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THE INDIVIDUAL WORKER IN GRIEVANCE ARBITRATION: STILL ANOTHER LOOK AT THE PROBLEM

By Sanford J. Rosen*

This article is concerned with the rights to be enjoyed by workers within collective bargaining processes, most particularly in grievance arbitration. When his status is involved in a grievance, should an individual be able to compel arbitration? If the union has decided to go to arbitration, has the concerned individual the right to notice of and presence at any hearing that is conducted? Has he the rights to participate and to be represented by separate counsel in the proceedings? Has he the right to challenge, in a judicial proceeding, an arbitration award that he considers to be adverse to his interests?

Investigation of these questions necessarily begins with and is continuously permeated by consideration that must be given to some of the basic questions involved in the jurisprudence of labor law. That is, to discuss the rights and status of the individual within arbitration meaningfully, it is necessary to contend with significant questions concerning such matters as the relationship between the worker and his union, and the character of collective bargaining, of grievance procedures and of labor arbitration processes. Furthermore, this exercise must be undertaken with the understanding that:

"The problem presented is not one of choosing theories, for we can draw from them only the contents

* A.B., 1959, Cornell University; LL.B., 1962, Yale University; Assistant Professor of Law, University of Maryland School of Law. Author's Note: I am indebted to the Editors of the Hastings Law Journal, who have been kind enough to permit me to repeat portions of my earlier article, Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining, 15 Hastings L.J. 389 (1964). I also wish to acknowledge my debt to Professor Clyde W. Summers of the Yale Law School for his many helpful comments and criticisms when an earlier version of this article was submitted to him as a seminar paper. The views expressed, however, are not attributable to him and he bears no responsibility for the result.
which we have placed in them. The problem is one of policy — what rights should an individual have under a collective agreement? This problem is rooted in the need for reconciling the interests of the individual with the collective interests of the union and management.  

COLLECTIVE BARGAINING AS GOVERNMENT

Collective bargaining is the accepted means by which employer-employee relations are organized in the United States. In collective bargaining, management negotiates with the employees, collectively represented by a union of their choosing, for the purpose of determining the conditions of employment that are to prevail and the structure of future collective relations. The process is continuous and encompasses both contract formation and contract implementation stages. The formal agreement that is negotiated, however, is rather like an industrial constitution or basic statute, while the grievance and arbitration procedures, established in that agreement to assure peaceful relations during its term, constitute a kind of administrative process. Although these are rough analogies and the distinction between negotiation and administration cannot be finely drawn, use of these analogies compels recognition of that which by now should be abundantly clear — within the legal limitations maintained by the general political community, the collective bargaining process is vitally con-

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4 See Hart & Sacks, op. cit. supra note 3, at 300, rev. prob. at 6-7; Dunau, supra note 3, at 732-33; Shulman, supra note 3, at 1007; Summers, supra note 3, at 24.
concerned with the establishment, legitimation and continuity of systems of industrial self-government.\(^7\)

On its first level, this private governing process is concerned with group relations, for it is within the broad framework of collective bargaining that the apparently conflicting interests of union and management, themselves petit private governments,\(^8\) are institutionally accommodated.\(^9\) But collective bargaining obviously is also concerned with the economic government of individuals, for ultimately it is the rights of the workers, incident to their


\(^9\) See Kuhn, op. cit. supra note 7; Slichter, op. cit. supra note 7; Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mt. L. Rev. 247 (1958); Hofstadter and Richter, Aspects of Arbitration Under Collective Bargaining Agreements in New York Courts, 144 N.Y.L.J., Nos. 57-58, p. 4, col. 1 (Sept. 21-22, 1960); Shulman, supra note 3; Summers, supra note 3.
employment, that are determined in the continuing dialogue between the power-bearing organs.¹⁰

In the main, procurement of the economic interests of individual workers is committed to the union that has been selected to represent them. The principal reason, in fact, for the existence of unions "is to speak for workers in negotiating terms of employment, to exercise the collective strength of workers in obtaining concessions, and to bind the workers by making collective contracts."¹¹ But trade unions are no more monolithic than are other complex social groupings. Within a union the interests of individuals or subgroups will often be pitted against one another and institutional needs of the general organization will sometimes clash with the interests of an individual or subgroup. Normally the union's resolution of such internal conflicts must prevail, but a corrupt or capricious resolution should never be considered normal, and, furthermore, normality, here as always, is not a general but a contextual condition.

When internal union conflict spills over into the variable arena of collective bargaining, some of the most engaging and perplexing problems encountered in studying labor relations result. But, as previously noted, more than anything else the problem here is definitional — What is or should be the place of the individual worker in what stages of collective bargaining?

¹⁰ As Professor Summers has stated it:
"Collective bargaining as conceived by the statute (NLRA) vests in the union collective power to enable it to bargain effectively with the employer, but the purpose of giving the union that power is to benefit the employees. The function of the collective agreement is not only to stabilize the relationship of the collective parties, but also to establish terms and conditions of employment for the employees. Nor are the interests of the employees conceived in narrow economic terms, for one of the dominant purposes of collective bargaining is to protect employees from arbitrary or unequal treatment — to bring a sense of justice to the workplace. The role of the collective agreement is to substitute general rules for unchanneled discretion; wages are not to be based on whimsy but on established rates, layoffs are not governed by favoritism but by seniority provisions, discharges are not based upon vindictive bias but upon just cause after objective inquiry."


¹¹ Summets, supra note 8, at 806; See TANNENBAUM & KAHN, PARTICIPATION IN UNION LOCALS 4-5 (1958); Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609-10 (1959); Note, 35 St. John's L. Rev. 85, 95 (1960); see § 1 of the NLRA, 49 Stat. 449, 450, 29 U.S.C. § 151 (1958); cf. Sherman, The Individual and His Grievance — Whose Grievance Is It?, 11 U. Pitt. L. Rev. 35, 36 (1949); Report, supra note 10, at 143.
GRIEVANCE ARBITRATION

THE COLLECTIVE BARGAINING PROCESS — THE QUEST FOR A LEGAL THEORY — ROUND PEGS IN SQUARE HOLES?

Judges and lawyers in general are likely to predicate consideration of labor relations problems with a characterization of the collective bargaining agreement as little more than an ordinary contract. Both procedural and substantive rights to be enjoyed under the agreement by individual workers are then determined in the context of traditional legal concepts that are found within or closely adjunct to the law of contracts. In this spirit, several different common law theories have been advanced to describe the status of the individual under the "labor contract". Employees have been described as third party beneficiaries under the union-employer contract. It has been held that employees' contracts of hire "incorporate" terms negotiated by the union with the employer. The employees have been said to be principals and the union their agent who negotiates the collective agreement on their behalf. And employees have been held to be the cestui que trust, owed a fiduciary duty of fair representation by the union, considered to be the trustee of the trust. None

12 An especially explicit statement to this effect is found in Falsetti v. Local 2026, UMW, 400 Pa. 145, 167, 161 A. 2d 882, 893 (1960), where the court said: "A collective bargaining agreement, it is important to note, is simply a contract, and any rights and remedies the appellant possesses must be derived solely from the Agreement itself." See Silver, supra note 10, at 56; cf. Jaeger, Collective Labor Agreements and the Third Party Beneficiary, 1 B.C. IND. & COM. L. REV. 125 (1960). But see, United Steel Workers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191, 201 (4th Cir. 1963).

13 See, e.g., Cox, Individual Enforcement of Collective Bargaining Agreements, 8 LAB. L.J. 350, 352-54 (1957); Note, 59 COLUM. L. REV. 153, 158 n. 25 (1959); authorities cited note 12 supra.


of these theories has in fact provided very extensive protection for individuals.\textsuperscript{18} And one consequence of the application of such theories, constructed upon the premise that the collective agreement is an ordinary contract, is that individuals have usually been deprived of any direct, independent access to the procedures that are established in the agreement to provide for its interpretation and for the determination of substantive rights. The rationale for exclusion is in the form of a rather pat logical construct, usually unstated but obviously implied. The collective bargaining agreement is a contract\textsuperscript{19} that is negotiated exclusively by union and management.\textsuperscript{20} Individual workers not being direct parties are thus, according to contract doctrine, neither promisors nor primary promisees. Therefore, individual workers have no rights of direct access to the administrative procedures established in the contract unless they are specifically given such rights by the contract or by separate agreement of the collective parties.\textsuperscript{21}

On the face of it, both the major and the minor premises seem sound. But such legalistic logic alone cannot solve the difficult problem of determining the individual's place in the collective enterprise. Furthermore, the first premise of the argument is subject to rather drastic qualification. That is, analysis of the realities of collective bargaining demonstrates that the process cannot be handily catalogued according to traditional common law concepts, for collective bargaining cannot be equated successfully with other contract situations and collective agreements are not like usual contracts.\textsuperscript{22}


\textsuperscript{19} See materials cited and quoted note 12 supra.

\textsuperscript{20} See, e.g., J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).


\textsuperscript{22} See, e.g., Chamberlain, supra note 7; Cox, supra note 9, at 262-63; Kotin, \textit{Labor Agreements in Collective Bargaining}, 6 N.Y.U. ANN. CONF. LAB. 1 (1963); Lenhoff, \textit{The Present Status of Collective Contracts in the
In the first place, the context in which collective bargaining takes place differs markedly from more usual contract contexts. The collective bargaining agreement is the focal point of especially complex social-economic relationships that vary considerably from shop to shop and industry to industry. While other types of contracts may also be negotiated for complex and variable conditions, an especially distinguishing attribute of the collective bargaining agreement is that it does not create the relationship it governs, rather it is super-imposed upon an existing relationship. In addition, the agreement is premised not only on expected continuation of the employer's framework of industrial organization and the prior-existing practices and procedures that have been left untouched by the agreement, but also upon expected continuation of the relationship itself. But, unlike the traditional contract situation, there is little danger that the relationship will not continue for it is, in every real sense, compulsory. Even if the interested parties — management, union and workers — were not compelled by law to deal with one another, the continuation of their relationship would be required by economic circumstances for the parties are truly wed to one another in the business enterprise. With all this, the purpose of the collective agreement, likely subject to indefinite renewals, is to govern, within the industrial complex, the broadest imaginable spectrum of the future behavior of not only the collective parties but also of the individual employees.
The unique type of context, in which and for which collective agreements are negotiated, determines their significant characteristics as written documents. Unlike what one expects in a contract, the most striking characteristic of a collective bargaining agreement is that it does not present "a detailed statement of responsibilities, duties [and] obligations which the parties have voluntarily assumed in return for specific considerations and which lends itself to specific performance." This attribute results from the fact that the complexity of the continuing relationship which it governs necessitates that, by comparison, the agreement itself be uncomplicated and deal explicitly with only the most significant and difficult problems. It is not possible to resolve all the issues that might arise between the parties; the situation is far too mercurial and the issues are too complicated. It can only be expected that procedures to govern the continuing relations will be established and the basic outlines of a substantive agreement will be blocked out. Thus, although the agreement does contain some provisions containing explicit rules to govern some aspects of the continuing tripartite relationship, in large measure the agreement is composed of broad standards that must undergo future interpretation. In this respect the collective agreement, unlike usual contracts, is indeed like an organic law or an industrial constitution that does not presume to terminate bargaining. The agreement in reality anticipates the continuation of bargaining, but within the procedures and processes that are provided, for the parties will most


3 As to legislative, administrative dichotomy, see supra notes 2-5 with text. A particularly apt summation of the essential attributes of collective agreements was made by the late Dean Shulman:

"It is not the 'typical' offer and acceptance which normally is the basis for classroom or text discussions of contract law. It is not an undertaking to produce a specific result; indeed, it rarely speaks of the ultimate product. It is not made by parties who seek each other out to make a bargain from scratch and then go his own way.

"The parties to a collective agreement start in a going enterprise with a store of amorphous methods, attitudes, fears and problems.

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likely have relinquished resort to economic contest, e.g., strikes and lockouts, during its term.\(^4\) And to these administrative processes, all the parties — union, management and workers — must generally look for vindication of their interests and claims under the agreement.

**The Union — Exclusive Bargaining Representative**

For a union to be able to fulfill its major legitimate function, the pursuit of maximum prerogatives for all the workers it represents, it is imperative that only the union be involved in the negotiation of the formal collective agreement. In recognition of this, Congress has adopted as a cornerstone of national labor relations policy the principle that the union, duly selected under the statutory scheme by election of a majority of the workers in a bargaining unit, is the exclusive bargaining representative of all the workers in that unit.\(^5\) The wisdom of thus excluding individuals from participation in the negotiation of the written agreement is unimpeachable. In negotiating the agreement, union and management are concerned with formulating the broad outlines of the system of industrial self-government. During these negotiations, more acutely

Though cast in adversary position, both [union and management] are dependent upon their common enterprise. ... They meet in their contract negotiations to fix the terms and conditions of their collaboration in the future. But the resulting collective agreement covers only a small part of their joint concern. It is based on a mass of unstated assumptions and practices as to which the understanding of the parties may actually differ, and which it is wholly impractical to list in the agreement. It is similarly impractical, if not impossible, to anticipate and guard against all possible future contingencies. ..."


\(^4\) Arbitration, to be considered at length later in the article, is widely recognized as a voluntary substitute for economic contest and litigation.


As to arbitration as a substitute for economic warfare, see Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); Textile Workers v. Lincoln Mills, 353 U.S. 448, 455 (1957) ("Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."); Kuhn, op. cit., *supra* note 7, at 1; Shulman, *supra* note 3, at 1007; Summers, *supra* note 3, at 17; Freidin, Legal Status of Labor Arbitration, 1 N.Y.U. Ann. Conf. Lab. 233, 234 (1948).

than at other times, the union must balance the demands and interests of worker against worker, class of workers against class of workers and must generally engage in the practice of politics as the art of the practical or the attainable. In order to assure maximum gain to the entire group represented, the union must be able to bargain from a position of absolute strength, unattended at the bargaining table itself by dissent from those whom it represents.

Certain matters of immediate individual concern, however, are determined at these conference tables. During the negotiation of the basic agreement, at least a portion of the union's energies must be directed toward the immediate establishment of individual employment rights. All such rights cannot remain contingent upon the continuation of the institutional dialogue that occurs after a contract has been accepted and during which time the union will probably have found it auspicious to have sacrificed its most powerful economic weapon — the strike. In addition, the individual workers do have some interest in the character of the institutional (i.e., grievance and arbitration) procedures that are to be established to interpret the written agreement and to adjudicate their claims under it. But, participation by individual workers in the negotiation of the collective agreement would be at least as detrimental to their own and the collective interests as would the participation of stockholders in the negotiation of commercial contracts be to the interests of the stockholders and the publicly held corporation. Historically, a central concern of the American Labor Movement was to secure the right of individual workers to act effectively in concert, i.e., to bargain collectively with employers. A major consequence of the NLRA was that federal governmental recognition and protection was afforded this right. It is unnecessary to review the social evils that were attendant upon the

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36 See, e.g., Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); J. I. Case Co. v. NLRB, supra note 35; Cox, supra note 8, at 604.
38 See, e.g., Woodward Iron Co. v. Ware, 261 F. 2d 138, 140 (5th Cir. 1958); Clark v. Hein-Werner Corp., 8 Wis. 2d 284, 99 N.W. 2d 132 (1959), rehearing denied, 8 Wis. 2d 277, 100 N.W. 2d 317, cert. denied, 362 U.S. 962 (1960), criticized on this ground in Note, 1960 Wis. L. Rev. 324, 336 (1960); Patenge v. Wagner Iron Works, 275 Wis. 495, 498, 82 N.W. 2d 172, 174 (1957). See also materials cited and quoted, note 10 supra; Fuller, supra note 7, at 10; Jaeger, supra note 12, at 133; Shulman, supra note 3, at 1005; Anno., Right of Individual Employees to Enforce Collective Labor Agreement Against Employer, 18 A.L.R. 2d 352, 364-70 (1950); Note, 25 BROOKLYN L. REV. 352, 357 (1959).
weakness of individual workers, unable to act in concert, to recognize the current utility — indeed the necessity — for exclusive collective representation at this stage.46

Since the group interest here is of such a magnitude as to eclipse any policy that might favor individual representation or negotiation, it is far better to require the individual to utilize the internal processes of his union for the vindication of his interests than to permit the integrity of collective action to be breached at this juncture. If, however, a resulting agreement invidiously discriminates or is perverse in its denial of the interests of individuals or groups of individuals, resort may then properly be made to a challenge, external to the self-governmental processes, in the courts. Such an action would usually be in the form of a suit, primarily against the union, on the ground that the union, often in overt or tacit concert with the employer, had violated its duty of fair representation.41

Admitting the utility of excluding individuals from the conference tables at which the basic agreement is formulated, it does not necessarily follow that the individual should invariably be excluded from separate participation in the private administrative proceedings wherein his rights under the agreement are adjudicated. It becomes


41 The Supreme Court formulated the so-called statutory duty of fair representation in a case, involving racial discrimination in the negotiation of a collective agreement, that arose under the Railroad Labor Act. Steele v. Louisville & N. R.R., 323 U.S. 192 (1944). A like duty exists under the NLRA. See Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). The duty has been extended to protect workers in crafts or bargaining units not represented by a discriminating union, from having their job rights invaded. Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952). The doctrine, moreover, has been held to extend beyond the negotiation of the formal collective agreement to compel fair representation in administration of the agreement through the grievance procedure. Conley v. Gibson, 355 U.S. 41 (1957). It is also clear that all invidious discriminations, not merely those based upon race, are prohibited. Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191 (4th Cir. 1963); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Humphrey v. Moore, 375 U.S. 335 (1964). In Humphrey, the latest Supreme Court decision involving fair representation, discussed at length infra, notes 160-92 with text, a duty of fair representation was implied from the collective bargaining agreement rather than from the union's statutory status as exclusive bargaining agent of all the workers in the bargaining unit. As to a possibly parallel fiduciary duty of union officials under § 501 of the LMRDA, 73 Stat. 532 (1959), 29 U.S.C. § 501 (Supp. IV, 1963), see infra notes 206-14 with text. See also, on fiduciary obligation of labor unions in collective bargaining, the materials cited note 17 supra.

