An employee who has a grievance can pursue a number of remedies. If the employee's life in the industry is governed by a collective bargaining contract which prescribes a grievance procedure, his easiest and most reasonable step is to put that procedure in motion. If he is a good union man and the union is friendly to his claim, the use of a union-controlled grievance procedure seems to be the sensible course for him. But if he is a non-union employee within the bargaining unit or if he is friendly to a rival union or part of an insurgent faction in the bargaining union, he may well be wary of a union-controlled grievance procedure. And even if he is a member in good standing, he may not trust his own union if his claim is one which may create an interpretation, classification, or precedent not favorable to the majority of the members of his union.

The tendency of individual claims to radiate into the interests of others and the difficulty of distinguishing between the interpretation and the creation of a contract create an important interest on the part of the union to participate in the grievance procedure. Union desires for the prestige among its members which comes from union prosecution of disputes with management, and union and management wishes for an orderly and uniform method of processing grievances, elevate the interest into one of having control over grievance procedures. But these observations do not cut unequivocally in favor of union control. True, individual interests seldom exist wholly independently of group interests, so that most individual grievance settlements involve a balancing of individual with group interests. Yet it may be questioned whether the group representative is suited by temperament or design to strike the balance. For the bargaining representative has first of all a concern for solutions most beneficial to a majority of the union members and beyond that a concern for the institutional interests of the union. Although these interests are both legitimate and considerable, the bias toward majority and union institutional interests which the bargaining representative thus expresses may lead him automatically to submerge the claims of individual employees in favor of any opposing claim of the majority.

Present federal labor statutes appear to circumscribe the extent to which individual grievance claims can be disregarded in favor of majority interest. Thus, under the proviso to section 9 of the Labor Management Relations Act (LMRA), an individual employee seems to have the right to present his own grievance to his employer and to have it adjusted without the intervention of his bargaining representative.1 He appears to have the right to sue his employer for a breach of contract under section 301 of the LMRA.2 Moreover, the bargaining representative’s duty to represent fairly all employees in the

bargaining unit apparently enforceable by the member through the courts and possibly the NLRB, places at least an outer limit on the freedom of the representative to juggle claims. The question which will be explored in this Comment is whether these rights of the individual employee do, or should, have enforceable substance.

I. The Individual's Right to Present His Grievance Under the Proviso to Section 9

Section 9 of the LMRA, after providing for the exclusive bargaining capacity of a majority representative, states in qualification that any employee or group of employees has an individual right

3. 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 in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.4

The words of the proviso are plain enough. The right to present grievances runs to individuals and not to their bargaining representative. It runs to all members of the bargaining unit whether or not they happen to be members of the union which is acting in other matters as the exclusive representative of the unit. On its face this proviso gives individual employees the right to present grievances directly to the employer. From the proviso's language, and from the statutory history accompanying the proviso,5 an argument could readily be made that a collective bargaining agreement could not establish contractual procedures for the processing of grievances which would deprive the employee of his right to present his grievances directly to his employer, and that the employer had a duty to hear the individual employee.

The Fifth Circuit, interpreting a similar statutory provision which preceded the present section 9 proviso, indicated that although the individual employee would not be permitted to circumvent the contractual grievance procedure in presenting his grievance, the individual would be free within the contractual procedure to speak for himself. The opinion, Hughes Tool Co. v. NLRB,6

3. The duty was articulated by the Supreme Court in Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). A major burden of this Comment will be an analysis of the role of this duty in federal labor law.


5. See note 8 infra and accompanying text.

6. 147 F.2d 69 (5th Cir. 1945). The suit was to enforce a NLRB cease and desist order, 56 NLRB 981 (1944). In the course of its opinion the Board held that at each step in the grievance procedure, where the contract provides for presentation by a union representative . . . the individual employee or group of employees has the right to present his or its grievance in person, with the union representative being present . . .

56 N.L.R.B. 981, 983 (1944). While refusing to enforce the order as stated, the court agreed with the Board on the proposition that " . . . individuals and groups may . . . fully prosecute their grievances through all stages and appeals." 147 F.2d at 73.
indicated that, within the contractual grievance procedure the individual possessed rights identical to those of the bargaining representative. Its implications were broader; if the representative could compel arbitration of a dispute under the contract, the individual could similarly compel arbitration.\(^7\)

The individual's power to stand in the shoes of the bargaining representative within the contractual grievance procedure did not, however, satisfy the Taft-Hartley Congress. The Senate Report accompanying the amendment of the section 9 proviso to its present form criticized *Hughes* for denying the individual direct access to the employer, independent of the bargaining representative.\(^8\) Implicit in the Senate Report is the balance between group and individual prerogatives. The scope for individual action was to be made broader rather than narrower. Ironically, subsequent courts interpreting the amended section 9 proviso have gone even further than the Fifth Circuit had gone in depriving the individual of right to any access to the employer, even within the contractual procedure for the presentation of grievances.\(^9\) This denial occurs not in suits to compel participation in the grievance process, but in suits for more drastic remedies — arbitration or damages. However, in assessing these stronger individual demands, courts have had occasion to review the

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7. On the right to compel arbitration see note 27 infra and accompanying text.

8. S. Rep. No. 105, 80th Cong., 1st Sess. 24 (1947), accompanying the amendment to the Section 9 proviso, stated:

> The Board has not given full effect to this right as defined in the present statute since it has adopted a doctrine that if there is a bargaining representative he must be consulted at every stage of the grievance procedure, even though the individual employee might prefer to exercise his right to confer with his employer alone. The current Board practice received some support from the courts in the *Hughes Tool* case . . . a decision which seems inconsistent with another circuit court's reversal of the Board in *NLRB v. North American Aviation Co.* . . . The revised language would make it clear that the employee's right to present grievances exists independently of the rights of the bargaining representative, if the bargaining representative has been given an opportunity to be present at the adjustment, unless the adjustment is contrary to the terms of the collective-bargaining agreement then in effect. [Emphasis added]

By adding to the individual's right to 'present' grievances the right to have them adjusted without the intervention of the bargaining representative, the words of the Taft-Hartley amendment themselves seem to belie interpretations which hold that the individual's right to 'present' imports no corresponding duty on the part of the employers to listen. Moreover, the apparent disapproval of the *Hughes* case in the Senate Report casts doubt on the proposition that the collective bargaining agreement may properly limit the right of the employee individually to present his grievances outside the contractually agreed grievance procedure.

9. Courts tend to consider the union power over the grievance an important union prerogative. Black Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962), suggests that the right of the individual grievant is limited to the presentation of it to the union. "A union's right to screen grievances and to press only those it concludes should be pressed is a valuable right." *Id* at 183. See also Ostrofsky v. United Steelworkers, 171 F. Supp. 782, 790 (D. Md. 1959), *aff'd*, 273 F.2d 614 (4th Cir.), *cert. denied*, 363 U.S. 849 (1960). On union control over grievances, see note 16 infra and accompanying text.
role and place of the individual in the presentation of grievances.\textsuperscript{10} The law as it presently stands appears to give the individual no independent voice within the contractual grievance process to present his own grievances to his employer.\textsuperscript{11}

This refusal to take the proviso at its word can be understood if one considers its place in the context of the federal labor law and policy. A major purpose of the federal labor law is to establish the parity of bargaining strength between employer and his labor force upon which a realistic contractual relationship must be based.\textsuperscript{12} The chief means to that end is the certification of exclusive bargaining representatives for bargaining units, selected by a majority of the employees within a bargaining unit. Section 9 divests employees of the right as an individual to create the law of the job. The divesture is a necessary corollary of the system of majority representation. Yet Congress apparently thought that the settlement of individual grievances under the contract was quite distinct from negotiations for the collective bargaining agreement. Although the negotiation of the contract would be in the hands of the exclusive representative, the individual could express his own complaints arising under the contract once it was created. But if the conception was false, if the creation and administration of a collective agreement are not separable functions, then the proviso spoke to an unreal difference and would \textit{pro tanto} have to be disregarded in the face of the statute's clearly overriding choice for majority representation.

It is the very crispness of the congressional distinctions which may have rendered the courts leery of exploring them, for bargaining is in many respects a continuous function. Contracts are often written in extremely general language and the elucidation left to future bargaining through such grievances as arise. Even in a well constructed and detailed contract, a grievance is likely to suggest an interpretation which, by its effect on other members of the unit, will be of interest to the bargaining representative. When grievance settlements thus define the "law of the job", the intent of the LMRA's provision for majority representation — the keystone of the scheme of the act — implies an active, if not exclusive role for the bargaining representative in every grievance settlement; in the realities of labor-management relations, the contract may be "on the line" each time a grievance arises. Thus, courts and commentators have reasoned that it is not inconsistent with the LMRA, although it is apparently contrary to the language of the section 9 proviso, to require

\textsuperscript{10} See, \textit{e.g.}, Black Clawson Co. v. International Ass'n of Machinists, \textit{supra} note 9.

\textsuperscript{11} On the manufacturer's duty to hear grievances from individuals, see note 14 \textit{infra} and accompanying text. On the union's discretion to refuse to process grievances see note 16 \textit{infra} and accompanying text. On individual power to compel arbitration see note 27 \textit{infra} and accompanying text. For a cogent commentator's endorsement of the courts' behavior, see \textit{Cox, Rights Under A Labor Agreement, 69 Harv. L. Rev.} 601 (1956).

