INDIVIDUAL RIGHTS IN COLLECTIVE AGREEMENTS: A PRELIMINARY ANALYSIS*

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DURING 1950 and 1951, the Ford Motor Company systematically laid off women employees in its Dearborn stamping plant while retaining men of lesser seniority. The women filed grievances, but the union refused to process the grievances because the local president and the Company had agreed to give men preference to jobs held by women regardless of seniority. The explanation given was that many of the jobs were too heavy for women, although the women claimed there were jobs available within their physical capacity and ability. The women appealed to the International Union which ruled that the layoffs were in violation of the seniority provisions of the contract, but still the grievances were not processed.

The women then sued both the union and the company for breach of contract, claiming to be third party beneficiaries under the collective agreements. The Michigan Supreme Court, in *Cortez v. Ford Motor Co.*,[1] held that they were third party beneficiaries, but dismissed the action. The only promise of the union which the courts could find was to "present grievances . . . for negotiation and disposition," and this the union had done. There was no promise by the union to enforce the contract. The only promise of the employer was to layoff according to seniority and ability, and this promise was conditioned on all disputes being determined through the grievance procedure. The women's rights were subject to this condition and their claims had been disposed of by the grievance procedure.

In contrast, the Wisconsin Supreme Court, in *Pattenge v. Wagner Iron Works*,[2] followed the contract logic to the opposite conclusion. A group of employees who were dissatisfied with their A.F. of L. representative joined the C.I.O. When four of their members were discharged, the rest walked out in protest. The A.F. of L. agreed with the employer that their employment should be treated as terminated and upon reinstatement they should be denied all seniority rights. Two months later when these employees were denied vacation pay they sued the employer. The Court held that the provision for vacation pay was for the benefit of the individuals and was imported into the individual's employment contract on which the individual could sue. Even though the collective agreement provided that the grievance procedure was the "sole means of disposing of grievances," the individual's contract right was not conditioned by resort to a hostile or unavailable procedure.

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1. 349 Mich. 108, 84 N.W.2d 523 (1957). The facts stated here are those alleged by the plaintiffs. No answer was filed, as the case was decided on a motion to dismiss.
2. 275 Wisc. 495, 82 N.W.2d 172 (1957).

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These cases illustrate the judicial confusion in attempting to define the rights of individual employees under a collective agreement.[3] The circular sophistry that one who seeks the benefits of a contract must accept its burdens[4] is matched with the bootstrap logic that there can not be a right without a remedy.[5] Neither solves the problem of whether the union's settlement of a grievance binds the individual, for neither tells us what the burdens of the contract are, nor measures the right to be remedied.[6] The judicial assertion that the individual has entrusted his rights to his union representative[7] is countered by the declaration that the union's power is limited by its fiduciary responsibility to the employees.[8] But the contours of fiduciary duty must depend upon the

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3. For recent writings on this confusing problem, see Individual Grievances, Report of Committee on Improvement of Administration of Union Management Agreements to ABA Section of Labor Relations Law (1954) reprinted in 50 Nw. U.L. Rev. 143 (1955); Blumrosen, Legal Protection of Critical Job Interests—Union Management Authority Versus Employee Autonomy, 13 Rutgers L. Rev. 631 (1959); Cox, Individual Enforcement of Collective Bargaining Agreements, 8 Lab. L.J. 850 (1957); Dunau, Employee Participation in Grievance Aspects of Collective Bargaining, 50 Col. L. Rev. 731 (1950); Hanslowe, Individual Rights in Collective Labor Relations, 45 Cornell L.Q. 25 (1959); Howlett, Contract Rights of Individual Employees As Against Employers, 8 Lab. L.J. 316 (1957); Lenhoff, The Effect of Arbitration Clauses on the Individual, 9 Lab. Arb. J. 3 (1954).

4. See, for example, Parker v. Borock, 5 N.Y.2d 156, 182 N.Y.S.2d 577 (1959); Taschenberger v. Celanese Corp., 34 L.R.R.M. 2305 (Md. Cir. Ct., 1954); Di Santi v. United Glass & Ceramic Workers, 40 L.R.R.M. 2548 (Pa. Com. Pl., 1959).

5. See, for example, Alabama Power Co. v. Haygood, 266 Ala. 194, 95 So. 2d 98 (1957); Woodward Iron Co. v. Ware, 261 F.2d 138 (5th Cir. 1958); In re Julius Wile Sons, 199 Misc. 654, 102 N.Y.S.2d 862 (1951). This logic was extended by the Wisconsin Supreme Court's recent decisions in Clark v. Hein-Werner Corp., — Wisc. —, 100 N.W.2d 317 (1959), which held that individual employees were not bound by an arbitration agreement between the employer and the union where the union took a position adverse to the particular employees. The court declared that seniority rights created by the collective agreement "constitute a valuable property right and cannot be diverted, without due process by law." For the arbitration award to be binding, the individual must be given notice and opportunity to intervene.

