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LABOR ARBITRATION AND THE CONCEPT OF EXCLUSIVE REPRESENTATION

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Those who cannot remember the past are condemned to repeat it.

—George Santayana

The principles and practices of collective bargaining have evolved during many decades, through negotiations between labor and management, through the day-by-day procedures of employee-employer relationships, and through legislative acts and judicial decisions.

Resistance to the process has taken a variety of forms. The legal argument of individual freedom of contract succeeded in blocking many statutory advances over the years in the social and labor welfare field.¹

The United States Supreme Court regarded such legislation as unconstitutional upon the following rationale:

The right of a person to sell his labor upon such terms as he deems proper is in its essence the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell In all such particulars the employer and the employé have equality of right and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.²

When directly confronted with the problem, Congress has recognized the workingman's handicap in seeking fair and equitable

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¹ Morehead v. Tipaldo, 298 U.S. 587 (1936); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Hammer v. Dagenhart, 247 U.S. 251 (1918); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).

² Id. at 174-75.

terms of employment through individual dealings with his employer, as well as the deleterious effects of such separate negotiations on the national welfare. In the 1932 Norris-LaGuardia Act, Congress declared that

... the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment....³

Almost a decade before the passage of this statute, the Supreme Court had stated:

[Labor unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer.⁴

Pronouncements of national public policy in favor of collective bargaining and against individual bargaining can also be found in the Railway Labor Act,⁵ the National Labor Relations Act⁶ and the Labor-Management Relations Act.⁷ The concept of individual freedom of contract as a basis for national labor relations policy was ultimately rejected when the Supreme Court upheld the constitutionality of the National Labor Relations Act.⁸ The Act granted labor organizations designated by a majority of the employees exclusive bargaining rights for these employees.⁹

Resistance to collective bargaining dies hard, however. Since

³ 47 Stat. 70 (1932), 29 U.S.C. § 102 (1964).

⁴ *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921).

⁵ 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151 (1964).

⁶ 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964):

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

⁷ 61 Stat. 136 (1947), as amended, 29 U.S.C. § 141 (1964).

⁸ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). See also *United States v. Darby*, 312 U.S. 100 (1941); *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁹ 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964).

individual freedom of contract can no longer be validly raised, a new legal argument has been advanced. Each worker, it is said, has the right to interpret for himself the collectively negotiated union contract, and he has the further right to press individually for his interpretation, either directly with the employer or through the grievance procedure provisions of the union contract.

This argument substitutes individual freedom of arbitration for individual freedom of contract, with the same intention and, clearly, the same end result: a return to the arithmetical notion of equality, one man-one voice, one employer-one employee, an "equality" which has no basis in social and economic reality. The argument is directed toward the abolition of collective bargaining, which in essence requires not only collective negotiation of contracts, but also collective arbitration of differences, and a return to the inequities and social costs of the individual employment agreement.

Interestingly, this retrogressive approach to labor relations is not found principally in management proposals. In contractual relations with unions, management prefers to determine the meaning and application of contracts through dealings with the exclusive, majority-selected bargaining agent, rather than with a multitude of individuals. Nor have the courts themselves, for the most part, favored the doctrine of union contract interpretation by individuals through the arbitration process. Rather, the new champions of individualism in labor-management relations are to be found among academicians, few of whom have had practical experience in collective bargaining.¹⁰ Most of their contentions can be traced to a spurious libertarianism. The arguments are structured on a foundation of law, both statutory and decisional, which leans heavily on the proviso in Section 9(a) of the National Labor Relations Act.¹¹

The National Labor Relations Act¹² requires employers to

¹⁰ Prof. Alfred W. Blumrosen, Rutgers Univ. Law School, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 Mich. L. Rev. 1435 (1963); Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy*, 13 Rutgers L. Rev. 631 (1959); Prof. Sanford J. Rosen, Univ. of Md. Law School, *The Individual Worker in Grievance Arbitration: Still Another Look at the Problem*, 24 Md. L. Rev. 233 (1964); Prof. Clyde W. Summers, Yale Law School, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362 (1962); Prof. Harry H. Wellington, Yale Law School, *Union Democracy and Fair Representation: Federal Responsibility In A Federal System*, 67 Yale L.J. 1327 (1958). But cf. Prof. Benjamin Aaron, *Inst. of Ind. Rel.*, Univ. of Cal., *Some Aspects of the Union's Duty of Fair Representation*, 22 Ohio St. L.J. 39 (1961); Prof. Archibald Cox, Harv. Law School, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 299 (1948); Prof. Kurt L. Hanslowe, Cornell Univ., *Individual Rights in Collective Labor Relations*, 45 Cornell L.Q. 25 (1959).

¹¹ 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964).

¹² 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964).

bargain with the bargaining representative selected by a majority of employees in an appropriate unit as "the exclusive representatives of all the employees in such unit for the purpose of collective bargaining." The original act contained the section 9(a) proviso, however, "that any individual employee or group of employees shall have the right at any time to present grievances to their employer." In 1947, this proviso was amended to read:

[A]ny individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining contract or agreement then in effect; *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.¹³

It has been held that this proviso grants individual employees the right to process their own grievances.¹⁴ The New Jersey Supreme Court ruled in the 1963 case of *Donnelly v. United Fruit Co.*,¹⁵ that, as a matter of federal law, an individual employee has vested rights under the section 9(a) proviso not only to present his grievance to his employer but to take his unsettled grievance to arbitration notwithstanding the refusal of his union to do so.¹⁶ Other state courts have made similar rulings.¹⁷

On the other hand, the Court of Appeals for the Second Circuit, in the case of *Black-Clawson Co. v. International Ass'n of Machinists*,¹⁸ has taken the view that this proviso merely gives the employer the freedom to consider grievances presented by individual employees; it does not grant an employee a substantive right requiring the employer to take up his grievance. The court decided that an employee, as an individual, had no standing to compel arbitration since the terms

¹³ 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964).