\textsuperscript{12} Professor Cox has said, "The most important purpose of the Wagner Act was to create aggregations of economic power on the side of employees countervailing the existing power of corporations to establish labor standards." \textit{Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev.} 1401, 1407 (1958).
all grievances to be processed through contractual grievance procedures in which the bargaining representative plays a major and vocal role.\textsuperscript{13} Where the bargaining representative refuses to present a grievance to the employer through the contractual procedure, the individual has no assured recourse to the employer outside the contractual procedure. Under the present interpretation of the section 9 proviso the employer has merely the privilege, and not the duty, of listening independently to an individual grievant.\textsuperscript{14} Unless the individual employee can enlist the support of the representative in initiating the contractual grievance procedure, the individual has no enforceable right that the employer must hear his complaint. Moreover, the representative has practically unlimited authority to decline to process individual grievances. Essentially the only limit on the representative's authority in this matter is his duty of fair representation, to the extent that it imposes a duty to process a "meritorious grievance."\textsuperscript{15} However, courts have allowed the representative a broad range of discretion in his representation to determine whether a particular grievance has merit.\textsuperscript{16} It is doubtful that violation of this duty by the representative could effectively be demonstrated unless the representative had simply refused to take up the grievances of a readily ascertainable class of employees — for example, where he had refused to process grievances sub-


\textsuperscript{14} A holding that an employer had the right and a suggestion that he had a duty to hear individual grievances appears in NLRB v. North American Aviation, Inc., 136 F.2d 898 (9th Cir. 1943). The court was dealing with the original § 9 of the Wagner Act (a less explicit proviso giving individual presentation rights than the present § 9 proviso). The court refused to enforce a Board order requiring that the company stop hearing individual grievances, holding that the company had the right, if not the duty, to consider and dispose of the grievances presented by individuals. The suggestion that the company had a duty to hear is, however, dicta, as the issue in the case was the company's right to hear the grievances. The suggestion has not been followed. See, e.g., Black Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179, 185 (2d Cir. 1962).

\textsuperscript{15} In Hughes the Fifth Circuit held that "a meritorious grievance is entitled, if desired, to the aid and countenance of the bargaining representative," 147 F.2d 69, 74 (5th Cir. 1945). The court saw the duty to handle meritorious grievances as growing out of the union's duty of fair representation. Enforcement of the duty to handle grievances impartially would, in the Fifth Circuit's view, thus take the form of some kind of fair representation proceeding. One method which grew out of the Hughes controversy was a motion for decertification for failure to fulfill the duties of an exclusive bargaining representative under § 9(a). Hughes Tool Co., 104 N.L.R.B. 318 (1953). The Board held that it would revoke certification for failure to process meritorious grievances, but instead of doing so immediately, gave the union a period of grace in which to conform its conduct to its duties. In fact decertification has never been used for this purpose. See Aaron & Komaroff, \textit{Statutory Regulation of Internal Union Affairs I}, 44 Ill. L. Rev. 425, 440 (1949).

mitted by employees who belonged to a union rivalling the bargaining representative.

Even where a representative has agreed to initiate the contractual grievance procedure and to present a grievance before the employer, the representative has broad discretion to settle the grievance and, by such settlement, to deprive the individual of any further access to the employer or to any further rights within the contractual grievance procedure, such as the ability to compel arbitration. The Supreme Court's opinion in *Elgin, Joliet & E.R.R. v. Burley* appears to stand for a contrary proposition, that the power of a representative to settle grievances without consent of the affected individuals should be narrowly restricted. In *Elgin* ten railroad employees had filed a grievance with the representative demanding back pay from the employer under the terms of the collective bargaining agreement. The representative settled the claim with the employer, agreeing to cancel back pay demands in return for future agreement regarding the general subject-matter of the dispute. The employees appealed to the Railroad Adjustment Board, which ruled that the settlement conclusively disposed of the individuals' grievances. The Supreme Court, reversing the Board, distinguished between the exclusive authority of the union to make collective bargaining agreements and its power to settle grievances. The Court held that only the clearest expression of congressional purpose would justify the courts in allowing unions

... to submerge wholly the individual and minority interests... not only in the forming of contracts which govern their employment relation, but also in giving effect to them and to all other incidents of that relation.

As the Railroad Labor Act in a provision far weaker than the section 9 proviso of the LMRA allowed individuals "to confer" with management, the Court was able to rule that the collective bargaining agreement between the carrier and the union could not nullify the rights reserved to individuals by the act.

As Professor Summers points out, the *Elgin* case, along with *Hughes*, is important not as a final statement of federal labor policy but as an integral part of the legislative history of section 9(a) in its present form. While the added words of the proviso go to the individual's right to grieve without interference from the bargaining representative, this right is *pro tanto* a restriction of the power of unions. Thus, while *Hughes* generated the form of the amendment, the debates suggest that Congress sought to follow the holding of *Elgin* at the same time.

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18. 325 U.S. at 733, 734.
19. 48 Stat. 1185, 1187 (1934), 45 U.S.C. § 152 (fourth) (1958) "... Provided that nothing in this act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time. ..." [Emphasis added].
20. 325 U.S. at 744.
Over the years the right articulated in *Elgin* has received at best sporadic recognition. Further, insofar as *Elgin* itself constitutes a restriction on union power, it is an easy restriction to circumvent. In fact, the Court itself invited the unions to avoid its holding. The Court held that there was a lack of "legally sufficient" authorization for the union to act in the individual's behalf when dealing with his accrued rights, but that unions might acquire the requisite authorization by provisions in their "by-laws, constitutions or other governing regulations as well as by usage or custom." Unions promptly availed themselves of this invitation by amending their constitutions to authorize settlements, thereby undercutting the basis of *Elgin*. Thus, whatever the force of *Elgin* might have been, it appears to have been dissipated.

The law developing after *Hughes* and *Elgin*, then, has tended to restrict severely the role of the individual in the grievance process. He must restrict his grieving to the contractual procedure. He cannot demand that the employer hear his grievance. He cannot force his bargaining representative to carry his grievance to his employer; if the union does undertake his cause, he cannot demand that there be no settlement not to his liking. The final and most significant limitation of individuals seeking to inject themselves into grievances occurs in the context of arbitration, where most of the law respecting the rights of individual grievants has been fashioned. Contractually agreed grievance procedures commonly contain provisions for binding arbitration of unresolved grievances. Individuals, seeking judicial aid in prosecuting their grievances, often urge the court to compel submission of their dispute to such arbitration. The federal courts have, however, unanimously construed the federal law to deny to individuals the right to compel arbitration.

*Black Clawson Co. v. International Ass'n of Machinists,* decided in 1962 by the Second Circuit, is representative of the dominant view of the federal law developing after *Hughes* and *Elgin*. *Black Clawson* did not, however, decide the question of whether individuals could compel submission to arbitration when they were represented by the union unless the terms and conditions of employment or arising out of the employer-employee relationship.}

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24. 327 U.S. at 663 n.2.

25. See, e.g., Constitution of United Steelworkers of America AFL-CIO, Art. XVII, § 3: "The International Union and the Local Union to which the member belongs shall act exclusively as his agent to represent him in the presentation, maintenance, adjustment and settlement of all grievances and other matters relating to terms and conditions of employment or arising out of the employer-employee relationship."

26. One case which refused to allow a union the easy way out of amending their constitution was *Guzzo v. United Steelworkers*, 40 CCH Lab. Cas. ¶ 70056 (Cal. Super. Ct. 1960), which held that, despite authorization, an individual is not bound by the union's settlement if the union was not representing him fairly when it reached the settlement.


28. 313 F.2d 179 (2d Cir. 1962).
The suit, a declaratory judgment action brought under section 301, sought a judgment that “this dispute [between the company and an employee] was not arbitrable under the terms of the collective bargaining agreement.”

The company sought this judgment after an employee who claimed wrongful discharge demanded that the employer go to arbitration. The employee claimed that he had the right to compel arbitration, both by virtue of the contract itself and by the section 9 proviso. The contract argument had only the merit of exposing some bad drafting: the contracting parties clearly never had any intention of allowing the individual aggrieved employee to compel arbitration. Of more general significance was the court’s analysis of the section 9 proviso. All of the arguments seen earlier in the context of refusing to allow an employee to by-pass a contractual grievance procedure were reiterated in the court’s opinion. The court did not consider whether there is a difference between the employee who disregards his bargaining representative and goes to his employer initially and the one who, having exhausted his representative’s assistance, tries to carry on by himself. Nor did the court consider the relevance of other routes to relief. Rather it contented itself with the observation that

chaos would result if every disenchanted employee, every disturbed employee, and every employee who harbored a dislike for his employer, could harass both the union and the employer by processing grievances through the various steps of the grievance procedure and alternately by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union.

Where the representative or the employer does himself choose to precipitate arbitration, the individual appears to have some chance of representing his interests by intervening in the arbitration proceedings. There is, however, as yet no federal labor law regarding the right of the individual to intervene; there is only state law, and various states are in conflict regarding the scope or existence of the individual’s rights to intervene in arbitration proceedings.

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29. Id. at 181.
30. Id. at 186.
31. “The law upon this subject is still in a state of flux.” Donato v. American Locomotive Co., 283 App. Div. 410, 127 N.Y.S.2d 709, 714, aff’d mem., 306 N.Y. 966, 120 N.E.2d 277 (1954). Thus the New York Supreme Court ordered intervention in 1955, in Matter of Iroquois Beverage Corp., 159 N.Y.S.2d 256 (Sup. Ct. 1955); while in 1960 the New York Court of Appeals reversed an order which had vacated an arbitration award on the grounds that the arbitrator refused to allow intervention and independent representation, Matter of Soto, 7 N.Y.2d 397, 165 N.E.2d 855 (1960). The Appellate Division in the 1960 case had ordered intervention on the theory that the employees were third party beneficiaries of the arbitration agreement. Soto v. Lanschaft Optical Corp., 7 App. Div. 2d 1, 180 N.Y.S.2d 388 (1958). But the theory of the Court of Appeals reversal would preclude the intervention as well as the challenge to the award. Thus we may assume that New York is heading toward a “sterile and unresponsive contract analysis” — Summers, Individual Rights in Collective Agreements and Arbitration, 37 N.Y.U.L. Rev. 362, 405 (1962) — wherein individual intervention will neither be ordered nor the denial made a ground for vacating the award.