6. The web of rights and burdens which may be spelled out are suggested by the decisions in the lower-New York courts prior to Parker v. Borock, supra note 4. The individual could not sue until he first exhausted the grievance procedure, including arbitration, Finley v. Waltzer, 31 Lab. Arb. 833 (N.Y. Sup. Ct. 1958); Spilkewitz v. Pepper, 27 Lab. Arb. 715 (N.Y. Sup. Ct. 1957); Buffalo Courier-Express v. Dyviniak, 124 N.Y.S.2d 249 (N.Y. Sup. Ct. 1957). This requirement was enforced even though the time for compelling arbitration was past. Ott v. Metropolitan Jockey Club, 282 A.D. 946, 125 N.Y.S.2d 163 (1953); In re Balsa, 30 Lab. Arb. 951 (N.Y. Sup. Ct. 1958). He could not compel arbitration under the usual arbitration clause as it provided only for arbitration between the union and the employer, Calka v. Tobin Packing Co., 9 A.D.2d 820, 192 N.Y.S.2d 886 (3d Dep't 1959); In re Brettner, 9 Misc. 725, 168 N.Y.S.2d 180 (1957); Cox v. R. H. Macy & Co., 26 L.A. 242 (N.Y. Sup. Ct. 1956); Bianculli v. Brooklyn Union Gas Co., 115 N.Y.S.2d 715 (N.Y. Sup. Ct. 1956); but he could compel arbitration if the arbitration clause so indicated, In re Radio Electronics Institute, 16 Lab. Arb. 1123 (N.Y. Sup. Ct. 1949). However, individual suits could be brought if the employer refused to arbitrate, In re Julius Wile & Sons, 199 Misc. 654, 102 N.Y.S.2d 862 (1951); or it was otherwise clear that arbitration was not available to the individual, Parker v. Borock, 286 A.D. 851, 141 N.Y.S.2d 351 (1955), or the arbitrator had been chosen by the union and the employer who had already prejudged the case, Donnelly v. United Fruit Co., 28 Lab. Arb. 64 (N.Y. Sup. Ct. 1957).

7. See, for example, Garner v. KMTR Radio Corp., 146 Cal. App. 2d 441, 303 P.2d 825 (1956); Mello v. Local 4408, 82 R.I. 60, 105 A.2d 806 (1954).

8. See, for example, Ostrofsky v. United Steelworkers of America, 171 F. Supp. 782 (D.C. Md. 1959), 43 L.R.R.M. 2744; Jenkins v. Schluderberg-Kundle Co., 217 Md.

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relationship involved, and no lines are sketched to mark the contours of this unique fiduciary relationship.[9] To compare the collective contract with legislation, and the grievance procedure with an administrative process is an appealing analogy,[10] but it gives us no guide as to the finality which shall be granted to the administrative decision.

The problem presented is not one of choosing theories, for we can draw from them only the contents which we have placed in them. The problem is one of policy — what rights *should* an individual have under a collective agreement? This problem is rooted in the need for reconciling the interests of the individual with the collective interests of the union and management. It is most sharply focused when the union and the employer seek to settle or adjudicate grievances without the consent or participation of the individual employees concerned.

The choice of policy is not left wholly at large, for the proviso of Section 9 (a) of Taft-Hartley speaks directly to this problem of reconciling individual and collective interests in our collective bargaining structure.[11] The courts, however, in deciding these cases have almost wholly ignored the policy thrust of the words and legislative history of this proviso. Instead, they have seemingly felt imprisoned by their self-constructed theories, or have reasoned from policies declared without reference to the provisions of the federal statute.[12]

The purpose here is not to articulate the policy of the proviso of Section 9 (a) and to analyze its implications with the hope of developing a blue print for delineating the individual's rights. The limited purpose is to present a preliminary analysis which may make a little clearer the size and shape of the underlying problem, and to suggest some of the major considerations to be weighed in choosing theories and designing rules to define these individual rights.

556, 144 A.2d 88 (1958); cf. Marchitto v. Central Railroad Co., 9 N.J. 456, 88 A.2d 851 (1952).

9. The awkwardness of the fiduciary concept is vividly illustrated by the recent Wisconsin case of Clark v. Hein-Werner Corp., supra note 5. The grievance involved the seniority rights of employees who had been promoted to foreman and later returned to the bargaining unit. The union argued that it had acted as their representative, although it had opposed their seniority claims. The court, in holding that the union was incapable of "fair representation" under these circumstances, observed, "The old adage that one can not serve two masters is particularly applicable to such a situation."

10. See Woodward Iron Co. v. Ware, supra note 5.

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

For discussion of the legislative history of this proviso, see Individual Grievances, supra note 3, at 169-173; 1959 Wisc. L. Rev. 154 (1949).

12. State courts have almost uniformly applied state law in determining the status of the individual under the collective agreement without any discussion of what law should apply. Under Textile Workers v. Lincoln Mills, 353 U.S. 448, 77 S. Ct. 912 (1957), the rights between the union and the employer are governed by federal substantive law. It would be anomalous, not to say awkward, if the right of the individual were to be governed by a different and perhaps conflicting body of state law. See Ostrofsky v. United Steelworkers of America, supra note 8; 71 Harv. L. Rev. 1169 (1959).

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I

The cases with which we are primarily concerned have two basic factual elements. 1. An individual claims that according to the collective agreement he is entitled to certain benefits. 2. The union and employer agree that he shall not receive those benefits. In *Cortez v. Ford Motor Co.* the women claimed that according to the seniority clause they were entitled to the jobs. The union and the company agreed that they should be denied those jobs. In *Pattenge v. Wagner Iron Works*, the C.I.O. members claimed that they met the contractual requirements for vacation pay. The employer and the A.F. of L. agreed that they should not have vacation pay. The reasons for the union and employer agreeing to deny the claim may vary. They may reject the individual's interpretation of the contract or his version of the facts; they may simply decide to vary or not follow the contract; or they may act because of an unrationalized melange of reasons. Regardless of their reasons, the basic factual elements remain.

Recognition of these two basic factual elements helps narrow and clarify the issue. First, we are not concerned here with the union's freedom in negotiating a collective contract, nor with the union's power to bind all employees in the unit according to its substantive terms. On the contrary, the individual insists that his terms and conditions of employment shall be governed by the contract.[13] He does not appeal for a variance from the contract but rather demands compliance with its terms. He does not seek to defeat the contract; he seeks its fulfillment. The individual, by the very nature of his claim, reaffirms the freedom of the union to make the contract; he challenges only the union's freedom to refuse to live by it.