¹⁴ *West Tex. Util. Co. v. NLRB*, 206 F.2d 442 (D.C. Cir.), cert. denied, 346 U.S. 855 (1953); *Hughes Tool Co. v. NLRB*, 147 F.2d 69 (5th Cir. 1945); *NLRB v. North Am. Aviation, Inc.*, 136 F.2d 898 (9th Cir. 1943).

¹⁵ 40 N.J. 61, 190 A.2d 825 (1963).

¹⁶ For definition of the term "grievances," see, e.g., Lapp, *How to Handle Labor Grievances* (1945); Katz, *Minimizing Disputes Through the Adjustment of Grievances*, 12 *Law & Contemp. Prob.* 249 (1947); Weiss & Hussey, *Grievance Procedure Under Collective Bargaining*, 63 *Monthly Lab. Rev.* 175 (1946); U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-1, *Major Collective Bargaining Agreements: Grievance Procedures* 5-15 (1964).

¹⁷ *Gilden v. Singer Mfg. Co.*, 145 Conn. 117, 139 A.2d 611 (1958); *Clark v. Hein-Werner Corp.*, 8 Wis. 2d 264, 99 N.W.2d 132 (1959), cert. denied, 362 U.S. 962 (1960); *Pattenge v. Wagner Iron Works*, 275 Wis. 495, 82 N.W.2d 172 (1957).

¹⁸ 313 F.2d 179 (2d Cir. 1961), cited with approval by the Supreme Court in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

EXCLUSIVE REPRESENTATION

of the applicable agreement limited arbitration to the union and the employer. The court stated that the section 9(a) proviso did not confer upon individual employees the power to compel an employer to entertain the grievance or channel it through the arbitration process:

Our conclusion is dictated not merely by the terms of the collective bargaining agreement and by the language, structure, and history of section 9(a), but also by what we consider to be a sound view of labor-management relations. The union represents the employees for the purposes of negotiating and enforcing the terms of the collective bargaining agreement. This is the modern means of bringing about industrial peace and channeling the resolution of intra-plant disputes. Chaos would result if every disenchanted employee, every disturbed employee, and every employee who harbored a dislike for his employer, could harass both the union and the employer by processing grievances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union.¹⁹

Other courts have agreed that a union member could not avail himself of the contract arbitration procedure or maintain an action against the employer to vindicate his rights under the agreement where the union declined to place the claim in arbitration.²⁰ Additionally the General Counsel of the National Labor Relations Board believes that the section 9(a) proviso was passed to afford employers the freedom to confer with employees on grievances without the intervention of the bargaining agent, and that it was not intended to require employers to meet with individuals.²¹ The view that individual employees who are represented by an exclusive bargaining agent have the right to process their own grievances to and through final and binding arbitration is destructive. It can destroy voluntary labor

¹⁹ *Black-Clawson Co. v. International Ass'n of Machinists*, supra note 18, at 186.

²⁰ *Broniman v. Great Atl. & Pac. Tea Co.*, 353 F.2d 559 (6th Cir. 1965); *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 312 F.2d 181 (2d Cir. 1962); *Palnau v. Detroit Edison Co.*, 301 F.2d 702 (6th Cir. 1962); *Ostrowsky v. United Steelworkers*, 171 F. Supp. 782 (1959), aff'd, 273 F.2d 614, cert. denied, 363 U.S. 849 (1960); *Arsenault v. General Elec. Co.*, 147 Conn. 130, 157 A.2d 918, cert. denied, 364 U.S. 815 (1960); *In re Soto*, 7 N.Y.2d 397, 165 N.E.2d 855, 198 N.Y.S.2d 282 (1960); *Parker v. Borock*, 5 N.Y.2d 156, 182 N.Y.S.2d 577 (1959).

²¹ See Cox, *Rights Under A Labor Agreement*, 69 Harv. L. Rev. 601, 624 (1956): [T]he internal evidence argues rather more strongly that the only effect of the proviso is to make it plain that the employer's duty to bargain exclusively with the representative designated by a majority of the employees is not violated if he chooses to receive grievances from individuals.

arbitration, undermine collective bargaining and endanger industrial peace.

Arbitration provisions in labor agreements are not enforceable under the common law or under the statutes of most states.²² The applicability of the Federal Arbitration Act to labor contracts is in substantial doubt.²³ Until 1957, when the *Textile Workers v. Lincoln Mills* case was decided by the Supreme Court,²⁴ employers as well as unions²⁵ were free in virtually all jurisdictions to ignore their respective contractual commitments to arbitrate. Arbitration compacts were generally unenforceable "gentlemen's agreements," not legally binding on the parties.²⁶ Before *Lincoln Mills* and the Supreme Court's later arbitration enforcement decisions, sometimes referred to as the Steelworkers trilogy,²⁷ an employer was often at liberty to reject a request for arbitration by the union and always could reject the request of individual employees to arbitrate.

