted instead "the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion."[576] As I have elsewhere pointed out,[577] this is a much lower threshold than that specified in the Court's earlier opinions. Until *Vaca* the essential ingredient was bad motive. In *Humphrey v. Moore*[578] the union's action was said to be free of further review if it "took its position honestly, in good faith, and without hostility or arbitrary discrimination." In *Ford Motor Co. v. Huffman*[579] the standard (as applied to the negotiation of agreement terms) was "good faith and honesty of purpose." As *Figueroa* shows, "arbitrary" or "perfunctory" handling of grievances can certainly include action (or non-action) taken in the very best of good, but mistaken, faith.

Vaca explicitly rejected, on the other hand, the apparent holding by the Missouri court below that proof of the merit of the employee's grievance was sufficient to show that the union breached its duty by failing to process it.[580] There must be something more: proof of "arbitrary abuse of the settlement device."[581] But a fair reading of the opinion also indicates that this something more need not be as much as proof of hostility or invidious discrimination. Fairness also requires, however, noting that at other places, the *Vaca* opinion speaks of the

573. Gray v. Heat & Frost Insulators & Asbestos Workers Local 51, 416 F.2d 313, 316 (6th Cir. 1969), *aff'd after remand*, 447 F.2d 1118 (6th Cir. 1971); International Bhd. of Teamsters v. Superior Court, 20 Cal. App. 3d 517, 97 Cal. Rptr. 765, 767 (4th Dist. 1971).

574. Wells v. Order of Ry. Conductors & Brakemen, 442 F.2d 1176, 1179 (7th Cir. 1971).

575. Vaca v. Sipes, 386 U.S. 171, 190 (1967).

576. *Id.* at 191.

577. Feller, *Vaca v. Sipes One Year Later*, in PROCEEDINGS OF N.Y.U., TWENTY-FIRST ANNUAL CONFERENCE ON LABOR 141, 167 (1969).

578. 375 U.S. 335, 350 (1964).

579. 345 U.S. 330, 338 (1953).

580. 386 U.S. at 192-93.

581. *Id.* at 193.

power of the union to settle grievances "honestly and in good faith,"[582] and that only recently the Court restated the standard, quoting both the "arbitrary or bad faith" language of *Vaca* and the older, more restrictive formulation "substantial evidence of fraud, deceitful action or dishonest conduct"[583] from *Humphrey*. The issue is therefore in doubt, with support in the Supreme Court's opinions for both the decisions that have continued to apply the older formulation[584] and those that, like the First Circuit in *Figueroa*, regard the threshold as having been lowered.[585]

The question of what the proper standard should be cannot be considered in isolation from the consequences of a finding that it has been violated. The most desirable solution would be to provide the maximum protection for the individual with the minimum interference with the system of industrial self government, but neither objective can be fully realized.

Maximum protection for the individual would require that the union process all grievances, or that the individual be given the right to invoke arbitration himself if it fails to do so. Both alternatives were rightly rejected in *Vaca*. Either would subject the system to such strains that its continued acceptability and survival would be doubtful. There are already indications that the system is in trouble because too many grievances are processed, it takes too long and it costs too much.[586] Providing an absolute right to arbitration would inevitably weaken constraints against over-utilization which are already too weak.[587]

No interference, on the other hand, would lead to injustices to individuals which would be regarded as intolerable even though, at least arguably, it would strengthen the system and thus benefit the majority. A balance must be struck. Limiting judicial remedies to the situations in which bad motive can be shown seems to me to tip that balance too heavily against the individual. A review of the lower

582. *Id.* at 192.

583. Motor Coach Employees v. Lockridge, 403 U.S. 274, 299 (1971).

584. Dill v.. Greyhound Corp., 435 F.2d 231, 238 (6th Cir. 1970), *cert. denied*, 402 U.S. 452 (1971); Bazarte v. United Transp. Union, 429 F.2d 868 (3d Cir. 1970); Hohlweiler v. Pennsylvania R.R., 294 F. Supp. 1382 (E.D. Pa. 1969), *aff'd* 436 F.2d 1382 (3d Cir. 1971), *cert. denied* 404 U.S. 884 (1971).

585. Zalejko v. Radio Corp. of America, 98 N.J. Super. 76, 236 A.2d 160, 163 (App. Div. 1967), *petition for certification denied*, 51 N.J. 397, 241 A.2d 14 (1968); Boone v. Armstrong Cork Co., 384 F.2d 285, 288-89 (5th Cir. 1967); Retana v. Elevator Operators Local 14, 453 F.2d 1018, 1023-24 (9th Cir. 1972).

586. The most heated discussion at the 1970 Steelworkers convention arose from the delegates' complaints concerning the delays and costs of the arbitration process. 1970 LAB. REL. Y.B. 265. The leadership narrowly averted a rank-and-file move to demand the elimination of arbitration and a return to the right to strike over grievances. Wall St. J., Sept. 29, 1970, at 3, col. 2.

587. *See* text accompanying notes 387-97 *supra*.

court decisions since *Vaca* shows too many cases of honest union action where some sort of relief should be available. Consider, for example, a case in which a grievance was not processed because a perfectly well-disposed shop steward threw it in the trunk of his car and forgot about it;[588] or one in which a discharge grievance was lost because the union failed to comply with the time limit for appeal from the fourth step.[589] Should an employee, terminated because of a failure to report for work after his employer determined that his disability ceased, be without remedy because the union mistakenly, although honestly, believed that the time limits for disciplinary cases applied?[590] Should Rosa Figueroa, assuming she had a good seniority grievance, be left without any remedy because the union leader failed to process it in the totally unfounded, although honest, belief that she would obtain relief through a Board proceeding which excluded her case? Assuming that some redress should be available in these kinds of cases, it would be burning the house in order to roast the pig to provide it by finding an individual contract of employment. The result may be relief to the individual but at an unnecessary cost to the integrity of the process, as well as an unanticipated and unbargained for liability for the employer or perhaps, depending on the scheme of allocation, for the union.

The more desirable solution is to accept the broadened standard expressed somewhat confusedly in *Vaca*, and perhaps even broaden it further, but to tailor the remedy so that it causes less damage to the institution and produces results more nearly conforming to the reasonable expectations of the parties. Proposition 3 therefore proposes, *but only in conjunction with the remedial scheme set forth in Propositions 4-6*, that the threshold question be phrased in terms borrowed from the Administrative Procedure Act, as requiring that the union decision not to process or to settle a grievance not be "arbitrary, capricious [or] an abuse of discretion."[591] Indeed, the use of a standard developed for judicial review of agency action within the scope of its authority may be particularly appropriate, since the union, in determining whether to abandon, settle, or process a grievance, is performing a discretionary administrative function.[592] A court should not review

588. Kress v. Teamsters Local 776, 42 F.R.D. 643 (M.D. Pa. 1967).

589. Sims v. United Papermakers & Paperworkers, 26 Mich. App. 129, 182 N.W.2d 90 (1970).

590. Boone v. Armstrong Cork Co., 384 F.2d 285 (5th Cir. 1967).

591. 29 U.S.C. § 706(1)(A) (1970). "The question of reasonableness reduces itself to whether the order is a rational conclusion and not so 'unreasonable' as to be capricious, arbitrary or an abuse of discretion." Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 695 (9th Cir. 1949).

592. The analogy is, of course, only a rough one and I certainly do not mean to suggest that formal requirements of hearing and record should be made applicable to

that action on the basis of its view of the merits of the grievance or of the union's policies. Where it finds that the action was based on improper considerations or was patently unreasonable, however, it should be able to afford relief.

Phrasing the threshold question in terms of reasonableness, of course, leaves many questions unanswered, but I suggest, many of those questions are unanswerable. Clearly the union should be able to consider, in determining whether to press a grievance, not only the likelihood of success, but also the effect of its action upon the legitimate interests of other members of the group. This is what a union does and must do in the bargaining which results in the rules, and its responsibility to consider the interests of the group as a whole cannot be considered suspended because an individual problem arises during the period when neither the union nor management has an obligation to discuss changes in the rules—which is what the "term" of a collective agreement is. Equally clearly such gross unfairness as the abandonment of the justified grievance of a discharged employee in return for an agreement that management will raise the pay of some others would be improper. But there is no rule which will provide a priori answers in particular cases, hence the somewhat uncertain standard suggested.

There is one situation, however, in which the pre-*Vaca* standard of honesty and good faith, rather than the more open-ended one here suggested, is both appropriate and necessary: where there has been arbitration and the claim made by the individual is that the union which presented the grievance, and lost, did not represent him fairly. The Supreme Court has not distinguished such a case, although, if the joint union-employee committee involved in *Humphrey v. Moore* is regarded, erroneously, as the equivalent of an arbitration tribunal, such a distinction would explain the difference between the *Humphrey* and *Vaca* standards. The considerations applicable if the union has either failed to process an employee's grievance or settled it are quite different from those applicable if the union has pressed the claim before an impartial arbitrator and lost. The losing employee is likely to believe that his grievance would have been sustained if properly presented, and in some cases he may even be right. But judicial review of the quality of the union's representation could wreak havoc with a system, the successful and economic operation of which requires both speed and reliance on non-lawyers. The protection of the few who may have been inadequately or even unreasonably, but nevertheless honestly, represented would be purchased only at the expense of gross

union decisions as to whether a grievance should be processed, abandoned, or compromised.

interference with the system. A deliberate attempt to "throw" a case in order to get rid of or punish a dissident employee is, of course, a different matter. When this kind of dishonesty of purpose is alleged and proved, the fact that there has been an award should not stand in the way of a remedy for the individual. In such a case, therefore, the test of honesty or good faith remains the appropriate one.

Proposition 4: *Refusal or failure of a union to process a grievance in violation of its duty of fair representation should be remediable only in a suit to compel the union to proceed. (Such a suit is not properly termed a section 301 action since it does not derive from contract and cannot be barred by contract. Nor, since it also does not derive from union membership, is it subject to a requirement that internal union remedies be exhausted.) The primary issue in such a suit is whether the union has breached its duty.*[593]

Most of this proposition follows from what has already been said and requires little further explication. In large measure it is consistent with the decided Supreme Court cases, although not with all of the lower court decisions. Some courts, for example, perhaps understandably confused by the treatment of *Maddox* as requiring "exhaustion" of remedies, have imposed a requirement that an employee exhaust the remedies provided by the union's constitution before bringing suit.[594] This is plainly erroneous. It imposes a bar based on a right arising out of union membership to a suit in which membership is irrelevant and which is based solely on employee status and section

593. Incidental relief may be necessary against the employer if the primary issue is resolved in the employee's favor. See Propositions 5 and 6 below.

594. The confusion of the courts is notably illustrated in the Sixth Circuit. In Bsharah v. Eltra Corp., 394 F.2d 503 (6th Cir. 1968) the plaintiff sued both the union and the employer. Dismissal of the union was sustained because the plaintiff did not "initiate her intra-union remedies. . . ." *Id.* at 503. The suit against the employer was dismissed for failure "to follow the contractual grievance procedures." *Id.* at 503. This has been subsequently interpreted as barring all relief if internal union appellate procedures have not been exhausted. Harrington v. Chrysler Corp., 303 F. Supp. 495 (E.D. Mich. 1969); Imbrunnone v. Chrysler Corp., 336 F. Supp. 1223 (E.D. Mich. 1971); Harris v. Continental Aviation Corp., 79 L.R.R.M. 2398 (N.D. Ohio 1972). In other cases, however, the failure to exhaust internal union procedures has been held to bar relief only against the union; suit against the employer has been entertained or disposed of on other grounds. Anderson v. Ford Motor Co., 319 F. Supp. 134 (E.D. Mich. 1970); Sedlarik v. General Motors Corp., 78 L.R.R.M. 2232 (E.D. Mich. 1971); Esquivel v. Air Conditioning Co., 82 L.R.R.M. 2001 (E.D. Mich. 1972).

The problem was properly analyzed by the Seventh Circuit in Orphan v. Furnco Constr. Corp., 466 F.2d 795 (7th Cir. 1972) which held that the suit should not be dismissed for failure to invoke the union's appellate procedures or even for failure to follow the union's rule as to the time for filing a grievance; the latter failure, if it was truly the reason for not prosecuting the plaintiff's claim, could be raised at trial to show that there was no union breach of the duty of fair representation and hence no employer liability.

9. If the employee has filed a grievance (or, under contracts under which only the union can file, has requested that the union do so) and the union official charged with the responsibility of processing his claim refuses to proceed, the employee should not be required to appeal through the union hierarchy before filing suit.[595]

The controversial portion of Proposition 4, and the departure from the dictum of *Vaca v. Sipes,* is the assertion that the only remedy for breach of the duty of fair representation is a suit brought to compel the union to proceed and that, consequently, the primary issue is whether there has been a union breach of duty. It was argued in *Vaca* that where the union's breach of duty consisted of a failure to take a grievance to arbitration, the only remedy should be an order directing it to do so. The Court, however, expressly refused to accept that proposition. It assigned two reasons. First, it said, "[i]n some . . . cases at least part of the employee's damages may be attributable to the union's breach of duty, and an arbitrator may have no power under the bargaining agreement to award such damages against the union."[596] The statement is true but does not support the Court's conclusion. The union may in fact be chargeable for some of the employee's loss and an arbitrator may be powerless (indeed he usually is) to assess damages against the union. But it does not follow that the court in which the suit against the union is brought should itself resolve the merits of the claim that management has not complied with the rules in the collective bargaining agreement. It is perfectly possible, and indeed desirable, to couple an order directing the union to process the grievance with an order imposing liability on the union for any additional damages suffered by the employee if it should be found in arbitration that the grievance was justified, without jumping to the conclusion that, in order to do so, the court must itself decide the merits of the grievance.

