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INDIVIDUAL RIGHTS IN COLLECTIVE AGREEMENTS AND ARBITRATION

CLYDE W. SUMMERS

COLLECTIVE bargaining is a system of industrial government in which governing power is shared by two collective entities—union and management. The collective agreement, in the words of the Supreme Court, "calls into being a new common law" which the parties agree shall be the law of the plant during the term of the agreement. Its explicit provisions and implied terms provide a framework of rules which guide and control the parties in developing their industrial common law through the grievance and arbitration process.

This system of industrial government, although essentially private, is not wholly autonomous. Its very existence is encouraged and protected by the labor relations acts which define the status of the collective parties, prescribe the area of shared control, and compel adherence to private lawmaking procedures. The statutory structure focuses predominantly on the relation of the collective entities to each other, leaving them largely free to establish by agreement the body of rules governing terms and conditions of employment. The freedom to agree, however, is not absolute, for there is a competing concern for the rights of individual employees who are governed by the collective agreement. Union and management cannot, for example, establish rules which create invidious or arbitrary distinctions, nor agree that the law of the plant shall be applied to achieve that end. Regardless of their mutual interests, under Taft-Hartley they cannot agree that only union members shall be hired, or that employment shall be conditioned on obedience to union rules. Indeed, the collective parties cannot even agree to establish a system of industrial government without first obtaining the approval of a majority of the employees. Thus the freedom of collective agreement is limited by individual rights. Drawing the boundaries so as to accommodate these

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competing values poses some of the most difficult problems within the statutory structure.\footnote{7}{See, e.g., NLRB v. News Syndicate Co., 365 U.S. 695 (1961); Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961).}

This problem of accommodating collective interests and individual rights extends beyond the making of the collective agreement to its administration. In the five years since \textit{Textile Workers v. Lincoln Mills},\footnote{8}{353 U.S. 448 (1957).} the federal courts have been engaged in fashioning a body of substantive law for the interpretation and enforcement of collective agreements. Their attention has thus far been focused exclusively on the rights and duties of the collective parties to each other, and the Supreme Court has explicitly deferred consideration of the status of the individual employee under the collective agreement and his rights with relation to the collective parties.\footnote{9}{Id. at 459 n.9.} The Court has not even crossed the threshold of declaring that these rights are governed by federal substantive law.

If the radiations of section 301 ultimately reach individual rights under the collective agreement—and for reasons given later, this seems inevitable—the task of working out an accommodation of collective interests and individual rights may challenge the judicial inventiveness relied on in \textit{Lincoln Mills}. The purpose of this article is to try to state more explicitly the fundamental but narrow problem involved, to search out statutory guides which point the courts toward solutions appropriate for our system of industrial government, and to suggest some of the detailed rules through which the needs of the collective parties and the needs of the individual employee can be accommodated.\footnote{10}{This paper seeks to develop more completely the analysis suggested in Summers, Individual Rights in Collective Agreements: A Preliminary Analysis, 9 Buffalo L. Rev. 239 (1960). Further consideration has led the author to different conclusions as to certain details but no change in the basic analysis.}

\section{A Preview of the Problem}

State courts have been confronted with the problem of the rights of individuals under the collective agreement in a substantial number of cases, but no settled body of law has developed.\footnote{11}{The state cases have been collected and analyzed from various points of view in a number of studies. See Comm. on Improvement of Administration of Union-Employer Contracts, Report, in ABA Section of Labor Relations Law, Proceedings 33 (1954), reprinted, 50 Nw. U.L. Rev. 143 (1955) [hereinafter cited as ABA Report on Individual Grievances]; Blumrosen, Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy, 13 Rutgers L. Rev. 631 (1959); Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956); Hanslowe, Individual Rights...
forms which the problem may take and the range of reactions of state courts is illustrated by two lines of similar cases in New York and Wisconsin.

In *Parker v. Borock*, an employee was discharged on the grounds that he had engaged in conduct detrimental to the employer. He filed a grievance, and the union refused to carry the case to arbitration after discussions with management had proved fruitless. Parker himself then moved to compel the employer to arbitrate, but this motion was denied on the grounds that enforcement of the arbitration clause was "purely a Union right." Thus blocked by the union and the employer from using the contractual procedures, Parker sued the employer for damages for discharge in violation of the collective agreement. The employer sought to frustrate this suit by moving to stay pending arbitration, but the lower court refused to leave the plaintiff remediless and ruled that since there was no dispute between the union and the employer there was nothing to arbitrate.

In the New York Court of Appeals, however, the plaintiff reached a dead end. The court held that although the individual employee was a direct beneficiary of the provision prohibiting discharge without just cause, his right could be enforced only through the arbitration procedure which the collective agreement made accessible only to the union. The status of the individual was made painfully clear. "A reading of the existing agreement indicates that plaintiff has entrusted his rights to his union representative. It may be that the union failed to preserve them. . . . '[T]here only conclusion which logically follows is that the employee is without any remedy, except as against his own union . . . .'" A concurring judge reinforced the contract logic

in Collective Labor Relations, 45 Cornell L.Q. 25 (1959); Howlett, Contract Rights of the Individual Employee as Against the Employer, 8 Lab. L.J. 316 (1957); Summers, supra note 10.

12. For the New York cases and their development see Note, Union Arbitration, the Civil Practice Act and the Remedy of the Individual, 35 St. John's L. Rev. 85 (1960). See also Hanslowe, supra note 11.


15. 136 N.Y.S.2d 588 (Sup. Ct. 1954), aff'd mem., 286 App. Div. 851, 141 N.Y.S.2d 359 (2d Dep't 1955). The appeal was dismissed by the court of appeals, 4 N.Y.2d 731, 148 N.E.2d 324, 171 N.Y.S.2d 118 (1958) (mem.). The employer then moved for summary judgment on the grounds that the plaintiff was not a party to the collective agreement and obtained no rights under it. The appellate division rejected this argument but found that the contract was for employment at will and that therefore, there was no violation. 1 App. Div. 2d 969, 150 N.Y.S.2d 396 (2d Dep't 1956) (mem.). In this posture the case was returned to the court of appeals.

with "policy considerations" which led him to conclude that "absent specific language giving the employee the right to act on his own behalf . . . the union alone has a right to control the prosecution of discharge cases." Like the majority, he observed that "the employee has a remedy against the union for breach of fiduciary duty if it unfairly discriminated against him."\(^{17}\)

The contract logic that the individual's rights under the collective agreement were limited by provisions giving the union the exclusive right to arbitration was carried another step in *Matter of Soto.*\(^{18}\) Employees represented by the National Jewelry Workers and earning $42 a week became dissatisfied, joined a rival union, and engaged in a wildcat strike. This strike was enjoined and the employees returned to work, but the employer charged that seven of the employees continued the disruption by engaging in a slowdown. The employer notified the union of its intent to discharge, and the union requested arbitration. The seven employees, notified of the arbitration hearing, appeared with their own attorney who asked leave to represent them. He pointed out that the lawyer representing the Jewelry Workers at the arbitration had appeared as counsel for the employer in enjoining the wildcat strike and also in proceedings to hold officers of the rival union in contempt because of the alleged slowdown. The arbitrator, after an adjournment, ruled that because the Jewelry Workers Union was the sole bargaining agent under the collective agreement, the employees had no right to be represented by independent counsel. At the hearing the employer put in his case, the union interposed no defense, and the arbitrator declared himself impelled on the record to uphold the discharges. The employee's motion to vacate the award was granted by the lower courts which concluded that the practical reasons for permitting the union to control the presentation and prosecution of grievances did not require that individuals directly affected by an arbitration be barred from intervening when the lack of fair representation of their interests in that proceeding is shown.\(^{19}\) The court of appeals, however, declared that "this was a wrong approach."\(^{20}\) Under the arbitration statute, the award could be vacated only by a "party" to the arbitration. Here, as in *Parker v. Borock,* the collective agreement granted the right to arbitrate only to the union and the company. The individual employee, therefore, was not a "party" to the arbitration procedure and could neither intervene nor challenge the award. He was not

\(^{17}\) 5 N.Y.2d at 162, 156 N.E.2d at 300, 182 N.Y.S.2d at 582.
\(^{19}\) 7 App. Div. 2d 1, 180 N.Y.S.2d 388 (1st Dep't 1958).
\(^{20}\) 7 N.Y.2d at 399, 165 N.E.2d at 855, 198 N.Y.S.2d at 283.
foreclosed, however, "from pursuing any remedy at law which might be available for breach of fiduciary duty owing by the union."  

The final turn of the screw in New York is presaged by *Saint v. Pope,* in which three employees sued the union for violating its fiduciary obligation by refusing to process their grievances for wrongful layoff. This remedy, held out by the court of appeals in *Matter of Soto,* proved illusory. The union as an unincorporated association could be held liable, said the appellate division, "only if the cause of action is provable against each and every member of the association." Even though the refusal to process the grievances was voted at a membership meeting, not all members were present and the complaint had to be dismissed.  

Similar cases in Wisconsin form a strikingly different pattern of individual rights. In *Pattenge v. Wagner Iron Works,* a group of employees who were dissatisfied with their AFL representative joined the CIO. When four of their members were discharged, the rest walked out in protest. The AFL agreed with the employer that their employment should be treated as terminated and that when they returned to work they should be treated as new employees without seniority. Later, when these employees were denied vacation pay for which they had become eligible prior to the strike, they sued the employer. The Wisconsin Supreme Court held that the provision for vacation pay, which was "clearly for the benefit of the individual employee," was imported into his individual employment contract on which he could sue. Even though the collective agreement expressly provided that the grievance and arbitration procedure "shall be the sole means of disposing of grievances," the individual's contract right was not conditioned on resort to a hostile or unavailable procedure, for this would place his rights "at the mercy of an unfriendly union."  

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21. Id. at 400, 165 N.E.2d at 856, 198 N.Y.S.2d at 284.  
23. 12 App. Div. 2d 168, 171, 211 N.Y.S.2d 9, 11 (4th Dep't 1961). The court distinguished the case of *Madden v. Atkins,* 4 N.Y.2d 283, 151 N.E.2d 73, 174 N.Y.S.2d 633 (1958), which held that a member wrongfully expelled from the union and thereby prevented from obtaining work could sue the union in damages without showing acquiescence of all members.  
24. As a secondary ground for dismissal, the court relied on the failure of the plaintiffs to exhaust their appeals within the union before beginning suit. 12 App. Div. 2d at 175, 211 N.Y.S.2d at 15.  
25. 275 Wis. 495, 82 N.W.2d 172 (1957).  
26. Id. at 500, 82 N.W.2d at 174.
The contrast between the New York and Wisconsin judicial reactions is further sharpened by *Clark v. Hein-Werner Corp.*,\(^{27}\) which involved a dispute over the seniority rights of employees who had been promoted to supervisory positions and later returned to the bargaining unit. The employer credited the former supervisors with continuous seniority from the date of hiring, but the union contended that the time spent as supervisor should be deducted. The union filed a grievance on behalf of the other employees and processed it to arbitration. However, none of the former supervisors were notified of the hearing and none were present or participated. When the arbitrator ruled in favor of the union and the employer proceeded to comply, they moved to vacate the award. The court held that since the union’s position in the arbitration was adverse to these employees, it could not fairly represent them, and they were therefore entitled to notice so that they could intervene and obtain representation of their interests. Although their seniority rights were created solely by the collective agreement negotiated by the union in their behalf, those valuable rights could not be divested without due process of law. This required representation in the proceedings by one whose interests were substantially the same. To the argument that the former supervisors’ interests were adequately represented by the employer, the court answered that as a matter of sound labor policy, employees “should never be put in the position of having to solely depend upon the employer’s championing their rights under the collective-bargaining contract.”\(^{28}\) On a motion for rehearing, the union argued that the court had interfered with its right as exclusive representative under the NLRA, and that because it could have negotiated a contract denying the supervisors seniority, it could accomplish the same thing through arbitration. The court branded this argument as “fallacious,” and declared: “Once the rights of employees have become fixed in the collective-bargaining contract, the union does not possess the right to barter them away before an arbitrator.”\(^{29}\)