As a result of the decisions holding that labor arbitration agreements by parties in interstate commerce were binding as a matter of federal substantive law, management began to reconsider its arbitration commitments and to restrict and narrow its obligation to arbitrate contract disputes with the union, since it was no longer free to capriciously ignore arbitration procedures previously agreed upon.²⁸

²² *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924); *W. H. Blodgett Co. v. Bebe Co.*, 190 Cal. 665, 214 Pac. 38 (1923); 5 C.J. Arbitration & Award § 6 (1916); Wyle, *Unions in Search of a Forum to Enforce Contracts*, 7 Lab. L.J. 425 (1956).

²³ *Textile Workers v. Lincoln Mills*, 230 F.2d 81 (5th Cir. 1956), rev'd, 353 U.S. 448 (1957); *Signal-Stat Corp. v. United Elec. Radio Workers*, 235 F.2d 298 (2d Cir. 1956); *Hoover Motor Express Co. v. Teamsters Union*, 217 F.2d 49 (6th Cir. 1954); *Tenney Eng'r, Inc. v. United Elec. Radio Workers*, 207 F.2d 450 (3d Cir. 1953); *Street Elec. Ry. Employees v. Pennsylvania Greyhound Lines, Inc.*, 192 F.2d 310 (3d Cir. 1951); *Mercury Oil Rep. Co. v. Oil Workers*, 187 F.2d 980 (10th Cir. 1951); *Furniture Workers v. Colonial Hardware Flooring Co.*, 168 F.2d 33 (4th Cir. 1948); *Gatliff Coal Co. v. Cox*, 142 F.2d 876 (6th Cir. 1944).

²⁴ *Supra* note 23.

²⁵ As a general rule, it is the union which seeks arbitration. In the event of a dispute over the meaning of the contract, the employer can proceed to act unilaterally subject to a union challenge either before an arbitrator or in the courts. The union is generally foreclosed from taking concerted economic action by a no-strike provision in the agreement.

²⁶ ABA Comm. on Arbitration, *Report on Labor Arbitration*, 28 Lab. Arb. 913, 929 (1957); Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 Colum. L. Rev. 829 (1948); Gregory & Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. Chi. L. Rev. 233, 236-41 (1950); Howard, *Labor-Management Arbitration: "There Ought to be a Law"—Or Ought There?*, 21 Mo. L. Rev. 1, 18-20 (1956); Pirsig, *Some Comments on Arbitration Legislation and the Uniform Act*, 10 Vand. L. Rev. 685 (1957); Wyle, *supra* note 22.

²⁷ *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). See also *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

²⁸ O'Connell, *American Management Ass'n Conf.*, 46 L.R.R.M. 57 (1960); Smith,

Arbitration is, of course, voluntary. Nobody can be compelled to arbitrate a dispute unless he has first agreed to do so.²⁹ Most arbitration provisions in collective bargaining agreements provide for this remedy only at the instance of a party to the agreement—the employer or the union.³⁰ Many employers who accept arbitration as the avenue for labor dispute settlement during the contract term do so secure in the knowledge that the union has demonstrated responsibility and will not plague the employer with meritless claims. In fact, employers rely upon the union to sift out and reject, through investigation and the grievance machinery steps preliminary to arbitration, those employee complaints which lack substance.

Some courts³¹ and many commentators³² maintain that employers should be obligated to arbitrate the claims and grievances of individuals which are rejected by the union. If the problem were resolved in that way, it seems clear that management's movement to restrict or exclude consensual arbitration as the terminal point for the settlement of grievances would have been greatly accelerated. Such a trend would be contrary to the nation's declared public policy.³³ It would eliminate the only practical method for the peaceful settlement of labor-management disputes during a contract term. It would cause unions to reserve the right to strike during the term of a contract which did not include arbitration, since arbitration is the *quid pro quo* for the union's no-strike pledge.³⁴

One particularly active champion of the "right-to-arbitrate" policy has observed that employers will not escape vexation by restricting the individual employee's arbitral freedom, since they can always recover contract benefits in a plenary action. He argues that preventing employees from arbitrating claims on their own initiative will only compel them to turn to the courts, thus causing the employers even greater annoyance and expense.³⁵ The recent decision of the Supreme Court in *Republic Steel Corp. v. Maddox*³⁶ shatters that argument.

Report, Eighth Annual Institute on Labor Law of the Southwestern Legal Foundation, 49 L.R.R.M. 48, 52 (1962).

²⁹ *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238 (1962). See cases cited note 27 supra.

³⁰ U.S. Bureau of Labor Statistics, supra note 16, at 1. The right of an individual employee to prosecute his own grievance through the arbitration machinery is unquestioned where the union and the employer so provide by the terms of the collective bargaining agreement. *Republic Steel Corp. v. Maddox*, supra note 18.

³¹ See cases cited note 17 supra.

³² Blumrosen, Legal Protection for Critical Job Interests, supra note 10; Summers, supra note 10.

³³ Labor Management Relations Act, § 203(d), 61 Stat. 154 (1947), as amended, 29 U.S.C. § 173(d) (1964). Final adjustment by a method agreed upon by the parties is "declared to be the desirable method for settlement of grievance disputes. . . ."

³⁴ *Textile Workers v. Lincoln Mills*, supra note 23.

³⁵ Summers, supra note 10, at 404 n.169.

³⁶ Supra note 18.