The Court's second reason for not limiting the remedy to an order to process the grievance was that "the arbitrable issues may be

595. The essential question is whether there has been a union decision not to prosecute a claim that management's action violated the rules in the collective agreement. Sometimes this can be found where the employee has not even filed a grievance, as for example in Glover v. St. Louis-S.F. Ry., 393 U.S. 324 (1969), where the employees were told by the union representatives in charge that it would be futile to do so. In the usual case the decision as to whether a grievance should be processed to the higher steps of the procedure is made by a committee of the local union or, in large plants, of a unit or department. A member of the union (but not, usually, an employee nonmember) may have the right to appeal an adverse committee decision to higher union authority. His failure to do so, should not bar suit, although it can be used to bar retroactive relief against the union. *See* text accompanying note 620 *infra.* To be sharply distinguished is the case in which a member complains of unfair application of the union's internal rules. *See* note 650 *infra.*

596. 386 U.S. at 196.

substantially resolved in the course of trying the fair representation controversy,"[597] and that in such situations a court should be free to decide the contractual claim and to award the employee appropriate damages or equitable relief. Again, the Court's observation is at least partially correct. If the basis of the claim against the union is that the employee's grievance was of sufficient merit that the union's failure to proceed must have been "arbitrary," there is no doubt that the merits of the claim will be at least peripherally involved in the proof of the breach of duty. It does not follow, however, that the court should proceed to decide the merits. It is not only that there are differences in the quality of judgment and the standards to be applied in arbitration as compared with the judicial forum, which the Court has made so clear in other contexts,[598] and considerable differences, already described, in the remedies available in the two forums.[599] There is also the very substantial likelihood that if the same jury that tries the suit for breach of the duty of fair representation also decides the merits of the grievance, its determination of the latter will make impossible a fair determination of the former. That is to say, the question of whether the union breached its duty of fair representation will ultimately be determined not by a judicial assessment of the factors properly applicable to it but by the decision as to whether the grievance is meritorious.

That was, indeed, precisely what had happened in *Vaca*. The jury there had been instructed that the union was liable only if it " 'arbitrarily . . . and without just cause or excuse . . . refused to press Owens' grievance to arbitration."[600] There was no evidence at all that the union had acted arbitrarily. Indeed, the contrary was clearly true. But the jury also had evidence it believed sufficient to decide that Benjamin Owens had a just grievance. Its decision on that question in effect predetermined the decision on the first question.

As *Figueroa* shows, the problem cannot be resolved by impanelling separate juries to decide the two questions if the first jury is to determine the merits of the grievance. It is almost as unlikely that a jury which is instructed that the plaintiff's grievance is justified will conclude that the union nevertheless fulfilled its duty when it determined not to process that grievance as it is that a jury charged with a duty of determining the merits of the grievance will find that the grievance is meritorious but that the union's decision was nevertheless not in violation

597. *Id.*

598. *See* particularly the Court's language in the Steelworkers' trilogy, quoted in the text accompanying notes 138-45 *supra* and in *Slocum* and *Gunther*, referred to in the text accompanying notes 94-102 and 184-85 *supra*.

599. *See* text accompanying notes 466-96 *supra*.

600. 386 U.S. at 176.

of its duty. Conceivably this identity of result need not necessarily follow if the question of whether the union breached its duty is adjudicated first. A second jury instructed that the union should have processed a grievance need not necessarily infer that the grievance was meritorious. But if the matter is separately tried in that order, the necessity of duplication of proof has not been avoided and there is no justification for not having the second trial, on the merits, in the forum the parties have determined to be appropriate and in which the remedies the parties have agreed upon can be awarded.

There are two potentially more cogent arguments against mandatory arbitration when it is judicially found that the union has breached its duty of fair representation. The first is that the union is likely to be less than wholehearted in its presentation of an employee grievance if that presentation is judicially ordered. This objection is serious but not insuperable. It can be met, simply, by permitting the employee to participate in the arbitration process, both personally and by counsel.[601] Concededly such a provision does violence to the concept that the arbitration process, created by the agreement between union and employer, should be controlled by them.[602] But the damage is relatively slight. A second, and related, potential objection is that the arbitrator may be inherently prejudiced against an individual claim, since he will regard himself as primarily responsible to the parties who appointed him.[603] I have doubts as to the validity of this objection but it is, in any event, not insurmountable. It can be met, very simply, by providing that, in those cases in which that relief is requested and appears necessary, the employee may participate in the choice of the arbitrator.[604]

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601. *See* Watson v. Cudahy Co., 315 F. Supp. 1286 (D. Colo. 1970) in which this offer was made and refused by the court on the ground that the arbitrator was the one chosen by the union and the employer.

602. In Koch v. Met Food Corp., 70 L.R.R.M. 2408 (N.Y. Sup. Ct. 1968), plaintiffs' demand to participate in the arbitration as parties was refused on this ground.

603. It should be emphasized, in this connection, that I am here talking about arbitration before a neutral, not the presentation of a grievance to a joint committee. If the union's breach of duty consisted of failure to process the grievance at the lower steps of the grievance procedure, which do not involve neutrals, it might perhaps be reasonable to permit those steps to be skipped. Again, this does some violence to the procedure, but the damage is slight and the advantages seem worth it. Where the procedure under the collective agreement does not provide for arbitration by a neutral at its terminal point, very different problems are presented. By hypothesis, however, I am not here considering that situation and the appropriate resolution in that case involves a number of other problems which will be considered separately below. *See* text accompanying notes 677-701 *infra.*

604. In a case such as *Figueroa* where it is found that the union breached its duty, but there is no finding of hostility or bad faith, there would be no occasion for such an order. Where the dispute is one over seniority which pits one group of employees against another, the order may be desirable. My own experience is that, even in highly charged political cases, dissident union members who seek to present

Neither the reasons stated by the Court in *Vaca,* nor the additional arguments suggested here, are, I believe, the real reasons why the Court refused to exclude the possibility of trial by the court of the merits of the grievance in a suit for breach of the duty of fair representation. That result was, I think, predetermined by the way in which the Court viewed the question. In the Court's view the basic contractual claim was the employee's. The grievance and arbitration provisions were characterized as "provisions purporting to restrict access to the courts,"[605] and as a "settlement device"[606] to handle an employee's "breach-of-contract"[607] claim which would otherwise be justiciable. The restriction on access to the courts was removed if the union's failure to act was wrongful. Given this view, and the fact that, by hypothesis, a judicial determination as to whether the union had breached its duty was necessarily involved, there would have to be strong reasons for not permitting the contract action to be tried in the same suit.

The principal burden of this Article has been that this approach is simply wrong. Grievance and arbitration provisions in industrial collective agreements developed not as a method of restricting access to the courts or as devices to handle breach of contract claims but as a mutually accepted alternative to the traditional form of enforcement, the strike. The hypothetical base from which the opinion reasoned, the collective agreement without a provision for arbitration, exists in real life only without, also, a rule against strikes.[608] The union's wrong, when it breaches its duty, is not in using a "settlement device" to prevent the employee from obtaining "judicial review of his breach-of-contract claim," but in improperly failing to exercise the discretionary right to arbitration obtained by union agreement to a rule depriving the employees of their right to strike to vindicate their claims. When the union arbitrarily or capriciously fails to exercise that right, the appropriate remedy is to direct it to do so, not to provide a contractual forum neither the union nor the employer (nor, for that matter, the employee) contemplated when the collective agreement was negotiated.

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their own arguments in arbitration will nevertheless accept as impartial the permanent arbitrator chosen by the employer and the union.

605. 386 U.S. at 183.

606. *Id.* at 193.

607. *Id.* at 185.

608. The Court's error is underlined by the case cited by it to illustrate the hypothetical: Smith v. Evening News Ass'n, 371 U.S. 195 (1962). As pointed out in the text accompanying notes 146-58 *supra,* the Court there simply assumed, contrary to fact, that there was no grievance arbitration procedure. The Court has in fact never had, and is unlikely ever to have, before it a collective agreement which has neither a provision for arbitration nor a right to strike over grievances. *See* note 693 *infra.*

Proposition 5. *The employer should not be able to defeat or limit recourse to the adjudicative mechanism provided by the collective agreement because of the union's failure to comply with time limits, when such failure results solely from the union's breach of its statutory duty. To ensure this result an employer may, therefore, be joined as a section 301 defendant in an employee's suit against the union for breach of that duty.*

Proposition 6. *The employer's retroactive liability should not be increased by virtue of proposition 5 over what would have been due if the union had not breached its duty, nor should the employee's recovery be reduced. Any potential increase in the employer's retroactive liability or potential reduction in the employee's recovery occasioned by the breach should be chargeable to the union.*

Propositions 5 and 6 are so closely related that they will be discussed together.

Were it not for the time problem, the solution so far suggested—an order directing the union to arbitrate, suitably conditioned where appropriate—would be all that would be required. But there is a time problem and a serious one. It has two aspects. First, most agreements contain procedural limits on the time for filing or appealing a grievance. If a union has, in breach of its duty of fair representation, prevented an employee from filing a grievance, failed to file one for him, or failed to appeal within the specified time, the right to have the grievance resolved in the procedure may have been lost. Under *Wiley*,[609] questions relating to procedural arbitrability are not to be decided by the courts but by the arbitrator. Arbitrators sometimes, in unusual circumstances, do not treat failure to comply with time limits as a complete bar to arbitration of a claim.[610] But the decision of an arbitrator on how to treat noncompliance is, and should be, confined to consideration of the agreement between the company and the union and what may reasonably be implied into it. Determining issues between union and employee is not normally part of an arbitrator's function, and any requirement that he consider whether the union's failure to meet the agreement's time limits was due to a breach of its statutory duty would place a responsibility on the arbitrator that is not properly his under the agreement.

It is, nevertheless, clear that if relief is to be provided the individual employee the time limit obstacle must be overcome. Here, and here

609. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557-59 (1964).

610. *See, e.g.*, Bethlehem Steel Co., 17 Lab. Arb. 7 (1951) (B. Selekman, Arbitrator); Smith-Haigh-Lovell Co., 20 Lab. Arb. 47 (1953) (J. Donnelly, M. Sviridorff & W. Clark, Arbitrators); Ironrite, Inc., 28 Lab. Arb. 398 (1956) (D. Whiting, Arbitrator); Lone Star Steel Co., 30 Lab. Arb. 519 (1958) (P. Kelliher, Arbitrator).

alone, section 301 becomes useful. The relief being sought is to compel the union to exercise its contractual right to arbitration, a right enforceable against the employer in a section 301 suit. The employer can therefore be joined as a section 301 defendant, just as a third person may be joined in a suit to compel a trustee to enforce a claim against that third person.[611] The union's right to compel arbitration (or, more precisely, its ability to succeed before the arbitrator) is subject to a potential bar which would permit the employer to escape responsibility to the employee because of the union's breach of duty. To avoid this bar the court should direct, as part of its remedial order, a waiver of any defense in arbitration based on a failure to comply with time limits which the court finds is attributable to the union's breach of duty.

This concededly imposes an alteration of the contractual arrangement: the employer is required to waive in the arbitration proceeding a defense which might otherwise be valid as against its opposite contractual partner. The alternatives, however, are unsatisfactory. Holding the union responsible in damages for the employee's total loss would, as the Court correctly held in *Vaca*,[612] impose an unfair (and, in many cases, uncollectible) burden on the union for damage caused initially by the employer. In the most serious kind of case, discharge, the union cannot minimize the loss by offering reinstatement. And, in every case, damages can be assessed only if it is first decided by the court that the grievance which the union failed to pursue was meritorious, thus requiring precisely the kind of judicial decision which I have argued should be avoided.

The remedy authorized by *Vaca* apportions the damage[613] but does not meet the other objections. Moreover, it imposes a greater alteration on the contractual arrangement by construing the substantive provisions of the collective agreement as an individual contract divorced from the procedures and remedies contained in the grievance and arbitration provisions. They are intended to be, and should be treated as, integral. Proposition 5, by requiring a waiver of time limits only where there is a judicial finding of breach of the union's duty of fair representation, imposes the minimum alteration of the contractual intention necessary to provide effective implementation of the extra-contractual duty imposed by section 9 of the Act.[614] The imposed waiver of time limits as a bar to further processing of a grievance should not, however, enlarge

611. RESTATEMENT (SECOND) OF TRUSTS § 282 (1959).

612. Vaca v. Sipes, 386 U.S. 171, 196-97 (1967).

613. *Id.* at 197-98.

614. The alteration is certainly less than that imposed if the court, as in *Figueroa*, permits a suit for damages to be maintained by the employee against the employer if the union's failure to comply with time limits was in breach of its duty. *See* Merkle v. Kerrigan, 79 L.R.R.M. 2616 (N.Y. Sup. Ct. 1972).

the employer's liability more than necessary, nor should the union's failure to observe them, in breach of its duty, either defeat or diminish the employee's rights. Unless an additional element is added, either can occur.

Grievance arbitration, as explained above, does not usually involve an award of damages but does often involve retroactive relief, such as back pay, as a necessary counterbalance to the understanding that the employer has the right to act in the first instance. Time limits on the filing of grievances and their appeal are one method of limiting this retroactive liability. Another method, used where immediate filing is not regarded as reasonable, is to specify a retroactivity date different from that of the event on which liability is based. The cutoff date for retroactivity in such cases is usually the date on which the grievance was filed or a limited period prior thereto. In discharge cases the usual retroactivity date is the date of discharge. In seniority cases it is usually related to the date the grievance is filed. In some cases there is an absolute maximum on the period of retroactivity.[615]

The delay necessarily imposed when a union processes a grievance only as a result of a judicial determination that it breached its duty of fair representation in failing to do so can affect retroactivity in two ways. If retroactivity runs from the event giving rise to the grievance and there are no time limits, or if they were observed, as in *Vaca*, or if the court directs their waiver in accordance with Proposition 5, the employer's retroactive liability may be enlarged by the delay if the grievance is ultimately sustained. If, on the other hand, the retroactive period under the agreement has not begun to run because of the union's failure to initiate the process, or if there are fixed limits to retroactivity, there may be a substantial period of time, attributable to the union's breach of duty, for which the employee can obtain no retroactive recovery in arbitration.