Of late, the National Labor Relations Board has taken steps, see infra notes 230-43 with text, to enforce a statutory duty of fair representation.
necessary to examine the relationship that individual and group interests in grievance determinations bear to the maintenance of the integrity of purpose of these procedures. Consideration, in turn, must be made of the extent to which grievance proceedings involve continuation of general collective bargaining as well as adjudication of individual rights that may be vested under the formal collective agreement.

**The Grievance Procedure**

Since "the function of the collective agreement is not only to stabilize the relationship of the collective parties, but also to establish terms and conditions of employment of the employees," employees attach great importance to the grievance process. This is because it follows from the definition of a "grievance", which "in the language of labor relations is an assertion of a claim under the provisions of a collective bargaining agreement," that the substantive provisions of the written agreement are implemented largely pursuant to the grievance procedure.

Although grievance procedures differ in detail and practice, there is considerable uniformity in broad structural outline:

"[A] typical agreement . . . provides for successive steps [culminating in arbitration] through which a worker and his representative may take a grievance if they receive no satisfactory answer.

"Most commonly, agreements provide for four steps, though some may list as many as six. . . .

"The participants at each succeeding step are higher-ranking officers of management and union. In early steps the provisions usually require but a single union representative to meet with a designated line officer. They meet, discuss, and try to settle problems as they arise. In the step before arbitration a committee of union representatives and one or more staff

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42 Summers, supra note 7, at 389. See Smith v. Evening News Ass'n, 371 U.S. 195, 200 (1963); Slichter, op. cit. supra note 7; Blumrosen, supra note 8, at 1475-77.

43 PURCCELL, BLUE COLLAR MAN; PATTERNS OF DUAL ALLEGIANCE IN INDUSTRY 200-09 (1960); see Kuhn, op. cit. supra note 7, at 22; Shulman, supra note 3, at 1022.

officers of the industrial relations or personnel department meet regularly."

Regardless of the specific form of the grievance procedure, it is at this stage of the total collective bargaining process that the individual has his most tangible interest, for the determination of a grievance is likely to have a visibly direct, immediate and personal effect upon him. Depending upon the outcome he may retain or lose his job, be promoted or passed over, gain or lose money, be disciplined or exonerated. Furthermore, there are a number of reasons why a worker might believe that his interest is not properly served by the union's handling of a grievance. First, the worker and the union might merely have a bona-fide disagreement as to the interpretation of a provision of the collective agreement, or they might otherwise disagree as to the merits of his grievance or claim. Second, the worker might think he has reason to fear union favoritism. A worker might believe that his interests are either being opposed or inadequately represented because he belongs to a disfavored racial, ethnic, sex or age class or that he is personally obnoxious to the union leaders or membership. On the level of internal union politics, an individual may

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Some variations include, prior to (or as a substitute for) arbitration, proceedings before a high level board composed of equal numbers of union (usually international) officials and officials of various companies in the employee's association that conducts collective bargaining with the international union. See, e.g., Humphrey v. Moore, 375 U.S. 335, 338-39 (1964) (grievance procedure outlined infra note 165); Parks v. IBEW, 314 F. 2d 886 (4th Cir.), cert. denied, 372 U.S. 976 (1963).

46 See Cox, supra note 8, at 615; Cox, supra note 13, at 854; Rose, supra note 44; Note, 25 Brooklyn L. Rev. 352, 358 (1959).

47 See, e.g., Report of the Committee on Labor Arbitration, ABA Section of Labor Relations Law 55, 73 (1957); Isaeecson, supra note 17, at 187; Comment, 6 U.C.L.A.L. Rev. 603, 628 (1959).

This is especially common in situations involving seniority provisions. See, e.g., Humphrey v. Moore, 375 U.S. 335 (1964); Clark v. Hein-Werner Corp., 8 Wis. 2d 284, 99 N.W. 2d 132 (1959), rehearing denied, 8 Wis. 2d 277, 100 N.W. 2d 317, cert. denied, 362 U.S. 962 (1960).


fear that union power will be abused because he is not a member or because he belongs to the political opposition or a different union. An individual might also fear that, to his detriment, he simply does not have as much political influence within the union as other individuals who are backing interests in opposition to his. Third, workers might have reason to fear that bureaucratic inefficiency or prejudice will result in "incomplete investigation of the facts, reliance on untested evidence, or colored evaluation of witnesses [that] may lead the union to reject grievances which more objective inquiry would prove meritorious." Finally, there might be reason to believe that over-zealous concern for institutional interests of the union and the collective enterprise will induce union officials to trade off unrelated grievances or make wholesale settlements that relinquish some meritorious claims or even to accept resolutions, that very much lack in personal justice, of some grievances.

While the possibility of similar actions, harmful to particular individuals' interests, may exist when the union conducts the formal negotiation of the collective agreement, individuals do have more legitimate cause to fear exclusive union control of grievance machinery than they do to fear exclusive union control over formal contract negotiations. Since the grievance procedure, unlike the formal negotiation stage, is concerned more with the settlement of particular claims than with the statement of general rules and classifications, it "is particularly susceptible to abuse, for through it individuals or groups may be singled out [more easily and surreptitiously] for arbitrary treatment."

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51 See, e.g., Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191 (4th Cir. 1963).
52 See, e.g., Bailer v. Local 470, Teamsters, 400 Pa. 188, 161 A. 2d 343 (1960).
54 See, e.g., Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191 (4th Cir. 1963).
Moreover, when formal negotiations are conducted to amend a collective agreement or to draft a new one, it is clear to all that something new or rather different is likely to result. When, on the other hand, negotiations or adjustments are undertaken through invocation of the grievance machinery, established for application and interpretation of the existing agreement, a new result can be more easily passed off as an extension, not a modification, of the old agreement.\textsuperscript{58}

There is, understandably, not only more reason but also more pressure for either enhancing substantive public or external, i.e., judicial and/or administrative, review of grievance and arbitral decisions or promoting participation by affected individuals in many of the proceedings that constitute the private administrative processes of collective bargaining. The intensity and form of the pressure will depend in part upon the character of the particular grievance or interest.

Obviously, an individual’s interest, both substantive and procedural, will appear most direct if the grievance to be processed is his own. However, individuals may also have direct interests in the grievances of other employees.\textsuperscript{59} If, for example, the grievant is not laid off, another individual may be laid off instead; if the grievant gains seniority, another worker’s seniority may suffer.\textsuperscript{60} Even the determin-

\textsuperscript{58} Professor Summers has cogently stated the relevant technical distinctions between contract negotiation and administration:

&ldquo;Although contract making (or amending) and contract administration are not neatly severable, they are procedurally distinct processes. Most union constitutions prescribe the method of contract ratification, and it is distinct from grievance settlement; the power to make and amend contracts is not placed in the same hands as the power to adjust grievances. [n. 145; Many union constitutions require that all collective agreements be approved by the international union, some create special committees or conferences to negotiate and approve agreements and a substantial number require ratification by membership votes. National Industrial Conference Bd., Handbook of Union Government Structure and Procedures 49-54 (1955). In contrast, grievance settlements, particularly at the lower steps, are commonly made by the local officers or shop stewards.] Indeed, many union constitutions expressly bar any officer from ratifying any action which constitutes a breach of any contract.&rdquo; Summers, supra note 57, at 397; see also Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker — Union Relationship, 61 Mich. L. Rev. 1425, 1475-76 (1963).

\textsuperscript{59} See, e.g., Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 99 N.W. 2d 132 (1959), rehearing denied, 8 Wis. 2d 277, 100 N.W. 2d 317 (1960), cert. denied, 362 U.S. 962 (1960); Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 615 (1956); Summers, supra note 57, at 363-70, 393-95.

nation of a wage, vacation or disciplinary dispute may have an effect on workers other than the named grievants, for the disposition of the grievance could be used as a quasi-precedent for the future resolution of similar claims.61

Actually, the extent to which workers will be legitimately interested in grievances not brought by or on behalf of themselves will depend largely upon the type of grievance that is involved. For the present purposes of analysis, it will be useful to classify grievances into three categories. First, there are those grievances, excepting disputes as to seniority, that concern economic benefits allegedly due under the contract, e.g., rates of pay, job classification, vacation, retirement, etc. As to these, there is a substantially direct secondary group interest because of the possible precedential value of the resulting dispositions. However, it can be anticipated that the union will almost universally support the grievant if he has a colorable claim, for his victory would generally have a cumulative effect of increasing the benefits enjoyed by other employees. Since both the grievant and potential intervenors will normally gain from a victory and the union can be expected conscientiously to pursue the claim and these claims do not usually involve "critical job interests", there will comparatively rarely be pressure by individuals or groups for separate participation in this type of grievance determination.62

The second broad classification consists of disciplinary grievances. The most extreme sub-type in this category is comprised of grievances involving disciplinary discharge — the so-called economic capital punishment or death penalty. Because of the importance of the particular facts involved, the determinations of these grievances carry very little precedential value; consequently there usually is no significant legitimate pressure on the part of secondary groups to

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62 Professor Summers reports that "more than three-fourths of the cases coming to the courts involve seniority rights or disciplinary discharges. The individual's very livelihood is at stake [in these]. In personal terms, loss of seniority undermines his sense of security, and discharge darkens his good name." Summers, supra note 57, at 392; see Blumrosen, Legal Protection For Critical Job Interests: Union-Management Authority Versus Employee Autonomy, 13 Rutger's L. Rev. 631 (1959); Report, supra note 10, 50 Nw. U.L. Rev. at 146 (1955).
participate. But, since the impact on the individual, especially of a discharge, can be quite substantial and since there may be circumstances in which he has reason to fear that although the union goes through the motions of representing him it actually favors the invocation of the discipline, there is likely to be pressure on the part of the grievant to participate.

Grievances in the third classification involve seniority determinations. As to such grievances, more employees than just the named grievants will invariably have direct and significant interests in the outcome, for seniority grievances are, in a real sense, primarily disputes between subgroups of employees that concern particularly important job interests. In proceedings to determine seniority, in fact, a common cause for complaint, either by the original grievants or by possible intervenors, is that if a particular employee or group gains seniority, the complainants will be disadvantaged. Naturally, the affected employees who are supported by neither the union nor the employer will most desire to participate personally in the grievance determination, but it is likely that these employees, who are opposed by the union, will desire to participate even if the employer ostensibly supports their position.

63 But cf. Report, supra note 10, 50 Nw. U.L. Rev. at 146 (1955). ("Even in discharge cases, the other employees may object to working with the complainant because he is not a suitable fellow employee." In footnote 6 to the Report, supra, such an incident is discussed).


The importance of seniority cannot be overly stressed for "[S]eniority, defined and assured by agreements, is vital in industrial government; it controls layoffs, recall rights, promotion, transfer, demotion, eligibility for vacation and welfare plans, distribution of overtime, and shift preference." United States Commission on Civil Rights Report: Employment 134 (1961).

66 See, e.g., Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191 (4th Cir. 1963). Not only in seniority cases, but also in "promotion, and transfer cases the protest is against another employee receiving benefits the complainant feels he should receive." Report, supra note 10, 50 Nw. U.L. Rev. at 146 (1955).

67 In some such circumstances only two groups of employees are concerned. The employer remains neutral and the union backs one group. See Humphrey v. Moore, 375 U.S. 335 (1964). In other circumstances, more than two groups of employees will be involved. The union backs group one, the employer backs group two and group three is out in the cold. See Matter of Arbitration between Iroquois Beverage Corp. and International Brewery Workers, 14 Misc. 2d 277, 159 N.Y.S. 2d 276 (Sup. Ct. 1955), noted, 66 Yale L.J. 946 (1957).

Since conflicting interests of different employees may be involved in a given grievance, it is evident that in the course of using the grievance machinery the union must balance interests within the grievance just as it must balance interests when it decides what issues to press in negotiating the formal agreement. Moreover, the union may have occasion not only to balance conflicting interests within a particular grievance, but it might find it appropriate as well to balance unrelated grievances against one another, relinquishing some claims in order to gain favorable settlement of others. But the balancing exercises undertaken here, both within a given grievance or between unrelated grievances, will rarely be of the same order as those which must be involved in the initial drafting of the collective bargaining agreement — primarily because of the very existence of the written agreement.

The grievance procedure really has a dualistic character that results from the characteristic of the collective agreement as a document containing some broad or ambiguous and some particular and relatively settled provisions and which generally embodies the twin crucial decisions to foreswear economic warfare and to resolve future conflict during the term of the agreement within grievance and arbitral machinery. On the one hand, individuals do, or should come to, enjoy specific rights that are created or vested by the agreement and these rights are, or should be, cognizable in grievance proceedings. On the other hand, many provisions of the collective bargaining agreement are sufficiently ambiguous as to place in doubt the exact character of the rights to which the individual may, in any concrete controversy, be entitled. Furthermore, problems raised in grievances may not really have been anticipated in the substantive provisions of the written agreement or, even as to comparatively explicit provisions, conditions may so drastically change as to require an adjustment that differs from the one originally contemplated in the written agreement. The grievance procedure is, therefore, not merely used for relatively mechanical administration and application of explicit and clear provisions of an existing formal agreement; it is also concerned with the continuation of negotiations between union and management which

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69 See note 55 supra.
70 See notes 22-34 supra with accompanying text.
71 See notes 10 and 38 supra.
72 See notes 31-33 supra with accompanying text.
73 See, e.g., Goldberg, supra note 32, at 360; Shulman, quoted supra at note 33; Wellington, Judicial Review of the Promise to Arbitrate, 37 N.Y.U.L. Rev. 471, 474-75 (1962).
makes it a part of the continuous collective bargaining process. But, even though the provisions of the agreement may be ambiguous or incomplete and therefore subject to continued negotiation, the agreement does provide "a standard which both sides have agreed is the norm in relation to which a dispute is to be settled." The Supreme Court appears recently to have held that these standards are suitable for substantive judicial scrutiny.

It is now likely established that, because the existing agreement does provide such standards, broader substantive judicial review of union-employer bargaining decisions made during the administration of the agreement is available than is available over similar collective decisions that are made when the basic agreement is formally negotiated or amended. If this is true, it would still remain to be ascertained how the willingness of the courts to engage in this comparatively expansive substantive judicial review of administrative determinations by the collective parties relates to proposals to enhance workers' procedural rights in the administrative proceedings of collective bargaining—particularly in arbitration. So far as the individual is generally concerned, the alternatives—substantive external supervision of collective action versus individual participation—may turn out to be fungible for, as analysis of the cases will indicate, "all the individual seeks is access to some neutral tribunal where, along with union and management, he shall have an opportunity to be heard." On the other hand, so far as the most appropriate institutional structuring of collective bargaining is concerned, one of the approaches might turn out to be preferable. A preliminary step in determining how the law should best respond to these matters involves consideration of what law is relevant.

What Law, Federal or State, Governs the Collective Bargaining Agreement

The question of what law, federal or state, governs the collective bargaining agreement and the relationships functioning thereunder is related primarily to judicial interpretation of section 301(a) of the LMRA which provides that:

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74 Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 Colum. L. Rev. 731, 733 (1950); see Summers, Individual Rights in Collective Agreements: A Preliminary Analysis, 9 Buffalo L. Rev. 239, 245 (1960).

75 Humphrey v. Moore, 375 U.S. 335 (1964), to be discussed at great length later in this regard.

76 Summers, supra note 57, at 370.
"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The issue has now been clearly settled in favor of federal law, but it has not always been entirely so.

Until recently both federal and state courts generally ignored the full implication of the Supreme Court's holding in the celebrated Lincoln Mills case that section 301 embodies a congressional mandate for the federal courts to entertain suits based upon collective bargaining agreements and thereby to create a substantive federal common law of labor relations. Relying on the earlier case of Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., in which it was held that suits to secure "uniquely personal" rights were not cognizable under section 301(a), courts either refused to entertain or to decide under federal law suits brought by or directly on behalf of individual employees. An anomalous situation was thereby created in which a single collective agreement was likely to be subjected to judicial interpretations within differing and possibly conflicting bodies of substantive law. More specifically, as the Supreme Court was later to declare:

"The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union

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81 More elaborate discussions of the anomaly and other reasons why the Westinghouse doctrine was inappropriate are to be found in: Ostrofsky v. United Steelworkers, 171 F. Supp. 782, 789-90 (D. Md. 1959), aff'd, 273 F. 2d 614 (4th Cir.), cert. denied, 363 U.S. 849 (1960); Summers, supra note 74, at 241 n. 12; Summers, supra note 57, at 370-75; Note, 71 Harv. L. Rev. 1169 (1958).
interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims 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."

Nevertheless, for almost eight years after the Lincoln Mills decision, claims of the collective parties were adjudicated according to federal law, but, since individual claims were not considered to be within the scope of section 301, they were adjudicated with reference to state substantive law.

Beginning with Lincoln Mills, however, the Supreme Court, accompanied by some of the more daring state and lower federal courts, eroded the Westinghouse doctrine until the Court was finally able to declare, in Smith v. Evening News Ass'n, that "subsequent decisions here have removed the underpinnings of Westinghouse and its holding is no longer authoritative as a precedent." It now appears that collective agreements within the sweep of the Commerce power of the United States are subject only to federal substantive law and further that not only suits by unions and by individuals supported by their unions, but also suits by individuals unsupported or even opposed by their unions, to enforce even "uniquely personal" employee rights, under such collective agreements, are justiciable under section 301. These actions, moreover, are not subject to pre-emptive jurisdiction of the National Labor Relations Board even when they involve matters that admittedly fall within the ambit of sections 7 or 8 of the NLRA. Finally, cases under section 301 may be entertained

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in either federal or state courts, but state as well as federal judges must of course apply federal substantive law to be formulated in accordance with "the policy of our national labor laws."