The Court declared that individual employees cannot bypass their bargaining agent and the contract grievance procedure to claim rights under a union agreement in a lawsuit. In fact, the decision resolves the profuse debate over individual arbitral rights.³⁷

Thus, under the present state of the federal law, which is supreme in this area, individual employees have no right to arbitrate claims under a union contract. An employer can be confident that his agreement to arbitrate claims arising under the collective bargaining agreement with a union will not lead to individual employee harassment through private arbitration or suit.

It has been argued that vesting exclusive power in the bargaining agent to prosecute the contract rights of individuals imposes too much authority in a union and subjects the individual's rights to possible union discrimination, indifference or indolence, or to the vagaries of union politics. A delicate balance exists between the rights of an individual member of any group and the welfare of the majority of its members. Unions strive to maintain this equilibrium in a complex situation, for the role of the bargaining agent involves more than negotiating the original agreement. A contracting union must be sensitive to the changes and developments in the industrial process, in the economy of the industry and in the work force itself. It must keep abreast of changes made through collective bargaining in other industries, as well as of new laws affecting employees and the relationship with the employer. As a corollary, it must be prepared to engage in collective bargaining during the period of a contract to seek changes in the agreement, when warranted by changes in circumstances. Such changes might affect adversely the rights or benefits of certain employees as fixed by the original agreement.

This was the case in *Ford Motor Co. v. Huffman*.³⁸ The union entered into a supplemental agreement during the term of the original agreement, granting seniority credit to employees for their time in military service. Inevitably, the relative seniority of other employees under the original agreement was reduced. The Supreme Court upheld the authority of the union to exercise its judgment and discretion in renegotiating the provisions of the existing agreement with the employer.

Unions are free to negotiate changes in existing collective agreements, if this is done in good faith, for an honest purpose. Employee rights and benefits provided by agreement are therefore not necessarily vested for the term of the agreement. They may be altered through subsequent negotiations due to changed conditions or, as sometimes

³⁷ See pp. 795-97 *infra*.

³⁸ 345 U.S. 330 (1953).

EXCLUSIVE REPRESENTATION

happens, through the disclosure of an unintended result in the processing of an employee grievance. For example, it may be revealed during a grievance session that a loose incentive system has developed a run-away wage rate, far beyond that which even the union considers reasonable.

Mr. Justice Goldberg, a labor attorney of vast experience before his accession to the bench, in a concurring opinion in *Humphrey v. Moore*,³⁹ pointed out:

The parties are free by joint action to modify, amend, and supplement their original collective bargaining agreement. They are equally free, since "[T]he grievance procedure is . . . a part of the continuous collective bargaining process" to settle grievances not falling within the scope of the contract. . . . In this case, for example, had the dispute gone to arbitration, the arbitrator would have been bound to apply the existing agreement and to determine whether the merger-absorption clause applied. However, even in the absence of such a clause, the contracting parties—the multiemployee unit and the union—were free to resolve the dispute by amending the contract to dovetail seniority lists or to achieve the same result by entering into a grievance settlement. The presence of the merger-absorption clause did not restrict the right of the parties to resolve their dispute by joint agreement applying, interpreting, or amending the contract. There are too many unforeseeable contingencies in a collective bargaining relationship to justify making the words of the contract the exclusive source of rights and duties.

It is well settled that an employer violates the National Labor Relations Act if he negotiates directly with his employees where there is a recognized union,⁴⁰ and that individual contracts of employment are superseded by the collective bargaining agreement.⁴¹ To hold otherwise would obviously upset the collective bargaining process. There is little difference, however, between an employer's making a separate agreement with an employee, providing different benefits from those contained in the collective agreement, and the employer's inducing an employee to accept different benefits through the grievance procedure. In each case, the bargaining agent is bypassed, and the collective agreement is undercut. The NLRB and the courts have rec-

³⁹ 375 U.S. 335, 353-54 (1964).

⁴⁰ *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

⁴¹ *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944). See also *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944); *National Licorice Co. v. NLRB*, *supra* note 8.

ognized this similarity and have barred attempts to negotiate terms and conditions of employment with individual employees or groups of employees under the guise of settling grievances.⁴² It is erroneous to view grievance adjustment as anything less than the continuation of collective bargaining or to attempt to distinguish between the two: grievance adjustment is an integral part of the collective bargaining process. As the NLRB has noted, "there is no distinct cleavage between collective bargaining and the settlement of grievances, whether individual or group."⁴³

The primary objective of a union is to obtain the best conditions of employment for as many employees in the bargaining unit as possible and then to enforce these benefits. It is unrealistic to expect that each employee represented, including the "disenchanted" and the "disturbed," will be satisfied at all times.⁴⁴ Not infrequently, situations occur where a conflict of interest develops between two or more groups of employees represented by the union. The union must then make a decision in support of one group or the other⁴⁵ before determining whether the employer's decision should be challenged under the grievance adjustment machinery. One can conceive of many situations in which a union might reject, for reasons other than the merits of the case, an employee's request to submit his grievance to arbitration. Perhaps the grievance involves a trifling point or a petty sum not worth the time and money required to prosecute the claim. Or the grievance may, if won, establish an undesirable precedent, or affect adversely the equities of a large number of employees.