In the latter case, the loss is truly, and precisely, what the Court described in *Vaca* as the "part of the employee's damages . . . attributable to the union's breach of duty" which "an arbitrator may have no power under the bargaining agreement to award."[616] That loss should, therefore, be chargeable to the union. But that result can be achieved without the distortion created by imposing judicial decision making and judicial remedies for the adjudicatory scheme which the parties have established. An order directing the union to process a grievance because its failure to do so was in breach of its duty of fair representation can contain provisions requiring the union to make up

615. A representative sampling of retroactivity provisions is contained in BULL. 1425-6, *supra* note 350, at 77-80.

616. 386 U.S. at 196.

the loss, either by reserving jurisdiction so that, if the grievance is sustained and the arbitrator awards retroactive payments which do not cover a period of delay which would not have existed had the duty not been breached, a judgment for the loss so suffered can be entered against the union, or by providing in advance for that result. The loss would not be apportioned by undefined notions of fault, as *Vaca* seemed to indicate,[617] or by the cost of securing recovery, as *Czosek*[618] seems to say, but on the basis of the retroactivity lost to the employee because of the union's breach.

The situation is more complicated in the former case, when the effect of the delay caused by the union's breach of its duty is to increase the employer's retroactive liability. If, as a result of a directed waiver of time limits in accordance with Proposition 5, the employer's protection against all relief is lost and a grievance is arbitrated which would otherwise be barred, the arbitrator should award the relief required by the agreement if he sustains the grievance. In a discharge case this is normally reinstatement with or without back pay. If the arbitrator orders back pay to the date of discharge, any additional retroactive pay beyond that which would have been payable if the union had observed the time limits is, again, a loss attributable to the union's breach which would not have otherwise been payable by the employer. In such case, the court should direct the union defendant to reimburse the employer for the retroactive pay in excess of that which would have been incurred if the time limits had been observed.

The more difficult cases occur when there are no time limits, or when they are observed and the grievance is, by agreement, kept in a hold status, as in *Vaca*, but back pay runs from the event giving rise to the grievance. In both these instances the retroactive liability of the employer is increased beyond the amount which would have been incurred if the union had not breached its duty by failing to process the grievance. On the other hand, this increase is one to which the employer, by failing to specify time limits in the agreement or by agreeing to "hold" the grievance, has voluntarily exposed himself apart from judicial intervention. Accordingly, it seems to me preferable in that case to leave the loss with the employer, although I would not quarrel with a rule which imposed the additional liability caused by the union's breach of duty upon the union.[619]

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617. *See* text accompanying note 206 *supra*.

618. Czosek v. O'Mara, 397 U.S. 25 (1970), set out in detail in text accompanying notes 231-37 *supra*.

619. It should be emphasized that these suggested rules would come into play only when the aggrieved party complains of employer action which has a continuing effect. Claims for back pay for work performed at specific times or under specific

These rules for the allocation of liability for retroactive payments should be subject to a qualification if there is an internal union appellate procedure which was available to the employee. If this procedure was not utilized any loss of retroactivity for which the union would otherwise be responsible should remain with the employee.[620]

The most difficult case is that in which the union does process a grievance to arbitration and loses but the employee seeks relief on the ground that the union breached its duty of fair representation. I have argued that where the breach claimed relates to the presentation in arbitration the standard to be applied to the union's conduct should be the pre-*Vaca* one of dishonesty of purpose. The question remains as to the nature of the remedy where the threshold requirement is met, and in the cases, as well, where the arbitration has been lost because of a pre-arbitration failure to comply with time limits. It can be argued that in this kind of case the entire burden of the employee's loss should be placed on the union. A number of lower courts have so held, relying on the Supreme Court's holding in the trilogy that an arbitrator's award, if purportedly based on the agreement, is not subject to judicial review and the individual is therefore estopped from seeking relief from the employer.[621]

On the views here expressed, the reliance is in error since it is based on the conception that the collective bargaining agreement vests contractual rights in the employee which are committed to the union as a fiduciary for presentation in the preferred forum of arbitration. If propositions 1 and 2 are accepted the only contractual parties, and hence the only parties to the arbitration, are the union and the employer. There is, therefore, strictly speaking no estoppel against the

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conditions, such as those which occupy most of the time of the National Railroad Adjustment Board, would be unaffected.

620. This is, of course, quite different than saying that the failure to exhaust union appellate procedures bars suit entirely. *See* text accompanying notes 594-95 *supra.*

621. Allesandrini v. Local 802, American Fed. of Musicians, 439 F.2d 699 (2d Cir. 1971), *cert. denied,* 404 U.S. 831 (1971); Hill v. Aro Corp., 275 F. Supp. 482 (D. Ohio 1967); Margetta v. Pam Pam Corp., 354 F. Supp. 158 (N.D. Cal. 1973). These cases must be distinguished from the plethora of cases in which the employer is sued after an adverse arbitration decision but no claim of union breach of duty is made. The courts routinely deny such claims, citing the trilogy. Chambers v. Beaunit Corp., 404 F.2d 128 (6th Cir. 1968); Piper v. Meco, Inc., 412 F.2d 752 (6th Cir. 1969); Sharpe v. Carolina Freight Carriers Corp., 337 F. Supp. 528 (E.D. Pa. 1972). In my view the result is correct but the proper ground of decision is the absence of any individual contractual right, before or after arbitration. That it makes a difference is shown by the cases in which the courts have granted relief to individuals on the ground that the arbitrator exceeded his jurisdiction in denying relief or that the issue was excluded from arbitration by the agreement. Nuest v . Westinghouse Air Brake Co., 313 F. Supp. 1228 (S.D. Ill. 1970); Aughenbaugh v. North American Refractories Co., 426 Pa. 211, 231 A.2d 173 (1967).

employee. His only right, on the other hand, is to obtain relief for breach of the union's duty of fair representation. Whether that relief should also include some possibility of employer responsibility is a question relating to the proper scope of the remedy for breach of the union's statutory duty and the trilogy is irrelevant.

The question is not an easy one. The employer has won an arbitration decision which the agreement makes final and binding and it could be argued that the union should be entirely responsible for the results of the breach of its duty.[622] On the other hand, I have argued that the statutory policy will justify an alteration in the employer's contractual right to insist on a time limit bar if the failure of the union to file or appeal is in breach of its duty. It is difficult to conclude that a different result should follow where the union belatedly seeks to correct its failure but loses in arbitration because of its failure to comply with time limits.[623] Where an award results from the union's bad faith, it can also be argued that an employer should have no greater protection than he obtains as a result of a failure by the union to timely process the grievance to arbitration, a failure which is intended to have the effect of making the company's last answer final and binding.[624] The most important consideration is the fact that in the most critical situations, seniority and discharge, only the employer is in the position to rectify the situation by reinstating the employee or assigning him to the job to which he is entitled under the agreement; the remedy against the union is necessarily limited to the recovery of damages. It would follow that the remedial principles proposed in Propositions 5 and 6 should be applicable where there has been an arbitration decision which, it is found, resulted from a breach of the union's duty of fair representation.

There is considerable support in the cases for such a result. *Humphrey v. Moore*[625] treated a joint committee decision under a Teamsters

622. Only, of course, if the union's breach is shown to have led to the loss in arbitration. The decision in Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972) sustaining a judgment against a union for breach of duty in the lower steps of the grievance procedure despite a subsequent fair but losing presentation in arbitration is simply inexplicable.

623. *See* Merkle v. Kerrigan, 79 L.R.R.M. 2616 (N.Y. Sup. Ct. 1972). In the absence of a claim of breach of duty, loss of the grievance in arbitration because of failure to comply with time limits bars the employee. Chambers v. Beaunit Corp., 404 F.2d 128 (6th Cir. 1968).

624. Often this effect is explicitly stated. *See, e.g.*, Guille v. Mushroom Trans. Co., 425 Pa. 607, 229 A.2d 903 (1967); Lomax v. Armstrong Cork Co., 433 F.2d 1277 (5th Cir. 1970); *cf.* Haynes v. United States Pipe & Foundry Co., 362 F.2d 414 (5th Cir. 1966) (strike option). See also the examples quoted in BULL. 1425-1, *supra* note 326, at 39-40 and BULL. 1425-6, *supra* note 350, at 30. The intention is the same in the absence of language. *Id.*

625. 375 U.S. 335 (1964), set out in text accompanying notes 163-68 *supra.*

agreement as an arbitration award and clearly implied that if it resulted from a union breach of duty it could be set aside. There are subsequent Teamster cases where a breach of the duty of fair representation has been found and the matter has been re-referred for a new decision.[626] The Court of Appeals for the Fifth Circuit, many years ago, sustained an award in damages against the employer for the loss of job opportunities which resulted from an agreement made by a railroad brotherhood in breach of its duty of fair representation.[627] And the Ninth Circuit, in a thoughtful opinion by Judge Browning, has recently reversed a summary judgment for the employer in a discharge case in which it was alleged that an arbitrator's award was secured by the union as a result of a breach of its duty of fair representation.[628]

It should be emphasized that the availability of the proposed relief against the employer does not mean that the entire burden for repairing the union's breach of its duty falls upon it; to the contrary, any monetary liability in excess of that to which the employer would have been subject if the union had not breached its duty would be transferred to the union. Where the arbitration award results from a breach of the union's duty of fair representation, requiring that the matter be re-referred to arbitration, before a different arbitrator, makes available the most desirable remedy for breach of the duty of fair representation and avoids the necessity of determining the validity of the grievance on the merits in order to assess damages.[629]

I. Figueroa Revisited

The difference between the scheme of remedies here proposed and those applicable under the conventional theory can be seen most clearly by reexamining *Figueroa*, the case with which we began.[630] The application of the principles here suggested would have produced the following results:

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626. Steinman v. Spector Freight Sys., 441 F.2d 599 (2d Cir. 1971); *cf.* Bieski v. Eastern Auto. Forwarding Co., 396 F.2d 32 (3d Cir. 1968).

627. Central of Ga. Ry. v. Jones, 229 F.2d 648 (5th Cir. 1956), *cert. denied*, 352 U.S. 848 (1956).

628. Local 13, ILWU v. Pacific Maritime Ass'n, 441 F.2d 1061 (9th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972). *See* Rothlein v. Armour & Co., 391 F.2d 574, 580 (3d Cir. 1968); *cf.* Lusk v. Eastern Prod. Corp., 427 F.2d 705 (4th Cir. 1970).

629. "The Court is fully cognizant of the extreme difficulty it will confront on the damage question and that it may be necessary to determine the validity of the grievance on the merits in order to assess damages [against the union], but this is necessitated by the Court's reading of . . . Vaca." Hill v. Aro Corp., 275 F. Supp. 482, 491 (D. Ohio 1967).

630. *See* text accompanying notes 9-53 *supra*.

1. The Suit Should Have Been Barred by the Statute of Limitations

There are two issues: (1) The appropriate statute of limitations in a suit against a union for breach of the duty of fair representation in failing to process a grievance, and (2) the applicability of that statute to whatever rights the employee may have against the employer. On the first question the district court in *Figueroa* held that the statute of limitations applicable to the suit against the union was the contract statute. On appeal, the First Circuit held that the shorter period of the tort statute applied.[631] Other alternatives are the 6-month period for filing unfair labor practice charges under the National Labor Relations Act, and, in states having such statutes, the limitation period for claims of breach of fiduciary obligations or for failure to perform an official function.[632] Although the suit, not being an unfair labor practice charge, is not literally subject to the Act's 6-month statute, it can sensibly be argued that this limitation period is the appropriate one since the duty being enforced derives from the Act. But, in any case, it seems plain that the contract statute should not be used, since the employee's claim against the union is not based on contract. The district court was, therefore, properly reversed. The Second Circuit, which, contrary to the First, has applied the contract statute in a similar situation[633] is in error.

As to the employer's liability, the limitation period provided for contract actions would be appropriate under the conventional theory that a collective agreement creates a contractual relationship between the employer and an employee who works under that agreement.[634] This was the theory adopted by the First Circuit in *Figueroa*, with the result that the plaintiffs' claim against the employer survived, although the claim against the union was barred. On the theory advanced above there is no contractual right against the employer; the basic suit is against the union for breach of the duty of fair representation, and the only relief against the employer arises as a result of compelling the

631. Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281 (1st Cir. 1970), *cert. denied*, 400 U.S. 877 (1970).

632. *See* Dill v. Wood Shovel & Tool Co., 80 L.R.R.M. 2445, 2449 (S.D. Ohio 1972).

633. Abrams v. Carrier Corp., 434 F.2d 1234 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971). The Second Circuit is, so far as I can determine, alone in so holding. The Sixth Circuit has applied the state statute applicable to actions based on liabilities created by statute. Gray v. International Ass'n of Heat, Frost and Asbestos Workers, Local 51, 416 F.2d 313 (6th Cir. 1969). Other cases are cited in Jamison v. Olga Coal Co., 335 F. Supp. 454, 463 (S.D. W. Va. 1971) (tort statute).

634. If a contract statute were to be used, a further choice usually would have to be made between the period applicable to written agreements and the generally shorter period provided for agreements not in writing. *See UAW v. Hoosier Cardinal Corp.*, set forth in detail in text accompanying notes 187-92 *supra*. In *Figueroa* no such choice was necessary.

union to invoke the agreement procedures. It follows, therefore, that if the suit against the union is barred by the statute of limitations, whatever statute is used, the suit should fail entirely.

2. If the Suit Had not Been Barred by Limitations, the Only Triable Issue Would Have Been Whether There Was a Union Breach of the Duty of Fair Representation.

This issue was decided by the second jury in *Figueroa* in favor of all plaintiffs except Elsie Lugo Bernier, but only after it had been instructed, on the basis of the first jury's findings, that the plaintiffs had meritorious grievances. Under the scheme here proposed, there would be no such preliminary finding. The court, or a jury, would decide whether the union's action was arbitrary on the basis of the situation as it appeared to the union leadership at the time the decision was made not to press the plaintiffs' seniority claims. The finders of fact should weigh not only the desire of the union to concentrate on the effort to roll back all of the layoffs and the effect on that effort of the processing of individual seniority claims but, as against such considerations, the likelihood of success under the "weak" seniority provisions. We do not know how they would have resolved that question. On the record made, there was probably sufficient evidence to sustain a finding that the union breached its duty in all of the cases. The distinction as to Miss Lugo, which apparently was based on the union's having filed a grievance in her case, appears totally unjustified since the union failed to press it on a seniority basis.