As to the sources of such federal law, the Court has held that:

"The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem."

Professor Summers has recently and very expertly examined two of the major federal law sources that might appropriately be drawn upon to describe and institutionalize a quasi-independent place for the individual employee in the grievance and arbitral processes. Rather than recanvass in detail the ground that already has been so well explored, for present purposes it will suffice to indicate the two main federal source areas and to refer the reader to Professor Summers' analysis.

The first significant source of employable federal law is section 9(a) of the NLRA. This provision designates majority unions as the exclusive bargaining representatives of all the workers in appropriate bargaining units.

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Textile Workers v. Lincoln Mills, supra note 89, at 457.

Summers, supra note 57, at 376-88.

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a 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 a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment."
The statutory designation is followed by the proviso that individual employees are to have the right, in the presence of the union if it chooses to be present, to settle their own grievances with the employer. Such settlements, however, may not contravene the collective bargaining agreement then in effect. Although there is evidence to the contrary, Professor Summers demonstrates that it is possible to read section 9(a) as a congressional mandate directing the recognition of non-defeasible procedural rights for individual employees in all aspects of grievance determinations. Until now, however, in the decided cases touching upon the rights to be enjoyed by individuals in the grievance process, the courts, have "generally ignored the policy thrust of the words and the history of the proviso. Instead they have seemingly felt imprisoned by their own self-constructed theories, or have reasoned from policies declared without reference to the provisions of the federal statute." Recently, for example, the Second Circuit "concluded that rather than vesting an 'indefeasible right' in the individual employee, section 9(a) 'merely set up a buffer between the employee and his union', permitting him the 'privilege' of presenting personal grievances to his employer while protecting the latter from charges of unfair labor practices by 'authorizing' him to adjust such griev-


Summers, supra note 57, at 376-85 (Interpreting the language of § 9(a) and other provisions of the NLRA in the light of the legislative history of the 1947 amendment of § 9(a) as affected by two prior decisions: Hughes Tool Co., 56 N.L.R.B. 381 (1944), enforced as modified, 147 F. 2d 69 (5th Cir. 1945); Elgin, Joliet & Eastern Ry. v. Burley, 325 U.S. 711 (1945), aff'd on rehearing, 327 U.S. 661 (1946).)


Summers, supra note 74, at 241.
ances without union interference.\textsuperscript{96} The New Jersey Supreme Court, on the other hand, has accepted Professor Summers' position and adopted an opposing construction of section 9(a).\textsuperscript{97} Since the Supreme Court has not yet

\textsuperscript{96} Note, 63 Colum. L. Rev. 1513, 1516 (1963) commenting on Black-Clawson Co. v. International Ass'n of Machinists, 313 F. 2d 179 (2d Cir. 1962).

The case involved a declaratory judgment proceeding brought by a company against a union and an employee represented by the union. The employee had been discharged for failure to return to work after a protracted illness. Purporting to have complied with the preliminary steps of the existing grievance procedure, the employee demanded that the employer submit to arbitration of his grievance. In a suit to avoid arbitration, the employer argued that the employee had no right under contract or law to compel arbitration. The Court of Appeals agreed with both propositions.

The following cases have considered and approved or followed Black-Clawson: Local 12405, Dist. 50, UMW v. Martin Marietta Corp., 328 F. 2d 945 (7th Cir. 1964); Carey v. General Electric Co., 315 F. 2d 499 (2d Cir. 1963), cert. denied, 32 L. Ed. 2d 179 (1964); Proctor & Gamble Independent Union of Port Ivory v. Proctor & Gamble Mfg. Co., 312 F. 2d 181, 184-85 (2d Cir. 1962), cert. denied, 374 U.S. 830 (1963); Brandt v. United States Lines, Inc., 55 L.R.R.M. 2665 (S.D. N.Y. 1964).

\textsuperscript{97} Donnelly v. United Fruit Co., 40 N.J. 61, 190 A. 2d 825 (1963).

Plaintiff, an employee of the company, was discharged, allegedly for inefficiency. He asked his union representative to investigate the case and it did so but declined to take the grievance further, informing the plaintiff that he had no case. In an action, against the union and the company, that went to the New Jersey Supreme Court, plaintiff alleged that the collective agreement had been breached in that his discharge violated the terms of the agreement and was further breached by the failure of the collective parties to process his claim in accordance with the grievance procedure established in the agreement.

The court held that the suit arose under § 301 of the LMRA and was therefore subject to federal substantive law. Interpreting § 9(a) in the light of its history and the court's view of sound labor relations policy, the court stated that:

"It is true the employee is not a nominal or formal party to a collective bargaining agreement. But the rights, duties and benefits of his employment are so created and controlled by the agreement made in his behalf by his statutory representative, the union, that for some purposes, at least, he ought to be regarded as a third-party beneficiary in substance as well as in spirit, or as possessing independent rights under section 9(a) of the Labor Management Relations Act, supra, which ought to be considered as part of every such contract by operation of law." 40 N.J. at 81-82, 190 A. 2d at 836.

The court held that upon the refusal of the union to do so, a grievant had an unlimited right of his own to process and adjust his grievance relating to personal rights. In fact, it was held that before a suit at law for breach by the union of its duty of fair representation would be entertained the grievant was required to exhaust all avenues of private relief. The court further concluded that the Congressional purpose of § 9(a) and the policy under § 301 favoring arbitration and uniformity and consistency of results in grievance determinations would all be served by requiring individual grievances to be handled through the contractual system of arbitration. Upon the union's refusal to compel arbitration, the court held that plaintiff should have requested it. In arbitration invoked by an individual the union could participate to argue its view of the contract provisions, but the employee is to be "in control of the procedural steps wherever necessary to achieve a just determination." 40 N.J. at 92, 190 A. 2d at 841. However, if the arbitrator were to find that the individual's claim was colorable and of a substantial nature the union would share the costs with the company, if the arbitrator failed to so find the court provided
considered the scope of the section as it bears upon the rights of individuals, it is by no means clear that the gloss applied by the Second Circuit will prevail.

As to the second major source of federal law, it is useful to examine the development under the Railway Labor Act, which has not been unlike that occurring under section 301 of the LMRA. Although practice here pertains to a somewhat unique statutory context, "there is no reason to assume that Congress, in accommodating the competing interests of the union and the individual in the enforcement of the collective agreement, would strike a different balance because the employee was a railroad engineer or airplane mechanic rather than a truck driver or foundry man." It is significant that at least since the Supreme Court's 1945 decision in Elgin, Joilet & Eastern Ry. v. Burley, interested individuals have been recognized to possess personal rights in relation to grievance processing and to be entitled to the rights of notice, presence and counsel in proceedings conducted before the National Railroad Adjustment Board. While this Board, established by statute, is technically a public administrative agency, it has a markedly "private" composition and proceedings before it are analogous to arbitrations and are characteristically the highest non-judicial stage in the determination of such grievances as are brought before it.

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that the individual was to bear his share of the costs. 40 N.J. at 87-93, 190 A. 2d at 839-42.

The plaintiff in the case before the court was unable to avail himself of the decision in his favor, for he had failed to demand, of the collective parties, the right to proceed pro se.

99 See summers, supra note 57, at 385; but see commentators cited infra, note 100.


100 See Whitehouse v. Illinois Cent. R.R., 349 U.S. 366, 371 (1955); Cox, supra note 59, at 635-36; McRee, supra note 93, at 437; Williams, supra note 93, at 272-73.

101 Summers, supra note 57, at 376.


103 See ibid; Order of R.R. Telegraphers v. New Orleans, T. & M. Ry., 229 F. 2d 59 (8th Cir. 1956), cert. denied, 350 U.S. 997 (1956); Brotherhood of R.R. Trainmen v. Templeton, 181 F. 2d 527 (8th Cir. 1950), cert. denied, 340 U.S. 823 (1950); Hunter v. Atchison T. & S.F. Ry., 171 F. 2d 594 (7th Cir. 1948), cert. denied, 337 U.S. 916 (1949); Estes v. Union Terminal Co., 89 F. 2d 768, 770 (5th Cir. 1937); Nord v. Griffin, 86 F. 2d 481 (7th Cir. 1936), cert. denied, 300 U.S. 673 (1955) (lower court decisions discussed but not passed upon); 1 Davis, Administrative Law § 8.11 (1958).


Although section 9(a) and the experience under the Railway Labor Act provide useful references for the general development of the rights of individual workers in the total grievance process, so far as individual participation in arbitration is concerned, by far the most relevant federal source of law is to be found not in explicit statutory provisions but in the well declared policy that favors and promotes contractual arbitration as the central facet in the institutional "private ordering" that is collective bargaining.

**Arbitration — The Touchstone of Industrial Self-Government**

Most grievances are necessarily settled at informal and low bureaucratic levels. The more troublesome and significant problems are carried up through the established procedures — each stage becoming more formal — which almost universally culminate in some form of arbitration before a neutral arbitrator or a multi-partied board with a neutral chairman. Although it is generally cheaper than litigation or economic contest, arbitration is still a rather expensive process and perhaps for that reason, as well as the desires of the collective parties generally to settle their own disputes if at all possible, it is comparatively rarely used. Nevertheless, the arbitration process is of great

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110 "In the typical labor management arbitration case today, the arbitrator charges at least $100 for each day of hearing and for each day devoted to study and writing the award. A recent research report of the American Arbitration Association showed, further, that in more than 60 percent of the cases the arbitrator's fees totalled between $100 and $300. More than $300 was charged in about a third of the cases; in fewer than one percent was less than $100 charged."


111 According to the court in Donnelly v. United Fruit Co., 40 N.J. 61, 91, 190 A. 2d 825, 841 (1963), during "the ten years between 1942 and 1952, in
importance to the integrity of collective bargaining, for realistically it is the substitute, to which the collective parties have agreed, for economic contests and substantive litigation. Arbitration is so highly valued in this respect that the Supreme Court has ruled that even in the absence of an explicit no-strike clause, one will be inferred from the existence of a general arbitration clause as its parallel.

Arbitration is truly the touchstone of the American practice of industrial self-government. Its importance to industrial peace results from the fact that it is not merely a court of last resort for the particular grievance but it is also as much a part of the continuous collective bargaining process as is the total grievance machinery of which it is the apex. It is through the office of arbitration that the collective parties submit themselves to an internal rule of law, for it is in large measure the arbitrator’s function to complete the necessarily sketchy collective agreement and to draw upon and to foster the continued development of a private common law within the shop. Arbitration is thus simultaneously both the highest stage in the machinery to resolve individual grievances and the highest stage in such collective bargaining as continues during the period after the negotiation of the existing written agreement and until the negotiation of the next one.

The centrality of arbitration is well reflected in the decisions of the Supreme Court. In the Lincoln Mills case the Court ruled that arbitration clauses are specifically enforceable in suits brought under section 301. Only a few years later the Court took significant steps, in a trio of cases now known as the Steelworkers Trilogy, to assure the relationship between Bethlehem Steel Company and United Steelworkers of America, involving more than 15,000 employees, of 17,000 written grievances only 1,000, or an average of 100 a year, were decided finally by an arbitrator.”

While arbitration may be rare compared to total written grievances, the total number of annual labor arbitrations appears quite significant. It is reported that in 1962 “arbitrators handed down awards in more than 15,000 labor controversies and wrote a million words of opinion. . . . And every year their case load increases — by 10 percent, according to the American Arbitration Association. . . .” Stessin, A New Look at Arbitration, New York Times Magazine 26, col. 2 (November 17, 1963).

See note 34 supra.


353 U.S. 448 (1957).

the private self-governing status of collective bargaining by promoting the predominance of arbitration and thereby limiting the possible incidence of substantive judicial review of alleged breaches of collective agreements. In the Court's view the realities of collective bargaining make it obvious that arbitration provides more appropriate general supervision than would extensive independent judicial review. As Justice Douglas stated:

"The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law — the practices of the industry and the shop — is equally a part of the collective agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."

In the Steelworkers Trilogy the Court spared no effort in making it evident that the major role in the arbitral process is to be played by the arbitrators rather than by the courts. In suits to compel arbitration, or to review arbitration awards, the function of the courts has been narrowly limited to determine "whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpreta-

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118 United Steelworkers v. Warrior & Gulf Nav. Co., supra note 117, at 581-82. See also, Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1493-98 (1959); Fuller, Collective Bargaining and the Arbitrator, 1963 Wis. L. Rev. 3; Shulman, supra note 109, at 1008-11; Summers, supra note 109, at 15-16.
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tion that covers the asserted dispute. Doubts should be resolved in favor of coverage."\textsuperscript{119} It has further been made clear that neither before arbitration is ordered nor upon review of an arbitration award are the courts to review the merits of a grievance.\textsuperscript{120}

Although it is clear that an important policy decision has been made in favor of self, or arbitral, as opposed to public, or judicial-administrative, ordering in the enforcement of collective agreements, the Steelworkers Trilogy and the cases following it need not be construed as an abdication of public role in relation to the adjunctive molding of acceptable arbitral processes. And, as prologue to consideration of the forms and implications of appropriate procedural structuring of arbitration, it is useful to describe the status enjoyed by individual workers in arbitration as it was defined in the various cases that addressed the relevant issues prior to the Supreme Court's past term. Many of the decisions in the past were those of state judges deciding cases according to state law. Although it appears that federal law, implementing the federal policy embodied in the national labor statutes, is to govern the status of individuals in arbitration, these state cases are still instructive and must be considered to the extent that they illuminate the social problems that are involved and develop and analyze competing policies, approaches and potential solutions. In its declaration of how federal law is to be created under section 301, the Supreme Court, in fact, specifically recognized that a role is to be played by existing state law, and asserted that "state law, if compatible with the purpose


The National Labor Relations Board has evidenced a similar deference for arbitration. If an issue raised in an unfair labor practice proceeding has been resolved in arbitration which was fair and regular, and all parties had agreed to be bound, and the award was not clearly repugnant to the NLRA, the Board will refuse to adjudicate the same issue in the unfair labor practice proceeding, even if it might have reached a different decision on the same facts. Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). Discussed in Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 Mich. L. Rev. 1435, 1514-17 (1963).

In further deference to the arbitrator, the Supreme Court recently refused to draw a distinction between substantive and procedural issues in arbitration and held that the arbitrator, not the courts, is to decide whether the procedural prerequisites to arbitration have been met. John Wiley & Sons v. Livingston, 376 U.S. 543, 555-59 (1964).
of section 301 may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights."

**INDIVIDUALS IN ARBITRATION — MAJOR APPROACHES UNDER STATE LAW**

It has generally been held that an individual worker cannot compel arbitration of his grievance unless he can demonstrate that his right to do so arises from the collective agreement itself, but collective agreements do not often anticipate this problem. Since "the grievance and arbitration clauses normally refer only to the collective parties," they are probably most susceptible to interpretations that deny the individual the right to invoke the process; but they probably could also be interpreted by willing courts to provide access to individuals. Courts, generally operating under state law, have for the most part, however, been unwilling to read collective agreements as favoring individual participation. As already noted, the most recent decisions fully treating this question, as governed by federal law, have been in the Second Circuit and New Jersey. The Second Circuit has made policy choices and adopted a reading of section 9(a) of the NLRA that precludes uninvited individual invocation of arbitration. The New Jersey Supreme Court, on the other hand, has adopted the opposing position that the best approach

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125 See cases cited note 122 supra.
126 Black-Clawson Co. v. International Ass'n of Machinists, 313 F. 2d 179 (2d Cir. 1962) discussed note 96, supra.
in this area is to read section 9(a) as giving the individual a non-defeasible right of his own to call forth arbitration. Until faced squarely by the Supreme Court, the question will remain unsettled.\textsuperscript{128} This entire area is, in fact, in a furious state of development and flux. And once one is beyond the difficult problem of compelling arbitration and faced with situations in which the union has decided to take a grievance to arbitration, the extent of the individual’s procedural rights becomes, if anything, even less clear.

For many years the law of New York was especially uncertain in this regard. Although the Court of Appeals for a long time had no occasion to pass upon any cases in which the rights of individuals in arbitration were involved, the lower courts did decide many such cases. Sometimes it was concluded that individuals were entitled to procedural rights in relation to arbitration\textsuperscript{129} and sometimes it was held that they were not so entitled.\textsuperscript{130} Beginning in 1959 the New York Court of Appeals took steps to clarify the legal posture of the individual in this area.

\textsuperscript{128} Two commentators have indicated that they think that the issue has already been settled and that the collective parties, who can agree that some procedure other than arbitration shall be final, can agree to exclude individuals from invoking arbitration. See Report of the Committee on Individual Rights in The Collective Bargaining Relationship, ABA Section of Labor Relations Law 164, 165-66 (1963), discussing, General Drivers, Local 80 v. Riss & Co., 372 U.S. 517 (1963); Barbash, Due Process and Individual Rights in Arbitration, 17 N.Y.U. ANN. CONF. LAB. n. 62 (1964 as yet unpublished), discussing Humphrey v. Moore, 375 U.S. 335, 347-48 (1964) (by implication). And see id., 375 U.S. at 331 where the Riss case, supra, is cited for the proposition that “The decision of the committee, reached after proceedings adequate under the agreement, is final and binding upon the parties. Just as the contract says it is.”