By contrast, Wisconsin has enjoined the enforcement of an arbitration award where
II. Redress of Individual Grievances Outside Contractual Grievance Procedure

A. The Unfair Labor Practice Complaint

1. Section 8 and the Exhaustion Doctrine

If an individual tries to take an alleged arbitrable breach of contract to the NLRB, on the grounds that the breach constitutes an unfair labor practice, he may be required to exhaust internal remedies before invoking the Board's section 8 jurisdiction. In dismissing the complaint in Montgomery Ward & Co. the Board said:

... despite the collective-bargaining agreement devised by the parties themselves for settling such a dispute, the Union chose instead to file the instant charges — thus asking the Board, in effect, to intervene and resolve the dispute. In these circumstances, the Board would be frustrating the Act's policy of promoting industrial stabilization through collective bargaining if we were to intervene in this dispute, instead of requiring the Union in this case to give "full play" to the established grievance procedure.

Thus, the NLRB has upon occasion taken section 201(a) of the LMRA as "clear statutory guidance" expressing a congressional judgment that the policies of the labor law are best served by voluntary adjustment of disputes. But in dismissing a complaint for failure of complainant to make full use of internal settlement procedures, the Board acts in exercise of its discretion, not in response to statutory mandate. Under section 10(a) of the LMRA the NLRB is empowered to ignore the existence of a grievance procedure or

"none of the . . . [grieving] employees were notified of the time and place of such hearing and none were present or participated in the arbitration proceedings." Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 267, 99 N.W.2d 132 (1959). The basis of the Wisconsin court's holding was that, as "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." Id. at 272.

32. See generally McCullock, Arbitration and/or the NLRB, in Labor Arbitration and Industrial Change 175 (Proceedings of the Sixteenth Annual Meeting, National Academy of Arbitrators) (Kahn ed. 1963).
34. Id. at 423, 50 L.R.R.M. at 1164.
Section 201. That it is the policy of the United States that
(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and representatives of their employees.
The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . .
even an arbitration award. Its decision to "take or decline jurisdiction, [de-

pends] upon whether it believes an order is necessary to effectuate the pur-

poses and policies of the Act." An individual standing alone, without his union's support, pressing an unfair labor practice complaint, would have a hard time successfully invoking the contractual grievance process. It seems unlikely that a Board sensitive to individual rights would demand exhaustion.

2. Individual Rights and Section 8

The type of contract breach which would also be an unfair labor practice would most likely be a section 8(b)(2) or 8(a)(3) violation. Section 8(b)(2) makes it an unfair labor practice on the part of a union to cause an employer to violate section 8(a)(3). Section 8(a)(3) makes it an unfair labor practice on the part of an employer "by discrimination . . . to encourage or discourage membership in any labor organization . . . ." Section 8(b)(2), by its reference to causing a section 8(a)(3) violation, implies a degree of dominance of the union over management or, at least, their collusion.

The Supreme Court, in Local 357, Teamsters Union v. NLRB, defined the elements of the union offense. The NLRB had found a hiring hall contract illegal per se. The Supreme Court admitted that like any other union activity, a hiring hall probably encouraged union membership, but held that the Board was not to indulge a conclusive presumption of discrimination. An action does not violate the act merely because it is foreseeable that the action will encourage or discourage union membership. Encouragement itself is not proscribed, but only such encouragement as is "accomplished by discrimination." To determine whether there has been discrimination, Mr. Justice Harlan's concurrence suggested an investigation of the motivation of action. If the true purpose of action is to encourage or discourage union membership, then there is discrimination.

In subsequent cases the controversy has been whether and to what extent the Local 357 opinion does require an affirmative showing of motivation to encourage union membership. The majority opinion rejected any conclusive presumption of discrimination, but left unanswered the question of what constitutes discrimination. Justice Harlan, while he put great stress on the need

38. Sullivan & Son Mfg. Corp., 102 N.L.R.B. 2, 16-17, 31 L.R.R.M. 1271, 1272 (1953). This interpretation of the Board's power has been upheld by the courts, NLRB v. Newark Morning Ledger Co., 120 F.2d 262, 266 (3d Cir.), modifying 120 F.2d 262, cert. denied, 314 U.S. 693 (1941); NLRB v. Walt Disney Productions, 146 F.2d 44, 48 (9th Cir.), cert. denied, 324 U.S. 877 (1945).


43. 121 N.L.R.B. 1629.

44. 365 U.S. at 680.

for an affirmative showing of motivation to encourage, admitted that in some circumstances a showing that no legitimate business justification existed would be sufficient to render an action discriminatory. Those who disagree with Harlan's emphasis on an affirmative showing of motivation argue that the lack of a business justification should always be sufficient to make discriminatory an action which foreseeable will encourage membership.

For those who argue that discrimination is shown whenever there is an absence of business justification, a violation of the act will occur whenever this discrimination will have the foreseeable consequence of encouraging or discouraging union membership. For those who suggest that discrimination occurs only when there is a showing of motivation to encourage or discourage union membership, an action which has the foreseeable consequence of encouraging or discouraging union membership, that is discriminatory only in the sense of being arbitrary, will not violate the act. This latter interpretation, while probably closer to the congressional intent, imposes difficult requirements of proof and is somewhat narrow in scope. It thus limits severely the protection which the act, and therefore the Board, can afford an individual who is arbitrarily, unfairly or capriciously treated by his bargaining representative or his employer.

Recent Second Circuit decisions\(^4\) have rejected both views and evolved yet a third interpretation of the act and of Local 357 — an interpretation which seems to have little basis in either: “[I]n the absence of discrimination based upon union membership or activity it is irrelevant that the union's action had the effect of encouraging union membership.”\(^4\) This test looks neither to the motivation of the differentiation nor to its justification (or lack of it). It looks rather to the nature of the differentiation itself: if the classification does not divide one class from another on a basis oriented to union activity it does not violate the act, regardless of its purpose, justification or result. A showing that discrimination is structured along union activity lines is perhaps no more difficult than a showing of improper motivation. Yet both tests put a heavy burden on the individual grievant, who must show as well that his treatment "had the effect of" encouraging union membership. Neither affords any relief against an action which appears to have been merely arbitrary. In its present state of confusion, the utility of the unfair labor practice remedy is hard to assess.

3. *Section 8 Preemption*

Whatever the employee's success before the Board, it is clear that if his injury is susceptible of treatment as an unfair labor practice the alternatives open to him will be substantially limited. *San Diego Building Trades v. Garmo*n,\(^4\) discussing the right of a state court to proceed in a controversy over which the NLRB had renounced jurisdiction, held that activity within section 7 and section 8 is a matter of federal concern even when the Board decides not to act. The decision was concerned with issues of federalism and the need

\(^4\) See cases cited note 45 *supra*.

\(^4\) *NLRB v. Local 294, Teamsters Union*, 317 F.2d 746, 750 n.6 (2d Cir. 1963).

for uniformity and therefore took unfair labor practices out of the maze of state laws. But its language was not limited to state courts; through the doctrine of primary jurisdiction, federal courts are deprived of jurisdiction as well, in the interest of uniformity and expertise. Thus, as far as Garmon was concerned both state and federal courts must refuse jurisdiction, deferring to the NLRB even if this deference combined with NLRB abstention to close all forum doors.

The exclusive jurisdiction of the NLRB over cases that fell within section 8 was being undercut even as it was asserted, as there grew up a federal substantive law of contract under section 301, enforceable by state and federal courts. A breach of a collective bargaining agreement could be complained of under this section whether or not the breach was also an unfair labor practice. But if Garmon did not have the effect of making unfair labor practices which were also contract breaches the exclusive province of the NLRB, it did have the effect of precluding access to state remedy where the alleged state cause of action would, if proved, show an unfair labor practice.

B. Suit on a Contract

1. Section 301 and the Exhaustion of Internal Remedies

Lincoln Mills turned the apparently mild procedural innovation of opening federal courts to suits on collective bargaining agreements into a mandate that the courts fashion a substantive federal law of labor contracts. One consequence of the struggle over the meaning of section 301 was the recognition of the standing of individuals to maintain a section 301 suit. Having decided in Westinghouse that section 301 did not grant jurisdiction to hear individual complaints of contract breaches, the Court in Smith v. Evening News Ass'n reversed itself, and announced that courts could take such jurisdiction.

Smith specifically reserved the issue of "when, for what kinds of breach, or under what circumstances, an individual employee can bring a section 301 action . . . ." Smith had alleged that he had been discriminated against and that this discrimination was in breach of a contractual non-discrimination clause. The Michigan court had rendered a decision denying jurisdiction to state courts. The Supreme Court reversed, holding that Michigan courts had jurisdiction. It therefore did not reach the question of federal law of whether petitioner, under this contract, has standing to sue for breach of the no-discrimination clause nor do we deal with the standing of other employees to sue upon other clauses in other contracts.

52. For an extensive analysis of § 301, see Wollett and Wellington, Federalism and Breach of the Labor Agreement, 7 Stan. L. Rev. 445, 472-75 (1955).
55. Id. at 204 (Black, J. dissenting).
56. Id. at 201 n.9.
The breach of contract alleged in Smith would, if it had occurred, have been an unfair labor practice. Thus, Smith's success before the Supreme Court set two important precedents. In addition to extending the coverage of section 301 to "suits to vindicate individual employee rights arising from a collective bargaining contract," the Court departed from its assertion in Garmon that state and federal courts must yield exclusive jurisdiction to the NLRB whenever an unfair labor practice is involved in the complaint before the court, and said that section 301 jurisdiction obtains even where the alleged breach constitutes an unfair labor practice. But Smith shares with Garmon the same felt need for a uniform federal labor law. In allowing individuals to sue in a state court under section 301, Smith has in no way gone against the choice in favor of federal law over local law reflected in Garmon; rather it has opened up alternative forums for the application of that federal law.