Second, the problem arises only because the union and the employer have each found it to their self-interest to reject the individual's claim. Neither welcomes restraints on pursuit of its self-interest; both are agreed that their settlement should be final and binding. For example, in *Elgin Joliet Eastern Ry. v. Burley*,[14] a group of employees claimed back pay for alleged violation of starting time provisions in the collective agreements. After extended discussions, the union and the company agreed to cancel these money claims for past violations in return for an explicit provision defining rights for the future. When the Supreme Court held that these individual rights could not be destroyed without the employees' authorization, both the union and the employer joined

13. The individual does seek to avoid being bound by certain elements of the procedural provisions of the agreement in the grievance and arbitration clauses, but only to the extent that those clauses bar him from resorting to any procedure at all to enforce the substantive terms.

The effectiveness of such clauses to bar an individual from proceeding except by union grace is now clouded by Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959. That section provides, "No labor organization shall limit the right of any member thereof to institute an action in any court . . . irrespective of whether or not the labor organization or its officers are named as defendants . . . ." See Ford Fair Stores v. Raynor, 45 L.R.R.M. 2008 (Md. Ct. App. 1959), n.1.

14. 325 U.S. 711, 65 S. Ct. 1282 (1945).

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in a chorus of protest.[15] Both preferred plenary power, even though jointly held, to make whatever settlements they found advantageous, regardless of the impact on particular individuals.

It is not surprising, therefore, that the industrial practice developed by unions and management is that the individual can not assert his claim apart from his union, and that most grievance and arbitration clauses give the union complete control over grievances.[16] It would be surprising if it were otherwise. Neither unions nor management want an individual's claim to live and haunt them after they have agreed that it should die; nor are they likely to write grievance clauses which will curb their power by recognizing individual rights.[17] This industrial practice is the raw assertion by the parties of the primacy of their self-interest and the subordination of the individual. It obviously provides no adequate guide for the solution of the problem, for it is the very source of the problem itself.

Third, the problem exists only because we do not completely trust unions and management to always protect the interests of individuals and minority groups. The law refuses to wholly submerge the individual in the collective structure and does not shrink from striking down agreements in order to protect individuals from over-reaching collective power. In *Steele v. Louisville, Nashville Ry.*,[18] the railroad and the brotherhood mutually agreed that "non-promotable" firemen should be placed at the bottom of the seniority list. The Supreme Court, however, did not hesitate to declare this clause invalid and enjoin its enforcement. Since by practice only Negroes were "non-promotable" this effectively relegated them to second class rights. It was not enough that the union and the employer had found a mutually satisfactory basis of agreement — that agreement must respect the rights of individuals and minority groups.[19]

The basic principle that agreements between unions and employers are not sacrosanct, that collective power is circumscribed by individual rights, applies with equal or greater force to the settlement of grievances.[20] As the court in

15. The protests resulted in a rehearing of the case at the next term of court, 327 U.S. 661, 66 Sup. Ct. 721 (1946), at which time a large number of briefs amicus curiae were filed. The court reaffirmed by a vote of 5 to 4, but stated that the union's authority to settle might be expressly granted in the union constitution or be implied from the employee's resort to the grievance procedure or acquiescence in the settlement.

There is doubt, however, whether these constitutional provisions are valid under Section 101(a)(4) of the Labor Management Reporting and Disclosure Act of 1959, prohibiting unions from limiting the right of members to sue, see note 13 supra. Section 101(b), further provides, "Any provision of the constitution and by-laws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect."

16. See Collective Bargaining Negotiations and Contracts (BNA) 51:221 and 51:281.

17. In a few cases, the courts have read the grievance and arbitration clauses as allowing an individual to carry his case to arbitration. See Gilden v. Singer Mfg. Co., 145 Conn. 117 (1958); Fagliarone v. Consolidated Film Industries, 20 N.J. Misc. 193, 26 A.2d 425 (1942), In re Radio Electronics Institute, supra note 6.

18. 323 U.S. 192, 65 Sup. Ct. 226 (1944).

19. See also, Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 72 Sup. Ct. 1022 (1952); Syres v. Local 23, Oil Workers International Union, 350 U.S. 892, 76 Sup. Ct. 152 (1955); Ford Motor Co. v. Ruffman, 345 U.S. 330, 73 S. Ct. 68 (1953).

20. Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99 (1957). This is the root of the

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"*In re Norwalk Tire & Rubber Co.*,[21] said in granting back pay for wrongful discharge to two employees whose grievances had been settled by the union:

> "If the entire nexus of the individual's right is subject to determination by the union, or a union committee, there is danger that his individual rights may not receive the consideration afforded by a court or may be used for trading purposes in bargaining with management, or that their vindication may depend upon his position in the union or his personal relations with the committee members."

Every court and every writer on the subject has agreed that the law must restrict the freedom of the union and employer to settle grievances. There is no dispute that the collective power should be limited. The central problem is what standard should be used to measure its limits.

II

Two identifiable standards for measuring the limits within which unions and management may settle grievances have been applied by the courts. The first and more flexible standard is that borrowed from the *Steele* case—the standard of "fairness." Thus, several recent cases have held that the individual has no recourse unless he can demonstrate that the settlement was "arbitrary," "capricious" or in "bad faith."[22] In none of these cases has the individual been able to persuade the court that the settlement has overstepped these vague boundaries.[23]

The *Steele* case standard was designed to place limits on the negotiating of contracts: It is doubtful whether it is equally appropriate for defining the limits in the administering of the contract. The need of the parties for freedom, the dangers of abuse of individuals and the ability to prove the abuse are substantially different at the negotiation stage and at the administration stage.