3. If the Union Were Found to Have Breached its Duty in Failing to Press the Plaintiffs' Grievances to Arbitration, the Court Should Have Ordered that it Proceed to Arbitration and that Any Employer Reliance on the Expiration of Time Limits be Disallowed.

If this, rather than damages, were the relief to be granted, the case need not have been tried at all. The union, when sued for failure to take the plaintiffs' cases to arbitration, responded by filing a cross claim against the employer demanding arbitration. The district court denied the cross claim on the ground that the matter could be dealt with satisfactorily by apportionment of damages. That judgment was erroneous, and the cross claim should have been allowed, even though the time limits for filing grievances had expired.

4. If Arbitration Had Been Ordered, It is Probable that an Arbitrator Would Have Sustained the Plaintiffs' Grievances, Including Rosa Figueroa's.

The district court assumed that the plaintiffs had the burden at the

trial of showing not only that they were senior to the employees retained but also that none of the junior employees retained were significantly superior in ability. The company did not, it appears, put on any testimony comparing the proficiency of the individual employees retained with that of the plaintiffs but rested simply on testimony that its personnel had complied with the applicable contractual standard in making its decisions. The jury found for all of the plaintiffs, but the court of appeals reversed as to Rosa Figueroa because it found the proof of her superior ability defective.

Most arbitrators would hold, however, that once it has been shown that a junior employee has been retained while a senior employee in the same classification has been laid off, the company must assume the burden of proving that its action was justified by the provision in the agreement permitting it to depart from seniority where abilities are unequal.[635] No such showing was made. It is probable, therefore, that if the cases had been heard in arbitration, all of the grievances would have been sustained. One cannot, however, be certain since the case might have been tried entirely differently before an arbitrator.

5. If Arbitration Had Been Ordered, and the Arbitrator Had Found a Breach of the Seniority Provisions of the Collective Bargaining Agreement and Ordered Reinstatement with Back Pay, Any Back Pay Liability Beyond the Date on Which Such an Order Would Have Issued Had the Union Not Breached its Duty Should Have Been Charged Against the Union.

What the district court did, in fact, was to permit the jury to proportion the fault between the union and the company on some unascertainable principle. The jury found the union responsible for 40 percent of the loss and the company 60 percent, except in the case of Elsie Lugo Bernier. In her case, it found no violation of the duty of fair representation and assessed 100 percent of the loss against the company. On appeal, the First Circuit imposed the entire liability for back pay, as well as the potential liability for loss of future earnings should reinstatement prove to be impracticable, upon the company except in Miss Lugo's case. She recovered nothing.

Under the scheme of remedies here proposed, there would have been a compulsory waiver of the 3-day time limit for the filing of grievances in every case except that of Miss Lugo's. If, therefore, an

635. Martin-Marietta Corp., 60 Lab. Arb. 61, 63 (1972) (R. Ray, Arbitrator) and cases therein cited. *See also* S. SLICHTER, J. HEALEY & E. LIVERNASH, *supra* note 358, at 203; Healy, *The Factor of Ability in Labor Relations*, in NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION TODAY, PROCEEDINGS OF THE EIGHTH ANNUAL MEETING 45, 50 (1955).

arbitrator had awarded reinstatement with back pay in the arbitration which the union demanded in its cross claim, the liability for additional back pay beyond that payable had the union filed a grievance within the time limits would be chargeable against the union. In Miss Lugo's case the liability would remain with the employer unless it were found that the union, by refusing to press her grievance on a seniority basis had, in effect, abandoned it. In that case, the situation with respect to her back pay would be the same as the others.

J. Qualifications, Limitations and Exceptions

The model of the industrial collective agreement and its adjudicative systems upon which the legal propositions set forth above has been based corresponds to a majority of the agreements in existence today. This has, in fact, been the kind of agreement involved in most of the Supreme Court litigation under section 301 from *Lincoln Mills* through the Steelworkers' trilogy, *Wiley v. Livingstone* and *Vaca v. Sipes.* It is the kind of an agreement which was involved in *Figueroa.* With one qualification, to be discussed below, the model corresponds to that imposed by the Railway Labor Act, at least as the Court has interpreted the Act since *Chicago River.*[636] It is not, however, the universal model. There is an enormous variety in the relationships created under a system of law which mandates collective bargaining where a majority of the employees desire it but says virtually nothing about the nature of the agreements to be made. This section will describe some of the more important variations from the model given and examine what exceptions, if any, from the proposed propositions are indicated. On balance, I think they are few.

1. The Trade Agreement

As a premise for the discussion of the industrial model of the collective bargaining agreement, a sharp distinction was drawn between it and systems of industrial relationships in which the union is an independent source of rule-making and administration, acquiesced in by the employer in a trade agreement.[637] One characteristic of a trade agreement is that there is no grievance procedure or, if there is one, it terminates in decision by the union. The number of such agreements is miniscule. In the 1964 survey by the Bureau of Labor Statistics, only twenty agreements, covering 50,000 workers, or a little over one half of 1 percent of the seven and one-half million workers surveyed,

636. Brotherhood of R.R. Trainmen v. Chicago River & I. R.R., set forth in text accompanying notes 243-47 *supra.*

637. *See* notes 289-340 *supra,* and accompanying text.

contained no grievance procedure. Twenty-nine thousand of the workers covered by those agreements were in the building and construction industry, and most of those agreements provided for a job or shop steward whose function, presumably, was to ensure compliance with the union's rules and, if appropriate, to shut the job down if non-compliance were found and not remedied.[638]

The Cox view was that such agreements should be treated as contracts conferring rights as between the employer and each individual employee.[639] My view, to the contrary, is that they are not contracts at all. The absence of a grievance procedure seems to me to denote not a lack of union concern with compliance by the employer such as to justify individual enforcement but a retention in the union of the power both to determine such questions and to decide when concerted action should be undertaken to enforce its decision. Proposition 1 seems, therefore, to be fully applicable to the trade agreement. The terms of the agreement may, of course, provide a usable standard for recovery in quantum meruit for work performed but there should be no enforcement of any executory obligations.

The remaining propositions are simply inapplicable because of the absence of a grievance procedure in the usual sense. A union's failure to properly protect the interests of its members by enforcing its own rules may be remediable in a suit against the union based on a contractual relationship created by membership but, as already indicated,[640] this is not part of the duty of fair representation here discussed.

2. *Hybrid Arrangements*

In some cases union rule-making exists concurrently with a system of relationships of the industrial type. This rule-making is usually illicit and surreptitious, as in the case of restrictions on output, but it sometimes can develop into a more formalized and open arrangement. *Scofield v. NLRB*[641] involved such a situation. A union opposed to a system of incentive pay based on piece work but unable to resist it through the collective bargaining process countered by an informal agreement among the members establishing a ceiling on the production which the members would turn in for pay. With the passage of time, this limitation became formalized and embodied in an explicit union rule. Eventually this rule was brought into the collective bargaining sphere: as the piece work rates were changed in the collective bargaining agreement, the employer bargained with the union for comparable

638. BULL. 1425-1, *supra* note 326, at 2, 5.
639. Cox, *supra* note 273, at 652-56.
640. *See* text accompanying notes 684-86 *infra*.
641. 394 U.S. 423 (1969).

changes in the union-imposed ceiling and, in return for agreement on such changes, cooperated with the union in enforcing compliance with it. A practice which originated in a successful attempt by the union to establish a unilateral rule thus became a negotiated rule, but subject to enforcement by the union's internal processes. What has been said with respect to the trade agreement applies to the enforcement of such a rule, and as well to the rules of other unions, such as the International Typographical Union, in those contracts in which a portion of the rules governing the employment relationship are subject to the grievance and arbitration procedure and a portion is reserved to union control.

3. *Union Security Provisions*

A much more common form of union rule-making and administration in the context of an industrial agreement is a union shop or maintenance of membership provision which requires a covered employee to remain in good standing with the union as a condition of employment. The employer enforces the provision by discharging a noncomplying employee but the determination of whether the employee has maintained his membership in good standing is made by the union in accordance with its own rules and procedures.

Disputes arising under these provisions can present a variety of problems since there are at least three possible sources for the applicable rule: 1) the collective agreement, which sets forth the employer's obligation, 2) the union's constitution and by-laws, which determine when a member has lost good standing, and 3) the federal statutes which strictly limit the right of an employer to discharge for nonmembership and the right of the union to cause such discharge.[642] For each of these there is a separate adjudicatory body: an arbitrator for disputes as to the meaning and proper application of the agreement,

642. Section 8(a)(3) of the National Labor Relations Act makes it an unfair labor practice for an employer to discriminate against an employee for nonmembership in a labor organization, but exempts union security agreements meeting certain specific requirements. It prohibits the discharge of an employee for nonmembership, even under permitted agreements, if the employer has reasonable grounds for believing that membership was denied or terminated for any reason other than the failure of the employee to tender the dues and initiation fees uniformly required by the union. 29 U.S.C. § 158(a)(3) (1970). Section 8(b)(2) makes it an unfair labor practice for a union to cause the employer to violate Section 8(a)(3). 29 U.S.C. § 158(b)(2) (1970). The Railway Labor Act, in section 2 (Eleventh), permits union security agreements subject to substantially the same limitations as an exception to the prohibition in section 2 (Fourth) against employer influence or coercion to induce union membership. 45 U.S.C. § 152 (1970). In addition, there are the possible state law restrictions on union security arrangements expressly permitted by section 14(b) of the National Labor Relations Act. 29 U.S.C. § 164(b) (1970).

internal union procedures for disputes as to the proper application of its constitution and by-laws, with possible review in the state courts, and the National Labor Relations Board and the federal courts for disputes as to the meaning and application of the statutory limitations. A dispute in any of these forums may involve interpretation and application of all three standards.[643]

Of particular interest in the present context is the case in which an employee, who has been discharged at the union's request pursuant to a union security provision, contends that under union law, properly construed, he had not lost good standing and that the union's request and the consequent employer action were therefore improper. In such a case there is no dispute between the union and the employer as to the proper interpretation of the collective agreement or, indeed, as to anything else. The dispute is between the union and the employee. If the collective agreement is regarded as establishing a contractual relationship between employer and employee the discharged employee may have a claim against the employer under the agreement, since it necessarily incorporates the union's rules as to loss of membership. Under the views here expressed no such claim could be made: the employee's right can be asserted only against the union and his claim must rest directly on the union's constitution and by-laws.

The matter is complicated by the statutory restrictions on the enforcement of union security provisions. The National Labor Relations Board will find a discharge for failure to maintain union membership to be an unfair labor practice even if based on the only statutorily permissible ground—failure to pay dues—if it is not in accordance with the terms of a valid collective agreement and the union's internal law.[644] Accordingly, a preemption issue is raised if a state court seeks to review the union's determination that the discharged employee had lost good standing under its internal law. In *Motor Coach Employees v. Lockridge*,[645] the Supreme Court held that the Board's jurisdiction is ex-

643. *See, e.g.*, Goodyear Eng'r Corp., 24 Lab. Arb. 360 (1955) (C. Warns, Jr., Arbitrator); S.S. White Dental Mfg. Co., 26 Lab. Arb. 428 (1956) (H. Gamser, Arbitrator). Sometimes the same dispute will be heard in two forums. In International Harvester Co., 138 N.L.R.B. 923, *aff'd sub nom*, Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964), the arbitrator enforced a union security provision in a way which he believed consistent with the Indiana "right to work" law. The penalized employee filed unfair labor practice charges claiming that the action violated the Indiana law and, hence, the National Labor Relations Act. The Labor Board dismissed the complaint on the ground that an arbitrator's award should be deferred to!

644. Borg-Warner Corp., 44 N.L.R.B. 105 (1942) (no contract); Krambo Food Stores, 114 N.L.R.B. 241 (1955), *enf'd sub nom.* NLRB v. Allied Independent Union, 238 F.2d 120 (7th Cir. 1956) (union constitution); NLRB v. Leece-Neville Co., 330 F.2d 242 (6th Cir. 1964), *cert. denied*, 379 U.S. 819 (1964) (union by-laws).

645. 403 U.S. 274 (1971).

clusive if the employee's complaint relates primarily to his loss of employment. It had earlier held, in *Machinists v. Gonzales*,[646] that where the primary relief sought is restoration of membership, the state courts could exercise their normal jurisdiction to determine whether the union had breached its contract with its members. *Lockridge* must be mentioned in the present context because in the Supreme Court, although not in the courts below, the plaintiff contended that the Board's jurisdiction was not exclusive since his complaint was one for breach of the duty of fair representation and therefore came within the rule of *Vaca v. Sipes* permitting judicial action under section 301 even though the conduct complained of was also an unfair labor practice. The Court rejected the contention, saying that *Vaca* required the plaintiff "to adduce substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives."[647]

On the analysis here, the conclusion was correct but the reasoning in error. The duty of fair representation involved in *Vaca* is a duty owed by the union to make fair decisions as to whether to press its contractual right to process claims against the employer over disputed questions of interpretation and application of the jointly agreed upon rules. The union shop provision in *Lockridge* represented employer acquiescence in union rules and the dispute was determinable not by resolving a question of the proper interpretation of the collective agreement but by reference to the union's constitution and by-laws. Claims that the union has improperly applied its internal rules may be adjudicable under a variety of standards, but, as has been indicated with respect to the trade agreement, this is not part of the duty of fair representation imposed by section 9 of the National Labor Relations Act. This was particularly clear in *Lockridge*, since it is hard to visualize a union duty to prosecute a complaint against action taken by the employer only at the union's request and in accordance with the union's assertion as to the proper application of its own internal law.[648]

A similar problem has arisen under the Railway Labor Act and was correctly disposed of. In *Brady v. Trans World Airlines*,[649] the union caused the discharge of the plaintiff under a union shop provision for failure to pay dues. Claiming that he had, in fact, paid his

646. 356 U.S. 617 (1958).

647. 403 U.S. at 301.