27. 8 Wis. 2d 264, 99 N.W.2d 132 (1959), rehearing denied, 8 Wis. 2d 277, 100 N.W.2d 317 (1960).
28. 8 Wis. 2d at 275, 99 N.W.2d at 138.
29. 8 Wis. 2d 277, 277a, 100 N.W.2d 317, 318 (1960). The contrast between New York and Wisconsin is completed by Fray v. Amalgamated Meat Cutters, 9 Wis. 2d 631, 101 N.W.2d 782 (1960), 13 Stan. L. Rev. 123. The plaintiff claimed that he was wrongfully discharged. Although he gave immediate notice of his discharge to the union, the officers failed to file a formal grievance within the time limits fixed by the contract. He sued the union for the negligence of the officers in causing him to lose his reinstatement rights. The union moved to dismiss on the ground that because the union had no legal existence apart from its members, the plaintiff was in effect suing himself and other co-principals for the negligence of their common agent. Although earlier Wisconsin cases had followed this reasoning and other courts had used it to bar a union member from
These two lines of cases serve to reveal certain basic elements of the problem of defining individual rights under a collective agreement. First, the cases suggest the wide range of reaction and conflicting results reached by state courts when confronted with this problem. Neither the New York nor Wisconsin decisions are sports in the law, but rather they represent the main streams of the two opposing currents running through the state court decisions. For example, a Michigan case followed reasoning parallel to that in *Parker v. Borock* to hold that the individual's rights were enforceable only through the union's grievance procedure,\(^{30}\) while Alabama\(^ {31}\) and District of Columbia\(^ {32}\) cases adopted the logic of *Pattenge v. Wagner Iron Works* to permit the individual to sue. A Pennsylvania case held, like *Matter of Soto*, that a discharged employee was not entitled to independent counsel at the arbitration, even though there were strong reasons to believe his discharge was instigated by the union;\(^ {33}\) but cases in California\(^ {34}\) and Kentucky\(^ {35}\) follow the basic rationale of *Clark v. Hein-Werner Corp*. In many states, such as Maryland, the decisions seem to look both ways.\(^ {36}\) The federal courts, in applying state law, have understandably not lessened the confusion.\(^ {37}\) Whether or not the law is in a "state of flux,"\(^ {38}\) it is in a state of basic conflict.\(^ {39}\) Neither doctrinal analysis nor policy considerations have produced a dominant rule, much less a consensus.

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39. For example, the question whether the individual must exhaust his remedies during his union for mishandling his grievance, the court rejected the argument. It held that for this purpose the union was to be treated as a separate entity and that it could be sued by a member for breach of its fiduciary obligation.
Second, these cases help make it clearer that the center of the problem and the source of the conflicting decisions is the status of the union as bargaining agent with reference to employees governed by the collective agreement. More specifically, to what extent does the union have exclusive control over enforcement of provisions of the agreement which are for the direct benefit of the employees? This might, in the first instance, be a question of contract interpretation—did the union and the employer intend that rights created by the agreement should be conditioned upon resort to union-controlled procedures? The roots of the conflicting decisions, however, go much deeper, for interpretation of the collective agreement is but the first step. Beyond the question whether management agreed to make the individual's rights subject to the union's decision to enforce, is the more basic question whether union and management can agree to so subject the individual employee to the union's control. In Pattengle v. Wagner Iron Works the court declared that a contract clause which placed an employee's rights "at the mercy of an unfriendly union" would violate policies implicit in Section 9(a) of the NLRA and a parallel provision in the Wisconsin statute. In Clark v. Hein-

under the grievance procedure has covered a spectrum of answers. No resort need be made if the suit is only for damages. Woodward Iron Co. v. Stingfellow, 271 Ala. 596, 126 So. 2d 96 (1960). Contra, Cone v. Union Oil Co., 129 Cal. App. 2d 558, 277 P.2d 464 (1954). Resort to the grievance procedure may not be required where the facts suggest that it would be futile, Nichols v. National Tube Co., 122 F. Supp. 726, 728 (N.D. Ohio 1954), rev'd on other grounds sub nom. United States Steel Corp. v. Nichols, 229 F.2d 396 (6th Cir.), cert. denied, 351 U.S. 950 (1956), but direct proof of attempt and rebuff may be required, Guszkowski v. U.S. Trucking Co., 162 F. Supp. 847 (D.N.J. 1958). Exhaustion may be excused where only the union is empowered to invoke the grievance procedure and fails to do so, Alabama Power Co. v. Haygood, 266 Ala. 95, 95 So. 2d 98 (1957); or it may be required even though the union refuses to appeal or allow the individual to appeal, Falsetti v. Local 2026, UMW, 400 Pa. 145, 161 A.2d 882 (1960).

40. The grievance and arbitration clauses normally refer only to the collective parties. Either union or management may appeal to the next step or demand arbitration. The two together select the arbitrator and share the expenses. From this the courts usually infer that the contract does not give the individual a right to arbitration, or make him a party to the arbitration; and, following the logic of the New York decisions, that this wording of the grievance and arbitration clause shows an intent that the individual's right shall be conditioned on the union's decision to process his grievance through arbitration. Other courts, in interpreting other contracts, have found no intent to make the grievance procedure the sole method of enforcing individual rights. Kosley v. Goldblatt Bros., 251 F.2d 558 (7th Cir. 1958); In re Norwalk Tire & Rubber Co., 100 F. Supp. 705 (D. Conn. 1951); Food Fair Stores, Inc. v. Raynor, 220 Md. 501, 154 A.2d 814 (1959); Hudak v. Hornell Indus., Inc., 304 N.Y. 207, 106 N.E.2d 609 (1952). Still others have found in the words of the arbitration clause an intent to permit the individual to compel arbitration on his own behalf. Gilden v. Singer Mfg. Co., 145 Conn. 117, 139 A.2d 611 (1958); Faglarone v. Consolidated Film Indus., Inc., 20 N.J. Misc. 193, 26 A.2d 425 (Cir. Ct. 1942).

41. 275 Wis. 495, 82 N.W.2d 172 (1957).
The court held that application of a contract clause excluding the affected employees from the arbitration denied their statutory rights of fair representation, if not their constitutional right to due process. The issue is thus sharply drawn, for the New York cases assert that union and management can, by agreement, make the union exclusive representative of the employees for enforcing their rights under the collective agreement.

Third, these cases emphasize that although the central issue strikes deeply, it is also narrowly confined. The question is not the union's status as exclusive representative in making the collective agreement, nor the union's freedom in negotiating the substantive terms of the collective agreement to make them binding on all employees in the unit. On the contrary, the individual insists that his terms and conditions shall be governed by the substantive provisions of the agreement. He does not appeal for a variance from those provisions, but rather demands compliance with them. Parker did not seek an exemption from the "just cause" provision of the contract; instead, he sought a determination that the employer had violated that clause. And in Pattenge, the plaintiffs sought no individual bargain but only enforcement of the vacation-pay benefits bargained for by the union. The narrow question is whether the union has the power to grant the employer variances or to sanction violations of provisions which directly benefit the individual. Even within this narrow scope, the individual does not seek to supplant the union, for he does not claim that his interpretation of ambiguous clauses or his version of uncertain facts shall control. Nor does he ask that the union's views shall be precluded. As both Matter of Soto and Clark v. Hein-Werner Corp. make clear, all the individual seeks is access to some neutral tribunal where, along with union and management, he shall have an opportunity to be heard.

II
THE CONTROLLING LAW—FEDERAL OR STATE?

In deciding these cases, state courts have applied state substantive law, as have the federal courts exercising diversity jurisdiction. With rare exceptions, federal law or federal policy has not even been mentioned, and in no case has it been considered controlling. When

42. 8 Wis. 2d 264, 99 N.W.2d 132 (1959), cert. denied, 362 U.S. 962 (1960).
44. 8 Wis. 2d 264, 99 N.W.2d 132 (1959), cert. denied, 362 U.S. 962 (1960).
state law governed the enforcement of collective agreements generally, this was appropriate, but Section 301 of the LMRA has worked sweeping changes. The question here is whether the impact of those changes now requires that the rights of individual employees be governed by federal substantive laws.

In *Textile Workers v. Lincoln Mills*, the Supreme Court held that section 301 "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements." It is now clear that the federal law so fashioned supplants state law. Although the state courts have concurrent jurisdiction, they are not "free to apply individualized local rules," for the "substantive principles of federal labor law must be paramount in the area covered by the statute." The radiations of *Lincoln Mills*, particularly as illuminated by later cases, would seem reasonably to reach all relationships created by the collective agreement and all proceedings to enforce its terms. The federal substantive law to be fashioned would sensibly encompass the rights of the individual employee under the collective agreement and his suit to enforce those rights.

Doubts whether federal substantive law controls individual suits spring from *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, which was decided before *Lincoln Mills*. In that case the union brought suit on behalf of some 4,000 employees for back pay. Six justices, in three concurring opinions, agreed that section 301 should not be interpreted as authorizing a union to enforce in federal courts the "uniquely personal right of an employee." Mr. Justice Frankfurter, speaking for three of the six justices, proceeded from the premise that section 301 did not create federal substantive rights. This interpretation raised serious constitutional questions whether Congress could thus grant jurisdiction to the federal courts to enforce contracts governed entirely by state law. By interpreting section 301 as not reaching suits to enforce terms

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46. 353 U.S. 448 (1957).
47. Id. at 451.
49. Ibid.
of the collective agreement which are peculiarly for the benefit of individual employees, the Court could postpone confronting the constitutional issue. *Lincoln Mills*, however, dissolved the constitutional problem by rejecting the premise—section 301 did call into being a body of federal substantive law—and this reason for limiting the scope of the section has ceased to exist.52

The distinction drawn in *Westinghouse* between union rights and "uniquely personal rights" was from its inception productive of difficulties and confusion in practical application.63 Subsequent decisions drained it of meaning and finally abandoned it. In *Lincoln Mills*, the Court ordered arbitration of a claim for back pay due employees; and in the companion case of *General Electric Co. v. Local 205, UEW*,64 ordered arbitration of a discharge case. Two justices felt compelled to reconcile these decisions with *Westinghouse* by rationalizing that the right enforced was the union's own right to arbitration and not the uniquely personal rights of employees.65 In *United Steel-workers v. Enterprise Wheel & Car Corp.*,66 the Court held that an arbitrator's award ordering reinstatement and back pay to an employee who was wrongfully discharged could be specifically enforced under section 301. No justice even noted that the federal courts applying federal substantive law were now open to the union to fully enforce personal rights through the arbitration clause. Finally, *Charles Dowd Box Co. v. Courtney*67 demonstrates that transmutation of personal rights does not require the alchemy of arbitration. The union there, as in *Westinghouse*, sued on behalf of the employees to recover back wages. The Court made clear that in adjudicating this claim the state court was bound to apply federal substantive law. There may remain a thin shadow of possibility that such a suit could not be brought in the federal courts, but it now seems plain that union actions to enforce, either directly or through arbitration, terms of the collective agreement which are peculiarly for the benefit of the individual employee such as wages, seniority or discharge are governed by federal substantive law.