In negotiating a contract, the union is faced with reconciling and compromising a medley of interlacing and conflicting demands. Skilled groups want percentage increases, but unskilled want across the board increases; older workers seek more pensions, but younger workers seek take home pay; some want longer vacations while others want medical payments. Each department,

majority opinion in Elgin-Joliet Eastern Ry. v. Burley, supra note 14, where the court refused "to submerge wholly the individual and minority interest, with all power to act concerning them, in the collective interest and agency, not only in forming contracts which govern their employment relations, but also in giving effect to them in all other incidents of that relation." 325 U.S. 611, 733. See also, Hughes Tool Co. v. N.L.R.B., 147 F.2d 69, 74 (5th Cir. 1945); Hughes Tool Co., 104 N.L.R.B. 318 (1953).

21. 100 F. Supp. 706 (D. Conn. 1951).

22. Ostrofsky v. United Steelworkers of America, supra note 8; Renzi v. Oertel Brewing Co., 31 Lab. Arb. 565 (Ky. Cir. Ct. 1958); Jenkins v. Schluderberg-Kundle Co., supra note 8; Cortez v. Ford Motor Co., supra note 1; Parker v. Borock, supra note 4; Di Santi v. United Glass & Ceramic Workers, supra note 4.

23. The Wisconsin Court, however, has suggested a radically different approach to the question of fairness in arbitration of seniority grievances. "Where the interests of two groups of employees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows as a matter of law that there has been no fair representation of the other group." Clark v. Hein-Werner Corp., supra note 5.

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craft, or work group has its special set of demands, and the seniority clause represents the scramble of too many men for too few jobs. All of these create political pressures within the union and the more democratic the union, the more acute the pressures. At the same time the union has its competing institutional interests—union security, super-seniority for officers, and paid time for grievance handling. On the other side the employer brings his complex of economic, organizational and institutional interests. Out of this melange a bargain is struck—a single package of assorted benefits which are neither equal or rational but which will meet the practical needs of the parties and provide peace. This inevitably loose-jointed process requires a wide area of freedom. For the law to impose substantial limits by inquiring closely into the fairness of the compromises would hinder the parties in arriving at peaceful settlements.

Furthermore, in negotiating a contract the parties state their settlement in the form of general rules which are to be uniformly applicable. This limits their ability to single out unwanted individuals or disfavored groups for discriminatory treatment lest other individuals or favored groups be caught by the same rule. If the parties devise some line of distinction which can be stated as a general rule, its discriminatory impact may be easy to demonstrate. For these reasons the loose limits of the *Steele* standard may be appropriate for giving unions and management sufficient freedom yet providing individuals and minorities adequate protection.

In the settlement of grievances, the considerations are quite different. It is true that the process of adjustment and the reconciliation of competing interests continues, for the contract is ambiguous and incomplete, but the bargaining is of a totally different dimension. The parties would be appalled by the prospect that every grievance reopened the contract, for they contemplate that grievances should be governed by the basic guidelines laid down in the contract. The parties do not need nor use the wide freedom in administering the contract which is needed in negotiating a contract. The law might therefore appropriately and safely impose much narrower limits on their freedom.

The settlement of grievances is also much more susceptible to abuse, for individuals or groups can be singled out for special treatment. The opposition leader may find his grievance traded for one filed by a "favorite son"; individuals who "needle" both union officers and foremen may find themselves eased out by joint consent; and minority groups or factions may have their grievance ignored or half-heartedly argued. Grievances can thus be rejected or bartered away without any open declaration of discrimination, or legal evidence of favoritism. If management is compliant, it may agree that the settlement shall not constitute a precedent and thus escape the danger of creating an awkward rule which would be embarrassing if generally applied.

The greatest danger arises when the grievance depends on disputed evidence, for the fact finding process within the union often falls far short of careful and objective appraisal of the evidence. Thus in *Woodward Iron Co. v.*

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Ware,[24] two employees who had been discharged sought to persuade the local union to process their grievance. The members present, obviously hostile to them, with shouts of "liars" voted down their request. Such a decision may give vent to prejudices and create no awkward precedents. In view of these potentialities for abuse in grievance settlement, it is obvious that protection of the individual requires a stricter standard than that imposed in the negotiating of the contract. The *Steele* standard of "fairness" is inadequate unless the word "fairness" is redefined to fit the special character of contract administration.

The second and more rigid standard applied by the courts in defining the limits within which unions and management can settle grievances is the substantive terms of the contract itself. Courts which allow an individual to sue on the contract, or to compel arbitration on the contract, are in effect holding that any settlement which does not comply with the substantive terms of the contract can not bind the individual.[25] Whether the settlement complies with the contract or not is determined by the court or the arbitrator.

This standard is not as rigid as the technical verbiage and theoretical paraphernalia with which it is clocked might suggest. The standard is the contract, but this is not merely the written instrument. It is the total collective agreement such as would be looked to by an arbitrator deciding a grievance. This inevitably means that the standard may contain unresolved ambiguities, and the individual's claim is subject to those ambiguities the same as any other contested grievance. The contract standard does not presuppose that there is any "right" answer to these ambiguities. It does presuppose that there is available — from a court or arbitrator — an authoritative answer; just as there is available to the parties an authoritative answer for unsettled grievances.