As these gentlemen do make persuasive arguments, it can only be suggested that the Court has not yet clearly faced the issues and in the light of recent developments it might find it useful not to extend the implications of those cases to embody such a sweeping rule.


In a far reaching decision, *Parker v. Borock*, the court held that an individual worker could not sue his employer to remedy alleged violations of rights that admittedly inured to his benefit under the collective bargaining agreement. Suit was brought against an employer by a discharged employee whose union had refused to take his grievance to arbitration. In an earlier proceeding it had been held that the employee could not compel arbitration, "purely a Union right." In the suit against his employer for damages, the New York Court of Appeals held that he also had no right to proceed against the employer. The majority's position was that "[A] reading of the existing agreement indicates that plaintiff has entrusted his rights to his union representative. It may be that the union failed to preserve them. . . . '[T]he only conclusion which logically follows is that the employee is without any remedy, except as against his own union. . . ." In other words, according to the New York court, the individual's only remedy, when his union refuses to take a grievance to arbitration, is to bring suit against the union for violation of its fiduciary duty of fair representation.

Having gone this far, the Court of Appeals, in the case of *In re Soto*, then settled the conflict that had existed in the lower courts as to the rights available to individuals in relation to arbitration proceedings that a union has elected to initiate.

A number of employees represented by Local 122 of the National Jewelry Workers Union, who were being paid $42.00 a week, joined Local 810 of the Teamsters Union out of dissatisfaction with the local of the National Jewelry Workers. A wildcat strike took place, but it was enjoined and the striking employees returned to work. The em-

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134 Judge Fuld, concurring, stated that "absent specific language giving the employee the right to act on his own behalf . . . the union alone has a right to control the prosecution of discharge cases. . . . '[T]he employee has a remedy against the union for breach of fiduciary duty if it unfairly discriminated against him." 5 N.Y. 2d at 162, 156 N.E. 2d at 300, 182 N.Y.S. 2d at 582.
ployer, however, then accused some of these employees of engaging in a slowdown. Local 122 was notified by the employer of its intention to discharge several workers. The union requested arbitration and a couple of hours before the hearing the employees to be discharged received notice of its time and place and were informed that they could appear and be heard. Accompanied by their own attorney, (counsel for Local 810), who requested an adjournment and leave to represent them, they attended the scheduled hearing. After an adjournment of three days the arbitrator ruled that independent counsel could not represent the grievants because Local 122 was the exclusive bargaining agent under the collective agreement and its counsel alone would therefore conduct the hearing for the discharges. This ruling was made in spite of the fact that the arbitrator had been informed that Local 122's lawyer at the arbitration had represented the employer in the proceedings to enjoin the wildcat strike and to hold the officers of Local 810 in contempt because of the alleged slowdown. Insisting that his clients were thus being denied counsel, the attorney for the discharged employees announced that they, consequently, would not appear at the hearing. The employer put on his case at the hearing and when counsel for Local 122 interposed no defense, the arbitrator was constrained to uphold the discharges.\textsuperscript{136}

An action to vacate the award was then brought by the aggrieved employees. Under the circumstances of the case, vacatur was granted by the lower courts on the ground that meaningful intervention should have been granted in the arbitration, for it was otherwise impossible for the grievants to have their position adequately represented.\textsuperscript{137} Reversing, a divided Court of Appeals held that since these individuals were not parties to the collective agreement and were not granted the right to intervene by that agreement, they were not parties to the arbitration and therefore they did not have the requisite status, under the New York Arbitration Statute, to initiate a proceeding.

\textsuperscript{136} There is no specific indication that the arbitrator knowingly ratified a decision that had been agreed between union and company before arbitration had been undertaken. There are, however, instances in which such use is made of the arbitral process. Union and management having agreed to the disposition of a matter, desire or need the "neutral" arbitrator's imprimatur. The arbitrator who agrees to such action has been said to prostitute his position. Such practice, which is reported to be declining, has been sharply criticized. See Fleming, Some Problems of Due Process and Fair Procedure in Labor Arbitration, 13 STAN. L. REV. 235, 248-51 (1961); Fuller, Collective Bargaining and the Arbitrator, 1963 WIS. L. REV. 3, 18-22 (1963).

\textsuperscript{137} 7 App. Div. 2d 1, 180 N.Y.S. 2d 388 (1st Dep't 1958).
for an order to vacate the arbitration award. The court concluded its decision by stating that "... an employee is not foreclosed, in an appropriate case, from pursuing any remedy at law that might be available for breach of fiduciary duty owing by the union." Thus, under New York law, even when a union elected to initiate arbitration and then proceeded in an unfair manner, an individual only had recourse to such remedy as was provided by a suit at law based upon the union's breach of its fiduciary obligation.

Shortly after the Soto decision, the single and limited right of an aggrieved worker to proceed against his union for breach of its fiduciary duty was further attenuated by an appellate division ruling. Building upon the antediluvian concept that a labor union — a voluntary association — is not an entity distinct from its membership and, therefore, cannot be sued in its own name or by a member, the court held that a union could be held liable for such a breach "only if the cause of action is provable against each and every member of the association."

No other jurisdiction has consumed so many pages of its case reports in examining the status to be enjoyed by individuals in arbitrations that a union elects to initiate as

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138 7 N.Y. 2d at 400, 165 N.E. 2d at 856, 198 N.Y.S. 2d at 288-84.

Four individuals, former employees of the Lorenz-Schneider Company, had purchased commercial routes from the company. The union, taking the position that the sale violated the collective agreement, took the matter to arbitration. The four individuals were not parties to the arbitration where it was held that the union's interpretation was correct and it was ordered that the four routes be restored to the coverage of the agreement. The court held that since the parties were parties neither to the arbitration nor to the collective agreement, they had no standing to seek vacatur of the award.

It is further noteworthy that the decisions of the United States Court of Appeals for the Second Circuit appear to accord with the Parker-Soto trend. See Black-Clawson Co. v. International Ass'n of Machinists, 313 F. 2d 179 (2d Cir. 1962); Belk v. Allied Aviation Service Co., 315 F. 2d 513 (2d Cir. 1963); Brandt v. United States Lines, Inc., 55 L.R.R.M. 2665 (S.D. N.Y. 1964).


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has New York; indeed, very few states have significantly touched upon these problems.

The Connecticut Supreme Court of Errors had occasion, in 1960, to decide that individual employees, not parties to or contemplated by collective bargaining agreements, could not compel arbitration; similarly they did not have standing to move a court to vacate an arbitration award. The Connecticut Court, however, had been known to find an intent in the words of an arbitration clause to permit an individual to invoke arbitration on his own behalf. The 1960 decisions, moreover, did not go as far as those in New York and declare that the aggrieved employee's remedy included no action against the employer and was limited to an action at law against the union for breach of its fiduciary duty.

Maryland, also rejected the full force of the drastic New York approach. In its leading decision, the Maryland Court of Appeals permitted an individual a suit for wrongful discharge against her employer and her union when "the Union acted arbitrarily and in a discriminatory manner in refusing to press the plaintiff's grievance to arbitration under the agreement." Michigan appears, on the other hand, to have adopted more of the total New York approach.

The Pennsylvania decisions were rather clearly in the New York camp. In *Falsetti v. Local 2026, UMWA* an aggrieved employee, who allegedly was laid off by the company while other employees with less seniority than he were not, and who was later expelled from his union, brought suit against his employer and union officials for the first affront, and against the union for the second. His claim for wrongful expulsion was decided against him on

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the ground that he had failed to exhaust his internal union remedies. On the wrongful discharge claim, it was held, following *Parker v. Borock*[^148^], that the employee could bring no action against the employer and that his only remedy was a suit against the union for breach of its fiduciary obligation. The court reasoned that, as a matter of contract law — under the existing collective agreement — and as a matter of sound labor relations policy, only the union could be permitted to prosecute a grievance. The court further refused to consider whether the union had breached its fiduciary duty of fair representation in failing to prosecute plaintiff's grievance. This time plaintiff was thrown out of court on the technicality that he had misjoined the union officials rather than the union itself in that cause of action.[^149^] There seemed to be no question but that a proper suit against the union could be joined without entity problems being encountered.

In *Bailer v. Local 470, Teamsters*,[^150^] the Pennsylvania Supreme Court bought another large portion of the New York approach. Plaintiff, a member of the Teamsters Union, seconded a motion in 1957 that his Local oppose the election of James Hoffa as President of the International. Officers of the Local did not permit the membership to vote on the motion and the moving party was advised that, regardless of membership opinion to the contrary, the Local's vote would be cast for Hoffa. Later plaintiff and other members circulated a petition embodying a request to an intermediate union supervisory body to assure that the Local Officers administered the affairs and meetings of the Local in a democratic fashion. The day that Hoffa was elected International President, plaintiff was fired from the job that he had held for seven years, allegedly for circulating the petition during business hours. Plaintiff filed a grievance with the Local. Although the shop steward did nothing, the Local submitted the grievance to arbitration. However, plaintiff's request that independent counsel represent him at the arbitration was rejected. Subsequently the arbitration award went against him. The court held that plaintiff failed to prove a claim, under the *Falsetti* decision, for breach of the union's duty of fair representation. As to plaintiff's request that he be represented at the arbitration hearing by his own lawyer,

[^148^]: See notes 131-34 supra and accompanying text.

[^149^]: Evidently Falsetti was not completely discouraged. He was recently held by a federal district court to be entitled to a trial on similar claims raised under § 301 of the LMRA. *Falsetti v. Local 2026, UAW*, 55 L.R.R.M. 2552 (W.D. Pa. 1964).

[^150^]: 400 Pa. 188, 161 A. 2d 343 (1960).
the court held that the request was properly denied since the Local was the exclusive bargaining agent with the company. Thus, in Pennsylvania as in New York, even when a union elected to initiate arbitration, an individual's only recourse against possible unfairness was to such remedy as was provided by a suit at law based upon the union's breach of its fiduciary obligation.

In Wisconsin the judicial climate has been much more favorable to the individual. First, the Wisconsin Supreme Court squarely held that, when faced with a hostile union opposing their interests, aggrieved workers could sue their employer to secure contract benefits that were “clearly for the benefit of the individual employee,” despite the fact that the collective agreement expressly provided that the grievance and arbitration processes “shall be the sole means of disposing of grievance.”151 Second, the court held that a labor union is an entity, separate from its membership, for the purposes of a suit by a member for breach of its fiduciary obligation.152

The Wisconsin Court occupied its most advanced position in Clark v. Hein-Werner Corp.153 This case involved a seniority dispute. A group of employees, with extensive seniority as production workers, were promoted to supervisory positions. Later, when the company retrenched, they were returned to production jobs and consequently to the bargaining unit. In calculating their seniority in production jobs, issue was joined over whether time served as supervisors should be included. The company, backing the former supervisors, argued for inclusion, while the union opposed. Siding with employees who had been laid off to make room for the former supervisors, the union filed a grievance and processed it to arbitration. None of the demoted employees, however, was notified of the arbitration proceedings and none was present or participated. When the arbitrator upheld the union's position, some of the former supervisors brought suit to vacate the award.

Recognizing a general rule that courts should not interfere with the arbitration process, the Wisconsin Supreme Court was, nevertheless, of the opinion that an exception was warranted in this case:

151 Pattenge v. Wagner Iron Works, 275 Wis. 495, 500, 82 N.W. 2d 172, 174 (1957).
"... where the interests of two groups of employees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows as a matter of law that there has been no fair representation of the other group. It is true even though, in choosing the cause of which group to espouse, the union acts completely objectively and with the best of motives. The old adage that one cannot serve two masters, is particularly applicable to such a situation."

The court's precise holding was that the arbitration award was not binding upon the plaintiffs because they had not been adequately represented by the union in the hearing. The court further held that the plaintiffs' interests were not adequately represented by the employer because sound labor policy required that employees "should never be put in the position of having to solely depend upon the employer's championing their rights under the collective bargaining contract." Correlative to these two holdings was the court's position that the arbitration award would have been binding had the prejudiced individuals been given the opportunity of intervening in the arbitration hearings. While the court seemed to be of the opinion that the plaintiffs' seniority rights could not be divested without due process of law, it did not find it necessary to base its:

"... holding, that the award should be held not binding upon the plaintiffs because of lack of notice to them of the arbitration hearing, upon lack of due process. Courts of equity traditionally have the power to grant relief in situations which offend the court's sense of justice and fair play. We are herein confronted with a new situation in which it is incumbent upon us to adopt such a rule of law as we deem to be in the best interests of sound public policy. We do not believe that the requirement of giving notice and an opportunity to intervene, to those employees not being fairly represented in the arbitration by the union, as a condition to the award being binding on such employees, will prove disruptive of the arbitration process. We are inclined to believe that in the vast majority of labor arbitrations no question of fair representation will ever arise."

On rehearing the court resisted the argument by the union that the original decision interfered with it role under the

154 8 Wis. 2d at 272, 99 N.W. 2d at 137.
155 8 Wis. 2d at 275, 99 N.W. 2d at 138.
156 Ibid.
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LMRA as exclusive bargaining agent in matters affecting employee seniority rights. Citing analogous holdings under the Railway Labor Act, the court held that "once the rights of employees have been fixed in the collective-bargaining contract, the union does not possess the right to barter them away before an arbitrator."\(^{157}\)

Despite elaborate criticism of Wisconsin's extreme approach,\(^{158}\) Kentucky also adopted the position that, in administering seniority provisions of a collective agreement, a union fails to accord group "A" fair representation if it espouses the cause of group "B" whose interest is diametrically opposed to that of group "A".\(^{159}\) In a landmark decision, Humphrey v. Moore,\(^ {160}\) the Kentucky case was reviewed by the Supreme Court, and when the air had cleared, not only had federal law been pronounced supreme, but the extremities of both the New York and the Wisconsin approaches had been irradiated.

**HUMPHREY v. MOORE**

In the Humphrey case, the question was "whether the Kentucky Court of Appeals properly enjoined implementation of the decision of a joint employer-employee [union] committee purporting to settle certain grievances in accord-

\(^{157}\) 8 Wis. 2d 277, 277a, 100 N.W. 2d 317, 318 (1960). The Wisconsin Court was not prevented by the sweep of its Clark holding from finding circumstances in which the resolution of a seniority issue was fairly achieved. O'Donnel v. Pabst Brewing Co., 12 Wis. 2d 491, 107 N.W. 2d 484 (1961). In another decision subsequently considering the Clark rule, the court affirmed the dismissal of an employee's complaint against her employer because she did not demonstrate that she should have been excused from exhausting the remedies available under the collective agreement. Widuk v. John Oster Mfg. Co., 17 Wis. 2d 397, 117 N.W. 2d 245 (1962).


ance with the terms of the collective bargaining contract. The decision of the committee determined the relative seniority rights of the employees of two companies, Dealers ... and E & L...." 161

As a result of legitimate business exigencies, E & L agreed to withdraw in favor of Dealers from the business of transporting new automobiles and trucks from the Ford Motor Company assembly plant at Louisville, Kentucky. After E & L withdrew, the amount of business conducted by Dealers decreased from the combined amount that had been conducted by the two companies prior to the transaction; concomitantly there was a contraction of the total number of available jobs.

The employees of both companies were represented by the same union, Local 89, Teamsters. Its president, understanding "that the transaction between the companies involved no trades, sales or exchanges of property but only a withdrawal by E & L at the direction of the Ford Motor Company ... advised the E & L employees that their situation was precarious. When layoffs at E & L began, three E & L employees filed grievances claiming that the seniority lists of Dealers and E & L should be 'sandwiched' and the E & L employees taken on at Dealers with the seniority they had enjoyed at E & L." 162 These grievances were processed by the union, but the Dealers' employees were advised by the local president or his assistant that they had nothing to fear "since E & L employees had no contract right to transfer under these circumstances." 163

As a result of inclusion within a single multi-employer, multi-local union bargaining unit, almost identical collective agreements, a number of whose provisions concerned seniority, 164 had been executed by Dealers and E & L. Under this agreement, disputes were to be settled pursuant to a multi-staged grievance procedure. Resort was made to

161 375 U.S. at 336.
162 375 U.S. at 337.
163 375 U.S. at 337.
164 "According to Art. 4, § 1 of the contract 'seniority rights for employees shall prevail' and 'any controversy over the employees' standing on such lists shall be submitted to the joint grievance procedure... .'" 375 U.S. at 337-38.

Art. 4, § 5 provided:

"In the event that the employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure." 375 U.S. at 338.
each higher stage if a settlement was not reached on the preceding lower one.165

In this case, the local joint committee deadlocked over the E & L employees' grievance, and endorsed it, over the signature of the local president and the Dealers' representative, and referred it to the Joint Conference Committee, the appellate board. Before that committee, having, according to the Court, been more fully advised as to the nature of the Dealers-E & L transaction, the local president supported the position of the E & L employees. The Court further found that Dealers' employees were represented at the hearing before the Joint Conference Committee by three shop stewards who, just prior to the hearing, were informed of the local president's new position by the union. After a full hearing the Joint Conference Committee accepted the view of the E & L employees and determined that in accordance with the provisions of the contract the E & L and Dealers' employees should "be sandwiched in on master seniority boards using the presently constituted seniority lists and the dates contained therein. . . ."166

As a consequence of this decision, a large number of Dealers' employees were to be laid off "to provide openings for E & L drivers" with greater seniority.167 Moore, an aggrieved Dealers' employee, brought a class action against the union and Dealers, in a Kentucky state court, to enjoin the execution of the Joint Conference Committee's decision or, in the alternative, to recover damages. Allegations were made to the effect that the union had breached its duty of fair representation, by fraudulently deceiving the Dealers' employees, by conniving with the E & L employees and by essentially failing to represent the Dealers' employees at all before the Joint Conference Committee. It was further alleged that "[T]he decision of the Joint Con-

165 Under Article 7, grievances were first to be taken up between the employer and the local union; next, they were to be submitted to the local joint committee where the union and employer are equally represented. The last stage in the grievance procedure was consideration by "the Automobile Transporters Joint Conference Committee upon which the employers and the unions in the overall bargaining had an equal number of representatives." The contract, by Article 7(d), made it quite clear that the Joint Conference Committee had jurisdiction to hear "all matters pertaining to the interpretation of any provision of [the] Agreement, whether requested by the Employer or the Union . . . ." If it was able to make a decision, "after listening to testimony of both sides," its decision was to be "final and conclusive and binding upon the employer and the union, and the employees involved." In the event the Joint Conference Committee was unable to come to a decision, on a dispute, provision was made for arbitration. 375 U.S. at 338.