In such cases, the justice of the individual grievance is not the determining factor in the union's decision. In fact, in a recent case involving the Union News Company, which made its way to the United States Supreme Court,⁴⁶ blameless employees suffered an obvious injustice to which the union nevertheless acquiesced in order to protect the collective interest. In this case the employer, who operated a restaurant, found that profits were lagging behind expectations and suspected that funds or goods were being stolen or mishandled by some of its dozen or so employees in that place of business. In discussions with the union, the employer proposed discharging all the employees, a plan to which the union objected. After lengthy negotiations, it was

⁴² *West Tex. Util. Co. v. NLRB*, supra note 14; *Hughes Tool Co. v. NLRB*, 147 F.2d 69, 72, 73 (5th Cir. 1945); *NLRB v. North Am. Aviation Inc.*, supra note 14. *Contra*, *Douds v. Local 1250*, 173 F.2d 764 (2d Cir. 1949).

⁴³ *North Am. Aviation, Inc.*, 44 N.L.R.B. 604, 611 (1942), enforced, 136 F.2d 898 (9th Cir. 1943).

⁴⁴ *Black-Clawson Co. v. International Ass'n of Machinists*, supra note 18, at 186.

⁴⁵ See, e.g., *Humphrey v. Moore*, 375 U.S. 335 (1964).

⁴⁶ *Simmons v. Union News Co.*, 341 F.2d 531 (6th Cir.), cert. denied, 382 U.S. 884 (1965).

agreed to lay off five employees for a two-week period; if the company's profits improved significantly during this period, the five employees would not be recalled to work. Profits did increase during the period, whereupon the five employees were permanently discharged in accordance with the employer's agreement with the union.

Two of the five employees protested vigorously, demanding that the union seek their reinstatement via the grievance and arbitration process. The union refused to do so, and the employer rejected direct negotiations with these employees. The employees then brought an action contending that they were not discharged for "just cause" as required by the collective bargaining agreement. The suit was dismissed on the ground that the agreement between the employer and the union as to "just cause" for the discharges was not subject to challenge by the affected employees.

The decision in this case illustrates the most essential precondition to effective collective bargaining. An individual employee should not be permitted to challenge or overrule a decision of his collective bargaining representative with respect to matters relating to wages, hours or conditions of employment, or reaching the interpretation, application or breach of a collective bargaining agreement by action under the agreement, notwithstanding possible lack of justification for the union's position. In such areas, which involve joint union-management dealings and determinations, only the bargaining agent acting in the collective interest should confer and reach decisions with the employer. Only the union should pursue remedies which can lead to final resolution of such issues. Professor Archibald Cox of the Harvard Law School expressed the same view in these words:

Unless a contrary intention is manifest, the employer's obligations under a collective bargaining agreement which contains a grievance procedure controlled by the union shall be deemed to run solely to the union as the bargaining representative, to be administered by the union in accordance with its fiduciary duties to employees in the bargaining unit. The representative can enforce the claim. It can make reasonable, binding compromises. It is liable for breaches of trust in a suit by the employee beneficiaries.⁴⁷

Nor should an individual employee be permitted to pursue through arbitration a contract interpretation contention which his union rejects. Although such action may benefit the specific employee, it may harm other employees, undermine the bargaining agent, disregard the group interest or disturb a good relationship with management. The

⁴⁷ Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 618 (1956).

law does not review the fairness of the substantive terms of the negotiated contract. It does not question the results of a good faith change in the contract during its term,⁴⁸ nor does it allow the agreement of the contracting parties as to the meaning or application of the contract to be subject to challenge by individual employees through recourse to the arbitral machinery. Arbitration procedures are negotiated to provide machinery for disputes between the contracting parties as to the meaning of the contract. Arbitration is not established as a court of equity to administer justice to individual complainants.

The decision in *Humphrey v. Moore*⁴⁹ has been read as a pronouncement by our highest court that individual employees may question the determination reached by their bargaining representative and their employer as to the meaning of the collective agreement. It has further been contended that the decision upholds the employees' freedom to participate in the grievance and arbitration process separate from the representation provided and to take a position different from that of the contracting union.⁵⁰ The case arose out of a situation in which one employer absorbed the operations and the employees of another. Both groups of employees were represented by the same union and were covered by the same multi-employer, multi-local union collective contract. The seniority standing of the employees became vital since there would be some loss of jobs as a result of the merger. The seniority issue reached a joint conference committee which, under the grievance provisions, consisted of an equal number of union and employer representatives. This committee decided that the seniority lists of both employers should be dovetailed. Since the employer who was discontinuing operations had been in business longer, its employees had accumulated more seniority. Some of the employees of the continuing employer were therefore threatened with lay-off when both groups of employees were merged.

The threatened employees brought an action to enjoin the decision of the joint conference committee. The Supreme Court held the action to be a proper one, although it denied relief. A tenable conclusion is that the Court upheld the right of individual employees to challenge a union-employer decision made under the grievance procedure, provided that the members of the joint conference committee were in fact the employer and union representatives. But, as Mr. Justice Harlan noted in his concurring opinion, the joint conference committee did not constitute the contracting parties; it was an arbitration board limited in its power to the settlement of disputes within the scope of

⁴⁸ *Ford Motor Co. v. Huffman*, supra note 38.

⁴⁹ Supra note 45.