The contract standard is basically flexible, for it is the creature of the parties themselves. Unlike the *Steele* standard of fairness which binds the parties to substantive rules decreed by strangers, the contract standard binds them only to the substantive rules which they have agreed should govern the terms and conditions of employment. The rules are not fixed forever, but can be changed by negotiation of a new contract or by formal amendment of the old. Furthermore, in resolving the ambiguities the parties are not left unconsulted, for the fact that the union and the employer join in an interpretation must carry weight with the court or arbitrator. However, their present desires in a particular case cannot be substituted for their original intent as to a general rule.[26]

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24. 261 F.2d 138 (5th Cir. 1958).

25. In addition to cases previously cited, see Nichols v. National Tube Co., 122 F. Supp. 726 (N.D. Ohio 1954); Macek v. Bethlehem Steel Co., 198 Md. 435, 84 A.2d 72 (1951) (semble); Stremblick v. Abell Co., 43 L.R.R.M. 2139 (Md. Peoples Ct. 1958); Eversole v. LaCombe, 125 Mont. 87, 231 P.2d 945 (1951).

26. For example, in Food Fair Stores v. Raynor, supra note 13, the court looked to the history of negotiations, statements by the parties as to what they intended, subsequent declarations and practices under the contract—all to interpret relatively unambiguous terms in the contract. In refusing to accept the interpretation urged by the union and the employer, the court said: "Their agreement was integrated, and as to others with an interest the agreement means what it says, not what the parties say they intended or what they subsequently agree it means."

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The meaning of the contract standard is simply that union and management, in the settlement of grievance, can not violate their own general rules laid down in advance. This, of course, imposes some rigidity in the administration of the contract, for discretion is limited by those rules establishing the substantive terms and conditions of employment. The parties lack full freedom to improvise settlements which conflict with those rules without the consent of individuals whose interests are involved. Beneath the skin of the contract standard seem to lay broad principles of uniformity, regularity and retroactivity; and if we peeled off another layer we might find at the core an elemental notion of due process.

The standard of *Steele* and the standard of contract have been applied as polar alternatives by the courts. However, if we inquired more critically into what we consider "fair" in the context of contract administration we might find the standards close together, if not merged. Consider the following case: A machinist with twenty years seniority was promoted to foreman, where he acquired the unenviable title of "Bull Whip" Pete. After two years his foreman's job was abolished and he sought to return to the production unit in accordance with a contract clause which provided that employees promoted to supervisory posts should retain their seniority in the production unit. The union did not deny that the clause entitled him to a job but refused to process the grievance. Most fair-minded men would feel that Pete had been mishandled, although those same men would not be seriously disturbed by a contract clause which provided that production employees who accepted supervisory posts lost their seniority after one year. The sense of injustice flows not from the substantive result, but from the union's refusal to follow the collective agreement. Similarly, the parties might negotiate any one of a number of clauses for consolidating seniority lists when plants are merged and their particular choice would not raise any question of fairness. However, if they chose one method and wrote it into their contract, but in a particular case applied a wholly different method, there would be created a feeling of unfairness. In other words fairness in contract administration is measured by the terms of the collective agreement.

The courts have failed to recognize the close relationship, if not identity, of the standard of contract and the standard of fairness when applied to the settlement of grievances. The decisions have only added explicatives of "arbitrary," "capricious," or "bad faith" without searching for objective standards to give content to those words. As a result, they have never even discussed the possibility that the substantive terms of the contract should provide a guide for fairness. Therefore, it is probably premature to discuss whether the standards merge or remain distinct. It is perhaps enough to suggest that both possibilities are open. It can be argued that to deprive an individual of any benefit to which he would be entitled according to an authoritative interpretation of the contract is *per se* unfair. The analogies, metaphors and freighted terms available for this line of argument need not be marshalled here. On the other

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hand, it can be urged that the substantive terms of the contract should provide a plumbline and that unfairness be made to depend on the degree of departure from that guide. The appealing flexibility of this approach need not be elaborated. In the last analysis, the choice between the two depends on the ability to mould them as working legal rules to achieve our objectives.

III

The measure of protection actually obtained by an individual, and the effective restraint or burden placed on unions and management depends on much more than the choice of standards to be imposed. The practical impact of the standard may depend on the forum which enforces the standards, the nature of the proceedings, the parties involved, the allocation of liability or costs, and many other factors. The rules governing these, along with the standard, must be designed as an integrated structure. This requires a blueprint — one which I do not now have. However, there are certain specifications which it seems to me would be so desirable in the finished structure.

1. Unions and management should be free, within the range of reasonableness to resolve ambiguities in the collective agreement.

The truism that collective bargaining does not end with the signing of the contract describes a panorama of activity which emphasizes the need of unions and management for freedom. Much of this activity, however, is irrelevant to our present problem, for we are concerned here only with claims by an individual that the collective agreement has provided him with benefits which he has been denied.

If the contract is incomplete in that the parties have not yet settled the particular term, he obviously has no claim. Thus an agreement which provides for setting aside a certain amount to be used in eliminating inequities in the existing wage structure creates no problems until the union and the employer agree on how it shall be distributed. Similarly a corporation-wide contract which provides that seniority shall be negotiated locally creates no claim in the individual until the local seniority agreements have been negotiated.

The problem is created by those terms which have not clearly been left open for future negotiation, those which purport to be settled, but which on application prove to be ambiguous. The ambiguity may be intentional — a disguised incompleteness; or it may be unwitting inclusion of inconsistent terms, failure to foresee future problems, or the use of inadequate words. The individual asserts a claim only because he finds within the agreement some term which he interprets as providing him a benefit.

Obviously, union and management must have some freedom to resolve these ambiguities through the grievance procedure. However, they do not need full freedom, for they normally expect to resolve those ambiguities within the range of reasonable interpretations. The width of that range may be wide or narrow,

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and its boundaries may be difficult to mark, but within that range the parties should be free to fill out and apply their collective agreement.