166 375 U.S. at 339.

167 375 U.S. at 339.
ference Board was . . . arbitrary and capricious, contrary to existing practice in the industry and violative of the collective bargaining contract." 168

Seemingly deciding the issues under state substantive law, the Court of Appeals of Kentucky held that the contract provision relied upon by the Joint Conference Committee was inapplicable and that the decision of the committee was therefore not binding. Reminiscent of the Wisconsin approach, the court further concluded that in the circumstances of the case, representation of the two antagonistic interests by a single advocate, the union (which had, according to the court, an interest of its own — enhancement of union power), rendered the committee's decision invalid as being "arbitrary and violative of natural justice." 169 In an opinion by Justice White, the Supreme Court took a somewhat different view of the case.

In the first place, while agreeing that this was "an action to enforce a collective bargaining contract," 170 the Supreme Court held that the issues raised, although justiciable in the state courts, were to be decided strictly according to federal, not state, law under section 301 of the LMRA.

The Court construed the pleadings to raise two separate but related claims: a direct cause of action against both union and management, for breach of the collective bargaining agreement and, also against both collective parties, a cause for violation of the duty of fair representation which also constituted a breach of the collective agreement. 171

After concluding that the plaintiff was properly in court, the Supreme Court then held that he failed to prove his case.

168 375 U.S. at 340.
169 356 S.W. 2d at 246.
170 375 U.S. at 341.
171 By this holding the Court was able to avoid the question whether a violation of the duty of fair representation is an unfair labor practice under the LMRA and therefore within the exclusive primary jurisdiction of the National Labor Relations Board. Ex Parte George, 371 U.S. 72 (1962); In re Green, 369 U.S. 689 (1962); San Diego Bldg. Trades Council v. Gormon, 359 U.S. 236 (1959). This is because "even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts, Smith v. Evening News Ass'n, [371 U.S. 195 (1962)]. . . ." 375 U.S. at 344. Thus, regardless of whether the statutory duty of fair representation is pre-empted, the courts will be able to entertain suits under the contractual duty. See Report of the Committee on Labor Arbitration, note 160 supra. The statutory duty is discussed in note 41 supra.

The National Labor Relations Board decisions dealing with the failure of individuals to be accorded fair representation are discussed infra, notes 229-42 with accompanying text.
First, the Court addressed itself to the question whether the Joint Conference Committee's decision was in violation of or unauthorized by the collective agreement and was therefore invalid. In disposing of this question, the Court did not squarely resolve the plaintiff's contention that collective parties are limited, in grievance proceedings, by the precise terms of the existing agreement. Instead, observing that the collective parties themselves purported to act in accordance with the provisions of the agreement, it reviewed the Joint Committee's actual construction of the agreement and held that the decision of the Joint Committee was not in violation of any of its provisions and its action was in fact empowered by the agreement. The strong implication can be drawn from the Court's approach that the parties are bound by their prior existing agreement until formally changed by amendment or negotiation of a new agreement. In the view of Justice Goldberg, who

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172 See note 161 supra and accompanying text. The court specifically reserved judgment on the problems that would have been "posed if § 5 [see note 164 supra] had been omitted from the contract or if the parties had acted to amend the provision." The Court further stated that "Even in the absence of § 5, however, it would be necessary to deal with the alleged breach of the union's duty of fair representation." 375 U.S. at 345 n. 7.

Except for this last sentence, Ratner suggests that: "... if what the parties say they are doing is controlling, they can be trusted to find suitable language to avoid undue judicial interference. Just as Burley was met by amendment of union constitutions and bylaws, so Moore will be met by a change in the language of grievance dispositions. Instead of casting the result solely in terms of interpretation or application of the contract, the parties will reach their decision also by amending the contract and announce that the contract is simultaneously amended in accordance with the result. Like the Rule in Shelley's Case, the effect of Moore will be to add a few words to official documents." Ratner, supra note 160, at 293. Cf. ILWU v. Kuntz, 56 L.R.R.M. 2708 (9th Cir. 1964).

In view of the technical differences between contract formation and contract administration, see note 58 supra, the collective parties might find avoidance of Humphrey more trouble than it is worth and there is no reason to expect that the courts would be taken in by such subterfuge. And, of course, there would still be the action for breach of the duty of fair representation.

173 In a footnote the court specifically said that "Reconciliation of these two provisions [§ 5, see note 164 supra and Art. 7(d), see note 165 supra], going to the power of the committee under the contract, itself presented an issue ultimately for the court, not the committee, to decide." 375 U.S. at 345 n. 8 (continued on 346).

Ratner sees two possible interpretations for this footnote and the Court's holding:

"The opinion may be read as holding that where contracting parties purport to be interpreting or applying their contract as written, the courts, rather than they, have the final word as to what the contract means. ... On the other hand, a narrower reading may be warranted. For the discussion is addressed to the proposition that the committee exceeded powers conferred upon it by the contracting parties, not that the contracting parties could not legally have conferred such power upon the committee, or legally have such power exercised themselves.

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concurred only in the result.\footnote{174} this treatment of the issue was as much as a holding to that effect.\footnote{175}

Having disposed of the first, or what may be called the true contract action, the Court next considered whether the union's conduct, impliedly ratified by the employer who was found to be neutral on this grievance,\footnote{176} constituted a violation of its duty of fair representation. At the outset, the Court found that there was no "adequate support in this record for the complainant's attack upon the integrity of the union and of the procedures which led to its decision"\footnote{177} and that there was "insufficient proof of dishonesty or intentional misleading on the part of the union."\footnote{178} Then the Court rejected the view of the Court of Appeals of Kentucky (and the Wisconsin Supreme Court)\footnote{179} that the union's representation of two antagonistic interests (or, more properly, its failure or practical inability to represent both interests simultaneously) rendered the Joint Committee's decision invalid. Relying upon Ford Motor Co. v. Huffman,\footnote{180} the Court held that in grievance proceedings, just as in contract negotiation and amendment, there is no "breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in support-

The narrower interpretation may well be intended, for the opinion does not assert that parties to a collective bargaining contract are, or explain why they should be, denied the liberty contracting parties normally enjoy to 'agree as to meaning'." Ratner, \textit{supra} note 160, at 292. See discussion note 128 \textit{supra}; Barbash, \textit{supra} note 128, at his note 61.

Of course, either view leads to some general expansion of individual rights, but the first is the one more favorable to the individual and the one that the author prefers as will appear more clearly.\footnote{174} Justice Goldberg was joined by Justice Brennan. 375 U.S. at 351.

Justice Douglas, concurring separately, agreed with Justice Goldberg's reasons for concluding that the litigation was properly brought in the state court, but agreed with the majority's reasons for concluding that on the merits no cause of action had been made out. 375 U.S. at 351.\footnote{175}

Justice Harlan concurred in part and dissented in part. He agreed with the majority as to the true cause of action for breach of contract, but agreed with Justice Goldberg, on the facts, that the fair representation cause in this case did not fall within § 301. He further was of the opinion that the case should have been reversed and remanded for careful consideration of whether the National Labor Relations Board had primary jurisdiction over the unfair representation claim. 375 U.S. at 359.\footnote{177}

\footnote{172} 375 U.S. at 353-54, quoted in text, \textit{infra}, note 188.

\footnote{173} 375 U.S. at 343; see Note, 5 B.C. Ind. & Comm. L. Rev. 848, 853 n. 25 (1964) (quoting from the Brief for Respondents, pp. 5-6).

\footnote{177} 375 U.S. at 348.

\footnote{176} 375 U.S. at 349.

\footnote{179} See Clark v. Hein-Werner Corp., cited and discussed notes 153-58 \textit{supra} with accompanying text.

\footnote{180} 345 U.S. 330 (1952). This case involved an alleged breach of the statutory duty of fair representation when a company and a union \textit{formally amended} an existing collective in such a manner as to derogate the seniority of some employees.
ing the position of one group of employees against that of another,"\textsuperscript{181} for,

"Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes."\textsuperscript{182}

A final question considered by the majority was whether the aggrieved Dealers' employees were "deprived of a fair hearing by having inadequate representation at the hearing" before the Joint Conference Committee, since the union opposed their position.\textsuperscript{183} The Court implied that at least in circumstances such as those before it, where the union could not possibly represent all the conflicting views of contending employees, there may be some requirement, under the duty of fair representation, that dissident employees receive separate and adequate notice of and representation at the grievance proceeding.\textsuperscript{184} The Court did not define the scope of such a requirement. It did note, however, that the Dealers' employees had notice of the hearing, were aware of the controversy and were in fact represented at the hearing, at union expense, by three stewards who "were given every opportunity to state their position."\textsuperscript{185} Observing that "the Dealers' employees made no request to continue the hearing until they could secure further representation and have not yet suggested what they could have added to the hearing by way of facts or theory if they had been differently represented,"\textsuperscript{186} the Court concluded that there was no indication that a different representation would have altered the result. This portion of the majority opinion no doubt induced Justice Goldberg's statement that "trial-type hearing standards ... [should not] be applied

\textsuperscript{181} 375 U.S. at 349.
\textsuperscript{182} 375 U.S. at 349-50.
\textsuperscript{183} 375 U.S. at 350.
\textsuperscript{184} See Barbash, note 128 supra, at his notes 69-71.
\textsuperscript{185} Of course at least one other as good an implication is possible, i.e., that "Under the Circumstances the Court thought it would be mere idle speculation to say that the result would have been different had the matter been differently presented," and therefore meant to imply nothing on the merits of the broad question. Report of the Committee on Labor Arbitration, note 160 supra, at 425 nn. 45-46. But see Justice Goldberg's exclamation of despair quoted in the text, note 187 infra.
\textsuperscript{186} 375 U.S. at 350.
\textsuperscript{186} 375 U.S. at 350-51.
so as to hinder the employer and the union in their joint endeavor to adapt the collective bargaining relationship to the exigencies of economic life."

The majority's willingness to entertain the claim that the Joint Conference Committee's decision was in violation of or unauthorized by the collective agreement was the first source of disagreement for Justice Goldberg. He would have ruled that the plaintiff could not state such a cause of action for breach of contract under section 301 and he disapprovingly interpreted the majority's act in reviewing and affirming the Joint Conference Committee's construction of the collective agreement as essentially a holding "making the words of the contract the exclusive source of rights and duties" in grievance proceedings. Expressing great concern for the collective interests in the continuing and unforeseeably contingent collective bargaining process, Justice Goldberg stated his opinion that "a mutually acceptable grievance settlement between an employer and a union, which is what the decision of the Joint Committee was, cannot be challenged by an individual dissenting employee under section 301 (a) on the ground that the parties exceeded their contractual powers in making the settlement." Unlike arbitration, where the arbitrator is bound by the collective agreement, contract provisions do not immutably bind the collective parties. As to the instant case, he was of the opinion that "[T]he 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."

Turning his attention to the Court's interpretation, or rather what he considered to be its misinterpretation, of the duty of fair representation, he agreed that plaintiff had proved no case. However, he rejected the holding that the claim should be treated as one for breach of the collective bargaining agreement supporting an action under section 301. His initial ground for disagreement was that to so base the action constituted a break with precedent, since the prior fair representation cases were premised upon "a duty derived not from the collective bargaining contract but implied from the union's rights and responsibilities conferred by federal labor statutes." But, Justice Goldberg's real objection to the majority position on fair representation as

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187 375 U.S. at 359.
188 375 U.S. at 354.
189 375 U.S. at 352.
190 375 U.S. at 353.
191 375 U.S. at 356. Historically, Justice Goldberg of course was correct. See note 41 supra.
well as the other issues lies on the level of policy, i.e., what
rights should the individual have in collective bargaining.
Because of the way he views the social interests in collec-
tive bargaining, Justice Goldberg would firmly strike a
balance in favor of the collective parties and maximum
flexibility in their relations. The only relief he seems will-
ing to allow the individual from collective power is that
which was allowed under the law of New York and Penn-
sylvania — such relief as may be available in a suit at law
against the union for breach of its duty of fair representa-
tion. The last paragraph of his opinion especially clarifies
his position:

"[I]n this Court's fashioning of a federal law of collec-
tive bargaining, it is of the utmost importance that the
law reflect the realities of industrial life and the nature
of the collective bargaining process. We should not
assume that doctrines evolved in other contexts will
be equally well adapted to the collective bargaining
process. Of course, we must protect the rights of the
individual. It must not be forgotten, however, that
many individual rights, such as the seniority rights
involved in this case, in fact arise from the concerted
exercise of the right to bargain collectively. Conse-
quently, the understandable desire to protect the indi-
vidual should not emasculate the right to bargain by
placing undue restraints upon the contracting parties.
Similarly, in safeguarding the individual against the
misconduct of the bargaining agent, we must recognize
that the employer's interests are inevitably involved
whenever the labor contract is set aside in order to
vindicate the individual's right against the union. The
employer's interest should not be lightly denied where
there are other remedies available to insure that a
union will respect the rights of its constituents. Nor
should trial-type hearing standards or conceptions of
vested contractual rights be applied so as to hinder the
employer and the union in their joint endeavor to adapt
the collective bargaining relationship to the exigencies
of economic life."192

But the majority of the Supreme Court appears to have
rejected Justice Goldberg's and New York's position by de-
claring that individuals shall have recourse to federal ac-
tions not only against unions for breach of the duty of fair
representation but also against the collective parties for

192 375 U.S. at 358-59.
violating the terms of the collective agreement, and further by possibly implying that individuals may sometimes be legally entitled to participate personally in the grievance process.

**Group V: Individual: A Partial Conclusion**

On balance, the implications of the majority’s position represent a healthier judicial approach to the total collective bargaining relationship than does Justice Goldberg’s stand. It is very easy to become so consumed with concern for flexible management of the collective enterprise that sight is lost of the legitimate interests and expectations of the individual workers. It is easy as well to lay captive to the idea that only through maximum enhancement of group stability and decision can the interests of the individual workers ever really be promoted. But the individual does exist apart from the group, and, at least to the extent that the provisions of the collective agreement are clear, he should generally be able to rely upon and expect benefits that the group has promised him. And surely the law should not be witness, indeed accessory, to the wicked and absurd shell game played with individual interests in the New York line of cases and particularly in *Soto*. Although not inevitable, this kind of posturing is an all too probable extension of Justice Goldberg’s response in this area. Furthermore, acceptance of the majority’s policy choice does not mean, as Justice Goldberg implies, that the group will be overthrown with the resulting chaos, nor does it necessarily mean that the courts, rather than the collective parties, should or will henceforth manage the collective relationship.

So far as substantive review is concerned, the majority’s position contemplates, at most, that when the collective parties themselves have formalized some basic agreement, the individual worker may then rely somewhat upon the specific provisions of the agreement at least until they are changed in a new contract or by formal amendment. It does not necessarily follow that legitimate collective interests in contract administration are to be stymied by recalcitrant individuals, nor does it follow that the individual can insist in court upon his interpretation of contract provisions to the same extent that the union could insist upon its inter-

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193 See notes 131-41 *supra* with accompanying text.
pretation in negotiations with the employer. The Court's decision on the merits in Humphrey attempts to make it clear, in fact, that only in the unusual case should the collective parties be held, on judicial review of the merits of a grievance or arbitral determination, to have transgressed the bounds of permissibility.

In circumstances involving contract ambiguities, or matters not expressly covered by the existing agreement, or perhaps even matters that, while apparently covered by the provisions, were not really anticipated or contemplated when the contract was negotiated, it would appear that the anticipated scope of judicial review on the merits is to be essentially the same as it is during the contract drafting stage — if the collective parties have provided procedurally for mutual resolution of ambiguities and the like through the grievance procedure. At the contract formation stage of collective bargaining the individual basically is protected only if he can demonstrate that an agreement breaches the union's duty of fair representation in that it is perverse in its effect upon him or is invidiously discriminatory. This limitation of substantive external review, even at the contract administration stages of collective bargaining, is necessary to promote needed flexibility on the part of the union in balancing competing interests for

"the collective agreement by which the individual and the collective parties are governed is not limited to the four corners of the written instrument. It is the whole agreement, including industrial customs, established practices, understandings and precedents which infuse the contractual words with life and meaning. The collective agreement inevitably includes incomplete terms and unresolved ambiguities; and the individual's rights, like those of the collective parties, are subject to these gaps and uncertainties."

But, despite the fact that the contemplated scope of judicial review is probably rather limited, Justice Goldberg's fears are valid to the extent that there remains the danger that reviewing courts will nevertheless be too stringent in protecting individual interests by finding clarity when the contract provision is not really clear. By the same token, they may be too lax by finding ambiguity where

195 Cf. Summers, supra note 158, at 396.
196 See note 41 supra with accompanying text; infra notes 198-201 with text.
197 Summers, supra note 158, at 396.
none really exists. Many potential defects, in fact, attend any system of judicial review that is expected to perform the task of reconciling individual and collective needs in the administration of collective agreements.