648. It is possible to visualize an employee grievance which the union would have a duty to prosecute arising under a union security clause. Suppose that an employer has improperly refused to discharge an employee under such a clause and, as a result, another employee is laid off who would otherwise have been retained. The second employee may have a valid grievance. Black, Sivalls & Bryson, 42 Lab. Arb. 988 (1964) (B. Abernathy, Arbitrator).

649. 401 F.2d 87 (3d Cir. 1968) *cert. denied* 393 U.S. 1048 (1969).

dues (but not a reinstatement fee demanded by the union) the plaintiff appealed to the System Board of Adjustment established under the agreement. It found the discharge proper. He then brought suit against both the union and the employer. They contended that the Adjustment Board decision barred the suit. The court of appeals rejected the contention, holding that the Board was without jurisdiction to adjudicate disputes between a union and its members as to the proper construction of its internal law. It went on to sustain a judgment against both defendants on the ground that a discharge for failure to pay a reinstatement fee violated the provisions of section 2 (Fourth) and (Eleventh) of the Railway Labor Act.[650]

4. Bilateral Grievance Procedures

The usual grievance procedure can be initiated by an employee or the union, but not by the employer. This reflects the essential characteristic of the collective bargaining relationship under the industrial type of agreement: the acceptance of the principle of management authority to direct the working forces in accordance with its conception of the applicable rules. There are exceptions to this principle, largely in industries where there is strong and militant union organization. The best example is provided by the longshore industry. In this mixed model there is a no-strike provision, but the employees or the union retain the right, in some aspects of the employment relationship, to determine in the first instance whether management has correctly applied the rules specified in the collective agreement. Their action is, in turn, subject to the joint grievance procedure and to arbitration by a neutral. Similarly, longshoremen are not discharged initially by the employer, but are "deregistered" which disqualifies them from employment through the jointly administered hiring hall.[651] Where such a relationship exists, the grievance procedure cannot be limited to union or employee grievances, but must be bilateral, since the union, or the employees, retain the right to act in accordance with their interpretation of the agreement. Either party may invoke arbitration and the arbitrator's decision, unlike that in the more typical industrial model, may be directed at the conduct of either. In order to avoid lengthy interrup-

650. The court denied Brady's claim that the union had discriminatorily applied its rules to him, which it confused with a claim for breach of the duty of fair representation, because he had not exhausted the union's internal appellate procedures. The disposition was proper precisely because the claim was not one for breach of the duty of fair representation but was a claim of improper administration of the union's own rules. *Cf.* Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(4) (1970).

651. *See, e.g.*, Local 13, ILWU v. Pacific Maritime Ass'n, 441 F.2d 1061 (9th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972).

tions of work while adjudication is pending, provision is often made for "quickie" arbitration so that a dispute may be resolved on the spot.[652]

The existence of bilateral arbitration in such agreements does not, I believe, require any change in the propositions suggested for the usual agreement except for the inclusion in Proposition 2 of a union duty to comply with the adjudicatory mechanism and to abide by the results thereof. This inclusion, however, requires that certain careful distinctions be drawn. If, for example, a union directs its members not to work a particular schedule in the good faith belief that it is contractually improper, that action is not a strike in the conventional sense of a withholding of all labor as a weapon to induce concession on a disputed point. It is rather the exercise of the employees' privilege of working only in accordance with their view of the rules. Nor, is the action of the employees insubordination. The employer's remedy is to file a grievance. If he does so, the union is obliged to arbitrate. If the arbitration sustains the employer and directs the employees to work as scheduled, that award may be confirmed by a court and the union can be enjoined from directing the employees not to work. A refusal to comply with such an order, however, is not necessarily a strike either.[653] This was the situation presented in *International Longshoremen's Association v. Philadelphia Marine Trade Association*;[654] the failure to distinguish explicitly between an order directing compliance with the arbitrator's award on the scheduling issue and one enjoining a strike led to the confusion in that case and the reversal of the contempt citations.

The same kind of problem was presented in *Drake Bakeries*.[655] The union's view there was that the collective bargaining agreement, properly construed, did not require work on the Saturdays after Christmas and New Year's. Accordingly, when the employer scheduled such work the union advised its members not to comply. The employer brought suit for damages, claiming a breach of the no-strike clause, and the union moved to stay the action on the ground that the dispute was subject to arbitration. In connection with Proposition 2 it was argued that a damage suit is not, in the usual industrial model, one to which the presumption of arbitrability applies, and that arbitration should be ordered, as an alternative to litigation, only if the parties

652. *See* Fairley, *Area Arbitration in the West Coast Longshore Industry*, 22 LAB. L.J. 566 (1971); New Orleans S.S. Ass'n v. Local 1418, ILA, 389 F.2d 369, 370 (5th Cir. 1968), *cert. denied*, 393 U.S. 828 (1968).

653. Nor is a refusal by an employer to comply with an arbitrator's award necessarily a lockout.

654. 389 U.S. 64 (1967).

655. Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. 254 (1962); *see* text accompanying notes 255-64 *supra*.

have clearly indicated their intention to make a damage claim arbitrable. There was no such indication in *Drake*, but the Court found the dispute an arbitrable one because the grievance procedure was open to employer grievances.

If my view of the usual reason for the existence of provisions for employer grievances is correct, such a provision is irrelevant to the question of whether a damage claim for breach of the no-strike promise is subject to arbitration. The Court's decision in *Drake Bakeries* was nevertheless correct, although for the wrong reason. The questions at issue in the dispute—whether the rules embodied in the agreement permitted the particular scheduling involved and whether they permitted the employees to disobey an allegedly improper order—were precisely the kinds of issues of interpretation and application intended to be resolved by bilateral arbitration provisions. Suppose, however, that under that same agreement the employer's claim was for damages because the union had called a strike to procure a change, let us say, in the wage rates specified in the agreement. That claim should not be held to be arbitrable unless the parties had indicated, in some way other than by providing for employer grievances, that they intended claims for damages for breach of the promise not to strike to be subject to arbitration.

5. *Benefit Agreements*

There are a substantial number of agreements between unions and employers which do not conform at all to our model and to which the suggested propositions may not be applicable. These are agreements covering such fringe benefits as pensions, insurance and supplemental unemployment benefits, usually made simultaneously with, but independent of, the basic collective bargaining agreements. These agreements sometimes contain grievance and arbitration procedures. Where arbitration is provided it is often under a separate procedure, and the subject matter is therefore excluded from the arbitration of grievances under the labor agreement.[656]

These fringe benefit agreements must be carefully separated from collective agreements of the kind discussed in this Article. They do not represent an understanding as to the rules governing the work place, but instead normally involve the payment of fixed amounts of money dependent not on the nature of the employee's work performance but on such exterior factors as disability or unemployment or old

656. *See* U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 1425-12, ADMINISTRATION OF NEGOTIATED PENSION, HEALTH, AND INSURANCE PLANS at 11, 30, 40 (1970).

age. They may often involve third parties, such as insurance companies or pension trusts. Agreements of this character should be treated as third-party beneficiary contracts vesting rights in the individual employees, since arbitration, where provided, is a substitute for adjudication by the courts and the considerations argued in this Article are largely inapplicable. The authority of the union to act and bind individual employees in disputes arising under these supplementary agreements presents real problems, particularly where businesses terminate operations and decisions must be made as to the allocation of limited pension funds,[657] but those problems are outside the scope of this Article.

6. *Joint Committee Procedures*

There is one variant of the usual grievance procedure which occurs frequently enough to warrant separate description and which, I believe, has been improperly treated by the Supreme Court. Where there are a number of employers bargaining through an association, it may be provided that a grievance that is not settled with the individual employer can be referred to a joint committee consisting of representatives of the employer group and of the signatory union or unions. The agreements of the International Brotherhood of Teamsters establish a whole hierarchy of these joint committees at the local, state, area, and, most recently, national levels. If the employer and union representatives on a committee agree, the settlement reached is said to be "final and binding." If they are deadlocked, the case is referred to the joint committee at the next higher level. In at least the steps above the first one the employer and the particular local involved in the grievance do not participate in the deliberations of the committees but instead appear as advocates of their respective positions. At the national level the procedure resembles in some ways the railroad procedure under which a grievance not settled between the carrier and the union may be taken to the National Railroad Adjustment Board composed of representatives designated by the carriers and by the railroad unions "national in scope."[658]

The Supreme Court, in *Truck Drivers v. Riss & Co.*[659] and *Humphrey v. Moore*,[660] treated these joint committees in many respects as if they were boards of arbitration, just as it has, in general, treated the

657. *See, e.g.*, Hauser v. Farwell, Ozmun, Kirk & Co., 299 F. Supp. 387 (D. Minn. 1969); Union Central Life Ins. Co. v. Hamilton Steel Prods., Inc., 448 F.2d 501 (7th Cir. 1971).

658. Railway Labor Act § 3, First (a), 45 U.S.C. § 153 (1970).

659. *See* text accompanying notes 165 *supra.*

660. *See* text accompanying notes 163-68 *supra.*

Adjustment Board. Most of the lower courts, and the National Labor Relations Board, have uncritically accepted joint committee decisions as arbitration awards.[661] This treatment seems wrong in principle. However great the separation between the particular employer involved and the employer representatives on the joint committee they are still employer representatives. There certainly should be no doubt that the Teamsters Union representatives who sit on the joint committees are representatives of the union, not neutrals. A decision by a joint committee that a grievance lacks merit, which has been analogized to an arbitrator's award, is thus simply an agreement by the union that management did not violate the agreement. If the union disagrees and the committee is deadlocked, the case may be appealed to the next higher committee. If it is not, management's decision stands. The system thus greatly resembles the usual grievance procedure in multiplant companies under which unsettled grievances appealed by the union are reviewed by representatives of the union and the company, sometimes meeting as committees, at successive levels, and "decisions" are made as to whether a grievance should be dropped, settled or appealed further. There is a difference, of course. In the typical grievance procedure, the appeal is to a higher level in a single bureaucratic structure; under the joint committee system the appeal is to a body representative of a multi-employer group, whose members may be entirely autonomous except for their association in collective bargaining. There can, therefore, sometimes be problems in securing compliance from a member of the group that does not accept the resolution of the dispute by a joint committee,[662] problems that normally do not arise within the structure of a single management. But these problems are unrelated to any status which the agreed-upon resolution may have as an arbitration award and are no different than those encountered in securing concurrence by recalcitrant members with collective bargaining agreements negotiated by employer associations.

661. *See, e.g.*, Steinman v. Spector Freight Sys., 441 F.2d 599 (2d Cir. 1971); Local 208, Local Freight Drivers v. Braswell Motor Freight Lines, 422 F.2d 109 (9th Cir. 1970); Teamsters Local Unions v. Braswell Motor Freight Lines, 392 F.2d 1 (5th Cir. 1968), *modified*, 395 F.2d 655 (5th Cir. 1968). Some courts have given joint committee decisions a more qualified acceptance. Safely v. Time Freight, Inc., 307 F. Supp. 319 (W.D. Va. 1969), *aff'd*, 424 F.2d 1367 (4th Cir. 1970); Fuller v. Local 107, Truck Drivers, 428 F.2d 503 (3d Cir. 1970). The Labor Board, on the other hand, has gone all the way and will dismiss an 8(a)(3) complaint in deference to the "arbitral determinations" of the National Grievauce Committee established by the National Master Freight Agreement. McLean Trucking Co., 202 N.L.R.B. No. 102, 82 L.R.R.M. 16 (1973).

662. *See, e.g.*, Local Union 24, IBEW v. Wm. C. Bloom & Co., 242 F. Supp. 421 (D. Md. 1965) and the cases involving Braswell Motor Freight Lines cited in note 661 *supra*.

Decisions by joint committees are therefore appropriately treated, as Mr. Justice Goldberg reasoned in *Humphrey*,[663] as agreements of the parties, not arbitration awards. The accuracy of that classification is emphasized by the fact that in most Teamster agreements the failure to agree at the highest committee level does not result in arbitration by a neutral but the right to strike. It therefore seems odd, to say the least, to regard the decisions in cases in which they do agree as arbitration awards.

Treating decisions by joint committees as settlements made in the grievance procedure rather than as arbitration awards has at least two consequences. First, a decision is not subject to even the limited review for action in excess of jurisdiction to which arbitration awards are subject under *Enterprise*. Second, insofar as an individual's claim is concerned, a decision of a joint committee that his grievance lacks merit should bind him just as much, but no more, than a decision reached at the third or fourth step of a grievance procedure that the grievance should be abandoned, *i.e.*, settled on the basis of the company's answer at that step.

7. *Adjustment Boards*

This leads directly to consideration of the machinery provided by the Railway Labor Act for the settlement of grievances, or as they are termed under that Act, "minor disputes."[664] The relationships under the Railway Labor Act conform to the general industrial model, and all of the propositions here expressed, with appropriate changes in terminology, are applicable to the agreements and relationships established under it, with one possible exception.[665] That exception relates to the nature of the arbitration machinery.

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663. Humphrey v. Moore, 375 U.S. 335, 351-55 (1964), set out in text accompanying notes 163-68 *supra*.

664. *See* Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723 (1945).

665. There is another exception which should be noted, but which is irrelevant to the present discussion. Industrial agreements were classified into "open" and "closed" agreements, depending upon the scope of the prohibition against strikes [*see* text accompanying notes 407-10 *supra*]. Railroad agreements are "closed" by statute, subject to being opened by the filing of section 6 notices. Under a closed agreement which contains a limited arbitration clause, the usual assumption as to management's rights leaves an area in which, during the term of the agreement, management can act without lawful recourse by the employees. The extent to which implied limitations and past practices can be used to fill this area is subject to much controversy. Not so on the railroads; there the closure is clearly reciprocal. The status quo provisions have been construed "to prevent the union from striking and management from doing anything that would justify a strike." Detroit & T. Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 150 (1969). When management seeks to change "actual objective working conditions" [*id.* at 143] not covered by the rules the union can, by filing a section 6 notice of a desire to change the rules to

Under the Act, minor disputes not settled on the property are referrable, at the instance of the union, the employer or, since *Burley*,[666] the individual grievant, to the National Railroad Adjustment Board. That Board consists of an equal number of representatives of the carriers and the so-called standard railway labor organizations. The Board is separated into four divisions, each having jurisdiction over grievances of specified classes of employees and each composed of an equal number of carrier and union representatives. If a division deadlocks on the disposition of a case, a neutral is appointed,[667] either by the labor and management members of the division or by the National Mediation Board. Alternatively, the particular carrier and union may agree to establish standing system boards of adjustment, consisting usually of two representatives of the parties with a comparable provision for appointment of a neutral in the case of deadlock. A third option is a special board of adjustment, usually consisting of a single representative of the carrier, the union, and a neutral, established to deal with a specified docket of unresolved disputes. Under the 1966 amendments either party may require that a special board (termed a "PL Board") be established to dispose of a dispute pending before the National Board for more than a year.[668] With respect to airlines there is no National Board, but the agreements between each carrier and union, in accordance with the statutory mandate, provide for system boards of adjustment to deal with disputes arising under them.