Defining the range of reasonableness is extremely difficult — perhaps more difficult than applying it to concrete cases. The case of *Di Santi v. United Glass and Ceramic Workers*[27] is instructive. While Di Santi was a full time local officer and therefore on leave of absence, he sought to bid on an open job. However, because the contract did not provide for bidding by those on leave, the Company told him that he should bid after he returned to his job. When he was defeated for re-election, he immediately bid for and was given the job, replacing the man who had held the job in the interim. The union committee, dominated by Di Santi's successor, insisted that Di Santi be removed from the job and the Company complied. Di Santi appealled to the international president who indicated his disagreement with this result which would bar union officers from opportunities for promotion but refused to intervene.

The mere fact that the words in the written contract were susceptible to the union's interpretation does not keep it within the range of reasonableness. To this must be added the traditional policy of protecting job opportunities of union officers,[28] the interpretation of the company, the views of the international president, and the whole context in which the dispute arose. The range of reasonableness might be even more narrowly limited by past practices or prior interpretation by the parties, for the demand for uniformity is one of the roots of the individual's claim.

If we view these cases in a procedural context, it may not be necessary to articulate or overtly apply the test of range of reasonableness. If the individual is simply required to persuade the arbitrator or judge that his interpretation is to be preferred, the practical effect may be the same. Arrayed against him will be the combined weight of union and management. The individual's burden of persuasion may be so heavy that he must in fact demonstrate the unreasonableness of the settlement.

2. The individual's claim should be adjudicated by the same character of tribunal as that used to settle disputes between the union and the employer.

The union and the employer are entitled to have a uniform body of rules govern their relationship, and the individual is entitled to no benefits beyond those he would obtain if the union vigorously prosecuted his grievance. To have the individual's claim determined in a forum different from that of the union grievance can lead to inconsistent rules and varied remedies.

In practice, this means that the individual's claim should be decided by an arbitrator, not by a court — a result which the courts have encouraged by

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27. 40 L.R.R.M. 2548 (Pa. Com. Pl., 1957).

28. For cases preserving the union officers' right to promotion, see Ford Motor Co. and UAW-CIO, case A-80, April 12, 1944 (Opinions of the Umpire, Harry Shulman); Chrysler Corp. and UAW, Case 150B, May 25, 1945 (David Wolf, umpire).

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requiring exhaustion of the grievance procedure,[29] but rejected by refusing to compel arbitration.[30] Even though the issue is whether an interpretation is within the range or reasonableness, the arbitrator brings to the problem an understanding of industrial practices, a perspective and set of values which may be quite different from that of a court.[31] In discharge cases, the remedy may be quite different, for the courts stubbornly refuse to reinstate the worker but rather give him damages which are a kind of liquidation value of his seniority rights.[32] Arbitrators, on the other hand, will order his reinstatement with back pay, but award no other damages.[33]

Rigid logical consistency might suggest that the individual claim should be arbitrated before the same arbitrator as contested grievances. This would mean that the individual would face an arbitrator named by his opponents. A practical solution is relatively obvious — an arbitrator acceptable to all three parties. Although he is not the same man, he will bring to the case the same general attitudes and frame of reference, and provide the same remedies.[34]

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29. The courts have almost uniformly required the individual to first seek relief available through the grievance procedure. Cone v. Union Oil Co., 129 Cal. App. 2d 558, 277 P.2d 464 (1954); Zdero v. Briggs Mfg. Co., 338 Mich. 549 61 N.W.2d 615 (1953); Jenkins v. Atlas Powder Co., 27 Lab. Arb. 778 (Tenn. 1956). The individual, in his complaint must explicitly allege his resort to the grievance procedure, Anson v. Hiram Walker & Sons, Inc., 222 F.2d 100 (7th Cir. 1955). He may be required to seek to present his grievances directly to the employer if the union refused to process it, Gusykowski v. U.S. Trucking Co., 162 F. Supp. 847 (D.N.J. 1958), Di Rienzo v. Warrand Optical Co., 148 N.Y.S.2d 587 (N.Y. Mun. Ct. 1956), and even demand that the employer submit the dispute to arbitration, In re Julius Wile Sons & Co., 199 Misc. 654, 102 N.Y.S.2d 862 (1951); but see Alabama Power Co. v. Haygood, 266 Ala. 194, 95 So. 2d 98 (1957). Exhaustion of the grievance procedure is not required, however, if resort to it would be futile, Woodward Iron Co. v. Ware, 261 F.2d 138 (5th Cir. 1958); Nichols v. National Tube Co., 122 F. Supp. 726 (N.D. Ohio 1954), or if it requires submitting the case to arbitration controlled by parties hostile to the claim, Pattenge v. Wagner Iron Works, 275 Wisc. 495, 82 N.W.2d 172 (1957).

30. United States v. Voges, 124 F. Supp. 543 (E.D.N.Y. 1954); Arsenault v. General Electric Corp., 45 L.R.R.M. 2483 (Conn. , 1960). In Meyers v. Richfield Oil Co., 98 Cal. App. 2d 667, 220 P.2d 973 (1950), the court, in ordering arbitration, gave weight to the need for the arbitrator's special competence.

The New York cases prior to Parker v. Borock, as set out in note 6 supra, refused to compel arbitration but stayed the suit pending arbitration. If the employer refused to arbitrate, the individual could then sue. This gave the employer the option of having the claim adjudicated by an arbitrator or by the court.

31. The difference in interpretation may be even greater if the issue is submitted to a jury. See Food Fair Stores v. Raynor, supra note 13.

32. See, for example, Masetta v. National Bronze & Aluminum Foundry, 159 Ohio St. 306, 116 N.E.2d 15 (1953); Mello v. Local 4408, 82 R.I. 60, 105 A.2d 806 (1954).