**Judicial Review of Collective Decisions and Actions: The Quest for Manageable Standards and Other Limitations of Litigation**

Any tribunal that is external to the collective bargaining machinery will find it difficult to ascertain and apply appropriate standards in reviewing the collective parties' actions in administering the collective bargaining agreement. In the first place, standards that are not derived from the collective agreement or relationship have not proved to be particularly satisfactory. For example, standards applied in enforcing the duty of fair representation have usually been cumbersome analogies to such constitutional concepts as are found in the Supreme Court decisions interpreting the equal protection clause of the Fourteenth Amendment. Unions have thus been admonished to avoid arbitrariness, capriciousness, "hostile discrimination," "invidious" discrimination, or "discrimination not based on . . . relevant differences." And the Supreme Court's latest pronouncement on the subject is that this means that a union does not breach its "duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another." Excluding for the moment the possibility of defining invidious discrimination, etc., by reference to the provisions of the collective agreement, this means that the courts are in a position only to remedy such abuses of power as are particularly gross, for the Supreme Court has further advised that, "[I]nevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid.

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The complete satisfaction of all who are represented is hardly to be expected."

The Court's wholly realistic approach also obviates any possibility of universal resort to full blown fiduciary concepts. This is fortunate, for the application of such concepts in the collective bargaining realm is pregnant with the danger of the inappropriately automatic, void as a matter of law, kind of reasoning employed by the Wisconsin Supreme Court in the Clark case and by the Kentucky Court of Appeals in the Humphrey case. A root notion of fiduciary obligation is, after all, that the fiduciary will not be continuously subject to conflicts of interest within the class comprising the cestui que trust. In the union representation context, particularly in seniority disputes, however, conflict of interest is the normal condition. Thus a crucial condition precedent to the application of fiduciary rules is absent. The Wisconsin and Kentucky Courts, employing orthodox fiduciary doctrine, nevertheless held that when different groups of employees vie for seniority advantage, a union that backs one group obviously breaches its obligation to the others. But, as the Supreme Court declared in Humphrey, such a legal result cannot be the consequence of the normal condition in which a union is found when, acting with the employer, it seeks to resolve a seniority dispute.

Although automatic reasoning, from orthodox fiduciary premises, has thus been rejected, this does not mean that no service may be derived from the transplantation of some concepts of fiduciary law to the realm of collective bargaining. Such concepts might, in fact, provide some useful standards when review is sought of settlements rendered in disciplinary grievances. In such grievances there rarely are direct and legitimate secondary group interests and thus no direct conflict of interest within the cestui que trust.

201 Ford Motor Co. v. Huffman, supra note 200, at 338. In Steele, supra note 199, the Court further stated that the union's obligation "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 relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the 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." 323 U.S. at 203.

202 See notes 153-58 supra with accompanying text.

203 See notes 159 and 169 supra with accompanying text.

204 As to conflicts of interests within seniority disputes, see notes 65-68 supra and accompanying text.

205 See note 63 supra and accompanying text.
But there might, on the other hand, be some indirect conflict of interest. A court, for example, might be hard put to review, according to orthodox fiduciary standards, a situation in which a union has found it auspicious to trade-off unrelated grievances, relinquishing some that have probable merit in order to secure a gain on the entire package.

Despite the difficulties involved, it can be expected that over the next few years more consideration will be given to the formulation of a law of fiduciary obligations in collective bargaining, for it is now very likely that union officials are required by statute to act, in collective bargaining, pursuant to a personal fiduciary obligation. Section 501 of the LMRDA imposes a fiduciary obligation, “taking into account the special problems and functions of a labor organization”, on union officials and permits members of the union to sue for breach on behalf of the union.\(^{206}\)

The cause of action is thus like a stockholder’s derivative action.\(^{207}\) And, according to Professor Cox, “The principles stated in section 501(a) were drawn from the Restatement of Agency in an effort to incorporate the whole body of common law precedents defining the fiduciary obligations of agents and trustees with such adaptions as might be required to take into account ‘the special problems and functions of a labor organization . . .’\(^{208}\)

While the main thrust of the provision is obviously to assure against financial misfeasance on the part of union officials, it is clear that it encompasses more than this.

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Legislative history, judicial opinion and scholarly commentary indicate that the fiduciary duty under section 501 is to extend to the sphere of collective bargaining. The scope of the duty is to be ascertained by reference to common law doctrine, but the common law is unclear and there is growing support for the view that section 501 is a mandate to the courts "to fashion a new federal labor law in much the same way that the federal courts have fashioned a new substantive law of collective bargaining contracts under section 301(a) of the Taft-Hartley Act." To the extent that this new federal labor law is responsive to the realities of collective bargaining situations where the union officials are daily compelled to make judgments as to conflicting interests within the cestui que trust class, the standards of fiduciary conduct demanded by section 501 are not likely to be greatly improved over those developed to date under the duty of fair representation.

There is substantial support in the legislative history of the Elliott bill, which contained exactly the same fiduciary provision as the LMRDA, for this interpretation. See H.R. Rep. No. 741, 86th Cong., 1st Sess. 81-82 (1959) (Supplemental views); Statement of Representative Elliott, read by Representative Bolling, 105 Cong. Rec. 14212-14213 (1959).


See materials cited note 208 supra. Comment on the sparse and confused state of the law regarding fiduciary duties in the field of labor relations, and the limitations of resort to analogy, has been made by Wollett, supra note 207, at 276-77; Note, Counsel Fees for Union Officers Under the Fiduciary Provision of Landrum-Griffin, 73 Yale L.J. 443, 449-52 (1964).


It is possible, as well, that to the extent the § 501 duty might overlap with the employee's fair representation or contract breach remedies, the § 501 action would be pre-empted. See LMRDA § 603, 73 Stat. 540, 29 U.S.C. § 523 (Supp. IV, 1963); Wollett, supra note 207, at 286; cf. Highway Truck Drivers and Helpers Local 107 v. Cohen, supra note 213, at 612-14; Note, supra note 212, 73 Yale L.J. 443, 449 (1964).

An additional avenue of relief from abusive use of the grievance machinery by the union may be available to individuals under Title I of the LMRDA, § 101(a) (3), 73 Stat. 522 (1959), 29 U.S.C. § 411(a) (3) (Supp. IV, 1963) provides:

"No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has
Even when the courts turn from exclusive resort to standards external to the collective relationship and seek to apply those embodied in the collective agreement, the result is not very satisfactory. Of course the collective agreement is useful to a court to the extent that the collective parties have established by it "standard(s) which both sides have agreed . . . [are to be] norm(s) in relation to which a dispute it to be settled." By looking into the agreement it becomes possible for a reviewing court to judge collective actions in administering it not only by vague or inappropriate external standards of fairness or fiduciary behavior, but also according to the contract terms or according to what the individual's reasonable expectations are under those terms. But, as earlier discussed, no collective agreement will present a reviewing tribunal with an elaborate catalogue of complete and unambiguous standards. While some provisions may contain explicit rules to govern aspects of the continuing tripartite relationship, in large measure the agreement is composed of broad, ambiguous and incomplete standards that must undergo intensive future interpretation. Any agency that reviews collective actions and determinations must resort to "the industrial common law — the practices of the industry and the shop—" to fill in the spare bones of the formal contract and infuse the contractual words with life and meaning. It is unlikely that the courts would be equal to that task. As the Supreme Court has recognized, even the ablest judges cannot be expected to bring the necessary

been (A) served with written specific charges; (B) given a reasonable
time to prepare his defense; (C) afforded a full and fair hearing." See also § 609, 73 Stat. 541 (1959), 29 U.S.C. § 529 (Supp. IV, 1963).

In the present context, the question raised by the section is: "When a union agrees with management that an employee should be disciplined, does this constitute union 'discipline' within the purview of section 101(a)(5)?" Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 Mich. L. Rev. 1435, 1501-02 (1963).

Upon review of the few cases thus far decided, Blumrosen concluded:

"If the union takes an affirmative hand in securing the discipline, the action is subject to the procedural provisions of section 101(a)(5). But if the union action is passive acquiescence, it becomes 'discipline' subject to 101(a)(5) only if the union was under a duty to process the grievance. This reading of section 101(a)(5) adds little to existing law concerning the union's duty to process a grievance. Such a duty must be found, and violated, before section 101(a)(5) comes into play."


212 Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 Colum. L. Rev. 731, 733 (1950).

213 See notes 31-34 and 71-74 supra and accompanying text.

expertise in “industrial law” “to bear upon the determination of a grievance.”\(^{218}\)

The difficulty in ascertaining judicially manageable standards makes real the possibility that aggrieved individuals, seeking “some neutral tribunal where, along with union and management, . . . [they would] have an opportunity to be [meaningfully] heard,”\(^{219}\) will find the courts to be essentially rubber stamps or legitimizing agencies for repressive collective actions.\(^{220}\) In this regard, related to the problem of standards is the problem of proof. With expanded judicial review, it would still be exceedingly difficult for a grievant to prove factually, to a court’s satisfaction, that the collective parties have acted unfairly, in abuse of discretion, or upon an error of fact. This is especially true of disciplinary cases but would also be true of any case in which the grievant alleged bias, bad faith, vindictiveness, or bureaucratic inefficiency or bungling. First, legal rules of evidence would present a bar to effective review. Particularly where arbitration is involved, the reviewing court will usually be presented with little documentation of probative value other than the arbitrator’s opinion for there normally is no transcript or report.\(^{221}\) And, as to challenges to grievance determinations in general, whether rendered in arbitration or not, the caliber of proof that is usually to be expected will make application of the available standards of little use in attempting to “reach the subtle forms of discrimination, insensitivity and other covert abuses in [all phases of] grievance handling.”\(^{222}\)

Unless unfairness is to be inferred from the circumstances, judicial review even in extreme cases like Soto,\(^{223}\) may not help the aggrieved individual, for the complaining individual generally must meet the burden of demonstrating, by positive evidence, that the union or the collective parties were improperly activated politically or were otherwise acting in bad faith or engaging in invidious discrimination. Especially if the collective agreement is unclear, the collective parties will likely have to show merely some proper reason for acting or some “reasonable” criterion for

\(^{218}\) Id. at 582.


\(^{222}\) Summers, supra note 219, at 410 n. 188.

\(^{223}\) See notes 135-139 supra and accompanying text.
the classification that was drawn.\textsuperscript{224} And, it is seldom difficult for unions and employers, or the courts, to find some apparently legitimate reason to justify almost any classification or action.\textsuperscript{225} Therefore, unless the classification or action is obviously based on some palpably unlawful criteria, such as race, or absent a valid union shop agreement, non-membership in the union,\textsuperscript{226} the courts will rarely be in a position to conclude that the collective action was invalid. Once apparently legitimate reasons for the collective action have been presented, the individual will then have to demonstrate that those reasons were pretextuous. Rarely will the collective parties act in such a manner as to make available to the aggrieved individual evidence that its presumable valid reasons were mere pretext.\textsuperscript{227}

Another disadvantage to litigation relates to the factor of time, for it will ordinarily be years before an individual’s claim is adjudicated\textsuperscript{228} and then, of course, before a strange tribunal that, in all likelihood, is largely unfamiliar with the on-going and particular context in which the dispute arose. Litigation could thus be so time consuming as to dissipate real enjoyment of the fruits of any ultimate victory. Furthermore, to gain relief an expensive law suit must be conducted — this is usually out of the question for

\textsuperscript{224} See, e.g., Gainey v. Brotherhood of Ry. Clerks, 177 F. Supp. 421, 430 (E.D. Pa. 1959) (\textit{dictum}), \textit{aff’d}, 275 F. 2d 342 (3d Cir.), \textit{cert. denied}, 363 U.S. 811 (1960); \textit{Report}, \textit{supra} note 10, 50 Nw. U.L. Rev. at 158 (1955). \textsuperscript{225} See, e.g., Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) (discrimination in favor of military veterans upheld); Britt v. Trailmobile Co., \textit{supra} note 200 (same); Whitfield v. United Steelworkers, Local 2708, 263 F. 2d 546 (5th Cir.), \textit{cert. denied}, 360 U.S. 902 (1959) (apparent racial discrimination justified); cf. Cortez v. Ford Motor Co., 349 Mich. 108, 84 N.W. 2d 523 (1957) (disparity of treatment based upon sex affirmed); see also Wellington, \textit{supra} note 198, at 1342 n. 77. \textsuperscript{226} See Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191, 198-99 (4th Cir. 1963); Crowell v. Palmer, 134 Conn. 502, 58 A. 2d 729 (1948). \textsuperscript{227} But see Thompson v. Brotherhood of Sleeping Car Porters, \textit{supra} note 226. The court was impressed by the fact that a union official explicitly wrote that “there was nothing I could do until you became a full fledged member... .” 316 F. 2d at 195. The Court was further impressed by the fact that the union had explained why its “reasons” for not acting on plaintiff’s behalf had not stopped it from acting on behalf of other, similarly situated, employees. 316 F. 2d at 195-96. See also Guzzo v. United Steelworkers, 47 L.R.R.M. 2379, 2386 (Cal. Super. Ct. 1960), \textit{cert. denied} sub nom., Smith v. Superior Court, 365 U.S. 802 (1961) (the court speaks of shifting the burden of proof). \textsuperscript{228} In Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191, 192 n. 1 (4th Cir. 1963), the court stated: “We note the unhappy fact that this litigation was begun more than four years ago, a circumstance for which the District Judge who tried the case was in no way responsible... .” See, e.g., Blumrosen, \textit{supra} note 214, at 1514 n. 216 (chart of time lapse in representative court cases).
all but especially outraged workers. In addition, it is to be expected that at least some courts, if only to avoid the odious tasks of presiding over strange family squabbles, will continue to compound the general limitations attendant to judicial remedy by “creating numerous procedural and technical barriers which tend to restrict effective protection of employees.”

THE NLRB: ANOTHER PUBLIC FORM?

Recent developments indicate that any future extensive and substantive external review of collective actions in contract administration is likely to be undertaken not only by the courts but concurrently by the National Labor Relations Board — an administrative agency possessed of elaborate labor relations expertise. Beginning with the Miranda case, the Board has of late concluded that when a union, in the course of processing a grievance, breaches its duty of fair representation, arising under section 9(a) of the NLRA, a violation of section 7 of the Act results and that viola—

229 Blumrosen, supra note 214, at 1471. Professor Blumrosen commented further that courts “have insisted on technicalities of pleading [n. 93, e.g., Hardcastle v. Western Greyhound Lines, 303 F. 2d 182 (9th Cir.), cert. denied, 371 U.S. 920 (1962); Wilson v. Ex-Cell-O Corp., 368 Mich. 61, 117 N.W. 2d 184 (1962); Carlini v. Curtiss-Wright Corp., 71 N.J. Super. 185, 178 A. 2d 569 (1962)], have applied doctrines restricting the suability of unions, have imposed an exhaustion of contract remedies requirement where such remedies seem unavailable [n. 95 see Widuk v. John Oster Mfg. Co., 17 Wis. 2d 367, 369, 117 N.W. 2d 245, 247 (1962); Larsen v. American Airlines, Inc., 207 F. Supp. 238 (S.D. N.Y. 1962), aff’d, 313 F. 2d 590 (2d Cir. 1963)], and have hesitated to allow the employee to protect his interest in arbitration [n. 96 In re Soto, 7 N.Y. 2d 397, 165 N.E. 2d 855, 198 N.Y.S. 2d 282 (1960)].” But see Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191 (4th Cir. 1963) (where counsel did such a poor job that at one point the court commented bitterly that “the thing has been poorly handled. . . .” supra at 197 n. 8. Nevertheless, reading the pleadings very liberally, the court held that a proper cause of action had been stated and remanded the case for trial on the merits.) See also Ferro v. Railway Express Agency, Inc., 296 F. 2d 847 (2d Cir. 1961); Nobile v. Woodward, 200 F. Supp. 785 (E.D. Pa. 1962); Falsetti v. Local 2026, UMW, 55 L.R.R.M. 2552 (W.D. Pa. 1964); Crowell v. Palmer, 134 Conn. 502, 58 A. 2d 729 (1948); Rumbaugh v. Winifred R.R., 55 L.R.R.M. 2602 (4th Cir. 1964).

It is noteworthy that preclusion of punitive damages may be another limitation imposed by the courts on the duty of fair representation. See Brady v. TWA, Inc., 196 F. Supp. 504 (D. Del. 1961); Thompson v. Brotherhood of Sleeping Car Porters, supra at 208 n. 21.

239 Miranda Fuel Co., 140 N.L.R.B. 181 (1962) (divided three to two) enforcement denied, 320 F. 2d 172 (2d Cir. 1963) (divided two to one).


“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted
tion is remediable by the Board. Remedy is to be found pursuant to unfair labor practice proceedings against the union under section 8(b)(1)(A) and against an employer that accedes to the breach under section 8(a)(1). The Board was further of the opinion that "a statutory bargaining representative and an employer also respectively violate Sections 8(b)(2) and 8(a)(3) when, for arbitrary or irrelevant reasons or upon the basis of unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee." Although a much divided panel of the Second

activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Miranda was a seniority case involving a truck driver, Lopuch, who was eleventh on a seniority list of twenty-one. His employer's business was seasonal and the applicable collective bargaining agreement, between the company and the union of which he was a member, provided that drivers could ask for leave of absences from April 15 to October 15 without loss of seniority. Lopuch, however, obtained permission to leave on Friday, April 12, 1957, at the close of business, rather than on Monday, April 15. The employer did not believe that his seniority rights would be prejudiced. Lopuch returned late, because of an illness excused by the company. The union, however, on the prompting of other members, demanded that his seniority be reduced. When the union discovered that he had returned late because of an excused illness it abandoned that ground and insisted that he be reduced in seniority because he had left prior to April 15. The company acquiesced in the union's demand. Nothing in the record indicated that the union was biased against Lopuch or was otherwise discriminating against him. In this posture the case went to the Board.