54. 353 U.S. 547 (1957).
These cases establish the context but do not decide the specific question relevant to our inquiry here: Is the suit brought by the individual employee on his own behalf governed by federal substantive law? Such a suit presents two discrete legal issues. One is the interpretation of the particular provision of the collective agreement benefiting the individual—the same issue presented when the union sues on the individual's behalf. The substantive law applied in deciding this issue should be the same regardless who is the nominal plaintiff. The test of the validity of the provision, the rules of interpretation, and the considerations brought to bear in resolving ambiguities ought not be different because the individual rather than the union brings the suit. The wages due, the order of layoff under the seniority clause, or the grounds for discharge can not vary with the form of the suit. To do so would create uncertainty, destroy uniformity, and "exert a disruptive influence upon both the negotiation and administration of collective agreements."58

The other, and more critical legal issue presented by an individual suit is the individual employee's standing to enforce the collective agreement. This has its roots in the fundamental question of the union's status with relation to the individual. To the extent that this is, in the first instance, a question of contract interpretation, all of the needs enunciated by the Court for applying a single body of federal law are equally applicable and additionally compelling. The provisions to be interpreted are the grievance and arbitration clauses. The question is the relative rights created in the employer, the union, and the employee to settle grievances, to compel arbitration, or to be a party to the arbitration proceedings. The rights of the individual are inseparably entwined with the rights of union and management to enforce—the very core of actions under section 301.

More importantly, the issue of the individual's standing is not merely one of contract interpretation, but ultimately raises the question whether union and management can, by their contract, deprive him of standing. The issue then becomes what limits the law places on the collective parties' power to determine the union's status by collective agreement. This must be governed by federal substantive law for it affects the union's status as statutory bargaining agent under section 9(a). State substantive law can not add to or subtract from the union's authority to represent, as defined by the federal statute. Congress has carefully and deliberately struck a balance between the union and the individual employee, and that balance can not be disturbed by application of varying and conflicting state

policies. The rights of individuals, both their right to standing and their substantive rights, must be governed by federal substantive law.

This result, which requires a comprehensive and exclusive body of federal law governing all relationships within the collective agreement, is a nearly inevitable consequence of the Court's decision in *Lincoln Mills*. The collective agreement creates a complex of relationships between the employer, the union and the employees. It is designed to benefit and govern all of the parties as a functioning institution. A coherent and appropriate body of law can not be fashioned by pulling threads from the fabric and treating them with multicolored state law. Mr. Justice Frankfurter in his *Westinghouse* opinion, clearly foresaw these implications: "If Congress has itself defined the law or authorized the federal courts to fashion the judicial rules governing this question, it would be self-defeating to limit the scope of the power of the federal courts to less than is necessary to accomplish this Congressional aim." And with reference to the specific question of the rights of individuals under the collective agreement he declared: "It would also be necessary to work out a federal code governing the interrelationship between the employee's rights and whatever rights were found to exist in the union."

Although federal substantive law controls the rights of the individual employees under the collective agreement, it does not necessarily follow that the individual can bring his suit in the federal district courts. It would be anomalous, however, to find in section 301 authority to impose federal substantive law but no authority for the federal district court to entertain the suit. The charge of Congress is to build a body of federal law consonant with national labor policy. This task would be seriously impeded if all individual suits were channeled through state courts laboring under the dead weight of precedents which consistently ignored federal law and federal policy. A heavier burden would fall on the Supreme Court to enunciate the principles and fashion the rules, without any assistance from the lower federal courts. Moreover, neither the words of section 301 nor the legislative history require this. The critical words of section 301(a), "suits for violation of contracts between an employer and a labor organization . . . ," are equivocal. They have been read by the lower federal courts as requiring that the suit be between an employer and a labor organization; but the words can as reasonably be read as

60. Id. at 455.

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requiring only that the contract be between an employer and a labor organization. The primary concern of Congress was to make unions legally responsible for breach of contract, but underlying this was the broader purpose of making collective agreements fully enforceable. During the House debates both Representative Hartley and Representative Case endorsed a statement made by Representative Barden that the section encompassed proceedings "brought by the employers, the labor organizations, or interested individual employees under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract." The principal argument marshaled against federal courts entertaining individual suits has been that it would impose a "staggering burden of litigation." The federal courts have already assumed the burden of enforcing personal rights when suit is brought by the union. Suits by individuals are rare by comparison and would add little to the burden. From available evidence, state courts now handle less than twenty such cases a year—something less than a "staggering burden" to preclude federal courts from entertaining these suits which involve uniquely federal rights.

III

SOURCES OF FEDERAL SUBSTANTIVE LAW

In fashioning federal substantive law to define the rights of individual employees under the collective agreement, the courts must look to "the policy of our national labor laws." Decisions under


62. Evolution of the wording of the clause seems to point in this direction. The Case Bill, as passed by both houses of Congress in 1946, used the words: "Suits for violation of a contract concluded as a result of collective bargaining between an employer and a labor organization . . ." H.R. 4908, 79th Cong., 2d Sess. § 10(a) (1945). The Hartley Bill, as passed by the House in 1947, used the words: "Any action for or proceeding involving a violation of an agreement between an employer and a labor organization . . ." H.R. 3020, 80th Cong., 1st Sess. § 302(a) (1947). The Senate reverted to the wording of the Case Bill, H.R. 3020 in the Senate, Sec. 301(a). The final wording was by the Conference Committee, H.R. Rep. No. 510, 80th Cong., 1st Sess. 23 (1947).

63. 93 Cong. Rec. 3656-57 (1947).

64. Schatte v. International Alliance of Theatrical Employees, 84 F. Supp. 669, 672 (S.D. Cal. 1949), aff'd on other grounds, 182 F.2d 158 (9th Cir. 1950).

65. Mr. Justice Frankfurter, in his Westinghouse opinion, expressed the fear that to read § 301 as reaching uniquely personal rights would "open the doors of the federal courts to a potential flood of grievances." 348 U.S. at 460 (1955). But Lincoln Mills and subsequent cases opened the doors of the federal courts to the very kind of suits with which he was concerned.

state law can provide little guidance, for they have not considered, much less illuminated, the policies or provisions of relevant federal statutes. Those decisions have evolved no consensus and are instructive only in defining the basic issue, illustrating the kinds of cases involved, and suggesting the range of available choice. Guidance in building a body of federal law must be found in the federal statutes, by looking both to their express provisions and implicit purposes as expressive of federal policy. In the words of Mr. Justice Douglas:

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

Guidance may be gained not only from the LMRA, but also from the Railway Labor Act and the decisions under that statute which have defined the rights of the individual under the collective agreement. Although the statutory schemes differ in detail, the underlying principles relevant to our inquiry here are the same. Both give the union statutory status as bargaining agent, and both contemplate the settlement of disputes arising under the collective agreement through grievance procedures and arbitration. Both, therefore, pose the basic issue of the relative rights of the union and the individual employee to enforce provisions of the contract made for his benefit. There is no reason to assume that Congress, in accommodating the competing interests of the union and the individual in the enforcement of the collective agreement, would strike a different balance because the employee was a railroad engineer or airplane mechanic rather than a truck driver or foundry man.

A. The National Labor Relations Act

The central question around which all others hinge is the statutory authority of the union as bargaining representative of the employees. This is set forth in section 9(a), which provides that the majority union shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent

67. Id. at 457.
with the terms of a collective-bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.68

The bare words of the statute make plain four elementary propositions concerning the status of the union in enforcing the collective agreement: (1) The statutory right of the union to represent the employees in negotiating an agreement is different from its statutory right in settling grievances arising under the agreement. (2) The statute does not give the union the right of exclusive representation in settling grievances, for the proviso expressly permits grievances to be presented by individual employees and to be adjusted without intervention of the union. (3) The union has a valid interest in all grievances and cannot, against its will, be excluded from the adjustment. (4) The union can insist that all grievance settlements be consistent with the terms of the collective agreement.

These four propositions do not meet squarely the crucial question whether the union and the employer can, by agreement, vest in the union greater control over settling individual grievances than that granted by the statute. However, the words of the proviso to section 9(a), if given their natural meaning, would seem to speak to this question. The proviso declares that the individual “shall have the right at any time to present grievances to their employer and to have such grievances adjusted.” These words, on their face, declare that an individual has a statutory right to process his grievance to final adjustment. “Without intervention of the bargaining representative” would seem to make it clear that the union may not bar the individual’s asserting a claim or block his obtaining an adjustment.

It has been strongly argued, however, that in spite of its words, the proviso does not create any rights in the individual employee, but only makes plain that the employer’s duty to bargain with the majority union is not violated if he chooses to hear and adjust grievances with individuals. The proviso is not placed in the statute in the section stating affirmative rights, but is placed in section 9(a) as a qualification of the majority union’s right to represent. Section 8(a)(5) defines the employer’s duty to bargain as “subject to the provisions of section 9(a).” Therefore, it is argued, the proviso merely states an exception to the employer’s duty to bargain with the majority union as exclusive representative. Furthermore, the employer has no legal obligation to hear the grievances of his employees when there is no statutory bargaining agent. He should therefore be free to agree with the union not to process individual grievances. Finally,

it is said, no sanction is provided for this claimed right, so it would be a right without a remedy, a legal contradiction which confirms that the word "right" was used loosely and not in a Hohfeldian sense.60

These arguments which limit the effect of the proviso to granting the employer freedom to hear individual grievances lack persuasiveness for the following reasons:

First, the argument views the role of section 9(a) in the statutory scheme too narrowly, for it treats the section as relevant only to the union's rights against the employer. The function of section 9(a) is much more wide ranging and profound—it establishes the majority union as statutory bargaining agent. That status relates not only to the employer but to other unions and to the employees. Thus, it affects the rights of other unions to picket70 or to bargain71 for their members. Without that status the union violates the individual's statutory right if it pretends to bargain for him without his consent;72 with that status the union can make an agreement which truncates his right to refrain from union activity.73 And the status may simultaneously affect different parties in different ways. Thus, if an individual employee and his employer make an employment contract which conflicts with the collective agreement, the employee would merely be barred from enforcing the contract but the employer would be guilty of an unfair labor practice.74

The broad function of section 9(a) is to establish the status of the majority union, and the purpose of the proviso is to define that status, not only with reference to the employer but also with reference to the employees. The proviso ought not to be viewed merely as a

71. In the absence of a majority union, a minority union can bargain for its own members. Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938). When a majority union is present, a minority union cannot represent its members, even in processing grievances. Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945).
72. International Ladies’ Garment Workers v. NLRB, 366 U.S. 731 (1961). The union may then be barred from representing even its own members until the effects of its unfair labor practice have been dissipated.
misplaced part of section 8(a)(5), nor should its words granting rights to individuals be construed solely to confer a privilege upon employers. It speaks directly to the relative rights of the union and the individual in the enforcement of the collective agreement.

Second, the argument that because the employer can refuse to hear individual grievances when there is no majority union, he can agree with the union not to hear such grievances, does not meet the critical issue. Although the employer may refuse to listen, he cannot by turning a deaf ear bar the individual from legally enforcing his employment contract. Whether the employer can agree with the union to listen only through the established grievance procedure is a subsidiary problem with which we are not here principally concerned. The critical issue is whether the employer by such an agreement can use the union's silence to bar the individual from legally enforcing his claim. If the employer could so agree, then the individual would have fewer legal rights than before. The end result would be that although the collective agreement prescribed the terms of the individual employment contract, the employee would have no enforceable rights under his employment contract. In practice, if not in theory, the rights would belong solely to the union.

Third, the absence of sanctions to enforce the "right" stated in the proviso does not prevent that proviso from being given effect when an individual brings suit under section 301 to enforce his rights under the collective agreement. The individual seeks to use the proviso only to nullify a term of the collective agreement, which he claims the union as bargaining agent had no authority to make. In outlining the sources of substantive law to be applied, Mr. Justice Douglas explained, "Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction.

75. Under NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952), the employer might be free to bargain to impasse for the right to adjust grievances with individual employees without relying on the proviso of § 9(a). If this is true, then the proviso adds nothing to the statute except as it secures rights for individual employees. In addition, it has been argued that the employer is permitted to hear grievances of the employees by the proviso of § 8(a)(2), and therefore § 9(a) must have an effect beyond creating a bare privilege for the employer. See Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 Colum. L. Rev. 731, 741-42 (1950).