⁵⁰ Ibid.; ABA, Sec. of Labor Rel. Law, 1964 Proceedings, Report of Committee on Labor Arbitration; Reiss, N.Y.U. 18th Annual Labor Conference (1965).

its authority under the agreement.⁵¹ The prevailing opinion, written by Mr. Justice White, also considered whether the committee exceeded the powers conferred upon it by the parties. It did not decide that the contracting parties could not legally have conferred such powers upon the committee nor exercised these powers itself.⁵² In short, *Humphrey* did not hold that a union cannot settle a grievance by an agreement made in good faith with the employer without also having the approval of the affected employees. It merely ruled that the court will entertain the conventional suit to set aside an arbitration award if it is alleged that the arbitrator exceeded his authority under the terms of the agreement.⁵³

The subsequent Supreme Court decision in *Republic Steel Corp. v. Maddox*⁵⁴ establishes beyond doubt that *Humphrey* is not authority for the proposition that individual employees may prosecute contract claims separately from their bargaining representative. In the *Maddox* case, the court decided that an individual employee cannot ignore the grievance and arbitration procedure of a collective bargaining agreement, as well as the union's role in such grievance adjustment machinery, by suing for severance pay allegedly due under the terms of the contract. It stated:

As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. See *Humphrey v. Moore*, 375 U.S. 335; *Labor Board v. Miranda Fuel Co.*, 326 F.2d 172. But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA § 203 (d), 29 U.S.C. § 173(d); § 201(c), 29 U.S.C. § 171(c) (1958 Ed.). Union interest in prosecuting employee grievances is clear. Such activity com-

⁵¹ 375 U.S. at 359. A joint labor-management committee decision rendered pursuant to the grievance adjustment machinery of the contract, if binding on the parties, is enforceable in the same fashion as an arbitration award. *General Drivers v. Riss & Co.*, 372 U.S. 517 (1963).

⁵² 375 U.S. at 342, 345.

⁵³ See *Drake Bakeries Inc. v. Bakery Workers*, 370 U.S. 254 (1962); *Atkinson v. Sinclair Ref. Co.*, supra note 29; cases cited note 27 supra; *Potoker v. Brooklyn Eagle, Inc.*, 2 N.Y.2d 553, 141 N.E.2d 841, 161 N.Y.S.2d 609 (1957).

⁵⁴ Supra note 18.

plements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.

A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a law suit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103.⁵⁵

Thus, relief is denied because the employee has no individual standing to enforce rights created by the collective bargaining contract.

The case of *Smith v. Evening News Ass'n*,⁵⁶ decided two years earlier, does not conflict with this ruling. It is true that, in *Smith*, individual employees sued to vindicate rights under a collective bargaining agreement, and the Court sustained the action. But the agreement in that case did not include provisions making arbitration for the adjustment of grievances possible. The majority opinion significantly recorded in a footnote that the Court did not consider the standing of the petitioner to sue or the standing of other employees generally to sue for contract breaches in that case since this point was not raised by the proceedings.⁵⁷

To the extent that *Elgin, J. & E. Ry. v. Burley*⁵⁸ is in disagreement, it is apparently overruled sub silentio. That case, decided five to four in 1945, involved employee rights under the Railway Labor Act⁵⁹ which expressly permits individuals to sue to enforce awards and sets

⁵⁵ Id. at 652-53.

⁵⁶ 371 U.S. 195 (1962).

⁵⁷ Id. at 20 n.9.

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

⁵⁹ 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151 (1964).

procedures for settling individual grievance disputes.⁶⁰ Comparable provisions are not found in the National Labor Relations Act.⁶¹ The Court held that the bargaining agent did not have the authority to compromise individual employee rights which had accrued under a collective bargaining agreement.

The *Maddox* case⁶² appears to adopt the reasoning in *Black-Clawson v. International Ass'n of Machinists*⁶³ that, under collective bargaining agreements, employees have no individual rights which they can enforce against their employer, except through their recognized union. This proposition of law, which provides the only foundation for preserving the system of collective bargaining, implies a certain relationship between an individual union member and the majority of members of the union, such that grievances should be settled in the interest of the majority, not the individual. Individuals have only such rights as the majority is prepared to support before, during and after contract negotiations.

Equating the union with the majority of its members reflects both its origin and the basis of its operation. The union is created by the majority of workers in a unit, who vote to be represented by it in collective bargaining, and the union's authority derives from the continued support of the majority, whose interests, rather than those of any single individual, it represents. The reality of numbers further supports the position that an individual may not challenge a union decision in grievance procedures. If a collective bargaining agreement provided strike freedom in lieu of arbitration in the event of a dispute, the union would be free to determine whether to call a strike to attain a satisfactory settlement of an individual employee's grievance. Individual employees do not have this power to call a stoppage each time that they feel aggrieved. Similarly, they should have no right to invoke arbitration, the substitute for the strike.

Individual employee pursuit of employment benefits to a final determination without the acquiescence of the bargaining agent is the equivalent of individual bargaining and individual employment contracts. To permit a procedure for individual adjustments is to move backward in bargaining practices and in economic conditions, and to discourage employers and unions from continuing to dispose of grievances peacefully through arbitration, a major factor in achieving industrial peace.⁶⁴

⁶⁰ 44 Stat. 577 (1926), as amended, 45 U.S.C. § 152 Fourth (1964); 44 Stat. 578 (1926), as amended, 45 U.S.C. § 153 First (1964).

⁶¹ 49 Stat. 449 (1955), as amended, 29 U.S.C. § 151 (1964).

⁶² *Republic Steel Corp. v. Maddox*, supra note 18.

⁶³ Supra note 18.

⁶⁴ *United Steelworkers v. Warrior & Gulf Nav. Co.*, supra note 27, at 582.