With the question of the individual's standing to sue for breach of a collective bargaining agreement to which he is subject settled, the question of ripeness becomes paramount. The individual who tries to invoke the aid of the courts before exhausting the contractual grievance procedure will almost always fail. The source of the individual's rights, if any, under section 301 must be the collective contract itself. The courts have no authorization, as does the NLRB when exploring unfair labor practices, to ignore agreements. That is not to say that contracts can never be attacked in court. Suits against a union for the breach of the duty of fair representation allow an individual both to challenge a discriminatory contract and to recover from the union for discriminatory administration of contract. This remedy, unlike a contract action, looks beyond the agreement to the special trust of the bargaining representatives. But if an individual tries to sue on the contract, under section 301, he will have to abide by the terms of the contract and avail himself of any remedies set in the contract before seeking the aid of the court.

57. Id. at 200.
58. See note 37 supra.
The requirement of exhaustion of internal grievance procedure has much to recommend it. It recognizes that grieving is an integral part of bargaining and that the two must, so far as possible, go on at the same time. The delay occasioned by court proceedings can inhibit the effectiveness of bargaining. Court suits are therefore to be discouraged to the extent that justice permits. The purpose of requiring the parties to exhaust their own grievance arbitration procedures is to encourage settlement within that process.60 This comports with the congressional policy.61

But if these policies are to be served, the internal remedies must be effective. The rationality of the exhaustion doctrine is dependent upon the fairness of the process to which the individual is remanded. Several courts have recognized this and do not require exhaustion where it would be futile 62 or where there is obvious union hostility.63 The requirement of exhaustion becomes oppressive, however, when it is coupled in a thoughtless manner with a refusal to compel arbitration. A writ may be stayed pending arbitration. The individual may have no right to compel the arbitration and the union may not elect to arbitrate. If a court is so thoughtless as to reason that there has been no exhaustion because the contract does provide for arbitration — even if such arbitration is unavailable to the complainant — then the individual will be suspended between two incompatible rules and the exhaustion doctrine becomes a mechanism of oppression.64

Thus it is seen that the rationality of the exhaustion doctrine hinges upon the individual having rights within those internal procedures, or failing that, a cause of action against the union for failing to represent him fairly. The right to sue on a contract, the right to be represented fairly and the right to represent oneself form an interdependent pattern where any change in the scope or enforceability of any one remedy always justifies and sometimes demands a change in the scope of the other remedies. When the pattern of rights is viewed as a whole, the fallacy in a court's dealing with one alone will be exposed. Thus the courts of New York have justified refusing to an individual any representational rights on the ground that he has a right of action against the union if it fails to represent him fairly.65 But when it is seen that that right is imperfect,66 the ground of the original refusal is removed.

2. Contract Rights under Section 301

The exhaustion doctrine does not, of course, ultimately bar claimants from

61. See note 35 supra and accompanying text.
62. Woodward Iron Co. v. Ware, 261 F.2d 138 (5th Cir. 1958); United Protective Steelworkers v. Ford Motor Co., 194 F.2d 997, 1001-02 (7th Cir. 1952).
seeking relief for breach of contract under section 301. *Smith v. Evening News Ass'n* read section 301 as giving jurisdiction to hear individual complaints, but left open the broader question regarding what was to constitute a breach of contract under section 301. Granted that the individual could allege a contract breach and that a court would take jurisdiction to hear his complaint, it is nonetheless unclear what relief, if any, a court could give him. The recent Supreme Court decision in *Humphrey v. Moore* casts some light on the question. The E & L Transport Company and the Dealer’s Transport Company were both carriers for Ford. When Ford announced the necessity of ending its use of one of the carriers servicing its Louisville, Kentucky assembly plant, the two companies entered into an agreement whereby E & L gave up its rights in Louisville and Dealer’s gave up its rights out of Lorain, Ohio. Employees of both E & L and Dealer’s were represented by the same union, which had practically identical contracts with each of the companies.

The contracts provided:

> In the event that the Employer absorbs the business of another private, contract or common carrier ... the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved.\(^69\)

When the layoff began at E & L, some E & L employees filed a grievance claiming that the seniority lists should be “sandwiched” with the E & L employees taken on at Dealer’s carrying over their seniority. The contracts called for final binding decisions by a Joint Conference Committee wherein the employers and unions of the overall bargaining unit were equally represented. Upon the recommendation of Local 89 and after a hearing at which stewards from Dealer’s were present, the Joint Committee ruled that the seniority lists should be dovetailed.

Moore, a Dealer’s employee, brought a class action in a Kentucky state court for an injunction against the carrying out of the Joint Committee decision, which, by putting E & L men with greater seniority before him, would cause Moore to be laid off. Moore alleged a breach of contract in that the parties lacked power to dovetail seniority because there was no absorption within the meaning of the contract and the contract granted no power to deal in jobs — it came into play only with respect to those E & L employees whom Dealer’s decided to hire.\(^70\)

The Supreme Court first noted that the complaint alleged that Moore’s discharge would violate the contract. This, said the Court, put the claim within the cognizance of federal and state courts subject to federal law under the *Smith* rule. The Court then ruled that the Joint Committee had not violated the contract as they could have reasonably concluded (1) that there was an

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68. 375 U.S. 335 (1964).
69. *Id.* at 338.
70. Moore further alleged a breach of the union’s duty to represent him fairly. The Court found no breach of the duty on the strength of *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). See generally text at § II (c) (1) *infra.*
absorption (2) that the contract dealt with employment as well as seniority. The Court decided the case as a hypothetical:

If we assume with Moore and the courts below that the Joint Conference Committee's power was circumscribed by section 5 and that its interpretation of the section is open to court review, Moore's cause is not measurably advanced.71

The Court refused again to commit itself to either of the following propositions: that an individual has a right to rely on the terms of a contract governing the terms and conditions of his employment, or that the bargaining representative is bound to the collective agreement in settling a grievance. Moore thus does not resolve the question of the content of section 301 jurisdiction for aggrieved individuals.

The most significant hint as to the way the wind is blowing may be in Mr. Justice Goldberg's "concurrence in the result." Moore had based his 301 action on the theory that the Joint Committee had exceeded its power under the contract in making its decision to dovetail. To this Mr. Justice Goldberg replied:

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.72

The parties are not bound by the terms of the contract because it is a creature of their own making. They are free in collective bargaining to modify, amend or supplement their original agreement. Since grieving is part of a continuous bargaining process, a grievance settlement mutually satisfactory to the representative and management is, to the extent that it is beyond the scope of the original agreement, a modification of the agreement.

The fullest implications of Mr. Justice Goldberg's reasoning might appear to be that, although there is jurisdiction under section 301 for individual actions regarding contract breaches, nevertheless the courts will refuse recovery in favor of the individual for breach of contract in almost every case in which it can be inferred that the employer and bargaining representative agreed to dismiss the individual claim. Justice Goldberg relies on the agreement between the employer and the bargaining representative in Moore to argue that a new collective agreement has been formed and that the individual's rights under the previously agreed contract have been extinguished. It is not clear from his concurrence whether Justice Goldberg believed that the bargaining representative must affirmatively act to secure agreement with the employer before the employee's contract rights would be extinguished. It has been seen that the individual employee has no enforceable right to require the employer to hear his grievance, and that the employer can force the employee to rely wholly on the offices of his bargaining representative to present his grievances. If the representative, acting under such a contractual grievance procedure,

71. 375 U.S. at 345.
72. Id. at 352.
decides not to press an individual grievance, it could reasonably be argued that the grievance was settled with the employer's consent, since the employer had agreed to give the representative this discretion. The representative must act within the vague boundaries of the duty of fair representation; and that duty seems to dictate that the representative must process a grievance which has "substantial merit." Thus, a court which determines that the representative complied with the duty of fair representation in declining to press a grievance would readily conclude that the contract grievance procedure envisioned a conclusive settlement of individual grievances where the bargaining representatives had determined that the grievance lacked "substantial merit." It could thus be argued, from Justice Goldberg's reasoning, that the refusal by the representative to process the grievance was in effect a renegotiation of any contract right the aggrieved employee might have possessed.

Similarly, where the representative presents the grievance to the employer, and is rebuffed, it can be deduced that the representative itself agrees to dismiss the grievance if it chooses not to compel arbitration or to commence suit against the employer under section 301. If the individual employee brings a contract action under section 301, where the representative has not actively agreed to abandon the grievance, a court is in a difficult position. Accepting the premise that every grievance involves issues which radiate beyond the individual case, the court must apprise itself of the representative's attitude toward the grievance because the interests of the representative are necessarily involved in the dispute. The safest course might be to regard the representative's refusal to press the claim actively as an acquiescence in the employer's actions, and thus as a settlement of the grievance which would extinguish any right to recovery under the contract. If these are the implications of the position espoused by Justice Goldberg in Moore, and if that position is adopted by a majority of the Court, it is difficult to imagine a situation in which an individual could successfully establish a contract breach under section 301.