76. The General Counsel of the NLRB has ruled that § 9(a) does not require an employer to deal with a minority group of employees who request a wage increase, Admin. Ruling of the NLRB Gen. Counsel, Case No. 317, 30 L.R.R.M. 1103 (June 2, 1952), or meet with a discharged employee and his lawyer to discuss the discharge, Admin. Ruling of the NLRB Gen. Counsel, Case No. 418, 31 L.R.R.M. 1039 (Nov. 3, 1952). Neither of these reaches the question of the validity or legal effect of contractual provisions purporting to give the union exclusive control over grievances.

77. This subsidiary problem is discussed in text accompanying notes 108-13 infra.
but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy."78

Fourth, there may in fact be sanctions to enforce this right. If the function of the proviso is, as has been suggested above, to strike a balance between the power of the union and the rights of the individual, and to mark the limits of the union’s authority, then various sanctions are available to keep the union within those limits. Where the union negotiates an agreement which oversteps its statutory authority to the injury of individual rights, the courts can use their broad equitable power to enjoin application of the offensive provisions,79 or the NLRB can use the administrative remedy of removing certification.80 In addition, violation of the right granted by the proviso may be an unfair labor practice. Section 7 guarantees employees not only the right to bargain collectively and engage in other concerted activities, but also “the right to refrain from any or all such activities.” These rights are obviously qualified by section 9(a) to the extent that the statutory status of the majority union circumscribes the individual’s right to refrain from bargaining collectively. If the proviso is read as limiting the union’s authority over the individual, any agreement between the union and the employer which gives the union greater control over disposition of grievances invades the individual’s right to refrain from bargaining collectively as guaranteed by section 7, and may therefore be a violation of sections 8(a)(1) and 8(b)(1).81 The plain words of the proviso creating an affirmative right can not be brushed aside as lacking enforcing sanctions.

The words of the proviso in section 9(a), when viewed in the context of the total statutory structure, point strongly in the direction of giving the individual a right to enforce substantive provisions in a collective agreement without being subject to the union’s veto. The

80. Hughes Tool Co., 104 N.L.R.B. 318 (1953), enforced as modified, 147 F.2d 69 (5th Cir. 1945).
81. See Sherman, The Individual and His Grievance—Whose Grievance Is It?, 11 U. Pitt. L. Rev. 35, 53-54 (1949); ABA Report on Individual Grievances 33, 62-63, 50 Nw. U.L. Rev. at 178-79 (1955). Giving the union such control to enforce or waive the provisions of the collective agreement which benefit the individual and govern his terms and conditions of employment might also be a violation of §§ 8(a)(3) and 8(b)(2). This would be equivalent to giving the union unilateral control over seniority, which has been held to be unlawful. NLRB v. Dallas Gen. Drivers, 228 F.2d 702 (5th Cir. 1956); NLRB v. International Bhd. of Teamsters, 225 F.2d 343 (8th Cir. 1955).
legislative history of the proviso, although clouded, throws some shafts of light for additional guidance. 82

The origin of the proviso goes back to section 9(a) of the Wagner Act which qualified the union's status as exclusive representative with the words: "Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer." 83 Although the intent of the framers is unclear as to the scope of the qualification, it does appear that the proviso was to do more than merely limit the employer's duty to bargain. 84 Wording the clause as granting an affirmative right was not accidental, for words without an affirmative grant were proposed and rejected. 85 The clause was modeled on a rule previously stated by the Railway Labor Board which prohibited the parties from making collective agreements encroaching on the individual's right to present grievances. 86

Cases interpreting this proviso involved only the employer's duty to bargain. However, in Hughes Tool Co., 87 the National Labor Relations Board spelled out the relative roles of the individual, the union and the employer in processing and adjusting grievances. It interpreted the proviso to mean that individuals were entitled to appear "in behalf of themselves . . . at every stage of the grievance procedure" and that the union was also entitled to be present and negotiate at each stage. 88 With reference to the power of the union to make a binding settlement, the Board stated:

If, at any level of the established grievance procedure, there is an agreement between the employer, the exclusive representative, and the individual or group, disposition of the grievance is thereby achieved.

85. Secretary Perkins proposed a wording which merely stated that nothing in the statute should impair the individual's existing rights to present grievances. This wording was rejected and words of affirmative grant were used. Hearings on H.R. 6288 Before the House Committee on Labor, 74th Cong., 1st Sess., 301 (1935).
86. "No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice." International Ass'n of Machinists, 2 R.L.B. 87, 96 (1921).
87. 56 N.L.R.B. 981 (1944), enforced as modified, 147 F.2d 69 (5th Cir. 1945).
88. Id. at 982.
Failing agreement of all three parties, any dissatisfied party may carry the grievance through subsequent machinery until the established grievance procedure is exhausted.\(^8\)

On the effect to be given a contract provision creating a grievance procedure controlled by the union, the Board made clear that although the individual must process his grievance through the steps of the contractual 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."\(^9\) Finally, the Board made explicit that "any adjustment . . . must be consistent in its substantive aspects"\(^9\) with the terms of the collective agreement.

The import of the proviso in the Board's view was that the union could not settle the grievance without the consent of the individual, nor could it by an agreement with the employer bar the employee from processing his claim to final adjustment. The court of appeals apparently agreed with the Board on this point, for it stated: "We understand the Board . . . to hold that individuals and groups may, under the statute, fully prosecute their grievances through all stages and appeals."\(^9\)

Shortly after the Hughes Tool decision, the Supreme Court decided Elgin, Joliet & Eastern R.R. v. Burley,\(^9\) which arose under the Railway Labor Act but which helped shape the 1947 changes in section 9(a). In that case a group of employees filed a grievance through the union, claiming back pay for alleged violations of starting time provisions in the collective agreement. The claim was processed through the grievance procedure to the final step where the union agreed to withdraw the grievance in return for an explicit provision establishing rights for such violations in the future, and the settlement of various other grievances. The employees, dissatisfied with this result, brought suit for back pay, and the company defended on the grounds that the union had settled the grievances. The Court held that, in the absence of any showing of authorization by the individual employees, the union did not have the power to surrender their claims.\(^9\) The Court drew a distinction between the union's

\(^8\) Id. at 982-83.
\(^9\) Id. at 983.
\(^9\) Ibid.
\(^9\) Hughes Tool Co. v. NLRB, 147 F.2d 69, 73 (5th Cir. 1945).
\(^9\) On rehearing, the Court affirmed but elaborated on what might constitute authorization to the union to settle or to submit the cases to the National Railroad Adjustment Board. 327 U.S. 661 (1946).
power to negotiate collective agreements and its power to settle grievances:

It would be difficult to believe that Congress intended, by the 1934 amendments, to submerge wholly the individual and minority interests not only in forming the contracts which govern the employment relation, but also in giving effect to them and to all other incidents of that relation. Acceptance of such a view would require the clearest expression of purpose. For this would mean that Congress had nullified all preexisting rights of workers to act in relation to their employment, including perhaps even the fundamental right to consult with one's employer except as the collective agent might permit.95

To the argument that the union was granted the power to make binding settlements by the collective agreement, the Court replied:

The collective agreement could not be effective to deprive the employees of their individual rights. Otherwise those rights would be brought within the collective bargaining power by a mere exercise of that power, contrary to the purport and effect of the Act as excepting them from its scope and reserving them to the individuals aggrieved.96

These two cases are important not as authoritative statements of federal labor policy or irreversible precedents, but as integral parts of the legislative history of section 9(a) in its present form. They help frame the purposes of the Taft-Hartley amendment and thereby illuminate the congressional policy to be effectuated in suits under section 301. The amendment added to the previous words of the proviso the following: "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."97

The purposes of adding these words are clouded by the customary imprecision of committee reports and legislative debates, but through the clouds three guideposts emerge quite clearly. First, the discussion was almost entirely in terms of the individual's rights, and the proviso was viewed through the eyes of the individual employee. Concern focused not on the duty of the employer to bargain, but on the relative rights of the individual and the union.98 Second, the words added to the proviso were framed with explicit reference

95. 325 U.S. at 733-34.
96. Id. at 744.
to the prior decisions. The Hughes Tool case was in the forefront of congressional debates; and the effect of the proviso was measured against the Supreme Court's decision in Elgin, Joliet & Eastern R.R. v. Burley. Third, at a very minimum Congress intended to secure by statute the individual rights recognized by the Board in Hughes Tool, and to adopt the principle of Elgin, Joliet.

One of the dominant themes in the enactment of Taft-Hartley was to protect the individual employee from being wholly submerged by the collective bargaining structures. The proviso of section 9(a) was listed by Representative Hartley as a part of a "bill of rights" for individual workers, along with the right to choose the majority representative, the right not to be discharged when expelled from the union, and the right to vote on union security contracts. These were not shadow rights protected only when championed by the employer; they were rights protected against both union and employer and not destructible by their collective agreement.

Both the external evidence of legislative history and the internal evidence of the words of section 9(a), read in the context of the statutory structure, point in the same general direction. From the words and the legislative history emerge guidelines for fashioning the federal substantive law under section 301:

(1) The individual employee has rights under the collective agreement, the enforcement of which are not subject to the union's exclusive control.

(2) The union and the employer cannot block the enforcement of these rights by agreeing between themselves that those rights can be compromised or ignored without the individual employee's consent or authorization.

99. See particularly the committee reports cited note 98 supra.

100. During the debates Representative Owens stated: "Is it not a fact that we have gone in accord with the decisions of the Supreme Court of the United States, which hold that where employees have a grievance, for instance in connection with the recovery of a certain amount of money claimed due from an employer, they can go to him and complain about it and settle it without the bargaining agent." 93 Cong. Rec. 3625 (1947). Representative Hartley agreed that this was correct. Ibid.


103. Some substantive provisions, such as those for a union shop, check-off, release time for union stewards and use of the bulletin boards create no substantive rights in the employees but only rights in the union.
(3) The individual rights are limited by the substantive terms of the collective agreement.

(4) The union has an interest in all terms of the collective agreement and a right to insist on the enforcement of the agreement.

B. The Railway Labor Act

Additional guidance in delineating the rights of individual employees under the collective agreement can be drawn from the Railway Labor Act. This act, which was the precursor of the Wagner Act, established as national labor policy the primary principle that the majority union should be the exclusive representative for purposes of collective bargaining. The federal courts, in applying the statute, have been confronted with problems comparable to those which will arise under section 301, and have sought to develop working rules which will balance the needs and interests of the union and the individual.

The most relevant difference between the two statutes is that the Railway Labor Act requires that grievances which the parties are unable to adjust by the usual process of negotiation be submitted to the National Railroad Adjustment Board for determination. Those determinations are enforceable in the federal courts. But even this difference can be overstated, for the function of the statutorily created Adjustment Board is generally comparable to that of contractually created grievance arbitration enforced under section 301.

Prior to 1945, the unions insisted that the individual employee had no right to process his grievance and carry it to the Adjustment Board. They insisted that they were the exclusive representatives not only for negotiating agreements but also for settling grievances arising under such agreements. In Elgin, Joliet & Eastern R.R. v. Burley, the Supreme Court, relying on statutory language far less explicit than the proviso to section 9(a), squarely rejected this view. So far as grievances were concerned, the individual had rights "to share in the negotiations, to be heard before the Board, to have notice, and to bring the enforcement suit." These rights could not be foreclosed by the union's settling his claim without his consent. Nor could an award of the Board be effective as against him unless he had authorized the union to present his case or had been given notice and opportunity to be heard.


105. 325 U.S. 711 (1945).