Collective bargaining and individual bargaining cannot exist side by side. Once the majority has chosen concerted bargaining, each employee must depend upon the benefits and advantages that accrue to him as a group member. It is not feasible for employees to be bound by majority decision only when it is satisfactory to them and to permit them to go their own way whenever the group or union decision is not in their individual interest. The Supreme Court noted many years ago that:

The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result.⁶⁵

The individual is not deprived of recourse if the union fails to exercise properly its fiduciary obligation to the employees it represents. It is firmly established under both the National Labor Relations and Railway Labor Acts that a union must act honestly, in good faith and without discrimination in the exercise of its exclusive authority to enforce both collective and individual rights under the bargaining agreement.⁶⁶

The leading case of *Steele v. Louisville & N.R.R.*, decided in 1944, involved a Negro locomotive fireman who sued to restrain his union and his employer from making an agreement which discriminated against employees of his race. Chief Justice Stone, writing for the Court, spelled out the majority union's collective bargaining obligations to the individual employee as follows:

. . . we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority. . . .

This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences . . . in seniority, the type of work performed, the

⁶⁵ J. I. Case Co. v. NLRB, supra note 40, at 339.

⁶⁶ *Syres v. Oil Workers*, 350 U.S. 892 (1956), reversing 223 F.2d 739 (5th Cir. 1955); *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944); *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); *Hughes Tool Co. v. NLRB*, 147 F.2d 69 (5th Cir. 1945).

competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit. Cf. *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 509-510, 512 and cases cited; *Washington v. Superior Court*, 289 U.S. 361, 366; *Metropolitan Casualty Co. v. Brownell*, 294 U.S. 580, 583. Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious.⁶⁷

Since both contract negotiation and grievance settlement are modes of obtaining employee benefits, discriminatory treatment of minority races in the processing of grievances, as well as in the negotiation of a contract, constitutes a breach of a union's duty to represent fairly all the employees for whom it is authorized to act as statutory agent.⁶⁸ This duty of fair representation is also applicable to employees who receive disparate treatment for reasons other than race bias.⁶⁹

Accordingly, a judicial remedy is available to the employee whose union has failed for invidious, capricious or arbitrary reasons to pursue a valid grievance. The employee may not be able to sue his employer or arbitrate a claim he may have under the collective agreement, but he has a cause of action against the union if its failure to support his claim is not honestly motivated. As the Maryland Court observed in *Jenkins v. Wm. Schluderberg-T. J. Kurdle Co.*:

Conflicts of interest may exist or develop in many instances in grievance matters as between individuals or groups of employees represented by the same bargaining agent. It seems desirable that the bargaining agent should have power to deal with such problems. It is possible that even the discharge of a single individual might have wide repercussions in employer-employee relations, though usually this would not seem probable.

⁶⁷ Id. at 199, 203.

⁶⁸ *Conley v. Gibson*, 355 U.S. 41 (1957).

⁶⁹ *Wallace Corp. v. NLRB*, supra note 66; *Ostrofsky v. United Steelworkers*, supra note 20; *Jenkins v. Wm. Schluderberg-T. J. Kurdle Co.*, 217 Md. 556, 144 A.2d 88 (1958); *Cortez v. Ford Motor Co.*, 349 Mich. 108, 84 N.W.2d 523 (1957); *DiSanti v. Corning Glass Works*, 9 D. & C.2d 611 (Pa. Com. Pleas 1956).

Possibilities of indifference, favoritism, discrimination and of trading off the interests of one group or member for the benefit of another group or member, of course, exist. Yet, possibilities of abuse of trust and confidence exist, in many fields. Through the law of trusts and of fiduciary or confidential relations, protections against such possible abuses have been developed in many situations. The law does not in such matters strike down discretionary powers conferred upon trustees merely because such powers might be abused. . . . Courts will redress misuse of power.⁷⁰

The AFL-CIO "accepts the proposition that a labor organization serving as exclusive bargaining agent has a duty to represent all the employees in the bargaining unit fairly and impartially. This duty has been enforced by the courts, and the Federation does not quarrel with the decisions upholding judicial enforceability."⁷¹ In addition, the NLRB has ruled that it will rescind the certification of a labor organization as the exclusive bargaining representative upon evidence that the union is not fairly representing all of the employees in the bargaining unit.⁷² In the *Pioneer Bus Co.* case, the Board also declared that it will not bar an election for representation on the petition by a rival union where the incumbent union is a party to a discriminatory agreement, notwithstanding its general contract bar rule protecting a contracting union from rival union raids for the duration of the reasonable term of a complete written agreement.⁷³

Recently, the Board has endeavored to turn the full force of its remedial powers against labor organizations acting in a manner which it regards as unfair, invidious or irrelevant toward employees in the bargaining unit. For the first time, it is interpreting certain unfair labor practice provisions of the National Labor Relations Act (sections 8(b)(1)(A), (2), (3)) as prohibiting discriminatory union conduct unrelated to union activity.⁷⁴

In its first unfair representation, unfair labor practice case,

⁷⁰ Supra note 69, at 574-75, 144 A.2d at 98.

⁷¹ AFL-CIO, Amicus Curiae Brief, P-2, NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963).