33. This difference in remedies has been used as one of the reasons for requiring exhaustion of the contract grievance procedure. Jorgensen v. Penn. R.R. Co., 25 N.J. 541, 138 A.2d 24 (1958).

34. The basic proposition that the individual claim should be adjudicated by an arbitrator assumes that the arbitrator will not be unduly influenced by the fact that union and management are agreed that the individual claim should be denied. There are many who believe that the arbitration process and the method of selecting arbitration is not conducive to objectivity in protecting individual rights. However, there is at least a strong core of feeling that the arbitrator has an independent responsibility to the individual. See Wirtz, Due Process of Arbitration, Proceedings of 11th Annual Meeting, National Academy of Arbitrators (1958) pp. 1-45.

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3. Both the union and the employer should be parties to the proceedings for determining the individual claim.

One of the basic factual elements in these cases is that the union and the employer have agreed that the individual should be denied his claimed benefit. His claim is based on the collective agreement which they made and both will be affected by the outcome. That both should be parties is self-evident.

Assessing financial responsibility if the claim is upheld, however, raises more difficult problems, for the union and the employer are not always equally at fault. In normal discharge cases, the employer takes the initiative and the union refuses to contest his action; but in discharges under a union security clause for claimed failure to pay dues the union takes the initiative and the employer acquiesces. In seniority cases, the two parties may actively agree, or employer may simply follow the union's suggested order of layoff. Allocating blame is often impossible, but rarely is either party faultless, for normally both will know of the existence of the claim and either could take steps to have it remedied. The most workable solution would seem to be to hold both jointly liable and leave them free to negotiate their own allocation.

4. The union ought not be burdened with costs of arbitration unless the individual's claim is upheld.

If the individual's claim is adjudicated by arbitration, the difficult question arises, who shall pay the costs of arbitration? Obviously, the union cannot be saddled with the costs of prosecuting worthless claims. Therefore, if the claim is rejected, the union should not be compelled to share the costs of arbitration. In the union's stead, the individual who insisted on an adjudication of his claim against the wishes of the union should bear its share.[35]

Even though the individual claim is meritorious, the union may have reasons for not prosecuting it. For example, if a man is wrongfully sent home for alleged refusal to do assigned work, the grievance may be worth only a few dollars, establish no precedent, and involve no principle. The union may be unwilling to spend twenty times the value of the claim to get an arbitrator's award. Although the union has a duty to represent the individual, there may be doubts as to whether the duty should be carried so far. Theoretically, the union should be free from the burden of arbitration expense, therefore, if it could show that its refusal to process the grievance was reasonable on all of the facts. Practically, however, it may not be possible to develop and administer a rule which will separate these cases from ones in which the union has shirked

35. There is a real question whether the employer should be saddled with a share of the costs of arbitrating worthless claims with individuals. However, he can be confronted by worthless claims by the union as well as by individuals. The argument is made that he can estimate the responsibility of the union and judge whether to open himself to this burden, but that he would not risk the burden of individual appeals and therefore reject arbitration entirely. It is doubtful, however, that the number of individual cases would be substantial, particularly if the individual were required to pay half of the costs if he lost.

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or violated its responsibility. There may be no workable alternative to requiring the union to share the cost of arbitration if the claim is upheld.[36]

5. Provision should be made for the special problems of disciplinary discharges.

More than three-fourths of the reported cases in which individuals have sought legal protection of their rights under a collective agreement have arisen out of disciplinary discharges. Therefore, any structure of standards and rules must provide adequate room for the special needs of these cases.

Although discharge cases may be pressed into the same conceptual and analytical mould as other cases, they contain differences in degree of such magnitude as to alter the balance of considerations. Four significant differences are most apparent:

(a) The union's need to reconcile competing interests in the work group is significantly less in discharge cases, for the other workers seldom view the reinstatement of a discharged employee as an encroachment on their interests or an unfairness to them. In some cases, such as fighting, use of obscenities or stealing from lockers, there may be antagonistic interests, but except for the union security cases, the union rarely asserts an affirmative desire for a man's discharge. For the individual to obtain reinstatement after the union had refused to process his grievance might cloud the union's prestige, but it would seldom conflict with any other interest of the union.

(b) The handling of discharge cases creates special dangers to the individual of unfairness and hardship. Union critics, opposition leaders or other unwanted individuals can be singled out for special treatment by disciplinary action without affecting the job rights of other employees or creating awkward precedents. Once discharged, the individual is removed from the scene and is seriously handicapped in voicing his protest. The impact on the individual is most severe, for it destroys all of his accumulated seniority rights, frequently wipes out all of his accrued pension and other fringe benefits, and places a black mark on his record which may bar him from future jobs. It is, to use the union's descriptive term, "capital punishment."

(c) The standard of "just cause" normally used in discipline cases is quite different from most other terms in the collective agreement. It provides no articulate rule to confine the parties, but gains content only from precedents, established practices, and vague notions of industrial morality. Its application differs in a wide degree from the usual process of interpretation, for it involves less of the extraction of meaning from the terms and more of the pouring of meaning into them.

(d) Discipline cases are largely fact cases; their life-blood is mainly conflicting evidence. The issue may be the simple, though not easy, "was he asleep

36. The union might avoid heavy arbitration costs in such cases simply by paying the individual his few dollars loss and dropping the case. Such a solution is scarcely satisfying, but it forces the union to make a realistic calculation of the risks involved.

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or only resting"; the more complex "who hurled the first epithet and who swung the first fist"; or the nearly inscrutable "who incited the walkout." Superimposed on these fact issues are the additional ones involved in determining the appropriateness of the penalty. Other types of grievances may also involve questions of fact, but the relative importance of such questions in discipline cases tends to set them apart.