In terms of the analysis of this Article, these various adjustment boards can be regarded as fulfilling the same function as arbitration before a neutral in cases in which the union representatives support the grievance, the carrier representatives oppose it, and the matter is therefore resolved by the neutral. But in those cases in which there is agreement between the partisan representatives, particularly where the case has been referred to the board by an employee rather than a union, they constitute analytically the functional equivalent of the last step in the grievance procedure prior to arbitration in other systems. This is clearly true with respect to system and special boards, where the contracting union and employer also name the partisan representatives. For the same reasons given in connection with the joint committee arrangements under Teamster agreements, I believe that it should also be

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prohibit the proposed action, require that the status quo be maintained until the almost interminable procedures under the Act have been concluded. At that point if agreement is not reached, management can act and the union can strike.

666. Elgiu, J. & E. Ry. v. Burley, 325 U.S. 711, 734-36 (1945) discussed in text accompanying notes 87-93 *supra*.

667. 45 U.S.C. § 153 First (*l*)(1970).

668. 45 U.S.C. § 153 Second, as amended by Act of June 20, 1966, Pub. L. No. 89-456 (1970).

considered true with respect to the National Board, although the members of the Board are not appointed by the parties to a particular dispute.

The Supreme Court has never quite made up its mind on the subject. It has not distinguished between decisions of the National Board reached with neutral participation and those reached by majority vote of the partisan representatives. Rather, the Court has varied its treatment of the Board on the basis of the nature of the claim made. Except where individual claims are involved, it has tended to treat the Board as a single entity fully equivalent to an arbitration tribunal.[669] However, where individual claims of the kind discussed in Propositions 3-6 are made, the Court has tended to disregard the National Board's function in interpreting and applying the collective agreement and to treat the dispute as one solely between the aggrieved employee and the union. Indeed, there is language in *Conley v. Gibson*[670] indicating that the Board would have no jurisdiction to hear claims of employees under the agreement if it were also claimed that the union discriminated against them in failing to present those claims. For the reasons already given with respect to other agreements this approach seems to me erroneous since it leads to the result that questions of interpretation and application can be decided either by the courts or by the Board depending on the identity of the claimant.

The solution which I have urged with respect to other agreements would, if carried over to agreements under the Railway Labor Act, require resort to adjustment board procedures in all cases, but would treat any decision of a board without reference to a neutral as a resolution of the dispute by representatives of the employer and the union. Where the decision of a board is reached as a result of a breach of the union's duty of fair representation to the grievant, the courts should require reference to a neutral appointed by the National Mediation Board. A judicial order directing such action could contain precisely the same protections for the individual employee and the employer with respect to retroactive liability that I have suggested in Proposition 6.

Implementation of this solution would, I concede, require considerable stretching of the language of the statute, which treats deci-

669. This treatment undoubtedly reached its high point in Transportation-Communication Employees Union v. Union Pac. R.R., 385 U.S. 157 (1966), where the Court held that the Board could not decide a claim by one union that a carrier had violated the agreement with it by assigning work to members of another union unless the other union were made a party and the jurisdictional dispute involved in the contractual controversy were settled. The havoc potentially created by this holding when considered in light of the actual structure of the Board, which may include representatives of one or both of the disputing unions is devastatingly demonstrated in Kroner, *Judicial Review of System Board Awards Under The Railway Labor Act: Some Problems and Opinions*, 35 J. AIR L. & COM. 358, 364 (1969).

670. 355 U.S. 41, discussed in text accompanying notes 113-21 *supra*.

sions of the National Board as final and binding without any distinction based on participation of a neutral referee.[671] It would also require considerable modification of the procedures of the National Board which, at least in the First Division, do not permit presentations to be made to the neutral other than by the carrier and union representatives on the Board.[672] But given the judicial legislation already engaged in by the Court both under section 301 and the Railway Labor Act, the task would not be insuperable. The procedures of special and system boards of adjustment would require less revision since those boards operate very much like tri-partite arbitration tribunals in any case.[673] Indeed, there have been airlines cases where, at the request of individual grievants whose interests may be adverse to the union's, the parties have simply omitted the adjustment board procedure and treated the neutral as a sole arbitrator.[674]

Perhaps the best solution, given the infirmities of the National Adjustment Board procedure in other respects, would be for Congress to adopt the proposals made by such diverse persons as the late Jack Kroner[675] and President Nixon[676] that the National Board be abolished and the provisions of section 301 made applicable to industries subject to the Railway Labor Act.

8. *Limited Arbitration Provisions*

The final category of agreements requiring special consideration presents the greatest difficulties and serves, in a sense, to underline the essential characteristics of the propositions here advanced. This category consists of that minority of agreements in which the last step in the grievance procedure, as to some or all issues, is not arbitration but the right to strike. Arbitration by a neutral of disputes not settled in the grievance procedure, and a corresponding ban on strikes over

671. 45 U.S.C. § 153 First (m) (1970).

672. See the entertaining, if distressing, description of the process in Daugherty, *Arbitration by the National Railroad Adjustment Board,* in NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION TODAY, PROCEEDINGS OF EIGHTH ANNUAL MEETING 93, 106 (1955).

673. Kroner, *supra* note 669, at 359; Hill, *Looking Back at Airline Grievance Procedures and System Boards: A Critical Appraisal,* 35 J. AIR L. & COM. 338, 348 (1969).

674. Hill, *supra* note 673, at 356.

675. Kroner, *supra* note 669, at 372.

676. Presidential Message of Feb. 3, 1971, 117 Cong. Rec. 1536 (Feb. 3, 1971). The proposed "Emergency Public Interest Protection Act of 1971" would have phased out the various adjustment boards over a two-year period and added to the Railway Labor Act a section 401 identical to section 301 of the Labor-Management Relations Act except for an additional sub-section making the Norris LaGuardia Act inapplicable. S. 560, 92 Cong., 1st Sess. (1971). See the explanatory statement at 117 CONG. REC. 1543 (Feb. 3, 1971).

grievances, is central to the conception of the industrial collective agreement I have advanced. There is therefore a serious question as to whether legal rules based on this characteristic should be applied where it does not exist.

There are several forms of agreement permitting strikes after exhaustion of the grievance procedure. Some have already been mentioned.[677] The agreements in the automobile industry exclude grievances over specific issues, such as production standards, from the arbitrator's jurisdiction and permit strikes after such grievances have been processed through all of the steps prior to arbitration.[678] Somewhat different is the form, typified by the Alcoa agreement,[679] in which the grievance procedure is available in any matter relating to wages, hours and working conditions, but arbitration is limited to alleged violations of the agreement, with a right to strike after exhaustion of the grievance procedure over any matter not subject to arbitration. The current agreements of the General Electric Company contain a complex categorization of arbitrable and nonarbitrable issues, coupled with a provision for judicial review of arbitrability in every case where it is disputed, and the right to strike if a dispute is not arbitrated.[680]

A broad right to strike was represented in the Supreme Court's first encounter with section 301, the *Westinghouse* case.[681] Under the agreement there, no grievance was subject to arbitration except by mutual agreement. Failing agreement to arbitrate, the union had the right to strike over any dispute within the scope of the grievance procedure.[682] The dispute before the Court involved deductions from the monthly salary of employees which the union claimed were in violation of the agreement. The question was whether the union, having the right to strike over such grievances when they were not resolved in the grievance procedure, could instead bring suit on behalf of the employees.

Agreements of the kind involved in *Westinghouse* are relatively rare today.[683] Their greatest incidence is in the trucking industry.

677. *See* text accompanying notes 404-07, 507-09 *supra.*

678. Agreement between General Motors Corp. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (exp. 1973) Para. 46.

679. Agreement between Aluminum Co. of America and International Union, United Steelworkers of America (exp. 1974) Article XV.

680. Agreement between General Electric and IUE (exp. 1973) Art. XV.

681. Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955).

682. *Id.*, Record at 32-35.

683. The Bureau of Labor Statistics found 97 agreements out of the 1,717 examined in 1966 which either had no arbitration provision or required mutual consent for arbitration. BULL. 1425-6, *supra* note 350, 388.

Under the motor freight agreements of the International Brotherhood of Teamsters covering most areas of the country there is a prohibition against strikes before exhausting the grievance procedure but no provision for arbitration.[684] The National Master Freight Agreement makes "null and void" any provision in the supplemental agreements covering separate segments of the industry which require arbitration of deadlocked disputes[685] and says that if a dispute is deadlocked at the highest joint committee level, "either party shall be entitled to all lawful economic recourse."[686] Sometimes agreements of this kind specify that the employer's decision at the last step shall be "final and binding" unless the union strikes within a specified time.[687] In others without an explicit time limit, such as the National Master Freight Agreement, it is implicit that in the absence of agreement the employer's decision stands.

There are three possible methods of dealing with subjects excluded from arbitration under these agreements. The first is to regard the collective agreement as a source of individual employee contractual rights, on any of the theories customarily advanced, thus rejecting Proposition 1 and permitting suit to be brought by individuals after exhaustion of whatever preliminary procedures are provided in the agreement. Propositions 3-6 dealing with the union's duty of fair representation would then be irrelevant. This was essentially the theory adopted by the individual opinions comprising the majority in *Westinghouse* as a premise for the conclusion that such rights were not cognizable in a union suit under section 301 and could be enforced only in the state courts. *Smith v. Evening News Association*,[688] an individual suit, reversed the jurisdictional conclusion but left open the question of whether employees have contractual rights under a collective agreement in the absence of an arbitration provision. *Humphrey v. Moore*[689] implicitly accepted the right of individual employees to sue on the contract and seemed to answer affirmatively the question left open in *Smith*.

The second possibility, whether or not Proposition 1 is accepted,

684. *See, e.g.*, Central States Area Over-The-Road Supplemental Agreement (exp. 1973) Art. 45.

685. Master Freight National Agreement (exp. 1973) Art. 8(a)(2).

686. *Id.* Art. 8(c). Arbitration of discharge cases, when provided in supplemental agreements, is exempt from the "null and void" provision. The "open-end" grievance procedure originated in the Central States Area and was expanded by Hoffa to other areas, displacing previous arrangements, notably in the Western States Area, in which there had been a permanent arbitrator. R. JAMES & E. JAMES, HOFFA AND THE TEAMSTERS, 167-170 (1965).

687. *See, e.g.*, Haynes v. U.S. Pipe & Foundry Co., 362 F.2d 414, 415 (5th Cir. 1966).

688. 371 U.S. 195 (1962) discussed in text accompanying notes 146-58 *supra*.

689. 375 U.S. 335 (1964) discussed in text accompanying notes 163-68 *supra*.

is to regard the agreement as permitting a union suit, such as *Westinghouse*, on a claim that the employer has violated the rules, either expressed or implied, on the theory that there is at least a contractual obligation to the union. This is what the court did in *UAW v. Hoosier Cardinal Co.*[690] without considering the availability of either the grievance procedure or the right to strike, thereby confirming the demise of *Westinghouse*. In this approach, Propositions 3-6, dealing with the remedies available to an individual employee denied fair representation would remain applicable, modified only by substituting the union suit, after exhaustion of the grievance procedure, for use of the agreement's arbitration procedures. This would involve, of course, considerable simplification in procedure and remedy. The individual suit would be the functional equivalent of a minority shareholder's derivative action, subject only to the threshold requirement that a breach of the duty of fair representation be shown.

The third solution is to take the parties at their word and adopt, as to subjects excluded from arbitration but over which the right to strike is retained, the rule set forth by the Privy Council in *Young v. Canadian Northern Railway*:

> If an employer refused to observe the rules, the effective sequel would be, not an action by any employee, not even an action by Division No. 4 [the union] against the employer for specific performance or damages, but the calling of a strike until the grievance was remedied.[691]

On this view, no change would be required in any of the legal propositions which have been advanced with respect to the more usual form of industrial agreement, but Propositions 2-6 would not apply to disputes as to which arbitration is not required but the union retains the right to strike.[692]

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690. 383 U.S. 696 (1966) discussed in text accompanying notes 187-92 *supra*. For a recent application of this solution see Local 783, Allied Indust. Workers v. Geueral Elec. Co., 471 F.2d 751 (6th Cir. 1973). The court held that a union suing on a collective agreement to enjoin the transfer of equipment to another plant, and for damages, was entitled to a jury trial and that evidence as to negotiation discussion and past practice at the plant was inadmissable because the collective agreement was unambiguous! It is fair to assume that the agreement, like other General Electric agreements, required that the union claim be processed as a grievance, did not require arbitration, and permitted a strike after exhaustion of the procedure.

691. [1931] A.C. 83, 89 (P.C. 1930) (Man.). To the suggestion that the union was unlikely to strike on the plaintiff's behalf because he was a member of a rival labor organization, their Lordships responded that "the moral thereby pointed would appear to be that in the case of an 'open' shop, the protection which an agreement . . . affords to a workman who is not a member of the contracting labour organization, is to be measured by the willingness of that body to enforce it on his behalf." *Id.* at 89-90. Compare the discussion in text accompanying notes 695-701 *infra*.