To the extent that Mr. Justice Goldberg's concurrence is a portent of what section 301 jurisdiction will mean and to the extent that it has the implications here suggested, the fate of individual rights under section 9 is being repeated in section 301 and for the same reasons. The need for a continuous working relationship between the bargaining representative and employer was felt in section 9 cases to justify a substantial curtailment of the right of direct access to the employer. Here too it is being suggested that the need for flexibility in the solution to unforeseen problems militates against strait-jacketing the bargaining parties within their own creatures. The fact that the individual may have banked his hope on the words of the contract is thought to be of less importance than the need for union and management to be able to meet new problems creatively. Besides, it is argued, the individual is protected by the duty of fair representation. No one remedy can be evaluated until the whole panoply of rights and remedies for a given wrong have been elucidated. Section 9 appears at present to give the individual no enforceable rights. The meaning of section 301 for a disaffected employee remains uncertain. At present it pro-
vides no explicit protection to the individual who stands alone. And Mr. Justice Goldberg in *Moore* seems to be suggesting that it properly should not. Fair representation remains the last alternative. Only when we have seen the scope and meaning of that remedy can we finally evaluate the whole spectrum.

C. *The Duty of Fair Representation*

1. *The Duty as Enforced in the Courts*

Consideration of the court remedies available to an individual who does not want to trust his own union grievance procedure foreshadowed the fair representation remedy as an alternative to a contract action. A recent NLRB action has given "fair representation" a renewed and expanded role. The typical action is a suit against a union by a member of the bargaining unit for breach of the union's duty to treat all members of the unit it bargains for equally. In a contract context, the action may challenge either the creation of a contract or the discriminatory administration of an apparently fair contract. A fair representation suit often differs from a suit on a contract since it may be, as the first fair representation suit was, a suit to set aside a contract.

The duty of fair representation was articulated by the Supreme Court in *Steele v. Louisville & N.R.R.* The case arose under the Railway Labor Act, and involved an interpretation of the grant in section 2 (fourth) to the representative selected by the majority of a craft of the right to be the exclusive bargaining representative of the class. The petitioner, a Negro employee who was part of the bargaining unit but excluded from union membership, alleged that the collective bargaining agreement entered into by the Brotherhood and the Railway discriminated against Negro employees.

The Court stated:

> If, as the [Alabama] state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty towards its members, constitutional questions arise.

The rule of construction which calls for interpreting statutes so as to avoid constitutional problems was employed in *Steele*:

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

In posing for itself the constitutional problem, the Court had analogized the bargaining representative to a legislature. A legislature, the Court noted, is subject to constitutional limitations on its power to invade the rights of those

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73. Miranda Fuel Co., 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963). For the fate of the NLRB initiative, see text at § II (c) (2) infra.

74. 323 U.S. 192 (1944).


76. 323 U.S. at 198.

77. *Id.* at 199.
for whom it legislates and "is also under an affirmative constitutional duty equally to protect those rights." Having decided to interpret the act so as to avoid constitutional problems, the Court returned to its original legislative analogy.

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. J.I. Case Co. v. Labor Board [321 U.S. at] 335, but it has also imposed on the representative a corresponding duty. Thus the duty of fair representation turns out to be the obverse of the coin of exclusive bargaining capacity, imposed in order to remove constitutional doubts concerning Congress' power to grant exclusive bargaining power. The duty was extended to bargaining agents under section 9 of the Wagner Act the same day.

The Steele Court also made a first effort to articulate the standards to be applied in reviewing a contract allegedly made in breach of the duty:

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....

Commentators have struggled with these words since they were uttered and this Comment will not presume to define their meaning apart from the context of interpretation which they evoked. The facts of Steele involved racial discrimination, but it is clear that the rationale of the decision is not restricted to discrimination based on race. It has been suggested that the scope of the Steele rule can be determined by reference to the reasons which underlay the Court's recognition of the duty. The Court's opinion drew heavily on an analogy between statutory bargaining representatives and legislatures. The Court had in mind duties similar to those that the fourteenth amendment imposes on state legislatures. The reasonableness requirement of the Equal Protection clause thus might serve as a test of collective bargaining agreements.

78. Id. at 198.
79. Id. at 202.
80. Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944); Syres v. Local 23, Oil Workers Int'l Union, 350 U.S. 892, reversing per curiam, 223 F.2d 739 (5th Cir. 1955).
81. Steele at 203.
85. However, Wellington, The Constitution, the Labor Union and "Governmental Action," 70 Yale L.J. 345 (1961), points out some of the limitations of the legislative analogy.
The Sixth Circuit Court of Appeals, however, in one of the broadest interpretations of *Steele*, approached the problem of standards negatively. In *Ford Motor Co. v. Huffman* the court, rather than saying what sorts of contracts are legal, undertook to list what would be illegal. It ruled that those provisions are void which have "no relevance to terms and conditions of work or the normal and usual subjects of contracts between union and employer." Clearly the Supreme Court felt that this rule excluded too much of what was fitting and proper to the collective bargaining process, for the Court overruled the circuit court and announced a rule sharply restricting any tendency to read *Steele* as an invitation for the courts to interfere with the collective bargaining process. It ruled that "a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." It is doubtful that the requirement of good faith goes any further toward articulating the standards of fair representation than the reasonableness requirement in *Steele*. If anything, it suggests an even looser standard than *Steele*, since "good faith" is introduced as the only limitation on the "wide range of reasonableness" which must be allowed a bargaining representative.

Construed with such latitude the duty of fair representation has provided scant protection. The courts have applied a presumption of reasonableness which has virtually precluded a finding of breach. Some state courts have made the remedy totally unavailable by refusing to allow a suit for breach of fiduciary duty unless every member of the union shared in the breach. The failure of the courts either to articulate workable standards for the duty or to enforce the duty has led commentators to urge that the NLRB take up the slack under its unfair labor practice jurisdiction.

2. The Duty as Enforced by the NLRB

In *Miranda Fuel Company* the NLRB took the step of declaring a breach of the duty of fair representation to be an unfair labor practice. The Second Circuit recently denied enforcement to the Board's order, but the court's opinion cannot be read as a clear rejection of the Board's claim of jurisdiction over fair representation questions, since the case generated from the three judge panel three opinions, only two of which (the two refusing enforcement) dealt with the fair representation question, and since one of these two reserved opinion on that issue.

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86. 195 F.2d 170 (6th Cir. 1952).
87. 345 U.S. 330, 338 (1953).
In *Miranda*, one Lopuch, a union member and driver for the fuel company, left work with the permission of the employer before the beginning of the slack season, which the contract fixed as April 15 to October 15. The contract further provided that any man who failed to return to work by October 15 would lose his seniority. In mid-October Lopuch became ill and did not return to work until October 30. The union demanded that the company reduce his seniority for failing to register on time. When it became evident that Lopuch's failure to register was excused by his proven illness, the union shifted its position and demanded that he be reduced for leaving early. When the Miranda Company reluctantly acquiesced, Lopuch began his proceedings before the NLRB.

The Board held that the section of the bargaining agreement under which the union purported to have acted vested in the union the exclusive control over the seniority status of the company's drivers, and that this was *per se* an unfair labor practice under section 8(b)(2), in that it tended by discrimination to encourage union membership. The Second Circuit enforced the Board's order, but while the petition for certiorari was pending, the Supreme Court handed down its decision in *Local 357, Teamsters Union v. NLRB*, refusal to hold a hiring hall contract to be an unfair labor practice *per se*. This decision seemed to preclude the Board from inferring a section 8(b)(2) violation in the absence of a specific finding of intent to encourage union membership discriminatorily. The *Miranda* case was remanded to the Board for reconsideration. Thus arose the Board opinion here being considered.

The Board found the union's action an unfair labor practice on two grounds. Only one is of relevance here. The Board held that any "hostile" action by a union against one of its members "for irrelevant, unfair or invidious reasons," in which the employer acquiesces and which adversely affects the terms and conditions of employment, constitutes a breach of the union's duty of fair representation and an unfair labor practice under sections 8(b)(1) and 8(b)(2).

The *Miranda* majority cited *Steele* as establishing a duty of fair representation under section 9, then continued:

> Viewing these mentioned obligations of statutory representatives in the context of "rights" guaranteed employees under section 7 of the Act "to bargain collectively through representatives of their own choosing," we are of the opinion that section 7 thus gives employees the right to be free from unfair, or irrelevant, or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives and we conclude the section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations which are irrelevant, invidious, or unfair.95

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94. The other ground, that the union's action was a § 8(b)(2) unfair labor practice, is discussed in § II (A)(2) supra.
95. 140 N.L.R.B. 181, 185 (1962).
The central argument of the *Miranda* majority is indeed simple. The content of the rights of the working men guaranteed by section 7 can not be understood without reference to the duties owed them by their bargaining representative, and the scope of this duty is the scope of the duty of fair representation. More concretely, section 7 gives workers the right to bargain collectively through representatives of their own choosing — that is, establishes the employee's right to bargain through agents — while the section 9 duty of fairness defines the principle of that agency. If the section 9 duty can thus be read as the converse of a section 7 right, a breach of that duty will be an unfair labor practice since section 8(b)(1)(A) makes it an unfair labor practice to interfere with section 7 rights.

If the reasoning of the *Miranda* majority had stopped here, its achievement would have been to create a new forum for the vindication of the right to be fairly represented. But its own logic carried the Board further. For if it is an unfair labor practice for a union to interfere with employees' organizational rights, so also is it an unfair labor practice for an employer to interfere with those rights. Thus whenever an employer participates in the bargaining representative's breach of his duty of fairness to the employee, he commits an unfair labor practice.

Whether or not this chain of reasoning would impose strong duties on employers, where before there was none, would depend upon what was said to constitute "participation" by an employer in the bargaining agent's breach of duty. Here two points should be made. First, even without the novel *Miranda* doctrine, an employer would be engaging in an unfair labor practice if at the union's instigation the employer discriminated against employees in such a way as to encourage union membership. Existing statutory provisions already proscribe union-management collusion aimed at strengthening unions. Second, *Miranda* was the most recent and perhaps the last NLRB attack on contracts delegating to unions control over hiring and over seniority.