"(b) It shall be an unfair labor practice for a labor organization or its agents - - -

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7. . . ."

"(a) It shall be an unfair labor practice for an employer - - -

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

provides that it is an unfair labor practice for a labor organization "to cause or attempt to cause an employee to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

"by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . [except as to specified classes of union shop agreements]."

140 N.L.R.B. at 186.
Circuit refused to enforce the Board’s order in *Miranda*, the Board has continued to apply its theories in new cases but it has not sought certiorari in *Miranda*.

If the NLRB’s new doctrines are ultimately affirmed and the Board becomes available as another forum in which individuals may challenge abusive collective actions in contract administration, many of the limitations on external review, from the point of view of the individual, would be eliminated.

"The concomitants of administration — the power to investigate, to urge informal settlement and to provide an expeditious hearing, and the expertise of the personnel involved — all suggest that the NLRB is equipped to handle these problems more speedily and more fairly than are the courts. This is true even in light of the great difficulties which the Board has faced in keeping its dockets anywhere near current. With all of its overload and backlog, it provides a more effective forum for solution of these problems than the courts."
Unquestionably the Board has technical advantages over the courts in this area. Furthermore, the Board and its staff could bring to grievance disputes general and detailed labor relations expertise and extensive experience in interpreting collective agreements in unfair labor disputes between individuals and collective parties. But even if substantive review by the Labor Board is more useful for the individual grievant it nonetheless is subject to one final objection that is shared by the courts: There is a danger that the courts or the Board by exercising frequent and intensive substantive supervision over the merits of collective bargaining decisions will thereby substitute public for private ordering and industrial self-government. At its extreme the danger is that collective determinations would too often be overturned. But even if this were not the result, as it probably would not be, the consequence for collective bargaining as industrial self-government would still be deleterious. It matters not that the collective parties may almost invariably be vindicated if they must carefully justify their actions in court or before an administrative agency. The necessity of having collective decisions ratified by a public agency in this manner is itself a significant burden as well as a continual demonstration of close and substantial public control. If no satisfactory alternatives were available to assure a proper regard for the interests of individual workers, this judicial-administrative role might be accepted without further comment as it is so far as statutorily defined unfair labor practices are concerned. But there is an alternative approach that, without completely negating the expansion of external review of the merits, could minimize the necessity for its invocation. The alternative is to enhance participation by the aggrieved individual in the private administrative processes of collective bargaining — particularly in arbitration.

Individuals in Arbitration — [Why] Close the Doors [If] They're Coming in the Windows?

So far as workers subject to the NLRA and the LMRA are concerned, the issues bearing upon individual participation in arbitral proceedings have not yet been squarely faced by the Supreme Court or by the National Labor Relations Board. It is possible, however, that the inference
capable of being drawn from the *Humphrey* decision, that aggrieved individuals may have a right to participate at least under some circumstances,245 will become actual holding in the not too distant future. Such rulings are especially likely if it is true, as it appears from the opinions in *Humphrey*, and from those of the NLRB, that the basic policy question, what rights should an individual have under a collective agreement, has been resolved in such a manner as to assure the availability, when necessary, of the courts or the Labor Board for the fair adjudication of individuals’ claims under collective agreements. If this is a specific teaching of *Humphrey*, its importance is great; but also of significance is what *Humphrey* teaches as the latest in a chain of Supreme Court decisions stretching back to the *Westinghouse* case.246 This lesson, perhaps broader than the first, is that the Court is seeking under section 301 to formulate a uniform and consistent, both logically and experientially, federal substantive law of collective bargaining relations. Thus, after *Lincoln Mills*247 was decided, the *Westinghouse* doctrine, that suits for uniquely personal rights and suits by individuals for breach of collective agreements were not justiciable under section 301, was progressively undermined until it was finally repudiated in *Smith*248 and *Humphrey*. This was done in part to assure that collective agreements are consistently interpreted according to federal law, not according to such law merely in suits brought by employers and unions and according to state law in suits brought by individuals.249

Under the uniform federal law thus far created, the primacy of contractual arbitration, as the collective parties’ voluntary self-governing substitute for litigation and economic contest, has been established.250 To promote arbitration, the Court has ascribed far reaching ramifications to the existence of a general grievance arbitration clause in a collective agreement. Even if there is no explicit no-strike clause in the agreement, one will be inferred.251 More-

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245 See notes 183-87 supra and accompanying text.
246 See notes 183-87 supra and accompanying text.
250 For the earlier discussion of arbitration of which this paragraph is a partial reiteration, see notes 107-120 supra and accompanying text.
over, although the collective parties may provide that a
disposition of a grievance or a dispute, other than by arbi-
tration, is final,\textsuperscript{253} in suits to compel arbitration or to review
arbitration awards, the function of the courts is narrowly
limited to determining

"whether the reluctant party did agree to arbitrate
the grievance or did agree to give the arbitrator power
to make the award he made. An order to arbitrate the
particular grievance should not be denied unless it may
be said with positive assurance that the arbitration
clause is not susceptible to an interpretation that covers
the asserted dispute. Doubts should be resolved in
favor of coverage."\textsuperscript{253}

Neither before arbitration is ordered nor upon review of
an arbitration award are the courts in any way to review
the merits of a grievance.\textsuperscript{254} A similar policy that favors
effective arbitration over resort to the Board has evolved
in the decisions of the National Labor Relations Board.\textsuperscript{255}

Integration of the various policies thus far adduced from
the Supreme Court's decisions portends a rule of law that
recognizes a right, at least under some circumstances, in
interested individuals to participate personally once the
collective parties have undertaken to subject a grievance
to arbitration. It would appear, in fact, that interested
individuals must be permitted to participate in some cir-
cumstances if all of these policies are to be soundly recon-
ciled.

To all intents and purposes, under the arbitration line
of cases, the arbitrator's decision and award — if he has
jurisdiction — is to be final and not subject to re-opening on
judicial (or administrative) review. Under Humphrey and
Miranda,\textsuperscript{256} on the other hand, the aggrieved individual
appears entitled to have his claim, for breach of the collect-
tive agreement and/or of the duty of fair representation,
meaningfully adjudicated somewhere. It is not likely that
an individual will receive such an adjudication in an arbi-
tration proceeding if he is a member of an interested class
to a seniority dispute that is opposed in the arbitration by
his representative, the union. By the same token, the adju-

\textsuperscript{253} See General Drivers, Local 89 v. Riss & Co., 372 U.S. 517 (1963); see also note 128 supra.
\textsuperscript{255} See cases cited note 120 supra.
\textsuperscript{215} See notes 230-41 supra and accompanying text.
dication of an individual's claim before an arbitrator will be suspect in a disciplinary case, such as Soto, where the individual alleges that his representation by the union was mere sham. If the individual is to have his day in court in cases such as these, and if the merits of the arbitration award are not to be re-opened on judicial or administrative review, the individual must be given the opportunity to participate in the arbitration proceedings.

In terms of legal consequence, permitting individuals to participate once arbitration is invoked would, of course, serve the orderly and uniform development of substantive federal law by promoting the twin policies of res judicata and singleness of suit and further by eliminating extensive forum shopping. So far as the collective parties are concerned, if the law is going to permit the individual a complete airing of his claim, it is in their interest that this be done in arbitration. Consistency of results and the uniform development of the common law of the shop would thus be promoted and the collective parties would generally avoid the possibility that an external agency might make even a more careful search into their activities than would an arbitrator. Furthermore, there are psychological and other social advantages to be derived from keeping substantive adjudication essentially within the system of private industrial government and from maintaining effective control over the character of the adjudicative forum. Individual workers might also reap benefits from institutionalized participation in arbitration: their claims would be more rapidly adjudicated and they would avoid the expense of law suits, although they might sometimes have to bear the additional expenses of arbitration. Assuming the arbitrator can be kept from being unduly biased in favor of the union or both collective parties, individual workers could expect more knowledgeable, and concomitantly more consistently just or equitable, adjudications of their claims.

Although the Court may adopt a rule of law favoring individual participation, it cannot be overlooked that there is perhaps another way, not to the advantage of aggrieved individuals, of reconciling the doctrines arising from its section 301 decisions. The Court could possibly decide that if an individual's claim is adjudicated in an arbitration invoked by the collective parties, he has received all the "day in court" to which he is entitled, even if he is not himself permitted to participate. Such a rule might be preferred

\[^{257}\text{In re Soto, 7 N.Y. 2d 397, 165 N.E. 2d 855, 198 N.Y.S. 2d 282 (1960).}\]
\[^{258}\text{See notes 135-38 supra and accompanying text.}\]
by the collective parties but it would hardly square with concepts of fundamental fairness or due process of law.\(^2\)

The Anglo-American legal tradition of procedural fair play, in fact, may be said to render it inappropriate for courts to ratify arbitral decisions that result from proceedings in which some interested parties have no opportunity for fair presentation of their positions. Furthermore, it could be argued that judicial ratification of arbitration decisions that result from proceedings in which interested parties are not permitted to participate is subject to constitutional objection, on the ground that the action of the government, through its courts, denies interested individuals their property without procedural due process of law.\(^2\)

Because of


It may be assumed that if the Court were to adopt such a doctrine, the individual would still be able to successfully challenge an arbitration award in a suit for breach of the duty of fair representation if he could affirmatively prove active fraud or caprice, on the part of the collective parties, or incapacitating bias, on the part of the arbitrator.

\(^{253}\)There is an increasing tendency to discuss the problems of individual participation in terms of due process of law, constitutional or otherwise. See, e.g., Fleming, Some Problems of Due Process and Fair Procedure in Labor Arbitration, 13 Stan. L. Rev. 235 (1961); Wirtz, Due Process of Arbitration, in The Arbitrator And The Parties, Eleventh Annual Meeting of the National Academy of Arbitrators (McKelvey ed. 1958) 1.

\(^{260}\)Initially it might be argued that judicial enforcement of particular awards rendered in such proceedings is prohibited. See Barrows v. Jackson, 346 U.S. 249 (1953); Black v. Cutter Laboratories, 351 U.S. 298, 300-04 (1956) (dissenting opinion); Shelley v. Kraemer, 334 U.S. 1 (1948); Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959, 968 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964). But a broader argument might also be made based upon the power of the courts under § 301 of the LMIA, to create a substantive federal law of collective bargaining relations. In the light of this power, the court’s function is more than merely to enforce private agreements; it is to create law, presumably in accord with the Constitution. Thus, if the Supreme Court, in creating substantive federal law, were to hold that there is no individual right to participate in arbitration and no other forum to which an individual could look for a full adjudication of his contract interest, it could be argued that the Court had established a rule in violation of the Constitution. The premise of such an argument, however, would be that individuals have personal legal rights under the collective agreement. So far the Court appears of the opinion that they do have such rights. Humphrey v. Moore, 375 U.S. 335 (1964). Another variant of a constitutional argument would be based upon the fact that arbitration is, under the Supreme Court’s decisions, the accepted substitute for litigation in contract disputes. If this is so, arbitration performs a state or governmental function and consequently is subject to constitutional requirements. See Terry v. Adams, 345 U.S. 461 (1953); Public Utilities Commission v. Pollak, 343 U.S. 451 (1952); Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944); Simpkins v. Moses H. Cone Memorial Hospital, supra. Constitutional arguments have been made in cases involving the lack of individual participation. In New York, a constitutional argument was rejected. Champka v. Lorenz-Schneider Co., 12 N.Y. 2d 1, 186 N.E. 2d 191, 233 N.Y.S. 2d 929 (1962), appeal dismissed for lack of a substantial federal question, 372 U.S. 227 (1963) (discussed note 139 supra).

In Wisconsin, the court avoided the constitutional issue. Clark v. Hein-
the possibility, nonetheless, of such an exclusionary rule, or the possibility that the Supreme Court might recant on the presumed promise of Humphrey, that the individual is entitled somewhere to a fair adjudication of his claim, it is necessary that consideration be given to certain objections that are raised against legally compelled introduction of individuals into arbitration.

Generally union, management and the arbitrators, who in a sense are the servants of the collective parties, have opposed compulsory participation of desirous individuals in the arbitral process, despite the fact that in practice interested individuals are usually permitted at least to be present. Moreover, full blown personal participation with the blessings of the collective parties or the arbitrator is by no means unknown, and it has also been reported, upon a survey of arbitrators, that when the issue of individual participation is raised before them they generally work something out that is agreeable to everybody but permits individual intervention and participation. In addition, a growing number of arbitrators and commentators, generally not wholly out of fear of an imminent legal requirement, have counselled the self-structuring of arbitration to take account of due process notions that promote participation by interested individuals.

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Werner Corp., 8 Wis. 2d 284, 99 N.W. 2d 132 (1959), rehearing denied, 8 Wis. 2d 277, 100 N.W. 2d 317, cert. denied, 362 U.S. 962 (1960) (discussed and quoted note 156 supra and accompanying text.)


263 See Blumrosen, Legal Protection for Critical Job Interests: Union-Management Authority Employee Autonomy, 13 Rutgers L. Rev. 631, 661-62 (1959); Summers, supra note 261, at 250; Report, supra note 10, 50 Nw. U.L. Rev. 143, 179 (1955); Note, 66 Yale L.J. 946, 954 n. 53 (1957); but see Wirtz, supra note 258, at 1-45 (discussion of the arbitrator's responsibility to individuals).


265 See, e.g., Williams, Intervention: Rights and Policies, in LABOR ARBITRATION AND INDUSTRIAL CHANGE, Sixteenth Annual Meeting of the National
A number of arguments, however, have been made against the participation by individuals. First it is feared that, if individuals are able to acquire favorable awards as a result of their personal participation, dissension and dissatisfaction with the union will result. It is further feared that such internal dissension might result in the undermining of the union's prestige and position in its continuing relations with management. It is thought possible, moreover, that management might actively take advantage of individual participation to undermine the union.

Although these appear to be significant considerations, they are really superficial. It can be anticipated that union-management common interest and the unfair labor practice sanctions of the NLRA will generally protect the union from the possibility that management will take advantage of individual participation in grievance arbitration proceedings. There is, however, some possibility that particular individual victories as a consequence of personal participation might cause the prestige of a union to suffer. But, particularly in disciplinary cases such as Soto and Bailor, the union's prestige would be undermined only because as a result of negligence, malice or bias, it was not doing its job. It taxes emotions of sympathy to be very concerned with union prestige in such circumstances. Furthermore, at least when resort is made to intervention in disciplinary cases, argument and presentation would probably be arranged so that first the company would put on its case.

Academy of Arbitrators (Kahn ed. 1963) 266; Barbash, Due Process and Individual Rights in Arbitration, 17 N.Y.U. Ann. Conf. Lab. (1964, as yet unpublished); Fleming, supra note 259; Wirtz, supra note 259.


Problems of improper representation by minority unions could also be handled pursuant to the NLRA. Cf. Hughes Tool Co. v. N.L.R.B., 147 F. 2d 69 (5th Cir. 1945); Local 626, Teamsters, 115 N.L.R.B. 890, 892 (1956); Federal Telephone & Radio Co., 107 N.L.R.B. 649 (1953); but cf. Douds v. Local 1250, Retail Clerks Unions, 173 F. 2d 764, 770-71 (2d Cir. 1949).


and then the union would put on its case and then the individual would extend and elaborate the record. If the union did its job properly, there would not be much that the individual could add and consequently little cause for embarrassment. Finally, since arbitration will have already been initiated, it is highly questionable that participation by interested individuals would have significantly disruptive and undue side effects either on the arbitral process or on the collective bargaining relationship generally.

"Once arbitration is initiated, the employer's attention is necessarily drawn to the dispute, and thus no opportunity remains for the union to eliminate frivolous claims. Moreover, a dispute reaches arbitration only when the parties have failed to achieve a voluntary settlement. Thus, the function of the arbitration procedure should be to facilitate a satisfactory decision by the arbitrator rather than to provide conditions conducive to settlements by the parties. Recognition of the right of individual employees to intervene will usually be consistent with this goal. Since participation of employees may evoke facts that might not otherwise emerge, the arbitrator's ability to render a just and well-considered decision is enhanced."274

A major rallying point for opposition to individual participation, nevertheless, is that such intervention will prove dangerously disruptive to the arbitral process, impairing its crucial function in the collective bargaining machinery.275 It is contended that, if intervention is compelled, arbitration, not itself a legal proceeding but rather an institution that should for effectiveness be kept free of legalisms,276 would become encrusted with the ponderous and technical trappings of judicial proceedings. It is feared that arbitration would thus be rendered overly formal, time consum-


ing and costly. It has also been argued that the courts would be flooded with suits by disappointed claimants and would be required to determine very difficult questions involving the drawing of tenuous lines between the collective interest and individual procedural rights.

As to the possibility that a terrible administrative and intellectual burden would be placed on the courts, the reality is very much to the contrary. First, once the arbitrators or the courts made it clear that intervention is to be permitted, it will be unnecessary for each potential intervener to go to court to secure his right in the arbitration proceeding. Second, while there might be more contested awards, the judicial inquiry, under the Steelworkers Trilogy and its progeny, would not be of a substantive nature, examining the merits; at most it would involve consideration of the procedure of the arbitration and the arbitrator's power under the contract to make the award.

To the argument that arbitration will become more like a judicial or some other legalistic institution, insofar as procedure and form are concerned, the short answer that might be returned is: So what? It does not necessarily follow that greater formality will impair the substantive utility of arbitration. As Professor Williams recently observed, "[I]t would be a shocking thing indeed in the modern development of intervention and joinder of parties in courts if the flexible arbitration process could not make a like accommodation to the needs of other interested persons."