692. There is one consequence of this view which should be specially noted. I have earlier argued [*see* text accompanying notes 503-19 & 535-38 *supra*] that the

Of the three possibilities, the first seems plainly unacceptable. It would permit suit by an individual, whether or not concurred in by the union and whether or not the union, in failing to sue or to strike, had breached its duty of fair representation. It would subject the courts to claims made on diverse theories by individual employees on issues the parties are unwilling to trust to arbitration without the protection which the arbitrator has of at least a preliminary screening by the union. The premise of the *Westinghouse* decision was therefore clearly in error. Insofar as *Smith v. Evening News Association* can be regarded as permitting individual suit where there is no arbitration provision but a right to strike, it was also wrongly decided. If it is assumed, as the Court seemed to, that there was in *Smith* neither a grievance and arbitration procedure nor a right to strike, the case is an oddity and the result should be ignored in other contexts, because it is simply inapplicable to any of the normal types of industrial collective agreement.[693]

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principles of the Steelworkers' trilogy and the comparable Railway Labor Act cases are properly rested not on any policy favoring arbitration or any presumed expertise of arbitrators but on the nature of the obligations assumed by the parties in the usual form of collective agreement. The so-called presumption of arbitrability was thus treated as essentially a corollary of Propositions 1 and 2. This rationale is not applicable to agreements under which the union retains the right to strike over grievances not arbitrated. In those situations, a judicial decision that a grievance is not arbitrable is not a decision that management is free to act in the way complained of without possibility of recourse by the union but that the parties have chosen to have the issue settled in economic conflict. There is no reason to presume one way or another on that issue. The policy favoring arbitration is, after all, grounded on the statutory provision favoring the settlement of disputes "by such methods as may be provided for in any applicable agreement. . . ." 29 U.S.C. § 171b (1970).

There is no governing Supreme Court decision. There are a number of lower court cases, involving General Electric or Westinghouse contracts, under which the union has the right to strike over any grievance not submitted to arbitration after it has been processed through the grievance procedure. *See, e.g.,* Agreement between General Electric Co. and I.U.E. (1960-63) Art. XIV. A few have adopted the view here expressed. *In re* Television and Radio Artists, 53 L.R.R.M. 2989 (Sup. Ct. N.Y. 1963); Westinghouse Salaried Employees Ass'n v. Westinghouse Electric Corp., 217 F. Supp. 622 (W.D. Pa. 1963). In most of the cases, however, the unions have succeeded in having the *Warrior & Gulf* principles applied. *See, e.g.,* Lodge 912, IAM v. General Electric Co., 236 F. Supp. 123 (S.D. Ohio 1964) and case cited therein; IUE v. General Electric Co., 221 F. Supp. 6, *aff'd.* 332 F.2d 485 (2d Cir. 1964), *cert. denied,* 379 U.S. 928 (1964); IUE v. General Electric Co., 322 F. Supp. 911, *aff'd.* 450 F.2d 1295 (2d Cir. 1971). As a result of *Boys Markets,* "arbitrability" under contracts in which the union can strike only over non-arbitrable issues becomes a two-edged sword. *See* note 537 *supra.*

693. The BLS found only 9 agreements covering 16,000 workers (out of a total of 7,438,000) which contained an absolute ban on strikes but not an arbitration provision. BULL. 1425-6, *supra* note 350, Table 8. The Labor Board has held that insistence by an employer on such an agreement is an unfair labor practice [*see* United Steelworkers AFL-CIO v. NLRB, 363 F.2d 272, 273 (1966), *cert. denied,* 385 U.S. 851 (1966)] but the Fifth Circuit has twice disagreed [NLRB v. Cummer-Graham Co., 279 F.2d 757 (5th Cir. 1960); Chevron Oil Co. v. NLRB, 442 F.2d 1067 (5th Cir. 1971)]. In my view, an agreement containing neither a provision for arbitration nor

The real choice is between the second and third solutions. If one looks solely at such exemptions from arbitration as are contained in the automobile contracts, the third solution is the obvious choice. By specifying that the grievance procedure terminates in the right to strike rather than adjudication before an arbitrator, the parties have clearly indicated that they do not want these issues adjudicated by anyone. The parties regard the issues as so vital, and the standards incorporated in their agreements so uncertain of application, as to require that resolution of disputes on the specified subjects remain open for the same kind of negotiation that takes place in the formation of an agreement. There seems to be no policy justification for imposing upon them adjudication by the courts. Similarly under agreements of the Alcoa type, there is no justification for permitting the union to bring suit on an implied obligation theory over matters, such as contracting out, which the parties have specified are not to be governed by the agreement at all.

The other typical cases of exemption from arbitration, however, bring in other values. The primary examples are the older Westinghouse salaried employees' and the Teamsters' contracts. As these exemplars indicate, agreements in which a broad range of subjects are excluded from arbitration, even though the rules are both express and sufficiently precise as to be reasonably adjudicable, are symptomatic in today's industrial context, although not in that of a generation ago, of a gross imbalance in economic strength. They tend to occur in industrial relationships in which either the union or the employer is confident that, in any contest resulting from the failure to arbitrate, it has such predominant strength that it will be able to make its views prevail. It is generally the weaker party in the relationship, the union in Westinghouse (and in General Electric as well) and the employers in the trucking industry, which seeks to broaden the arbitration provision and to substitute adjudication for the strike as a last step.[694]

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a right to strike so far departs from the normal understanding of what a collective bargaining agreement is that, except in the most extraordinary circumstances, insistence on such an agreement is tantamount to a refusal to enter into an agreement.

694. The *H. K. Porter* litigation provides a graphic example. In the first phase of the negotiations which ultimately led to the decision in H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970), the Labor Board held that the employer's insistence on an agreement permitting neither arbitration nor the right to strike constituted a refusal to bargain in good faith. The employer did not contest the Board's order beyond the trial examiner level and it was summarily enforced by the Fourth Circuit. On returning to the negotiation table, the employer promptly offered the strike alternative. *See* H. K. Porter, Inc., 153 N.L.R.B. 1370, 1371-72 (1965). That resolution was inevitable, given that the litigation occurred because the union was too weak to strike to get a contract. On the opposite side, the elimination of arbitration has become an instrument of Teamster power because strikes are dreaded by most trucking operators. R. JAMES & E. JAMES, *supra* note 686, at 168-71.

Here a national labor policy favoring arbitration of grievance disputes, unnecessarily used by the Court to justify its decisions in other contexts, would be truly applicable. If a union could sue to redress claims of employer breach when the parties have provided for a right to strike, presumably a similar suit for declaratory relief against the claim would be available to the employer The courts would thus in effect deny to the parties the right to establish rules to govern the employment relationship and exclude adjudication by outsiders as to the proper application of those rules. The necessary result, it may be reasonably assumed, would be that the parties would then opt for the alternative of adjudication by an arbitrator chosen by them and presumably more understanding of their needs, in place of adjudication by the courts. If it is true that the absence of arbitration represents an imbalance of economic strength, it could be argued that this consequence is desirable. To this consideration could be added also the observation that the provision of an alternative remedy would tend to eliminate the manipulation of the grievance settlement machinery for purposes totally unrelated to the merits which has been observed in the operation of the Teamster machinery.[695]

On principle, the preferred view would be to honor the intentions of the parties in the absence of a clearer showing than now exists that federal labor policy requires that arbitration be imposed, directly or indirectly, where it has not been agreed upon. Section 301 was, after all, enacted on the thesis that the parties should be required to honor their agreements. Where the parties have agreed, for whatever reason, that the ultimate recourse shall be a test of economic strength during the term of an agreement as well as at the periodic intervals when the agreement is open for renegotiation, it should require a clear showing that Congress intended to overrule that intention before a system of impartial adjudication, either judicial or arbitral, is imposed on parties who have shown that they do not desire it. On this view the result in *Westinghouse* was correct—although for reasons directly opposed to those given by the Court!

Although I believe that this is the correct solution, it should be recognized that it eliminates any substantial remedy for the improperly represented employee, as to whom I have argued the intentions of the parties need not necessarily be honored. In those cases in which the union, in breach of its duty, fails to file a grievance, or refuses to

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It is fair to predict on the basis of this analysis that one of the results of the strength demonstrated by the General Electric unions in the 1970 strike may be a reconsideration by the company of its previous opposition to a standard arbitration provision accompanied by a no-strike clause.

695. R. JAMES & E. JAMES, *supra* note 686, at 171-85.

process it fairly through the steps prior to its right to strike, such relief could be ordered in accordance with Propositions 3-6. But the likelihood that this remedy would be meaningful is small. It is improbable that the parties will agree to settle a grievance favorably to the employee if it is being processed only because of judicial compulsion.[696] In the absence of such a settlement, the only recourse would be the strike, and it is not likely that the union would strike under such circumstances. The only significant remedy for the unfairly represented employee would be to permit him to sue either the union or his employer once the process has been completed, and to permit recovery if he can show a breach of duty in not pursuing the strike weapon.[697] But, apart from the almost insuperable problem of proving this prerequisite, any judicial relief will inevitably require a judgment by the court that the grievance was a meritorious one, with precisely the consequences which I have argued should be avoided.

This result can be summarized by considering a hypothetical case. Assume a claim by an employee that his job has been improperly classified under the terms of the collective agreement and that he has therefore been underpaid. Assume further that questions of job classification are specifically excluded from arbitration but that the union retains the right to strike over such issues after processing a claim through the grievance procedure.[698] If the third solution is adopted no suit could

696. There is therefore an air of unreality in the complicated maneuverings reported in Steinman v. Spector Freight Sys. Inc., 441 F.2d 599 (2d Cir. 1971), in which the Labor Board, having found that an employee was unfairly represented before a Joint State Grievance Committee under a Teamster contract, directed the local union to request a rehearing before the committee.

697. It is conceptually possible to argue that a court should go further and order the union to strike just as it could order it to arbitrate, but this plainly would be nonsense. A strike not only involves the loss of income to all of those involved but also the potential loss of their jobs, their seniority, and, indeed, the bargaining rights of the union. Unions will sometimes undertake this kind of risk in order to enforce the claims of grievants. This is in fact what happened in United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960): The union could not reach a new agreement because of its insistence on arbitrating the cases of eleven discharged employees, went on strike and lost the strike, and its status as bargaining representative, although the grievants it was seeking to protect ultimately were reinstated as the result of the Supreme Court's decision. But not even the strongest advocates of individual rights in the grievance process would, I think, urge that such a result should be judicially compelled.

698. If the no-strike clause is absolute, the exclusion from arbitration is intended as a bar to adjudication by anyone as to the proper classification of a job and the basic propositions apply, *viz:* no suit can be brought directly on the claim, under Proposition 1. If arbitration is sought by the union and there is a claim, tenable or not, that the exclusion is inapplicable because, for example, all other employees on the same job were classified higher and the reason for the mis-classification in the grievant's case was that he was a black, arbitration should be ordered pursuant to the Steelworkers' trilogy and Proposition 2. If the union arbitratily refused to process the

be maintained by either an employee or the union if settlement was not reached in the procedure. If the union acted in bad faith, for example by refusing to process the grievance through the lower steps because the grievant was a black or a union dissident, such processing could be ordered. But if the union refused to strike after unsuccessfully processing the claim, there would be no relief because granting it would require that a court, which found such bad faith, then adjudicate the merits of the classification question.[699] Apart from the question of allocation of the damages for work previously performed, it would also have to decide whether to impose damages for the future upon the union or order the employer to reclassify the job permanently.

The case assumed is the easiest one for relief since it involves only pay. If we assume a grievant claiming loss of his job because it was contracted out, or the imposition of an intolerable work burden because of a production line speedup, the difficulties increase. And permitting suit by a misrepresented employee would open at least the possibility of deliberate use by the union of the suit as a device to obtain an adjudication on otherwise unadjudicable matters.[700]

The reason there is no satisfactory solution for the unfairly represented employee in this class of cases is that a collective agreement which excludes an issue from arbitration but permits the use of economic force to resolve it is, almost by hypothesis, not intended to provide a definitive standard for conduct but is rather a rough guide, the precise contours of which the parties themselves will decide as cases arise in light of their economic interests and their relative strength. Any scheme which permits the use of that standard as the basis for granting damages to an individual employee therefore is inherently self-contradictory, and would be even more unsatisfactory if it involved specific relief imposing the result on the parties for the future.

This is perhaps not true where all issues, including the payment of the agreed-upon wages, are nonarbitrable; such agreements reflect an imbalance in economic power not the absence of definitive standards. A perhaps possible answer, therefore, would be to adopt different solutions for the different types of agreements. Unless the agree-

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claim, it could be ordered to do so under the rules suggested in Propositions 3-6. The arbitrator in deciding the case would be barred by the exclusion from granting relief unless he found that an express or implied provision of the agreement forbidding discrimination had been violated.

699. Note that in this case, unlike the alternate hypothetical posed in the preceding footnote, the court would have to decide the question of proper classification *vel non* and could grant damages even if it did not find discrimination by the employer but simply an erroneous application of the agreement.

700. *Cf.* United Aircraft Corp. v. Canel Lodge No. 700, I.A.M., 77 L.R.R.M. 3167 (D. Conn. 1971).

ment is one which does not provide for arbitration at all, or provides it only for a narrow class of cases, thus providing no system for internal adjudication by a neutral as to the proper application of ascertainable standards, there would be no judicial remedy, even for an unfairly represented employee, as to strikeable issues. If the agreement is of that kind, however, a judicial remedy would be provided after the grievance procedure has been exhausted.[701] If it is available to the unfairly represented employee it must, however, be made available also to the well represented one, i.e., to the union. Otherwise a union too weak to strike, or not disposed to dissipate its members' resources, would be without a remedy for grievant unless it first violated its statutory duty to him.

The result would be the adoption of what I have described as the second solution, but for an extremely limited class of agreements. The law would, in effect, say to the parties, and particularly to employers: "if you do not provide for arbitration as a method alternative to the strike for resolving disputes over the proper application of your agreements, we will permit litigation, whether you like it or not." I emphasize the last phrase. Suits would be brought, assuming this solution, not on any theory that the parties intended the collective agreement to be an enforceable contract. By providing the strike as the terminal point in the grievance procedure they have clearly indicated that they do not so intend, whether or not they explicitly provide that the company's decision at the last step shall be "final and binding" unless the union strikes.[702] The law suit would be available, despite the intention of the parties, because its availability is essential to protect the statutory right of the employees to be fairly represented and, as well, because of the hostility to agreements not providing for grievance arbitration,

701. The distinction must be based on the character of the agreement not the particular grievance. The most frequent cases of breach of the duty of fair representation are discharge grievances, and the standard of "just cause," which is sometimes not even expressed, is hardly a definite standard.