96. If the Board were to capture fair representation cases within its unfair labor practice jurisdiction, there would remain the question of whether that jurisdiction would be "primary." See the opinion of Medina, J. in *Miranda* for the argument that Board jurisdiction would then be primary. 326 F.2d 172, 177 (2d Cir. 1963). See also the reaction of Friendly, J., 326 F.2d 172, 186 n.7.

97. LMRA § 8(a)(1), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1958). By finding the employer in violation of the act for its participation in the union's breach of its duty of fair representation, the Board cured a major defect in the protection offered by that duty. "[T]he union cannot provide the most needed remedy — reinstatement." Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362, 410 n.188 (1962). The employer can. In the Board's original *Miranda* order, 125 N.L.R.B. 454, 458 (1959), he was ordered to restore Lopuch to his job and his seniority. That order was re-affirmed in the instant decision.


99. See, e.g., Mountain Pacific Chapter, 119 N.L.R.B. 883 (1957), remanded, 270 F.2d 425 (9th Cir. 1959), *enforced as modified*, 306 F.2d 34 (9th Cir. 1962); Pacific Intermountain Express Co., 107 N.L.R.B. 837 (1954), *enforced as modified*, 225 F.2d 343 (8th Cir. 1955).
the NLRB had been wont to declare such contracts illegal \textit{per se} on the ground that their very existence favored union membership in violation of sections 8(b)(2) and 8(a)(3). It should be noted that these decisions made the creation of such a contract an unfair labor practice on the part of both union and employer. In \textit{Local 357} the Supreme Court rejected the Board's \textit{per se} rule and required that discrimination be shown. The present \textit{Miranda} opinion did not hold the contract to be illegal \textit{per se}, but held it to have been administered in an arbitrary, invidious and unfair manner. Then, with the machinery outlined above it cast a net which landed not only the Teamsters, but also the Miranda Fuel Company. The employer's "participation" consisted of this: that it delegated to the union a power, the power to determine seniority, which the union had used discriminatorily.

The Board obviously still opposes the delegation of power over seniority and hiring, but \textit{Local 357} required that the Board assess the violation of the delegation not at the time of contracting, but at the moment of the union's use of the delegated power. It is in this context and against this history which the holding of the employer \textit{in pari delicto} with the union must be assessed. The "participation" of the Miranda Fuel Co. in the union's breach of its duty of fair representation was two-fold: first, when it contractually gave the union the right to determine seniority; and second, when it acquiesced in the union's demands that Lopuch's seniority be reduced. Absent any delegation, if a union, for arbitrary reasons and in breach of its duty of fairness, requested an employer to lay off, reclassify or deny the grievance of an individual, will an employer be participating in the union's breach? The context and the history of the \textit{Miranda} opinion suggests a narrow construction which would not find him in breach; the logic of the argument suggests that the mere acquiescence could be "participation."\textsuperscript{100}

Whatever the implications of the decision for the scope of the duty of fair representation, the jurisdiction of the NLRB to take cognizance of the breaches of the duty of fair representation has been cast in doubt by the Second Circuit's refusal to enforce the Board's order. It has been noted that of the majority of two denying enforcement, one, Chief Judge Lumbard, reserved opinion of the question of the Board's jurisdiction over fair representation questions. Chief Judge Lumbard thought that, even if the Board's theory were sound, there was a failure of proof — that the evidence was insufficient to support a finding that the union action was hostile.\textsuperscript{101} It is impossible to tell whether, at this time, on other facts, the Board's theory would get a sympathetic hearing from the Second Circuit.\textsuperscript{102}

From the perspective of the election of remedies, the decision of the Board is of yet further interest. First it is worth noting that the employee might have sued for breach of contract. The contract contained specific criteria for the

\textsuperscript{100} It is worth noting however that even the most liberal construction of the opinion would not make an unfair labor practice out of a unilateral unfair act by an employer (unless the act encouraged or discouraged union membership).

\textsuperscript{101} 326 F.2d 172, 180 (2d Cir. 1963).

\textsuperscript{102} See text accompanying footnote 9.
reduction of seniority. Lopuch's loss of seniority occurred in spite of the contractual criteria and, in that sense, was in breach of contract. Yet, following at least the implications of Mr. Justice Goldberg's reasoning in Moore, it could be argued that the union in denying the grievance, acting under delegated authority from the employer, effectively extinguished the contract right, so that nothing but the duty of fair representation would remain to control the union action.

The full implications of Miranda in terms of expanded duties upon management and expanded jurisdiction for the NLRB will depend on how vigorously the Board is able to push its new doctrine. If the Board does succeed in extending its jurisdiction to fair representation cases, there is a reasonable prospect that the Board will act more aggressively and perhaps more expertly than the courts have done under Steele in elucidating standards to flesh out the duty. It is not clear, however, that the role that fair representation is designed to serve in federal labor law could be effectuated by assigning jurisdiction over the duty to the NLRB any better than it has been under the aegis of the courts. As a limit on the power of a statutory bargaining representative, the duty of fair representation is an expression by the Supreme Court of the same concern for individuals in the collective bargaining process that Congress expressed in adding its proviso to the grant of exclusive bargaining capacity. As different expressions of the same concern, the proviso and the duty ought to be viewed in relation to each other. Further, any claim that individuals should have a right to enforce a labor contract against his employer, despite the contrary wish of his union, is also an expression of concern for the status of individuals under federal labor law. Section 301 jurisdiction should therefore be viewed in the context of the other expressions of like concern. Adjudicators have not commonly considered these rights in the light of their impact on one another. Viewed in relative isolation these rights have been seen to offer little protection to aggrieved employees. Each of these rights, divided from the context and support of the others, has not been persuasive enough to avoid inundation by "the needs of collective bargaining." If they are viewed together, a pattern emerges which, precisely because it can be reconciled with the legitimate needs of collective bargaining, demands a place in a coherent and equitable federal labor law.

103. The Trial Examiner in the most recent case in the Hughes controversy, Hughes Tool Co., Case No. 23-C.B.-429 and Case No. 23-R.C.-1728, NLRB, Div. of Trial Examiners, has pushed Miranda a little further. Miranda dealt with affirmative union action in seeking to have Lopuch's seniority reduced. In Hughes Tool Co., the union merely failed to process a substantial grievance, but the Trial Examiner held that "what is said in Miranda with respect to union action would appear equally applicable to inaction which was founded upon 'arbitrary or irrelevant reasons or upon the basis of an unfair classification.'" This was part of an argument that the failure to process a grievance violated § 8(b)(2) in that it coerced an employer to act in such a way as to encourage union membership. He also held that the failure to process the grievance was an interference with the workers' right to bargain collectively through representatives of their own choosing, in violation of § 8(b)(1)(A) and — inasmuch as the processing of grievances is part of the bargaining function — was a refusal to bargain in violation of § 8(b)(3).
III. The Remedies in Context

By and large, the individual's right to secure assistance from government authority either in prosecuting grievances or in resisting attempts to defeat his grieving has been sacrificed to the needs of collective bargaining. The proviso to section 9 has been rendered unenforceable by the courts. The Supreme Court has not explicitly recognized even the existence of section 301 contract rights for individuals; the premises on which some urge their existence are under attack by the Court's outstanding labor lawyer. Whether the NLRB has authority to enforce the duty of fair representation is, after Miranda, at best dubious. The right has not been developed as a significant fount of protection in the courts. Severe limitations of employees' rights were envisioned by the Wagner Act. The creation of the system of majority representation took freedom of contract — for what it was worth — out of the hands of individuals. Further limitations are justified by courts and commentators in terms of the needs and realities of collective bargaining: the need to preserve majority rule and the reality that a labor contract is often little more than a promise to work out differences amicably. To the extent that this vision of the act's realities is accurate, it undercuts the act's contrary mandate in the proviso, for individual participation in the grievance process. The prestige of the representative and therefore of the system of majority representation is not enhanced by allowing individuals to press their own complaints. Further, if labor contracts are not designed to create definitive rights and duties for individuals it makes little sense to allow an individual to intrude himself into the bargaining context or to demand arbitration of his grievance or to sue in court for a breach of contract, for he will insist on having the contract as the measure of his rights.

But against the admitted bias of federal labor law towards majority rule and against the implications that courts and commentators have seen in that bias, one must consider Congress' declaration in the proviso that the individual shall be entitled to some measure of self help and the warning of Steele that the very constitutionality of the system of majority representation may hinge on the fairness of the system. Liberally construed, the proviso to section 9 would allow the individual to take the place of his bargaining representative in presenting his grievance and to appeal his case through to arbitration. Following the assumption underlying the language of the section 9 proviso that the contract governs grievances, an arbitrator would be expected to make his determination according to the terms of the contract. The duty of fair representation, on the other hand, would seem at least initially to have reference, not to giving the individual any particular contract rights, but rather to insuring impartiality and disinterestedness in the representative's handling of his constituents. The duty also arises from section 9 but, as the obverse of majoritarian exclusive representation, it is concerned with the permitted range of representative, not individual action. Whatever impact the proviso is to have in terms of individual participation or the right to compel arbitration, this impact is limited by the terms of the proviso to the grievance context.
In contrast, the duty of fair representation cuts across the whole range of the representative's functions, from grievance to bargaining.

Conceptually, then, section 9 suggests the following pattern: individual participation in the grievance process with the ultimate right of insisting on the contract as the measure of rights enforceable by individuals against employer and union; and exclusive representation in bargaining by the majority representative who is free to bargain away contract provisions or individual interests, subject only to the limit imposed by the duty of fairness. The individual would then have some independent remedy against both the enforcement and the promulgation of the code under which he works. The conceptual split between grieving over the administration of the contract and enforcing a duty to act fairly in establishing its terms is not so easily made in practical situations. This ideal must immediately be qualified in two important respects.