106. Id. at 736.

107. Authority of the union to settle the claim or to present it to the Board can be
The holding in *Elgin, Joliet* that the union does not have exclusive power to settle or appeal an employee's grievance has required the federal courts to develop rules governing the individual’s processing and enforcing his own claim. It now seems generally accepted, both by the parties and the courts, that the individual can file his grievance without going through the union.\(^{108}\) However, he must process it “in the usual manner,” which means that he must follow the contractual grievance procedure. Thus, in the lower steps he may not be entitled to be represented by counsel\(^ {100}\) or by a minority union\(^ {110}\) unless the contract so permits, and the bargaining representative is entitled to receive notice and to participate in accordance with the contract.\(^ {111}\) Moreover, the individual may not settle the grievance without the union’s consent, for as the Court recognized in *Elgin, Joliet*, both collective and individual interests are involved when the dispute arises from the terms of a collective agreement.\(^ {113}\)

The process thus required is remarkably similar to that described by the NLRB in *Hughes Tool*.\(^ {118}\)

When the individual has exhausted the grievance procedure in seeking to enforce his claim, his resort is not to the courts but to the Adjustment Board, for it has exclusive primary jurisdiction over individual claims as well as claims of unions and employers.\(^ {114}\) As express or implied. It might be found in the individual’s filing his grievance through the union, in his knowledge that his grievance was being discussed, and remaining silent, or if he is a union member, it might be found in the union constitution. But such authority cannot be obtained by the bootstrap device of including it in the collective agreement. 325 U.S. at 744-48; 327 U.S. 661 at 664-67 (1946) (on rehearing).


112. “To leave settlements in such cases ultimately to the several choices of the members, each according to his own desire without regard to the effect upon the collective interest, would mean that each affected worker would have the right to choose his own terms and to determine the meaning and effect of the collective agreement for himself. . . . To give the collective agent power to make the agreement, but exclude it from any voice whatever in its interpretation would go far toward destroying its uniform application.” 325 U.S. at 737 n.35.

113. 56 N.L.R.B. 981 (1944).

114. The one exception is that an employee who is discharged can treat his discharge as final and sue for damages. This is a shrunken remnant of Moore v. Illinois Cent. R.R., 312 U.S. 630 (1941), which now has very restricted application, see Transcontinental & W. Air, Inc. v. Koppal, 345 U.S. 653 (1953), but which the Court has not yet overruled. See Pennsylvania R.R. v. Day, 360 U.S. 548, 553 (1959).
the Supreme Court pointed out in *Pennsylvania R.R. v. Day*, the "need for experience and expert knowledge" and the "need for uniformity of interpretation and orderly adjustment of differences" is the same regardless of who is the claimant. In the proceedings before the Adjustment Board, the union is an interested party representing the collective interests of other employees in the interpretation of the contract. The individual is entitled at this stage to be represented by any person or union of his choice.

The individual employee may not only carry his own case to the Adjustment Board, but he is also entitled to notice and the opportunity to be heard in proceedings which effectively adjudicate his rights under the collective agreement. In *Estes v. Union Terminal Co.*, the union filed a grievance claiming that one employee, Lane, had improperly been given seniority over certain other employees. It carried the case to the Board and won, but the company refused to comply with the award on the grounds that Lane had been given no notice. To the argument that Lane was not entitled to notice, the court replied:

> [E]very person who may be adversely affected by an order entered by the Board should be given reasonable notice of the hearing. . . . No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that is the intent of the law. The case at bar illustrates how a single employee may be caught between the upper and nether millstones in a controversy to which only a labor organization and a carrier are parties before the Board.

This right to notice and hearing was solidified by *Elgin, Joliet*, and has been applied in subsequent cases involving competing claims of groups of employees.

The unifying purpose of these decisions under the Railway Labor

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116. Id. at 551.
117. 40 Ops. Att'y Gen. 494, 495 (1946). Under the NLRA the rule on representation is somewhat different; the individual may be represented by a friend or even a lawyer, but not by a minority union. Hughes Tool Co. v. NLRB, 147 F.2d 69, 73 (5th Cir. 1945). See discussion in Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 Colum. L. Rev. 731, 751-54 (1950).
118. 89 F.2d 768 (5th Cir. 1937).
119. Id. at 770. The court held that formal notice was not necessary, and found that Lane had actual knowledge of the proceedings and relied on the employer to protect his interests. Therefore, allowing him to intervene in the court proceedings would afford him due process of law. See also Nord v. Griffin, 86 F.2d 481 (7th Cir.), cert. denied, 300 U.S. 673 (1936); Primakow v. Railway Express Agency, Inc., 56 F. Supp. 413 (E.D. Wis. 1943).
120. Order of R.R. Telegraphers v. New Orleans T. & M. Ry., 229 F.2d 59 (8th Cir. 1956); Allain v. Tummon, 212 F.2d 32 (7th Cir. 1954); Hunter v. Atchison, T. & S.F. Ry., 171 F.2d 594 (7th Cir. 1948).
Act is to provide the individual employee procedural due process in having his substantive rights under the collective agreement determined. The very essence of procedural due process is to have those rights determined by an impartial tribunal. In Edwards v. Capital Airlines, the union protested that two pilots had been given seniority status greater than that to which they were entitled, and carried the dispute to a system board of adjustment. The two pilots appeared with lawyers who argued in their behalf, but the system board, made up only of representatives of the union and the carrier, ruled against them. In a suit to enjoin enforcement of the award, the court held that the collective contract provision making the board’s award final and binding could not foreclose the rights of a minority group when the union representing the interests of the many was actively an adversary party. “Persons in their situation must have available to them, at some point, an impartial look at a decision, thus made, denying their claims to substantial rights. This is the time-honored function of an equity court.” Recognizing that the award was “presumptively valid,” the court nonetheless declared the seniority provisions to be clear, interpreted them, and modified the decision of the system board. Even a decision of the Adjustment Board itself can be reviewed on the grounds that members of the Board, as officers of the union, had adverse interests such as to justify an inference of bias.

121. Although the employee has no right of judicial review from an adverse decision of the Adjustment Board, the courts can and must determine whether the employee has been denied due process of law in the proceedings. Ellerd v. Southern Pac. R.R., 241 F.2d 541 (7th Cir. 1957). See Union Pac. R.R. v. Price, 360 U.S. 601, 616-17 (1959); Barnett v. Pennsylvania–Reading Seashore Lines, 245 F.2d 579, 582 (3d Cir. 1957).

122. 176 F.2d 755 (D.C. Cir. 1949).

123. Id. at 761. In Arnold v. United Airlines, Inc., 296 F.2d 191 (7th Cir. 1961), a union-employer board empowered to settle grievance disputes intentionally reached a deadlock, hoping thereby to escape a charge of bias by enabling an arbitrator to decide the case before it. The aggrieved employees, however, seemed to lack full confidence in a “neutral” so named.

124. Hornsby v. Dobard, 291 F.2d 486 (5th Cir. 1961). The make-up of the Adjustment Board creates serious doubts as to fairness when cases are brought by individuals or unions not members of the Board. See Kroner, Minor Disputes Under the Railway Labor Act: A Critical Appraisal, 37 N.Y.U.L. Rev. 41, 46-48 (1962); Rose, The Railway Labor Act and the Jurisdiction of the Courts, 8 Lab. L.J. 9 (1957); Comment, Railway Labor Disputes and the National Railroad Adjustment Board, 18 U. Chi. L. Rev. 303 (1951). The problem is especially acute when an employee is discharged for failure to comply with a union security provision, for the interests of the union are always adverse and the Board’s tri-partite structure gives no guarantee of fairness. See Brady v. Trans World Airlines, 156 F. Supp. 82 (D. Del. 1957), modified on rehearing, 167 F. Supp. 469 (D. Del. 1958). For a practical solution developed for this problem see text accompanying notes 165-68 infra.
C. The Needs of Collective Bargaining

Both the National Labor Relations Act and the Railway Labor Act express the basic national policy of reliance on collective bargaining as a system of industrial government. Section 301 is but a segment of the statutory framework supporting and shaping that system, and the courts in constructing rules to govern the rights of individual employees should seek to further, not frustrate, the purposes of collective bargaining. But the purposes to be furthered are not simply those of the collective entities—union and management. The controlling purposes are those of the statute, for collective bargaining, a private institution, is charged with a public function.125

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

A major achievement of collective bargaining, perhaps its most important contribution to the American workplace, is the creation of a system of industrial jurisprudence, a system under which employer and employee rights are set forth in contractual form and disputes over the meaning of the contract are settled through a rational grievance process usually ending, in the case of unresolved disputes, with arbitration. The gains from this system are especially noteworthy because of their effect on the recognition and dignity of the individual worker.126

125. Congress, in amending § 9(a), made clear that it did not believe that exclusive control by the union over grievances was essential for collective bargaining to fulfill the statutory purpose. At the very least, § 9(a) upholds contracts which deny unions such exclusive control. Indeed, the legislative history makes it unmistakably clear that Congress considered such contracts preferable.

126. Comm. for Economic Development, The Public Interest in National Labor Policy 32 (1961). The importance of the collective agreement and its observance for the individual is underlined by § 104 of the LMRDA, which requires that the union provide employees with copies of the collective agreement. One of the purposes of this
The needs of collective bargaining, thus conceived, inevitably look two ways—toward the interests of the collective parties and their relationship, and toward the interests of the employees and their individual rights. The need for an effective union to obtain benefits and establish rules carries with it a need for individuals to receive those benefits according to the rules. The need for the collective parties to resolve disputes and meet changed conditions during the contract has a concurrent need for the individual to be fairly treated according to general rules. In framing the legal rules, the multiple needs of collective bargaining cannot be fully served by looking only to the collective relationship; for one of the major functions of collective bargaining may be frustrated if the employees’ interest in fair and equal treatment under established rules is not given significant weight.

If the law looks only to the needs and desires of union and management, it may give little protection to the individual. Both of the collective parties are primarily concerned with managing their relationship, and that is simplified by giving the union exclusive control over the prosecution of grievances. Three uses of the grievance procedure in managing the collective relationship are particularly relevant in defining individual rights. First, the grievance procedure is used to complete the collective agreement. Contract provisions may be intentionally silent or vague, or they may unwittingly leave gaps, include inconsistent terms, or fail to foresee future problems. Whatever its source, ambiguity reveals that the agreement is incomplete and requires continued bargaining. The forum for bargaining is the grievance procedure, and the unsettled rule is illustrated by a particular grievance. The process of completion is akin to the original negotiation of the agreement, and the collective parties have primary interests in evolving the general rule to fill out the agreement. But this bargaining process is more confined than the original negotiation, for the parties normally expect that the grievance will be settled within the range of reasonable interpretations which can be drawn from guides in the agreement, and if they are unable to settle the dispute, it will be resolved by arbitration.127

Second, the grievance procedure may be used to change the collective agreement and serve the needs of flexibility.128 During cut-

127. For an analysis of the dual role of the grievance procedure in “legislating” new employment standards and “administering” established standards, particularly with reference to individual rights, see Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 Colum. L. Rev. 731, 747-51 (1950).

128. One of the arguments most commonly used against recognition of individual
backs in employment the employer may lay off all women employees and retain men with lesser seniority or impose layoffs instead of spreading the work as required by the seniority clause. The union, by refusing to appeal the grievances, accepts an informal modification of the agreement. The purposes of both collective parties are served by the freedom to improvise exceptions to the general rules of the agreement. Of course, the line between changing the contract and completing the contract is indistinct, but the line is crossed when the settlement is beyond the range of reasonable interpretation of the agreement or contravenes a previously established rule. The indistinctness of the dividing line does not obliterate the essential difference in the two uses of the grievance procedure.

Third, the grievance procedure may be used as a clearing house for balancing off unrelated claims. Grievances may be bargained against each other, the employer granting one in return for the union's surrendering another. This may serve a useful and legitimate function, but also can raise serious problems. In Guzzo v. United Steelworkers, the union called a strike during the contract term. The employer sued the union for damages and singled out one employee for discharge. The union protested the discharge as discriminatory and processed the employee's grievance up to arbitration, but at that point the union agreed to withdraw the grievance in return for the employer's dropping his suit against the union. When the grievance procedure becomes clogged, large numbers of grievances may be settled in a wholesale exchange. Thus in Elgin, Joliet, the union's surrender of back pay claims was part of a package settlement of sixty-one different grievances.