The grievance procedure is not particularly suited for objective fact finding, for it is designed to reconcile conflicting interests rather than conflicting evidence; facts are not to be determined by negotiation or compromise, especially when the vital interests of others are involved. The fact that the union and the employer agree to act as if the individual is guilty scarcely makes him so. Although they may both have useful facilities for gathering the evidence, neither may be in a position to make an objective evaluation.

All of these differences make clear that in disciplinary discharge cases the need of the individual for protection is much greater, the need of the union for freedom to make a binding settlement is much less, and the absence of an objective fact-finder is much more critical than in other types of cases. All of these point toward the type of solution developed by the railroads and the non-operating railway labor organizations. The union shop agreement negotiated by the parties in 1952 provides that if an individual is discharged for non-compliance and he disputes the fact that he has failed to comply, he can demand arbitration. The arbitrator is selected by the individual, the carrier and the union, and if the three can not agree, by the Chairman of the National Mediation Board. If the individual loses, the costs are shared equally by the three parties; if he wins they are shared by the carrier and the union.[37] The value of this arrangement is indicated by one case in which the individual was ordered reinstated. The union, after repeated warnings to employees delinquent in dues, demanded the discharge of those more than one calendar quarter in arrears. At the arbitration hearing it developed that two days before the deadline the individual had tendered dues money, but because he lacked enough to pay the last quarter's dues, the steward refused to accept any of it. The steward apparently assumed that all who were not fully current would be discharged and the individual might as well save what little money he had. Since others were not discharged unless they were two quarters in arrears, he was reinstated.[38]

The five specifications or general guides, which have been outlined above are not refined and do not pretend to include all considerations or indicate their relative importance. It may be impossible to achieve all of them in full measure in a workable or attainable structure, but they may provide some basis for trial sketches.

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37. Agreement of August 29, 1952 between Certain Eastern Railroads and Seventeen Cooperating Railway Labor Organizations, Section 5.

38. Matter of Brotherhood of Maintenance of Way Employees and Pennsylvania Railroad Co. and Fifteen Employees of the Pennsylvania Railroad Co. (David Stowe, arbitrator) January 29, 1958.

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The most obvious framework suggested by these specifications is to permit the individual to obtain review of his claim before an arbitrator — a design new to us but long accepted in other democratic countries. In Sweden, for example, the principle of autonomy of labor unions and employers' associations is even more deeply rooted than our own, and the parties have even greater freedom of collective bargaining.[39] For thirty years the Swedish law has provided that if the union refuses to carry an individual's claim to the labor court, the statutory tribunal for arbitrating grievances, the individual could appeal the case in his own right.[40] This individual right has been used, chaos has not developed, and the grievance procedure has not been disrupted.[41]

Admittedly, this solution has thus far not found favor with our courts, for they have feared as "disastrous to labor as well as industry"[42] such radical arrangements as adopted by the railroad brotherhoods or dispassionate Swedes. A less perfect but perhaps liveable device was developed by the lower-New York courts which confronted the employer with the alternative of submitting the individual case to or having the claim litigated in court arbitration.[43] As the courts are fond of saying, "the law is in a state of flux."[44] Therefore, no potential solution should be ignored.

This paper has no conclusion, for it is but a beginning — a preliminary analysis which attempts to lay bare some of the basic elements of the problem, articulate the standards used by the courts in protecting the individual, and to suggest certain guides in choosing a standard and designing a structure of rules. Behind it all lies a troubled concern for preserving the worth of the individual within a working system of collective bargaining.

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39. See Robbins, The Government of Labor Relations in Sweden (1942); Meyers, Industrial Relations in Sweden (1951).

40. Lag om arbetsdomstol, den 22 juni 1928 (Labour Court Act of 1928) section 13.

41. See, for example, Arbetsdomstolen domar, 1928, No. 68; 1941, No. 155; 1946, Nos. 69 and 70; 1949, No. 19; 1954, No. 7. In all of these cases, the individual won after the union had refused to process his grievance.

42. Bianculli v. Brooklyn Union Gas Co., 115 N.Y.S.2d 715, 718 (N.Y. Sup. Ct. 1952). The courts, however, have upheld the right of the individual to intervene in the arbitration proceeding, particularly where there was evidence that the union's interest was adverse to that of the individual. Matter of Iroquois Beverage Corp., 14 Misc. 2d 290, 159 N.Y.S.2d 256 (1955); Soto v. Lenscraft Optical Corp., 7 App. Div. 2d 1, 180 N.Y.S.2d 388 (1958). Failure to notify the individual of the arbitration so as to give him an opportunity to intervene makes the award not binding as to him. Clark v. Hein-Werner Corp., supra note 5. The latter case suggested that the right to intervene was a constitutional right under the Fourteenth Amendment.

43. See note 6 supra.

44. Donato v. American Locomotive Co., 283 A.D. 410, 415, 127 N.Y.S.2d 709, 714 (1954). The direction of the flow, as seen by this court, is suggested by the immediate subsequent passage. "According to the older view, expressed in many decisions in the lower courts, the union has the sole right to bring an arbitration proceeding under a collective bargaining agreement and has the sole right to control the proceedings and to move to vacate an adverse award. . . . In recent years, however, there has been a growing recognition that the individual employee has enforceable rights of his own under a collective agreement. Thus it has been held that an individual employee may maintain a direct action for damages as a third party beneficiary to the contract, where exclusive remedy under the contract the employee may demand arbitration if the there is no arbitration clause barring such action, . . . and where arbitration is the union is neglectful of his interests." (Citations omitted.)

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