702. *See, e.g.*, Haynes v. United States Pipe & Foundry Co., 362 F.2d 414 (5th Cir. 1966). This is the leading case in which the question was squarely faced. The court held that a discharged employee could not bring suit when the union failed to strike. There was no claim of breach of the duty of fair representation. To the same effect are Miller v. Spector Freight Systems, Inc., 366 F.2d 92 (1st Cir. 1966) (joint Teamster committee referred to as "arbitrator") and Rothlein v. Armour & Co., 268 F. Supp. 545 (W.D. Pa. 1967), *rev'd on other grounds*, 391 F.2d 574 (3d Cir. 1968). A contrary result was reached in Safely v. Time Freight, Inc., 307 F. Supp. 319 (W.D. Va. 1969), *aff'd*, 424 F.2d 1367 (4th Cir. 1970) because of the absence of "final and binding" language in the Teamster national agreement, although the plaintiff lost on the merits. *Haynes* has been criticized by the Seventh Circuit in Ford v. General Elec. Co., 395 F.2d 157, 159 (7th Cir. 1968), but the same result was reached because the union had not taken the final step of requesting arbitration, necessary before it would strike under the General Electric contract.

which is just the other side of the coin so frequently described as the national policy favoring such arbitration.

CONCLUSION

What has gone before is perhaps subject to the complaint that I have gone round Robin Hood's barn. An elaborate justification has been offered for a theory of the collective bargaining agreement different from the conventional American third party beneficiary analysis. Under the usual form of agreement, however, the only important consequence is a proposed modification in the remedial apparatus to be utilized in cases where a union has been found to have breached its duty of fair representation in the processing of a grievance. Insofar as such criticism reflects the fact that, with a few exceptions, the case results correspond to those called for by my analysis, I plead guilty. Most of the Supreme Court cases in which there was no union-employee controversy would have come out the same under either conceptual approach. And I have accepted, with perhaps only a change in emphasis, the basic proposition of *Vaca* that an employee can bring suit on a collective agreement only where he shows a breach of the duty of fair representation.

I would argue that the exceptions prove the case: that if the test under section 301 is, as it should be, conformance by the courts to the institutional arrangements embodied in collective bargaining agreements, the result reached in the now overruled *Westinghouse*[703] case (but not the reasoning) was correct, and the result in *Hoosier Cardinal*[704] was wrong. The proposed theory, furthermore, provides what I believe are the proper answers to some questions which have not as yet been decided by the Supreme Court.[705] And it does, finally, provide a conceptual analysis which is internally consistent and which corresponds to the institutional realities. But, given all this, it is true that the most significant differences in judicial result which would follow from acceptance of the theory here advanced appear in the cases in which a remedy is provided for a breach of the duty of fair representation.

The other side of that coin, of course, is that the merits of the scheme of remedies proposed in Propositions 3-6 can be examined wholly apart from the theoretical basis upon which they have been

703. Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955). *See* text accompanying notes 126-29 & 681 *supra.*

704. UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966). *See* text accompanying notes 187-92, 544-45 *supra.*

705. *E.g.*, the question of individual liability for breach of no-strike provisions and the arbitrability of employer damage claims. *See* text accompanying notes 262-70 & 541 *supra.*

rested. The issue, in these terms, is whether the remedial scheme proposed in Propositions 3-6 strikes the appropriate balance between the requirements of the institutional structure represented by the typical grievance and arbitration procedure and the need for protection of the individual. This has certainly been central to the Court's treatment of the problem. In *Vaca* the Court considered at length the possible effect of a rule requiring the union to take all grievances to arbitration, or permitting the complaining employee to sue the employer whenever the union failed to do so, whatever the reasons for the failure. Both were rejected because their necessary effect would be to weaken substantially the grievance and arbitration procedure as a governing mechanism in the system of industrial self-government.[706] Assuming first the correctness of that conclusion, the question is whether the suggested alteration in the present scheme of remedies would have a similar effect.

I believe it would not. Concededly, the standard for judicial intervention suggested may be somewhat looser than that stated by the Court—depending on which portion of which opinion is looked to—and quite clearly the union's potential monetary liability is increased over that which *Vaca*, at least as supplemented by *Czosek*,[707] suggests. In cases where retroactive liability continues to accumulate pending final disposition, the suggested rules entail a major shift by dividing the liability on the basis of time rather than some allocation of fault. The usual result would be that, by the time a suit for breach of the duty of fair representation is filed, the only accumulating retroactive liability would be the union's, although the responsibility for prospective relief would remain with the employer. This may cause unions to be less willing to settle or drop such cases short of arbitration, and therefore may add to a flow which most observers believe to be already too high. The added flow, however, is likely to be in precisely those areas where a sensible argument can be made that the existing rules give too great weight to the needs of the institution and too little protection to the individual: discharge and seniority.[708] And, although I cannot document the assertion, my belief is that the effect will be small. Unions, I believe, generally do not drop or settle discharge cases in which there is any reasonable probability of success, and, therefore, the added potential liability in such cases will not create any major change in the fre-

706. 386 U.S. at 191-92.

707. Czosek v. O'Mara, 397 U.S. 25 (1970); *see* text accompanying notes 231-37 *supra*.

708. *See* Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy*, 13 RUTGERS L. REV. 631 (1959) and Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1485 (1963).

quency of such cases. Nor will the impetus to increased arbitration in seniority cases be large, since the accumulating liability transferred to the union will only be a difference in pay or work opportunity rather than full pay.[709] Finally, counterbalancing these effects, is the elimination of the forum shopping which *Vaca*'s refusal to require arbitration created. By preserving the method of adjudication and the remedies which the parties have negotiated, the proposed modification makes it less likely that dissatisfied employees will seek relief in forums which they may believe to be more sympathetic and hence will reduce the union incentive to forestall such recourse by processing grievances believed to be unmeritorious.

This leads directly to consideration of the second and more significant issue: the soundness of *Vaca's* basic holding rejecting the right of an individual employee to bring suit on a collective agreement in the absence of a claim of breach of union duty. That rejection, which is consistent with the theory of the agreement here advanced but inconsistent with the traditional analysis, has been much criticized.[710] The ground set forth by the Court—that the consequence of permitting individual suit would be to overburden and undercut the grievance procedure—I believe to be sound. But there is another and equally important basis for the Court's conclusion: the effect of a contrary view on the entire structure of rules embodied in the typical American collective agreement.

Critics of *Vaca* too often assume the substantive rules embodied in a collective agreement as a given and concern themselves solely with the injustices found in their nonenforcement. But those rules are not given. They are the product of a consensual arrangement. American industrial society relies to an extraordinary degree on the voluntarily developed systems of law embodied in collective agreements to provide the protections for employees which are provided in other societies by public law. There are enormous advantages to such a system. Public law can provide certain elementary protections, such as the right to be free from discharge except for just cause, but complex systems of seniority, of rules governing scheduling and the allocation of overtime, of job evaluation and classification, and the myriad other matters which are made subject to a rule of law in the modern American collective agreement cannot be imposed by broadly applicable public law. They must be developed in the light of the particular needs and circum-

709. This assumes what I believe to be the case: that the number of seniority cases involving layoffs is very small compared to those involving promotions.

710. *See* the commentary cited in note 5 *supra*. Most of the critical articles are cited in Local 13, ILWU v. Pacific Maritime Ass'n, 441 F.2d 1061, 1068 n.12 (9th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972).

stances of individual industries, companies and even plants or departments.

Under our system there is no mandate that such rules be contained in collective agreements. The parties must agree. Their willingness to do so is, I believe, dependent in large measure on their ability to establish their own adjudicative machinery, with its own remedial limitations. The specification of a rule in a collective agreement is always subject to the hazard that its application in unforeseen circumstances or its interpretation in unforeseen ways will bring unintended consequences. That hazard is limited to the extent that the parties themselves control the procedure in which disputed questions of interpretation and application are determined and the remedies which can be provided. I believe, in short, that the existence of the very rules upon which many individual claims are based is itself dependent upon the absence of an individual right to obtain adjudication of claims of their violation in a forum foreign to the system.

To put the matter in concrete terms, I would hazard the guess that if the rule in *Tennessee Coal, Iron and Railroad Co. v. Sizemore*[711] were universally applicable, the long run result would not be the recovery of substantial damage claims by individual employees but the elimination of the safety and health provisions upon which such claims could be based. If every application of a flexible procedure for handling the very difficult seniority problems presented by a merger or transfer of operations such as that involved in *Humphrey v. Moore*[712] would be subject to litigation by whichever group of employees were disadvantaged, the result would be either the absence of a rule or a mechanical one which would sacrifice equity to forestall litigation. If lawsuits could be brought by any individual who claimed a violation of the standards for production line speeds contained in the automobile manufacturing contracts,[713] or of the standards of "equitable incentive compensation" contained in the basic steel contracts,[714] the result would be the elimination of the standards. If, alternatively, the law suit were to be made available only if the agreement provided for arbitration, the result would be the elimination of arbitration and a reversion to the older system, represented in the automobile case, of resolution of disputes by economic contest, a result which can hardly be argued to provide greater protection for the individual employee. This concededly would not be the

711. 258 Ala. 433, 62 So. 2d 459 (1952). *See* text accompanying note 500 *supra.*

712. 375 U.S. 335 (1964). *See* text accompanying notes 163-67 *supra.*

713. *See* text accompanying note 506 *supra.*

714. Agreement between United States Steel Corp. and United Steelworkers of America (exp. 1974) Sec. 9-C-3(d). *See* text accompanying notes 426 & 507 *supra.*

result in every case. There are some unions strong enough, and some issues important enough, to cause the adoption of enforceable rules even at the risk of exterior adjudication. But I have no doubt that in a large number of situations a rule which would permit individual suits on any claim of violation of the collective agreement would seriously limit the scope of the issues made subject to the collective agreement.

The case, then, for the *Vaca* principle and, indeed for much of what I have argued, rests as much on the character of the collective bargaining process as it does on the necessity of avoiding an undue burden on the grievance and arbitration procedure. *Vaca*, and the propositions here proposed, do set a limit on the degree of flexibility which the parties can provide in the administration and enforcement of the rules. That limit, I suggest, is as far as it is feasible to go.

It has been argued that the availability of an individual remedy only where a union breach of duty can be shown makes suit so expensive and so uncertain as to discourage all but the most persisitent litigants. There is some evidence on this question. Although not conclusive, it does not support the contention. In the six years since *Vaca*, there have been more than 300 reported opinions in cases brought by individuals to redress claimed breaches of their rights under collective agreements. This represents, of course, only a small portion of the total volume of cases filed. It does not include cases that were settled nor those that were tried and decided without appeal or recorded opinion. It is true that only a very few of the reported cases represent final judgments for plaintiffs, but this may reflect the generally faithful performance by unions of their function and the consequent lack of merit in the claims as much as the difficulty of prevailing in a meritorious case. Indeed, my own feeling after having read all of the cases is that there is a far greater prevalence of footless litigation than faithless union performance. Concededly there are some cases, such as *Union News Co. v. Hildreth*[715] and *Simmons v. Union News Co.*,[716] that seem to raise serious questions of injustice. But those two, both arising from the same event, are about it. Far more frequent seem to be cases in which the principal injustice is the persistence of the litigation.[717] It is clear that the volume of individual litigation has increased rather than lessened since *Vaca*, and any prediction that its limitation of remedies would discourage individual suits was in error. The changes in reme-

715. 295 F.2d 658 (6th Cir. 1961).

716. 341 F.2d 531 (6th Cir. 1965), *cert. denied*, 382 U.S. 884 (1965).

717. *See, e.g.*, Acuff v. United Papermakers, 404 F.2d 169 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969); Gainey v. Brotherhood of Ry. Clerks, 406 F.2d 744 (3d Cir. 1968), *cert. denied*, 394 U.S. 988 (1969); Hohlweiler v. Pennsylvania R.R., 294 F. Supp. 1377 (E.D. Pa. 1969), *aff'd*, 436 F.2d 1382 (3d Cir. 1971), *cert. denied*, 404 U.S. 884 (1971).

dies proposed here might have some discouraging effect on litigation: the gold mine of a damage verdict based on the plaintiff's expected lifetime earnings in discharge cases is replaced by reinstatement with back pay, a remedy much less valuable to a contingent fee lawyer. But, on the other side, the clear specification of a lowered threshold for relief and the suggested shift in the responsibility for retroactive payments may make litigation less necessary in precisely those cases.

Whether a particular balance between the protection of individual rights and the encouragement of the process which provides the rules under which those rights arise is the appropriate one is a decision which calls, in the end, for an exercise of judgment. That judgment must take into account the whole spectrum of varying collective bargaining structures and necessarily reflects one's own background and experience.[718] It is my belief that the balance struck in *Vaca*, with the suggested changes in remedy here proposed, is the correct one. In any case, as I have tried to demonstrate, it is the one which best fits the autonomous structure which the parties have erected. Almost twenty years ago Harry Shulman concluded his Oliver Wendell Holmes Lecture by urging "that the law stay out":[719] that the parties be left to the usual methods of adjustment of labor disputes rather than to court actions when the system breaks down. Much has happened in the interval. The courts, responsive to the contrary direction of Congress, are in. Their presence, I believe, can be helpful so long as the legal doctrine they impose is not at war with the premises of the structure it regulates.

718. I make no pretense of a lack of bias. Before becoming a teacher I represented unions for almost twenty years and served as General Counsel for the United Steelworkers and the Industrial Union Department of the AFL-CIO. I was personally involved on the union side in much of the Supreme Court litigation discussed in this article from *Westinghouse* through *Vaca*. That my present judgment is not solely that of an advocate is, however, perhaps indicated by the views here expressed as to the result in *Westinghouse*.

719. Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955).

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