From the union's institutional viewpoint, exclusive control over grievances enhances the union's prestige and authority. Through the prosecution of grievances it can daily demonstrate its effectiveness as guardian of the employee's interests; successful settlement builds bonds of loyalty from those benefited; and refusal to process under scores the union's authority. Conversely, grievances settled with

rights under the collective agreement is that "a prime function of the grievance procedure is to secure uniformity in interpreting the agreement and building up a 'law of the plant' with respect to matters not spelled out in the agreement." Ostrofsky v. United Steelworkers, 171 F. Supp. 782, 790 (D. Md. 1959). See discussion in Cox, Individual Enforcement of Collective Bargaining Agreements, 8 Lab. L.J. 850, 855 (1957). This argument puts the shoe on the wrong foot, for it is the individual who insists on uniformity—that he be treated according to the "law of the plant" which governs all others under the agreement. It is the collective parties who insist on exceptions, variations and departure from uniformity.

131. 325 U.S. at 712, 715.
individuals or other unions makes the majority union appear unnecessary, if not ineffective, and creates conflicting loyalties. More importantly, the union as representative of all of the employees has a collective interest in the individual’s claim. If the claim is granted, it may be at the expense of other employees—seniority, promotion, and job assignment cases are only the most obvious examples. If the claim is denied, it may provide a precedent which casts a cloud over other employees’ rights. The union has not only an interest but a responsibility to protect the other employees’ rights. In addition, it has a separable institutional interest that the bargain it has made not be remade or frittered away by individual action.

From management’s viewpoint, vesting exclusive control over grievances in the union simplifies contract administration. Friction and distrust on the part of the union are reduced, and all grievances are funneled through a single established procedure which orders appeals up the chain of management control. Most important, it simplifies management’s obtaining definite answers to questions arising under the collective agreement. Grievances settled with the union cannot return to haunt management in the form of individual claims; dispensations granted by union officers cannot be challenged by individual employees. The employer can proceed with full security, for the union’s control over the grievance procedure shields him from possible liability to his employees.

These needs and desires of the collective parties, and their use of the grievance procedure to manage their collective relationship are all served by giving the union exclusive control over the grievance procedure. Obviously, not all of these needs are equally compelling nor the desires worthy of fulfillment in the same measure. More important, however, many of these needs do not require such totality of union control, or may be adequately met through other methods. The purpose here is only to identify the principal collective needs, not to prescribe the measure or method of meeting them. That must be done through specifying the design of the substantive law.

The needs of collective bargaining look also to the interests of the employees and their individual rights. In simple economic terms, the individual’s interest is often of first magnitude, for more than three-fourths of the cases coming to the courts involve seniority rights or disciplinary discharges. The individual’s very livelihood is at stake. In personal terms, loss of seniority undermines his sense of security, and discharge darkens his good name. Making the union the exclusive representative for processing grievances subordinates those interests of individual employees and endangers interests which collective bargaining purposes to protect.
The grievance procedure is particularly susceptible to abuse, for through it individuals or groups may be singled out for arbitrary treatment. In *DiSanti v. United Glass Workers*, a former union officer bid for and was given a promotion. The grievance committee, dominated by his political rival, insisted that he be removed from the job and management complied. And in *Woodward Iron Co. v. Ware*, two employees who had been discharged sought to persuade the union to process their grievances but their request was summarily rejected by hostile members. Seniority grievances are especially vulnerable to discrimination. In *Edwards v. Capital Airlines*, two pilots who had been reinstated found themselves pitted against all those lower on the seniority list; the union officers cast aside the contract and embraced the majority. And in *Cortez v. Ford Motor Co.*, women who were systematically laid off in violation of the seniority provision found that the local union president had informally arranged with the employer that regardless of the contract, men should have preference. The danger of unfairness is magnified and its presence obscured when the grievance depends on a disputed issue of fact. Thus, in *Cortez*, the union thinly veiled its discrimination by claiming that the jobs were too heavy for women; and in *Matter of Soto* the union conceded that unwanted employees had engaged in a slowdown. Most grievances involve some factual issue, and the union, by rejecting the employees' version, can act “responsible” and wear the face of fairness.

The individual's interest may more often be vitiated without vindictiveness or deliberate discrimination. Incomplete investigation of the facts, reliance on untested evidence, or colored evaluation of witnesses may lead the union to reject grievances which more objective inquiry would prove meritorious. Union officials burdened with institutional concerns may be willing to barter unrelated grievances or accept wholesale settlements if the total package is advantageous, even though some good grievances are lost. Concern for collective interests and the needs of the enterprise may dull the sense of personal injustice. Thus in *Union News Co. v. Hildreth*, the management of a restaurant found that the food costs were out of line with past experience, a fact indicating wastage, serving too large portions, or

133. 261 F.2d 138 (5th Cir. 1958).
134. 176 F.2d 755 (D.C. Cir. 1949).
137. See, e.g., Donato v. American Locomotive Co., 283 App. Div. 410, 127 N.Y.S.2d 709 (3d Dep't 1954), and Fray v. Amalgamated Meat Cutters, 9 Wis. 2d 631, 101 N.W.2d 782 (1960), where grievances were lost because of the union's delay in prosecuting them.
138. 295 F.2d 658 (6th Cir. 1961).
theft. Unable to discover who or what was at fault, management picked five of the twelve employees at random and replaced them. When food costs appeared to go down, this was taken as proof that the culprits had been caught and the five employees were discharged. The union agreed that "just cause" had been shown and refused to process a grievance on behalf of the discharged employees.

Although the frequency of unfairness in grievance handling is impossible to measure, there is no doubt that the danger to the individual can be substantial. Within union groups cliques are not uncommon, political rivalries are often sharp and factional fights are bitter. Refusal to process grievances or "botching" them is a subtle but effective weapon. Seniority grievances are vulnerable to group pressures, and "horse-trading" of grievances can become commonplace. That these are real dangers is evidenced by the few studies made and confirmed by leading commentators.

Beyond these dangers of malice, majority intolerance, or official insensitivity, there are less tangible, but more pervasive values. One of the functions of collective bargaining is to replace vagrant discretion with governing rules. The individual, by his ability to insist that those general rules be observed, gains an assurance of fair and equal treatment and a sense of dignity and individual worth. If the union, by ad hoc settlement, can set aside the rule and bar the aggrieved individual from access to any neutral tribunal, these values are denied. What is involved, and what collective bargaining seeks to bring to industrial life, are elemental notions of due process—the right of a person to be governed by the law of the land and the right to be heard in his own cause.

Although union and management may fear that transplanting such notions of due process into our system of industrial government will complicate their collective relationship, experience under the Railway Labor Act suggests that those fears may prove unfounded.

139. See ABA Report on Individual Grievances 33, 41-44, 50 Nw. U.L. Rev. at 153-56. In this study questionnaires were sent to over 1,000 labor lawyers. Out of 175 replies, two-thirds stated that in their experience they found that meritorious grievances were at times ignored or surrendered because of political pressures within the union. See also Fleming, Some Problems of Due Process and Fair Procedure in Labor Arbitration, 13 Stan. L. Rev. 235 (1961); Schubert, Individual Rights in the Grievance Procedure of the Railway Labor Act (1961) (unpublished study in Yale Law Library); Comment, Railroad Labor Disputes and the National Railroad Adjustment Board, 18 U. Chi. L. Rev. 303 (1951).

The collective parties greeted the Elgin, Joliet decision with alarums that it would "shackle" the unions, "cause a breakdown of grievance handling" and jeopardize the whole process of orderly adjustment of disputes. However, no such consequences followed. The right of the individual to carry his case to the Adjustment Board is now accepted and the rules of notice, hearing and fair tribunal have proved livable.

The interests of the collective parties and the interests of the individual employees do not stand in simple opposition to each other; they cannot be lumped for weighing on the scale of judgment to determine whether individuals should or should not have rights under collective agreements. The interests do not clash directly, and the choice is not whether the union should have complete control or the individual full independence. We are not required to choose between polar alternatives; we are rather required to work out an accommodation of the multiple needs of collective bargaining as conceived by our national labor laws. The significant inquiry is what structure of legal rules can be designed which will best serve all of the multiple needs of collective bargaining, and to what extent can the varied interests be mediated by details in the design. This is the task of the next section.

IV

THE STRUCTURE OF SUBSTANTIVE LAW

From these varied sources which project the national labor policy, the courts must build a body of federal substantive law defining the relative rights of individual employees and unions under the collective agreement. The state courts are as much bound by this responsibility as the federal courts, and their task is made more difficult by the clutter of precedents which have largely ignored controlling federal concerns. The incomplete words of section 9(a), the suggestive experiences under the Railway Labor Act, and the diverse needs of collective bargaining provide no ready-made blueprint. From these,

however, emerge three guiding rules which provide a basic framework for the law.

*First,* the individual employee is bound by the substantive terms of the collective agreement. He cannot bargain individually to vary the contract or set it aside; he can only demand compliance with its terms. He cannot deny the union's power to make a binding agreement; he can only insist that when the agreement is made, he shall not be denied its benefits. The very essence of the individual's claim is that the terms and conditions of his employment are governed by the collective agreement and that neither he, nor the union, nor the employer can refuse to live by it.

The collective agreement by which the individual and the collective parties are governed is not limited to the four corners of the written instrument. It is the whole agreement, including industrial customs, established practices, understandings and precedents which infuse the contractual words with life and meaning. The collective agreement inevitably includes incomplete terms and unresolved ambiguities; and the individual's rights, like those of the collective parties, are subject to these gaps and uncertainties. The individual whose claim is disputed cannot insist on his interpretation; he can only insist on access to an appropriate procedure through which that dispute can be resolved. In this sense, the individual's right under a collective agreement is essentially procedural—the right of access to a tribunal, court or arbitrator, to have his substantive claims determined and enforced.

*Second,* the union has a substantial interest in the settlement of all individual claims arising under the collective agreement. The employee and the employer cannot make a binding settlement without the consent of the union, nor can they submit their dispute to a tribunal without making the union a party. The union has a right to be heard on behalf of other employees and its institutional interests.

But this right of the union has more than procedural significance, particularly when the individual's claim arises out of a gap or ambiguity in the collective agreement. If the union supports management's interpretation, this will be highly persuasive to the court or arbitrator so long as the interpretation is within the range of reasonableness as determined by the words, practices and precedents of the parties. Thus the collective parties will retain a dominant voice in completing the terms of the agreement, thereby satisfying in substantial measure this need of collective bargaining.

*Third,* the collective parties can change the general rules governing the terms and conditions of employment, either by negotiating a
new agreement or by formally amending the old. The individual has no right to have the contract remain unchanged; his right is only to have it followed until it is changed by proper procedures. Although contract making (or amending) and contract administration are not neatly severable, they are procedurally distinct processes. Most union constitutions prescribe the method of contract ratification, and it is distinct from grievance settlement; the power to make and amend contracts is not placed in the same hands as the power to adjust grievances.\textsuperscript{145} Indeed, many union constitutions expressly bar any officer from ratifying any action which constitutes a breach of any contract.\textsuperscript{146} Through the ability to change the agreement, the collective parties retain a measure of flexibility. They are not free, however, to set aside general rules for particular cases, nor are they free by informal processes to replace one general rule with a contrary one.

These three basic guides go far toward defining in broad terms the relative status of the individual and the union, fulfilling the essential purposes of the federal statutes and accommodating some of the most pressing needs of the collective parties in managing their collective relationship. Within this framework it is necessary to sketch some of the details of the design of the federal substantive law, for it is in those details that the national labor policy is expressed and the multiple needs of collective bargaining finally accommodated. In marking out the rights of the individual, it is helpful to examine separately his rights:\textsuperscript{147} (1) when the union supports his claim; (2) when the union refuses to support or actively opposes his claim; and (3) when the union carries a case to arbitration that directly affects his interests. All have common considerations, but each raises distinctive problems.

\textsuperscript{145} Many union constitutions require that all collective agreements be approved by the international union, some create special committees or conferences to negotiate and approve agreements and a substantial number require ratification by membership votes. National Industrial Conference Bd., Handbook of Union Government Structure and Procedures 49-54 (1955). In contrast, grievance settlements, particularly at the lower steps, are commonly made by the local officers or shop stewards.