⁷² Independent Metal Workers (Hughes Tool Co.), 147 N.L.R.B. 1573 (1964); Pioneer Bus Co., 140 N.L.R.B. 54 (1962); A. O. Smith Corp., 119 N.L.R.B. 621 (1957); Pittsburgh Plate Glass Co., 111 N.L.R.B. 1210 (1955); Hughes Tool Co., 104 N.L.R.B. 318 (1953); Larus & Brother Co., 62 N.L.R.B. 1075 (1945).

⁷³ Pioneer Bus Co., supra note 72.

⁷⁴ Rubber Workers, 57 L.R.R.M. 1535 (1964); Maremount Corp., 149 N.L.R.B. 48 (1964); Tanner Motor Livery, 148 N.L.R.B. 1402 (1964); Galveston Maritime Ass'n, 148 N.L.R.B. 897 (1964); Independent Metal Workers (Hughes Tool Co.), supra note 72; Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963).

Miranda Fuel Co., the three to two decision of the Board was denied enforcement by the Second Circuit. The Board majority has declared, however, that it will continue to find unfair representation by unions to be unfair labor practices until the Supreme Court rules to the contrary.⁷⁶ It is doubtful that the determination by a bare majority of the Board to suddenly enlarge its section 8 jurisdiction to embrace race and other alleged forms of discrimination by labor organizations will be sustained in the courts.⁷⁰

Efforts to convert the NLRB into an agency to protect civil rights may succeed only in weakening the processes of collective bargaining, to the detriment of laboring men and women of all colors and creeds. Congress has established specific machinery to combat discrimination on the basis of race or color by employers or unions. Title VII of the Civil Rights Act of 1964⁷⁷ created an Equal Employment Opportunity Commission, effective July 1965, to process charges of discriminatory practices against employers and unions.

The most effective remedy available to an employee who considers himself to be mistreated by a union is generally overlooked by the courts and by commentators. Discussions of the problem often contain references to the alleged arbitrary, dishonest or apathetic conduct of the "union" in the handling of an employee grievance. The "union" usually proves to be a shop committeeman, steward, local union officer or business agent. The acts, decisions and conduct of such minor union officials are virtually always subject to review by a union body composed of the union's executive board or the local union membership. Further appeals are usually provided to the international union's officers or governing board, and finally to the international union convention.⁷⁸ Some unions, notably the UAW and the Upholsterers' International Union, have established outside public boards with authority to review and reverse union action against members.⁷⁹ Capricious, invidious and personal considerations on the part of a union representative can thus be exposed and corrected. On the other hand, if a decision is considered by a governing body of a union or by the membership itself to be sound and in the group's interest, that decision should be accepted by the member, if rendered in accordance

⁷⁶ *Galveston Maritime Ass'n*, supra note 74.

⁷⁸ *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *NLRB v. Miranda Fuel Co.*, supra note 71. See dissenting opinions of Chairman McCulloch & Member Fanning in *Miranda Fuel Co.*, supra note 74, and *Independent Metal Workers*, supra note 72. Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 Colum. L. Rev. 563 (1962).

⁷⁷ 78 Stat. 263 (1964), 42 U.S.C. § 2000e (1964); see Symposium, 7 B.C. Ind. & Com. L. Rev. 413 (1966).

⁷⁸ See, e.g., *UAW Public Review Board; Its First Year*, 42 L.R.R.M. 75 (1958).

⁷⁹ Taft, *The Structure and Government of Labor Unions* 124-80 (1956).

with the principles of due process and the union's governing procedures.

Access to the union's internal appeals procedure presupposes that the employee is a union member. The non-member—in a bargaining unit not covered by a union shop—does not have access to this procedure. But such a situation demonstrates further that collective bargaining through a labor organization is a form of industrial democracy in which employees participate only to the extent that they become citizens by joining the union and paying their share of the costs of government. Unless they do so, they forego not only appeals from union decisions, but also a voice in determining issues which are basic in their employment relations. Issues such as union demands for contract terms, strike action and the processing of particular employee grievances, are decided in the councils of the union, not within the ranks of the bargaining unit as such.

In any community of men, some individual will occasionally suffer as a result of the pursuance of the group interest: the childless couple pays school taxes; the innocent person languishes in jail overnight because bail was not raised until morning; the crewman stands aside as the lifeboat of a sinking ship is filled with passengers. In the industrial field, an employee may lose his job because of retrenchment due to increased labor costs or higher productivity. Male employees sustain a relative loss in seniority when female employees doing the same work are integrated into the seniority list. Absolute justice, satisfaction and equity for each individual will never be attained, for, as the late President John F. Kennedy observed:

... [T]here is always inequity in life. Some men are killed in a war and some men are wounded, and some men never leave the country. . . . It's very hard in military or in personal life to assure complete equality. Life is unfair.⁸⁰

The function of collective bargaining is not to obtain utopian justice for each individual employee. Its purpose is to improve the conditions of labor of the group that it represents. The function of arbitration machinery is not to dispense equity to each individual employee, but to resolve disputes between the employer and the union during a contract term without a strike. Individual claims arising out of the group action must be subject to the acceptance and support of the group.

To convert the arbitration process into a forum for hearing the complaints of individual employees would discourage employers and

⁸⁰ The President's News Conference of March 21, 1962, reported in *Public Papers of the Presidents—John F. Kennedy* 254 (1963).

EXCLUSIVE REPRESENTATION

unions from continuing to treat differences and disputes through arbitration. To allow individuals to make private settlements or pursue private interests in arbitration without the approval of the union, which is the guardian of the collective interest, would undermine collective bargaining, encourage the return of the individual employment contract and turn back the clock.