While the proviso demands that the distinction between grieving and bargaining be made, it is not immediately clear that the distinction can be made. The requirement of the proviso may stem from an inadequate congressional view of the collective bargaining process. The task of the representative is not to meet once every year or period of years and write a definitive contract for the benefit of his constituents. Rather it is to work continuously with management as a voice for aggrieved individuals and as a partner with the employer in facing unforeseen problems. His job as a bargainer, it is said, cannot be meaningfully distinguished from his job as a griever. One man’s complaint may well involve the interests of many others. In a contract not designed to be definitive, it may be impossible to distinguish those situations that involve creating contract provisions and those which involve interpreting them.

Related to the possibility of making the kind of distinction required by the proviso is the problem of the relationship between a breach of contract and a breach of the duty of fair representation. Ideally the individual would be able to rely on the clear terms of a contract in the grievance context and on the more vague standards of fair representation in bargaining. But even if grieving and bargaining could be distinguished, it does not follow that contract rights could be apportioned to one and fair representation to the other. Even if it is decided that the dispute is a grievance and that the contract is to remain the measure of an individual’s rights, the contract will often not provide an easy resolution of the dispute. Often we can expect that the contract under which an individual asserts rights will be ambiguous, or that the collective agreement was originally drafted by representatives and management with reference to generally prevailing standards of fair conduct within the industry and the contract itself only alludes to those standards and does not define them. In these situations, to say that the individual is entitled to have the contract stand as the measure of his rights is to say little more than that representative-management concurrence that the individual has no right under the contract is not conclusive, and that some standard is available to which the individual can appeal in a forum superior to representatives and management for vindication. This overarching standard can as meaningfully be called
the duty of "fair treatment" of the individual by representation and management as it can be called a contractual duty owed the individual. Further, even if it is decided that the dispute calls for bargaining to settle, and that therefore the individual has no right to insist on the contract as a fixed measure of his rights, nonetheless the contract and conditions prevailing under it ought to be highly relevant in deciding whether the union has violated its duty of fair representation.

While not suggesting that clear determinations can always be made, it is proposed that meaningful distinctions between grieving and bargaining can be made along the lines implied by Congress in the proviso, and that there is reason to use the contract as the plumbline of fairness in the grievance context.

There are those who argue that all grievances inevitably radiate outward to affect other employees, and that there will thus always be present a relevant union interest which would be, but ought not to be, infringed upon by grieving at individual initiative. Any settlement, they say, will always have the elements of a bargain, and thus be within the union's exclusive domain. This is true, doubtless, but it may be suggested that the truth of the argument stems in considerable degree from the expansive and sophisticated notions of relevancy available to modern courts. Postulate that the union is resisting grieving or reaching a particular settlement, and it seems necessarily to follow that the union feels it has some interest in the resolution of the grieving employee's dispute. But union interests — like national interest in security cases — may be presented in a distorted manner. The collective bargaining contract is subject to periodic negotiation; union and management consider it to be binding on them in many circumstances, providing that it, as interpreted by an outside party, the arbitrator, shall govern their disputes. In this context, grieving by an individual threatens not the entire contract, or the union's overall prestige as bargaining agent, but a particular interpretation of particular terms, which may affect only a handful of men. The union is frequently in the position of opposing suggested interpretations of the agreement they have reached. That opposition is not conclusive against management. Few reasons appear why it must be so against members. If the proffered interpretation would affect a substantial number of men, undercut a carefully structured bargain of advantages, or deal a direct blow to union prestige as bargaining agent, then the union would have a strong case against grieving. In contrast, the individual's argument for grieving is in all cases strong. Congress was careful to preserve this much independence for him. He prosecutes the grievance to secure some benefit he believes to be his as of right, or to escape some penalty he thinks is incorrectly applied. In his personal perspective these interests are substantial. Furthermore, the union has an interest in the occurrence of grieving. That is, a union must be deemed to desire that every member — including those who are in a present minority — is treated equally and fairly under its contract.

Although "radiations" may inevitably be found to exist, it is suggested that situations can be identified where these radiations will not generate a union interest of such a magnitude that it should always and automatically over-
whelm the individual's substantial interest in the outcome of his complaint. With respect to radiations in terms of impact on other workers, it ought to be incumbent on the representative to show that the interpretation argued for by the union will adversely affect interests roughly comparable to those which will be favored. The clear case of “grieving” where the mere fact of a union's objection to the claim will not suffice to turn the dispute into a situation appropriate for bargaining is the case where the contract interpretation argued for in fact will affect only the grievant. This is much like the Miranda situation.

In Miranda itself the fact that Lopuch had “bargained” for himself the special right to leave early, apparently without consultation with the union, introduces another factor, more persuasive to the union side. Lopuch's action, taken on his own initiative, looks like individual bargaining for a contract; no act could be more destructive of the union's position as exclusive bargaining agent. But insofar as the radiations claimed are in terms of the impact on union institutional interest, it is not enough for the union to claim that the mere allowance of grieving, contrary to its wishes, will undermine its prestige. The proviso grants individuals the right to grieve, thus repressing the judgment that if the grieving hurts union prestige it is an injury of which they can not complain.

It is not suggested that because the individual's interest, as here outlined, outweighs the interests of the collective representative and of the management, the individual should therefore prevail on the merits of his claim. It is suggested, however, that he ought to be able to rely on the prior articulation of rights. It is not suggested that the attempt to separate cases of grieving from cases of bargaining or to separate contract breaches from unfair representation will always lead to clear results. What is submitted is that a relatively increasing emphasis on the terms of the contract duties is appropriate as the scope of the dispute narrows. The proposal is aimed at avoiding ad hoc treatment of individuals. The proposal tries to encourage rule-like behavior on the part of representatives — and management — by insisting that they live by the old rules and that they be permitted to forge new rules only in appropriate contexts. In one sense, the insistence that the bargaining representative and management are bound by the terms of the contract which they earlier created is simply one mode by which the duty of fair representation is guaranteed. The collective bargaining agreement, once it is reached, breeds expectations among the employees who live subject to it. A rule that management and the bargaining representative cannot at will alter the contract safeguards employee expectations. Certainly these expectations of the immutability of the contract should not always be protected. As discussed above, there are many instances — which we have notionally termed “bargaining” situations where the interests at stake have wide ramifications — where the representative and management should be permitted to alter a previously entered contract. But by refusing to permit renegotiation of the contract simply by virtue of the ipse dixit of management and labor, some measure of protection is given to the individual
employee. For one thing, the problem which the individual faces in claiming that he has been unfairly treated has been the absence of any standards which are acknowledged to control the behavior of labor and management; if an individual can claim that in particular situations the explicit terms of the contract furnish the standards against which the actions of labor and management are to be assessed, the individual has accomplished something significant. Moreover, the notion that in some instances the contract cannot be changed simply at the concurrence of labor and management contributes to a sense of certainty in job status for the individual.

The LMRA, by providing for majority rule, limits the degree to which an individual may establish his own terms of employment by making him act through a majority representative. In the most important aspects of his life on the job the individual is subject to the will of the majority. However, there are some circumstances, even under the regime of the LMRA, in which majority interests are not directly at stake; the section 9 proviso, though inarticulately, speaks to this proposition. And where majority interests are only indirectly touched, the individual should retain the ability to insist on his own interests. There is no reason to read the LMRA any more broadly than required by its purposes in effectuating the will of the majority where majority interests are involved. Thus the expectation on the part of the individual employee that he is entitled to rely on the terms of the collective bargaining agreement should be respected where the interests of the majority do not dictate otherwise.

To the extent that the foregoing has been successful in showing that grievance can be distinguished from bargaining, it has undercut the main reason for the restrictive reading courts have given to the section 9 proviso. The section and its proviso give the individual the right to present his own grievances to the employer, and thus restrict the exclusive power of the majority representative to bargaining situations. Having said that a grievance can be identified, it makes sense to allow the proviso its full impact on that area and to allow individual participation in the presentation of grievances. How is this impact to be achieved? A liberal reading would allow the individual to stand in the shoes of the representative and compel arbitration whenever the representative could. But to compel arbitration of grievances on an individual's behalf is clearly an extension of the words of the proviso, calling for justification on other grounds. If the arbitrator is to be preferred to the courts or the Board as the forum for vindicating individual rights, it will have to be on grounds more substantial than the proviso standing alone.

An initial problem with the choice of arbitration is jurisdictional. Compulsory arbitration, if condoned by the contract, would be available only in grievance situations. However, whether a complaint is a grievance, as that term is here used, cannot be known until the hearing is held. It might be suggested that the arbitrator could make a jurisdictional finding — i.e., that the dispute is a grievance — before going on to decide the merits of the dispute. In fact, it is to be doubted whether complaints will be drafted with sufficient clarity
to allow the arbitrator to make his jurisdictional findings before the hearing on the merits is fairly well advanced. After all, the scope of the interests affected will depend on the scope and meaning of the contract term in dispute. Thus, whatever other advantages or demerits arbitration may have as the forum for the vindication of individual rights, it suffers from the detriment that it may lead to duplication of effort. The arbitrator would have to conduct a hearing the result of which might well be denying himself jurisdiction; he has no authority to decide whether the representative has breached his duty of fair representation in the bargaining context. How severely the interposition of the arbitrator would handicap the process of vindicating individual rights would depend on how much a court would be willing to rely on the arbitrator’s jurisdictional findings in a grievance hearing when it was hearing a complaint for unfair representation in bargaining. Of course if the court were willing to use the arbitrator, in effect, as a special master in its fair representation hearings, the detriment would be removed. However, this would present numerous problems, not the least of which would be expanding the arbitrator’s jurisdiction beyond even the most generous reading of the proviso.