\textsuperscript{146} For example, the Constitution of the United Auto Workers provides: "No officer, member, representative or agent of the International Union or of any Local Union . . . shall have the power or authority to counsel, cause, initiate, or participate in or ratify any action which constitutes a breach of any contract entered into by a Local Union or by the International Union . . . ." Art. 19, § 1. For a similar provision in the Constitution of the United Steelworkers see Guzzo v. Steelworkers, 47 L.R.R.M. 2379, 2381 (Cal. Super. Ct. 1960), cert. denied sub nom. Smith v. Superior Ct., 365 U.S. 802 (1961).

\textsuperscript{147} Here, as in the rest of the discussion, the individual may in fact be representative of a group of employees, or the group may seek to assert their common rights.
1. The Rights of the Individual When the Union Supports His Claim

An employee may seek to present and process his own grievance even though the union is ready and willing to press it on his behalf. He may distrust the union and fear that it will make but a half-hearted presentation; he may actively dislike unions and wish to avoid involvement or obligation; or he may favor a rival union and prefer that it shall obtain the credit. The evidence available indicates that the third reason is the main motivation in the great majority of cases in which an individual seeks to by-pass a ready and willing majority union. The proviso of section 9(a) clearly precludes an individual from processing his grievance through a minority union, but he can have a "more experienced friend" speak for him, and this is often an officer or attorney for the rival union.

Such grievances inevitably undermine the prestige of the statutory representative and can sow seeds of disruptive tension. Moreover, a poor presentation and unfavorable settlement may create a damaging precedent. The union must then bear the burden of appealing and is saddled with the handicaps of overcoming an adverse decision. Such grievances also present problems for management, for dealing with an individual invites distrust by the union, and settlement may ultimately require consultation with the union.

The intersecting needs and desires of the parties would seem to be best accommodated by requiring the employee to file his grievance through the statutory representative and have it processed through the regular channels. By giving the individual a right to be present and an opportunity to add what he believed necessary, he would be assured that his claim had been forcefully argued. Whether the proviso in section 9(a) requires that the individual be given greater rights is unclear, for neither the words nor the legislative history distinguish sharply between the proviso's two functions—limiting the employer's duty to bargain, and limiting the union's control over the individual employee. The legislative history makes it reasonably clear that an employer can legally bargain for the freedom to deal with individuals on grievances and restrict the union's role to protesting the adjustment. However, there is no compelling evidence that the

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149. Hughes Tool Co. v. NLRB, 147 F.2d 69, 73 (5th Cir. 1945); Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 Colum. L. Rev. 731, 751-58 (1950); Sherman, supra note 140, at 55.
150. If the union is not consulted, it might file a grievance claiming that the employer's settlement with the individual was contrary to the terms of the collective agreement and carry it to arbitration.
right of the individual as against the collective parties was intended to be more than the right to participate and the right not to be bound by the settlement without consent. The pattern under the Railway Labor Act has been that the individual may be limited to these rights at the lower steps of the grievance procedure, but before the National Railroad Adjustment Board, he has free choice of representatives.

2. The Rights of the Individual When the Union Refuses to Press or Actively Opposes His Claim

The union may refuse to process an employee's grievance because it disbelieves his version of the facts, disagrees with his interpretation of the agreement, believes the grievance is too trivial, or because of personal hostility or political pressures. In cases such as those involving seniority, the union may actively oppose the individual's claim or even press a grievance on behalf of competing claims. All of the cases, however, have the common element that the union accepts a result which the individual believes violates his rights under the collective agreement and he seeks to enforce those rights himself. The effort to enforce presents a cluster of subordinate problems which must be resolved in the light of the statutory policies and the needs of collective bargaining.

(a) What procedures must the individual follow in enforcing his claim? The successive steps of the grievance procedure provide an established and orderly process for consideration and review of disputes arising under the collective agreement. It is designed to aid in resolving those disputes, and ends with appeal to the highest level of authority. All grievances, regardless of who is the grievant, should be channeled through this process, for it simplifies the administrative work of management; provides the maximum opportunity


152. See note 117 supra and accompanying text.

153. The individual can enforce only those provisions of the contract which are for his personal benefit, not those solely for the benefit of the union as an institution. The dividing line may be difficult to define precisely; but the problem is more theoretical than real, for the reported cases suggest that borderline provisions are not the ones which give rise to real cases.

Distinctions between past or "accrued" rights and future rights are not meaningful in this context, for a grievance settlement on accrued rights also articulates standards applicable for the future, and any adjudication of the grievance must also look both ways. See Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 625 (1956). The distinction might be relevant if the parties sought to amend the contract and, for example, canceled certain back pay claims.
for settlement; and helps insure that the substantive terms of the settlements will be uniform. If the union processes the grievance through some of the steps and then withdraws, the individual should be required to appeal through the succeeding steps. If the collective parties bar his grievance, then further appeals should be excused, for an individual's rights cannot be conditioned on his exhaustion of nonexistent remedies.

The grievance procedure in such a case may become three-cornered in nature, for the union continues to be a party. In some cases, such as discipline, the union may be neutral, torn between hoping for the individual's hopeless cause and fearing the embarrassment of his possible victory. In others, such as seniority, the union may be more opposed to the individual's claim than the management. No binding settlement is possible without the agreement of all three parties.

Conceivably there may be more than two competing claims—three or more employees may seek the same promotion, or three groups of employees may each claim top seniority. Such cases are in fact less common than often imagined; only one reported case appears to have involved such a dispute. When such a case does arise, it would seem that all claims should be represented in the grievance procedure, whether by the union, management or other spokesmen, so that any settlement would be final and binding on all.

(b) What tribunal should determine the individual's unsettled grievance? The union and the employer are entitled to have a uniform body of rules govern their relationship, and the very core of the individual's claim is his right to equal treatment. But such uniformity and equality cannot be achieved if individual grievances are adjudicated

154. The courts have generally required exhaustion of the grievance procedure. See Blumrosen, Legal Protection for Critical Job Interests: Union Management Authority Versus Employee Autonomy, 13 Rutgers L. Rev. 631, 642-51 (1959); Hanslowe, Individual Rights in Collective Labor Relations, 45 Cornell L.Q. 25, 36 (1959); Summers, Individual Rights in Collective Agreements: A Preliminary Analysis, 9 Buffalo L. Rev. 239, 250 (1959). There is no plausible reason why exhaustion should be excused in discharge cases where the individual sues only for damages. See discussion note 39 supra.


156. This is the procedure contemplated by Hughes Tool Co. v. NLRB, 147 F.2d 69, 73 (5th Cir. 1945), and implicit in the Railway Labor Act cases cited notes 118-24 supra and accompanying text. It also follows the interpretation of § 9(a) favored by Professor Cox shortly after the 1947 amendments. Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 274, 301-03 (1948).

by courts and union grievances are decided by arbitrators.\textsuperscript{158} As the Supreme Court has said:

The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.

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The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.\textsuperscript{159}

This mirrors the view of the parties that the deciding of disputes by an arbitrator is a part of the very substance of the agreement. More than that, it expresses the larger federal policy, as enunciated by the Supreme Court, that disputes under collective agreements should be resolved through arbitration and that courts ought not substitute their judgment for that of arbitrators. All of these considerations point unmistakably to arbitration as the proper forum for individual grievances.\textsuperscript{160}

These considerations have been largely ignored by the courts in applying state law. Arbitration rests solely on contract, they reason, and the arbitration clause is worded as giving only the union and the employer the right to demand arbitration. The individual employee, therefore, has no right to arbitration.\textsuperscript{161} Often, as in \textit{Parker v. Borock},\textsuperscript{162} this logic is but a prelude to denying him any rights under state law.
the collective agreement—essentially what the collective parties intended when they denied him access to arbitration. Whether they intended that if he had rights under the collective agreement his claims should be adjudicated by a court rather than an arbitrator seems much more doubtful. The more serious weakness in the logic, however, is that it severs labor arbitration from its special context and cramps it into common contract molds. If the collective parties cannot by agreement prevent an individual employee from acquiring substantive rights under collective agreement, they ought not be able to bar him from the procedure which they have chosen to help give the agreement life and meaning, nor should he be free to choose another forum. This again is the pattern of the Railway Labor Act—the Adjustment Board has primary and exclusive jurisdiction over disputes arising under the collective agreement, whether brought by unions or individuals.

(c) How shall the arbitrator for individual claims be chosen? If arbitration is the proper forum, it might be argued that individual claims should come before the same arbitrator as union grievances. But this would mean that the individual would face an arbitrator named by his opponents. The more appropriate solution is an arbitrator acceptable to all three parties. If the collective agreement contemplates *ad hoc* arbitration, such tri-partite selection of the arbitrator would not affect the substance of the agreement. If the collective agreement contemplates a permanent umpire, his personal experience, attitudes and judgment may be more of the substance of the bargain. However, the individual employee, aware that the arbitrator’s tenure depends on the collective parties, may have less than full confidence in his fairness, even though he may in fact be more independent than an *ad hoc* arbitrator. The umpire himself may find his judgment disturbed by doubts as to his own objectivity. A substitute for the particular case may, therefore, be necessary, and though the specially selected arbitrator is not the same person, he will bring to the case much the same attitudes, considerations and competence.

Experience under the union shop amendment to the Railway Labor Act is instructive. Shortly after the passage of the amendment, a presidential emergency board recognized that appeal to the Adjust-
ment Board was not adequate protection to an employee discharged under a union shop clause. It recommended that the individual should have the right to request arbitration and should have an equal right with the union and carrier in selecting the arbitrator. A number of unions and carriers have included provisions for such arbitration in their union shop agreements; several arbitrations have been held under these provisions, some resulting in reinstatement of improperly discharged employees.

(d) Who shall bear the costs of arbitration of individual claims? Obviously, the union cannot be saddled with the costs of presenting worthless grievances brought by mistaken or litigious employees. Therefore, if the claim is rejected the individual who insisted on an adjudication of his grievance against the wishes and judgment of the union should bear what would normally be the union’s share of the cost of arbitration. Placing this financial burden on the individual will serve to discourage, in the very way on which the law normally relies, the pursuit of fanciful claims.

If the individual’s claim proves meritorious, the individual has performed the union’s function in enforcing the agreement and might logically call on the union to share the costs of arbitration. However, the union’s duty to represent does not require enforcing every jot and tittle of the contract. If an employee is sent home for alleged loitering in the washroom, the grievance may be worth only a few dollars, establish no precedent and involve no principle. The union might reasonably refuse to spend twenty times the value of the claim to get an arbitrator’s award declaring management mistaken. Or a union might decide because of limited funds not to press certain categories of grievances where the collective interest is not sufficient, and leave these grievances to individual enforcement. In such cases the individual, even though he wins, should bear the costs, for he is entitled to no more than equal protection. However, if the union refuses to prosecute only because of doubts as to the outcome in arbitration, it cannot deny responsibility for the costs after the individual, at his own risk, has dispelled those doubts by winning.

The employer continues to be responsible for his share of the

arbitration costs regardless of whether the union or an individual is the prosecuting party. Though there may be fears that the employer will be harassed and burdened by litigious employees, the danger is easily exaggerated, for the financial burden on the individual in pressing the claim is relatively much greater, and there will be few who will challenge the combined forces of union and management.100

(e) What standard shall the arbitrator use in determining an individual claim? The obvious answer is the same standard as used in other grievances. This, however, oversimplifies matters. Normally an arbitrator is concerned with accommodating the competing claims of union and management, but individual claims often find the collective parties agreed. This poses psychological, if not occupational, hazards for the arbitrator. He must avoid being unduly influenced by the position of the collective parties and recognize the interests of the individual.170

To the extent that the grievance involves questions of fact, the arbitrator’s task is simply to weigh the evidence as objectively as possible. Questions of interpretation, however, can be more complicated. The arbitrator must, of course, look beyond the written instrument to the practices, implicit understandings, and industrial context which make up the total agreement as he must in deciding any other grievance. But this may give no firm answer, for the total agreement may still be ambiguous or incomplete. In such a case there is reason for giving weight to the collective parties concurrence in how the grievance should be settled. The arbitrator’s inquiry is whether the collective parties’ result fits within the structure of rules and principles of the total agreement. Does that result express adoption of a general rule, or is it an improvisation for the particular case? Does it add a new rule to fill a gap, or does it supplant an old rule for a different one? These questions, to be sure, may not always have easy or certain answers, but they suggest guides for accommodating the coexistent interest of the individual in being governed by established general rules and the interest of the collective parties in completing their agreement.171

169. Fears that opening arbitrations to individuals will make management reluctant to enter into arbitration agreements seem unfounded, for such a course would not free the employee from liability but instead make him subject to suit in court.