Surely the courts and the arbitrators are eminently qualified to draw the tenuous procedural lines, if they are so tenuous, to take account of the conflicts between legitimate collective interests and individual rights. To repeat Professor Williams' thought, for it bears repeating: Conventional legal institutions are not unfamiliar with intervention and multi-party proceedings that could be adapted to the arbitration forum. Can it be, therefore,

278 See Note, 1960 Wis. L. Rev. 324, 330 (1960); 1957 ABA Section on Labor Relations Law, supra note 275, at 76 (by implication).
279 See Cox, supra note 268, 8 Lab. L.J. at 857 (in a different context); Note, 59 Colum. L. Rev. 163, 161 (1959) (by implication); Note, 44 Marq. L. Rev. 115, 119-20 (1960).
280 See notes 117-120, 249-54 supra and accompanying text.
282 See Fed. R. Civ. P. Rules 14 (Third-Party Practice), 22 (Intervenor). As to administrative proceedings see generally, 1 Davis, Administrative Law § 8.11 (1958); 2 Davis, Administrative Law Ch. 15 (1958); 3 Davis, Administrative Law Ch. 22, especially § 22.08 (1958).
that the fear that arbitration cannot cope with the complexities involved in the introduction of individuals as additional parties is based upon a belief that arbitration, despite its utility and institutional adaptability within an endless variety of systems of industrial self-government, is too rigid for significant internal adaptation? It is rather to be expected that arbitration can adapt to individual participation on an institutional scale and still remain both less formal and costly, in time and money, than judicial or even administrative proceedings and remain, as well, a more useful adjudicative forum for industrial private ordering. Furthermore, the problems incident to declaring a right to intervene are not likely to be so great as opponents might suggest. It can be anticipated that at least union members will be likely to seek to participate only when "critical job interests" are at stake. In addition, potential expense to the individual and the requirement of sufficient interest will be limiting factors on wholesale participation. Finally, it probably will be the comparatively rare case in which the individual is dissatisfied with his union, its representation of him, or its resolution of a question in conflict. Normally the individual will be satisfied with his union's representation or will be afraid to oppose it.

INTERVENTION IN ARBITRATION — WHO MAY INTERVENE AND OTHER PROCEDURAL CONSIDERATIONS

The increase in cost that might result from individual participation will likely be nominal and could be absorbed by the collective parties. If the expense is more substantial, it could, in appropriate cases, be assessed to the intervening individuals. The New Jersey Supreme Court, for example, has ruled that when an individual compels arbitration, he must pay half the costs unless the arbitrator finds that his claim is both colorable and substantial and that the union arbitrarily refused to take his grievance.

283 See note 62 supra and accompanying text.
284 See infra notes 287-91 with accompanying text.
285 See infra notes 292-303 with accompanying text.
to arbitration, in which case the union pays his share.\footnote{289 Donnelly v. United Fruit Co., 40 N.J. 61, 92-93, 190 A. 2d 825, 842 (1963). See also, Summers, \textit{supra} note 287, at 403-04.} When an individual merely intervenes in arbitration, he might, likewise, be required to pay both his personal counsel fees\footnote{290 See Williams, \textit{supra} note 267, at 279; \textit{but see Barbash, supra} note 267 at his notes 82-3 (Discussing Brotherhood of R.R. Trainmen v. Virginia \textit{ex rel. Virginia State Bar}, 377 U.S. 1 (1964); and Gédéon v. Wainwright, 372 U.S. 335 (1963)).} and the additional cost of the proceedings unless the arbitrator finds that his claim was colorable and substantial or that the union and/or the employer acted in bad faith, necessitating his personal participation.\footnote{291 \textit{In re Soto, supra} note 272. See also notes 48-54 \textit{supra} and accompanying text.} One advantage to having the potential intervenor run the risk of bearing the expense is that intervention in practice will not be likely to be frivolously invoked.

Notice requirements need not be formal and could be tailored somewhat to meet the needs of the particular type of case or interest that is involved. An ideal, probably unattainable, would be that anyone who has a right to intervene is entitled to notice of the proceedings and/or appropriate effort to give such notice must be made. Statement of the ideal, however, leaves remaining the questions: What kind of notice? And who should be entitled to intervene?

As to some parties and circumstances, in which there clearly should be a right to intervene, personal or actual notice might be required. There would be little difficulty in requiring this caliber of notice to a grievant in a disciplinary discharge case or, for that matter, to any single grievant. In such circumstances the individual's reason for seeking intervention would arise from fear that the union will abuse its power, negligently botch his defense or otherwise fail to champion his cause properly.\footnote{292 \textit{Cf. Rolax v. Atlantic Coast Line R.R.}, 186 F. 2d 473, 481 (4th Cir. 1951).}

"Where those fears are well-founded, allowing the individual separate counsel is imperative if the arbitrator is to make a sound decision. If those fears are not well-founded, to deny the individual counsel of his choice and force upon him counsel he distrusts, deprives him of the feeling that he has had a fair hearing. The minor problems of having an additional advocate is not a large price to pay for confidence in the process. For practical reasons, the right to intervene ought not depend on proof that the fears are well
founded, for inquiry into that issue will create added problems, impose more burdens, and be more disruptive than to allow the individual separate counsel in those few cases when his fears are great enough to lead him to bear the costs."

There being no significant problems of identifying nor, normally, of locating these potential intervenors, who already know at least that proceedings are to take place sometime, a rule could be established that actual notice of the proceedings must be given or personal notice sent for the union to avoid being held prima facie guilty of bad faith.

In seniority cases, on the other hand, it would be inappropriate to require specific or actual notice to all potential intervenors. Of course, even in seniority cases one class of potential intervenors would include the particular grievants, who might have reason to fear that the union will desert them or otherwise sell them out or fail them in arbitration. As to these named grievants, just as with dischargees, a requirement of actual or personal notice might not be overly burdensome. But, in seniority grievances, potential intervenors would also often include workers who are not grievants but whose seniority might suffer if the grievants were to prevail. It could thus often prove to be difficult to identify the various interested persons or groups. Actually the initial task in the identifying process would normally not be as troublesome as it might at first seem. While seniority disputes always involve conflicts of interest between workers or groups of workers, the classes of workers likely to seek intervention are usually easily defined. Generally, persons beyond, i.e., before or after, the disputed range on the seniority list do not care what the outcome of the grievance will be. They will not be directly affected by the outcome and consequently have no right to intervene and no need for notice. This would follow even if they might be indirectly affected, for example, because of the precedential value that might be attached to the determination.

"The right to intervene need be extended only to those directly affected by the outcome of the case. Those who are indirectly affected by the decision as a

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293 Summers, supra note 287, at 406; see Williams, supra note 267, at 279-80.
294 See Summers, supra note 287, at 405.
295 See notes 65-8 supra with accompanying text.
precedent have no greater claim to being a party to an arbitration than to any other legal proceeding. Repercussions may reach remote employees, but that does not make their interest sufficient to require intervention. Indeed, it is the primary concern of the union to urge these more widespread and remote consequences before the arbitrator. The need is only that those immediately and tangibly affected by the specific case be allowed full opportunity to be heard. Though the line may be hard to define, it is less difficult to draw in practice.\footnote{Summers, supra note 287, at 407.}

Once the range of individuals who are sufficiently interested is initially identified, however, there remains the problem of locating the individual potential intervenors and giving them notice. Especially in the industrial union context, this task may often prove to be difficult. In a typical case, for example, there might be thirty individuals, not actual grievants, who will be directly affected by the seniority determination. Two of these individuals might be absent from the job, e.g., on sick leave or on vacation, on military leave or on leave as union officers, and consequently receive no notice of the arbitration. The twenty-eight workers who are at work, however, do receive notice but fail to act. Should the two absent workers have a right to challenge an award that is rendered without personal or actual notice of the proceedings to them? An affirmative answer to the question would give the stragglers (or perhaps even the entire class) a second shot at the dispute and would unduly interfere with policies favoring finality of decision. A more appropriate rule would be to provide that when notice comes to the bulk of a class of potential intervenors, it constitutes constructive notice to all of its members. But this solution does not approach the ideal of requiring personal or actual notice to all who might have a right to intervene. The question, therefore, that must be asked is: assuming there is an individual right to intervene, even though the individual is a member of a definable class, must individual notice be given? This question is, of course, related to the question, who shall be taken to be within the class(es) of potential intervenors? Admittedly, the answer to the second question should be only those individuals who are likely to be directly affected by the resolution of the grievance. Situations will arise, however, in which the primary matter to be arbitrated may involve a grievance to reinstate one worker yet everybody
GRIEVANCE ARBITRATION

with less than 20 or 30 years seniority is likely to be affected at least to the extent of falling back one place on the seniority roster. In practice, it will probably not be difficult to determine whether particular individuals who seek intervention are affected with sufficient directness. It would be a terrific burden, however, if all issues of sufficient interest had to be resolved by the union in determining who was entitled to notice. It might, therefore, be best to avoid a mechanical rule that personal notice must be sent or actual notice be received in order to avoid a prima facie finding of bad faith or having the arbitration proceedings reopened on subsequent challenge. It might be more appropriate to provide that the individual's rights to notice and to intervention are not co-extensive and that the right to intervene is broader than the right to notice. So far as single individuals who obviously are potential intervenors or who, with reasonable effort, should be known to be interested are concerned, actual notice or personal notice by mail, etc., could be required, as to all others, and particularly when large classes may be involved, posting of notice on the bulletin boards, and other such general publications and the like would be sufficient. If such parties, whose interest is not apparent, receive notice they could seek to intervene and have the question of sufficient interest determined, but, after the proceedings have terminated and particularly after a decision has been rendered, they could not insist that the proceedings be reopened nor could they make a full scale judicial challenge of the merits of the determination. Individual members

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298 See, e.g., Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191 (4th Cir. 1963).
299 See Summers, supra note 287, at 407 (quoted in the text, supra note 297).
300 Regarding the example in the text, intervention might normally be restricted to those who would immediately lose job status. On the other hand, depending upon the circumstances, all persons who are likely to lose seniority might have a substantially direct interest in the grievance even if their job status was not in immediate jeopardy. There might, for example, be a good possibility that job status would be affected in the near future because of business retrenching.
301 See Estes v. Union Terminal Co., 89 F. 2d 768 (5th Cir. 1937); Summers, supra note 287, at 408.
303 Of course, if the individuals bringing the challenge were prevented from receiving notice or from intervening because of the fraud, malice or invidious discrimination of the union or both collective parties, the arbitration proceedings might be set-aside and re-opened on judicial review or a fair representation suit might be entertained on its merits by the courts or the National Labor Relations Board.
of reasonably defined classes, would, of course, be bound if notice comes, to the bulk of the class.

Two additional procedural matters require brief consideration: First, there might be problems that arise from the fact that individuals generally are strangers to the selection of arbitrators, who, consequently, may appear to be little more than the servants of the collective parties.\textsuperscript{304} So far as intervenors are concerned, in the absence of a showing of improper particular bias, rather than mere institutional or philosophic bias, they probably should not be heard to complain. They have no more right to select the forum or the judge than do intervenors in general legal proceedings.\textsuperscript{305} On the other hand, arbitration is unlike many other proceedings in that some of the parties do select the arbitrator. And it has been argued that, when individuals seek to compel arbitration, they have a right to participate in the selection process, even if such participation requires arrangement of a substitute for a permanent umpire.\textsuperscript{306} Perhaps similar provision could be made for individuals who seek to intervene prior to the commencement of the proceedings. Convenience and order, however, require that intervenors who come into the middle of arbitration proceedings should not be permitted to insist upon the calling of a new arbitrator in the absence of a strong showing of bias.

The final procedural consideration pertains to situations, usually involving seniority disputes, in which great numbers of individuals may seek to intervene. Representation problems and other undue complication of the proceedings could be minimized by drawing upon the procedural device of the class action.\textsuperscript{307} Those with sufficient interest to intervene could be represented at the proceedings by division into a functionally justifiable number of classes. It is entirely likely that the individuals, seeking intervention will, in any event, have done this themselves.\textsuperscript{308}

\textsuperscript{304} See note 264 supra.

\textsuperscript{305} See Summers, supra note 287, at 405 (by implication); cf. Parks v. IBEW, 314 F. 2d 886, 911-13 (4th Cir.), cert. denied, 372 U.S. 976 (1963) (and references discussed and cited therein) (discussion of fair hearing in the context of internal union discipline).


\textsuperscript{307} See, e.g., note 282 supra.

\textsuperscript{308} Matter of Iroquois Beverage Corp., 14 Misc. 2d 290, 159 N.Y.S. 2d 256 (Sup. Ct. 1955).
Any discussion of the right to intervene in arbitration would be incomplete without at least brief mention of the outlook for individual participation in other stages of the administration of collective bargaining agreements. Going down the line to situations in which a grievance has been acted upon by the collective parties but neither seeks arbitration, the various doctrinal streams emanating from the Supreme Court decisions once again portend at least for a rule that promotes individual participation. If the individual is entitled to a final adjudication of the merits of his claim, before a court or administrative agency if necessary, the implications of the Court's arbitration decisions support the view that he should usually be able to invoke arbitration. In order to promote arbitration and thereby to avoid external adjudications, which the Court considers generally unsuited to the collective bargaining context, the Court has declared that "[A]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute."\(^3\) Building upon this judicial attitude, it can be argued that, in interpreting arbitration clauses when an individual seeks to invoke the process, the courts should discard the traditional presumption that an individual cannot compel arbitration unless he can affirmatively demonstrate that his right to do so arises explicitly from the agreement.\(^3\) In interpreting the agreement, it should rather be presumed that aggrieved individuals have a right to compel arbitration unless clearly waived\(^3\) or unless the agreement expressly excludes them. To the extent that arbitration is the highest stage in the grievance machinery, and with the risk of applying bootstraps reasoning, the same presumption might be applied in interpreting the agreement when determining whether an individual may personally invoke or participate in the earlier stages of the grievance procedure.

Under the contract interpretation approach, at least so far as compelling arbitration and invoking and participating in the lower stages of the grievance procedure are con-
cerned, the collective parties could exclude individuals by clear and explicit provisions in the collective agreement. But, if the aggrieved individual possesses the right to challenge their action and have the merits of his claim adjudicated before a court or an administrative agency, it would be in the interest of the collective parties not to exclude him. By permitting him full use of the grievance machinery they would thereby avoid the possibility of a potential external review of their collective actions that is even more searching and certainly more disruptive than arbitration. Such action or policy might in addition add to stability in shop or industrial relations by promoting greater confidence in the collective bargaining processes on the part of workers. Moreover, if the grievance machinery, including arbitration, were available to the aggrieved individual, on judicial review, all the participating individual could challenge would be the power of the arbitrator to make the award and the procedural regularity and fairness of the proceedings. The merits of the grievance or the correctness of the determination would not be subject to review. Individuals who failed to intervene or to invoke the process would not be able to secure external review unless they could prove that they were without fault in failing to employ the internal processes and that the union or both collective parties were guilty of fraud or other such misconduct.812

It is, of course, open for the Supreme Court to go beyond the contract interpretation approach and accept the arguments based upon section 9(a) of the NLRA and the Railway Labor cases that individuals have nondefeasible rights to participate in and invoke all phases of the grievance machinery, including arbitration.813 And this is the position the Court could find it necessary to take in order to harmonize its decisions, develop a viable and uniform body of federal law of collective bargaining relations, and avoid possible constitutional questions — especially if a contract interpretation approach fails in the task of consistently and properly accommodating group and individual needs.814


In the area of internal union discipline, Congress and the courts have already established rules dealing with the exhaustion of available remedies that might prove to be somewhat adaptable to cases involving individual participation in grievance determinations. See, e.g., Detroy v. American Guild of Variety Artists, 286 F. 2d 75 (2d Cir.), cert. denied, 366 U.S. 929 (1961); Parks v. IBEW, 314 F. 2d 886, 924-25 (4th Cir.), cert. denied, 372 U.S. 976 (1963) (both cases discussing relevant statutory provisions, judicial decisions and scholarly commentary).

813 See notes 91-106 supra and accompanying text.
CONCLUSION

The proposals that have been drawn here for the future development of the law in this area run the risk of having the epithets "bootstraps" and tautology applied to them. This is truly a danger, for the arguments presented give the appearance of circularity. The circle is pierced, however, at the point at which inquiry provides an answer to the initial question: What rights should individuals have under the collective bargaining agreement and in the grievance and arbitral processes? The question can only be answered after intensive socio-legal examination of the collective bargaining processes. And, when an answer is delivered all else can be seen to follow, for once it is declared that the individual should have the right to have his claim fairly adjudicated before a tribunal at least somewhat removed from the collective parties, other considerations come to bear upon the general problem of reconciling group and individual needs. In order to preserve the essential private and self-governing character of collective bargaining, it can be argued that it is best to arrange that such adjudications be conducted within the administrative processes of collective bargaining, culminating in reasonably neutral arbitration.

Once these underlying questions have been asked and, to the extent possible, answered, relevant legal doctrines must be structured to take account of the social realities reflected and to govern the institutional forms. But, it is necessary for the lawyer, in seeking to develop appropriate legal responses, however, to continuously recognize that the social conclusions involved may, after all, prove to be invalid or incomplete. Consequently, as far as the law is concerned, especially the law in public realms such as labor relations, there are no responses that have the character of even reasonably final answers — there are only ways of approaching or temporarily solving problems. The social and legal questions considered here dealt with group-individual conflict, and particularly as to such questions there are no final solutions. What has been offered here, therefore, is intended only as a more or less tentative and gross blueprint for future development in the light of present and past experience as viewed through certain democratic or humane value judgments.