Pitted against the problem of possible duplication of effort must be the realization that an arbitrator will probably be more familiar with the industrial setting than any other prospective adjudicator. However, this very expertise could create a problem: it could lead to bias. The arbitrator is especially attuned to subtleties of union-management relations. To his ear individual complaints may well sound discordant. If this were the only ground of arbitrator bias, that bias might only be a consequence of never having had to deal with three-way arbitration. It might be thought that experience with the new type of arbitration would cure that bias. However, there is another likely cause of bias. Many arbitrators make their livelihood by performing their services to the satisfaction of the parties. Even if an individual is given a voice in the choice of his arbitrator it is doubtful that he will need the services of the arbitrator in the foreseeable future. Union and management, on the other hand, probably will. To the extent that the arbitrator is looking for work, he would do well to listen to the combined wishes of union and management. That this is a problem cannot be denied.

However, bias may be countered in a number of ways. One possible way of securing neutrality in the arbitrator is to allow the individual to have a voice in the selection of the arbitrator. Related to this is assuring neutrality in the arbitrator by having him selected by a neutral party. Thus parties deadlocked over the selection of an arbitrator might appeal to a court to appoint him. A further method of countering bias on the part of the arbitrator lies in the kind of judicial review given the arbitration award.

But even if the problem of bias could be solved, the selection of the arbitrator as the appropriate forum would still present problems. Not the least of these is the problem of costs. Presumably costs would be allocated by the arbitrator. If the dispute were one which the bargaining representative ought
to have been willing to press for the individual — which is to say, whenever
the arbitrator decides in favor of the individual on the merits — costs would be
allocated to the union or to union-management according to the terms of their
contract. But this still leaves the individual shouldering the costs of an un-
successful plea to the arbitrator. This factor alone would undoubtedly deter
many grievants from pressing arbitration.

A final problem with the selection of the arbitrator as the appropriate forum
is that one of the seeming advantages of his selection could turn out to be
illusory. The choice of an arbitrator is attractive because he has none of the
docket problems of the Board or the courts. Therefore it is the procedure best
adapted to a speedy resolution of the dispute. But if anyone opposing arbitra-
tion wants to delay the proceeding, numerous mechanisms are available. He
can make the individual obtain a court order before proceeding with arbitra-
tion and, following the arbitration, force the individual to go to court to enforce
the award. Again the costs of initiating court proceedings may be prohibitive
to the individual.

The courts, however, if they are determined to do so, have ways of ex-
pediting the applications brought to them. Believing the arbitrator to be better
suited and better positioned to make the determinations, the court could order
arbitration without first making its own determination as to whether the dis-
pute is one appropriate for grieving or for bargaining.104 Judicial review of
the arbitrator’s award would not be so casual. The arbitrator’s decision, both
in designating the dispute “grieving” or “bargaining” and, if a “grievance” is
at issue, in interpreting the terms of the collective agreement with reference
to the grievance, could be reviewed as courts review decisions of expert ad-
ministrative agencies.105 The arbitrator would be required to articulate the
rationale by which he decided the dispute. While the arbitrator’s expertise
gives a presumption of correctness to his findings both as to the jurisdiction
and to the merits, nonetheless he must explain why he believed the dispute to
be of great or small magnitude and why he interpreted the contract as he did.
A court may assess the persuasiveness of the arbitrator’s reasoning even
though the court itself may not have felt confident to decide the question of
“grieving” or “bargaining” de novo. Careful judicial review of the arbitrator’s
decision is necessary not only to vindicate the interests of employer and rep-
resentative but also to protect the individual from summary treatment by an
arbitrator who may be excessively attentive to the wishes of the employer
or the representative.

This scope of judicial review over arbitration awards, where the arbitration
is precipitated by individual complaint, would be different from the minimal,
almost cursory review over arbitration awards in disputes between employer

104. To this extent, arbitration could be compelled for even “frivolous” individual
claims just as arbitration is presently compelled for arguably “frivolous” disputes between
representative and employer. United Steelworkers v. Warrior & Gulf Navigation Co.,
363 U.S. 574 (1960).

105. See Wellington, Freedom of Contract and the Collective Bargaining Agreement,
and representative provided in the Enterprise Wheel case. The Supreme Court limited judicial review of arbitration awards in Enterprise apparently because it felt that the dominant national policy of preserving industrial peace would be jeopardized if awards, which finally settled a labor-management dispute, were to be overturned by the courts. The same spectre of industrial strife does not hang over arbitration of individual complaints where management and labor are united in opposing the individual claim. Indeed, it is precisely the peaceful concert of management and representative that generates the kind of problem that this Comment has attempted to outline. Careful judicial review of arbitration awards in individual claims thus is not foreclosed by the reasoning of the Enterprise Wheel case.

The individual, when seeking to enforce an arbitration award in his favor or oppose an adverse determination, would argue in the alternative that: (1) the dispute was a grievance; or (2) that if the dispute was a situation appropriate for bargaining, then he was nonetheless injured by the representative's failure in his duty of fair representation. The same facts which would be adduced by an arbitrator to support his denomination of the dispute as "bargaining" or by a court in overruling an arbitrator's contrary decision — the radiation of claim and the scope of interests affected — would, by characterizing the aggregates involved, help make visible such unfairness as there may have been, and therefore aid the court in its evaluation of the employee's alternative claim of unfair representation.

The alternatives of allowing either the courts or the NLRB — if it can capture fair representation jurisdiction — have one initial advantage over the solution of compulsory arbitration. The arbitrator's jurisdiction would be limited to grievances and contract breaches, and thus he could authoritatively dispose of only a portion of the cases that would come before him. A court, however, has both section 301 and unfair representation jurisdiction. And the Board, if it had unfair representation jurisdiction, could construe a contract breach in the grievance context as an instance of unfair representation and could take cognizance of all aspects of the case before it.

The courts could serve as the sole forum for vindication of an individual employee's rights. If the employer and representative dismiss the individual's claim, and if that claim is properly a subject for "grievance" rather than "bargaining," then the individual might pursue his claim in court under a section 301 action for breach of contract. In enacting section 301 Congress apparently believed that it was possible to identify a breach of a labor contract; commentators, arguing similarly to Justice Goldberg in Moore, have suggested that the occasions of a "breach" of a labor contract are in fact occasions for renegotiations as part of the continuing relationship of employer and bargaining representative. But when an individual brings suit for breach of contract, he could argue that the availability of this suit is essential to the scheme of

107. See generally Wellington, supra note 105.
ensuring fair representation and that a breach of contract must be distinguished from a renegotiation for the same reasons and in the same way that "griev- ing" must be distinguished from "bargaining" under the section 9 proviso. If the court overrules the individual's contention that the dispute is appropriate for grieving, it will still be open to the individual to argue that his representative bargained for him unfairly. Another major advantage of the courts over an arbitrator is that courts would minimize the problem of bias. A public official would not be subject to the necessity of protecting his source of income. But the price to be paid for this impartiality is just that which would be gained by selecting an arbitrator. The arbitrator would be working close to the source of the dispute and would bring to bear a general familiarity with industrial and labor problems. A further disadvantage of the courts is the problem of delay. It was pointed out that willful opposition to arbitration could create considerable delay, but such delay is not intrinsic to the procedure. In the court system delay seems inevitable.

A final forum for the protection of the individual rights here outlined would be the NLRB. Before the Board could become an appropriate forum it would have to extend its unfair labor practice jurisdiction to fair representation cases. Its attempt to do just that in Miranda was not supported by the Second Circuit. The issue however is not closed.109

As with the courts, a major drawback of the Board is delay. There must be a charge filed with the regional director, an investigation by a field examiner, a hearing before a Trial Examiner, a hearing before the Board and finally enforcement by the courts.110 There is a possibility that the regional director could effect a suitable informal settlement quickly, but this chance must be balanced against the possibility of a protracted climb toward an enforceable order. A further difficulty for a complaining individual may be the unwillingness of the regional director to issue a complaint where there is accord between union and management. The individual may appeal the dismissal of the charge in writing to the General Counsel, but usually no hearing can be had.111 A final procedural difficulty is that, as presently conceived, an unfair representation action must be against the union, "when the employer is often the initiator of the protested action."112 As Professor Summers argues, "suing the union poses both psychological and procedural difficulties, and unions can not provide the most needed remedy — reinstatement."113 The difficulty with respect to remedies may not be insuperable. It will be recalled that the Board in Miranda found that the Fuel Company had participated in the union's breach of duty. This suggests that Board orders under fair representation jurisdiction might not be limited to orders running against the union.

109. See text at § II(c) (2) supra.
110. For a general exposition of Board procedures, see Silverberg, How to Take A CASE BEFORE THE NATIONAL LABOR RELATIONS BOARD ch. 8 (1959).
111. Id. at 210.
113. Ibid.
The major advantage which would be obtained by the selection of the Board as the appropriate forum for the enforcement of individual rights would be in solving the problem of cost. Violations of the Labor Act are a public concern and not a private matter. The General Counsel prosecutes the complaint, and he can provide skilled legal assistance which the individual could never afford. Once the regional director issues a complaint, the charging party is a necessary party to any settlement agreement. If the charging party refuses to sign the settlement agreement, a hearing on the unfair labor practice complaint must be held.

No one forum is essential. No one remedy is indispensable. But some forum and some remedy are. Viewed in isolation each of the protections of individual grievants has been seen to be inadequate. Viewed together they suggest a pattern of protection. This Comment has tried to sketch that pattern.

114. Another evident advantage of the Board, stressed by Wellington in *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 *Yale L.J.* 1327, 1358-59 (1958), is institutional competence. In its enforcement of the duty to bargain, the Board has helped "determine the substantive matters discussed at the bargaining table." Ibid. It thus has a background of familiarity with contracts, such that it could judge their substantive validity if empowered to do so. This advantage over the courts is shared by arbitration.


116. Ibid.