170. Many feel that this is expecting too much of mere humans seeking the benefits of the affluent society, and the author is not untroubled by doubts that the method of selecting arbitrators is conducive to objectivity in protecting individual rights. However, there are hopeful signs that arbitrators are developing a sense of responsibility for the individual. See Fleming, supra note 139; Wirtz, Due Process of Arbitration, 11 National Academy of Arbitrators Ann. Meeting Proceedings 1 (1958).

171. This does not assume there is any “right” interpretation, nor does it obstruct
3. The Right of the Individual To Intervene in Arbitration

The practical objections commonly raised to allowing an individual to demand arbitration of his grievance have little or no application when the individual seeks to intervene in arbitration initiated by the union or the employer. The collective parties' freedom to agree is not circumscribed, for the arbitration manifests their inability to agree. They are not drawn unwillingly into the procedure nor saddled with a wholly uninvited burden. At most, the costs may be increased a fraction by the addition of an intervenor. Selection of the arbitrator poses little problem, for the intervening individual will normally be bound by the collective parties' choice. Even if the policy considerations favored allowing the union to settle the employee's grievances against his will, it does not follow that the individual should be excluded from the arbitration of his unsettled grievance. He has important interests at stake—whether or not they are denominated rights—and a substantial claim to being heard.

Court decisions denying the right of the individual to intervene have most often used the sterile and unresponsive contract analysis that the arbitration clause did not make the individual a party to the arbitration, drawing no distinction between the right to compel and the right to intervene. In Bailer v. Local 470, Teamsters, the court also saw practical difficulties in intervention. In September, 1957, Bailer seconded a motion that the local oppose the election of Hoffa as president of the international. The local president refused to put the motion to a vote and declared that the local's vote would be for Hoffa. Bailer and others then circulated a petition to the joint council asking it to order the local president to conduct the union's affairs in a democratic manner. The day that Hoffa was elected, Bailer was discharged on the grounds that he had been circulating the petition during working hours. The local submitted the case to arbitration, but denied Bailer's request to have his own counsel represent him at the arbitration. When the arbitrator upheld the discharge, Bailer claimed that the adverse decision was the result of the union's failure to represent him in good faith before the arbitrator. Said the court:

Were each aggrieved employee permitted to be represented at an arbitration by private counsel who has the right to question witnesses and the day-to-day co-operation of the parties in working out their problems within the guideposts of the agreement.

otherwise participate fully in the proceedings, the Local, as a trustee representative, would be effectively unable to perform its duty. Union officials and private counsel might well be at complete loggerheads over what witnesses to present, in what order to present them, the efficacy of cross-examination of a particular witness, or over any one of the myriad decisions that enter into the conduct of a trial proceeding.\textsuperscript{176}

Such reasons lose persuasiveness when confronted with the realities of modern procedural rules allowing liberal intervention and joinder of parties.\textsuperscript{178} In unfair labor practice proceedings before the National Labor Relations Board, employers or unions who file charges are allowed to participate fully along with the Board's counsel in prosecuting the complaint.\textsuperscript{177} It is a strange lack of confidence in the adaptability of informal arbitration procedure to argue that it cannot cope with such problems when the way has been shown by the courts and administrative agencies.\textsuperscript{178}

Intervention may be sought in three types of cases. \textit{Bailer v. Local 470} represents the first type of case. The individual may fear that the union in presenting his claim will not make out the best possible case—either out of incompetence, indifference or malice. Where those fears are well-founded, allowing the individual separate counsel is imperative if the arbitrator is to make a sound decision. If those fears are not well founded, to deny the individual counsel of his choice and force upon him counsel he distrusts, deprives him of the feeling that he has had a fair hearing. The minor problems of having an additional advocate is not a large price to pay for confidence in the process. For practical reasons, the right to intervene ought not depend on proof that the fears are well founded, for inquiry into that issue will create added problems, impose more burdens, and be more disruptive than to allow the individual separate counsel in those few cases when his fears are great enough to lead him to bear the costs.

\textit{Clark v. Hein-Werner Corp.},\textsuperscript{179} represents the second type of case—the individual (or group) interest is actively opposed by the union and supported by the employer. Grievances rooted in seniority

\textsuperscript{175} Id. at 193, 161 A.2d at 347.

\textsuperscript{176} See generally 3 Moore, Federal Practice 2701-25 (2d ed. 1948); 4 id. 1-64.

\textsuperscript{177} See Silverberg, \textit{How to Take a Case Before the National Labor Relations Board} 172 (1949). On intervention and consolidation in administrative agencies generally, see 1 Davis, \textit{Administrative Law} 564-78 (1958).

\textsuperscript{178} Arbitrators, in their pragmatic ambivalence, insist that arbitration is carried on between the collective parties, and the individual has no right to intervene, but Professor Fleming's study suggests that in most cases they in fact "work something out" to enable the individual to be heard. The arbitration process has proven to have more than adequate flexibility. Fleming, supra note 139, at 240-42.

\textsuperscript{179} 8 Wis. 2d 264, 99 N.W.2d 132 (1959), rehearing denied, 8 Wis. 2d 277, 100 N.W.2d 317 (1960).
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rights are commonly of this character. When the issue is the right of supervisors to seniority upon return to the production unit, management has strong interests and may be a vigorous spokesman; but when the issue is simply the order of layoff, transfers, or even promotion, management's interest may reach little beyond saving face and back pay. Employees in an organized plant ought not be compelled to look to the employer as their defender, and they might understandably have less than full confidence in the employer as counsel. Again, practical problems of proof and the burden of a second proceeding weigh against inquiring into the question whether the employer will adequately represent the employee's interest. Much simpler and much more productive of fairness and the sense of fairness is to allow the individual or group to intervene and be heard on their own behalf.

_Iroquois Beverage_\(^\text{8}\) represents the third type of case. The employer gave work to group A, the union insisted it should go to group B, and at arbitration group C sought to intervene, claiming it had seniority over both other groups. Obviously, without intervention the interests of this group will not be represented, and the arbitrator may not be fully informed of the ramifications of his decision. Theoretically, the arbitration could become multi-sided and the proceedings cumbersome, but this will in fact rarely occur, for the dispute will almost always narrow down to the two or three most plausible interpretations. The arbitration will probably never become as complicated as proceedings which courts commonly confront in litigation arising out of decedents' estates, trusts, partnerships or corporate ownership.

The right to intervene need be extended only to those directly affected by the outcome of the case. Those who are indirectly affected by the decision as a precedent have no greater claim to being a party to an arbitration than to any other legal proceeding. Repercussions may reach remote employees, but that does not make their interest sufficient to require intervention. Indeed, it is the primary concern of the union to urge these more widespread and remote consequences before the arbitrator. The need is only that those immediately and tangibly affected by the specific case be allowed full opportunity to be heard.\(^\text{181}\) Though the line may be hard to define, it is less difficult to draw in practice.\(^\text{182}\)

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\(^{182}\) Recognizing the right of groups to intervene does not require allowing each
Closely related to the right to intervene is the right to notice of the hearing. Since the function of the notice is to give an opportunity to intervene, it need not be formal. If only a single employee is involved, as in a discharge case, he could be notified by mail or any other direct communication. The requirement of notice in such cases adds no burden, for the individual normally has actual knowledge and is commonly present at the hearing. Where large numbers are involved, as in seniority cases, posting of notice in an appropriate place or any other way designed to adequately call it to their attention should be sufficient. It is not necessary that every member of the group have actual knowledge of the proceedings, for if most of the group knows, there is in fact ample opportunity to intervene.

The rights of the individual, whether to process his grievance on his own behalf, appeal a grievance settled by the union, or intervene in an arbitration initiated by the collective parties, may be waived by his authorization of the union to act for him, or by his consent to its action. Unions have sought to secure such authorization in two ways. First, the union may include in the grievance form signed by the individual a provision granting the union full authority to negotiate and settle the grievance without further notice or consent. It would seem that the union could refuse to process the grievance unless it was given such authority; but it could not at the same time insist that all grievances be processed by the union, for this would make the individual's claim wholly subject to the union's control. Such authority is of little value where groups are involved, for it can bind only those signing the grievance and not other members of the group; and if the grievance involves competing claims, it cannot bind those whose interests the union opposes.

The second method used by unions to secure authorization is to include in their constitutions clauses stating that the union is the exclusive agent to represent all members in the presentation and settlement of all grievances. These provisions have limited reach, for they apply only to members of the union. If the union has a union shop agreement, all employees may be required to become members, but since authorization assumes voluntariness the constitutional clause member of the group to intervene separately. Their common interests may be adequately presented by a common representative, following principles developed by courts in handling various types of class actions. See Lenhoff, supra note 155, at 22-23.

183. See Elgin, J. & E. Ry. v. Burley, 327 U.S. 661, 666 n.9 (1946); Hunter v. Atchison, T. & S.F. Ry., 171 F.2d 594 (7th Cir. 1948); Estes v. Union Terminal Co., 89 F.2d 768 (5th Cir. 1937).

184. What would constitute authorization or consent was indicated in the first Elgin, Joliet decision, 325 U.S. 711, 744-48 (1945), and was spelled out in greater detail on rehearing, 327 U.S. 661 (1946). See note 107 supra.
would seem thereby to be rendered unenforceable. Otherwise, the employer and union, by their collective agreement, would be able to make the union the exclusive representative for settling grievances, contrary to the proviso of section 9(a). The fact that membership is compelled should invalidate the blanket authorization.\(^{185}\) Moreover, to enforce the constitutional provision against an unwilling employee would seem to constitute unlawful discrimination under \textit{Radio Officers Union v. NLRB}.\(^{186}\) If a member openly repudiated the clause, the only recourse of the union would be to expel him.\(^{187}\)

The individual may consent to the union's action, either expressly or by acquiescence. The fact that he knows that the union is processing a grievance, however, would not ordinarily indicate assent to an unfavorable settlement made without warning. Once the settlement is made and known, then failure to object would show consent. Notice that the union was demanding arbitration would show willingness to be represented by the union in arbitration unless a request were made to intervene.

The limited reach of authorization and consent means that settlements made by the collective parties alone in a grievance meeting may not always be final. However, an employee who is directly affected can upset the settlement only by showing that it was in conflict with the collective agreement. The number of cases in which the employee will challenge the settlement made by the collective parties will be

\(^{185}\) This result probably would not flow from an "agency shop" clause which does not require membership but only payment of a "bargaining fee." Under the Railway Labor Act, an employee may comply with a union shop contract by maintaining his membership in another union national in scope. Railway Labor Act § 2 Eleventh (c), added by 64 Stat. 1238 (1951), 45 U.S.C. § 152 Eleventh (c) (1958). He is not therefore always compelled to join the majority union as under the NLRA, and a competing union then has exclusive authority.

\(^{186}\) 347 U.S. 17 (1954).

\(^{187}\) Constitutional authorization clauses are possibly vulnerable on two other grounds. Some constitutions also have clauses declaring that no officer or member shall have the authority to "ratify any action which constitutes a breach of any contract." UAW Const. art. 19, § 1. See note 142 supra. When an individual appeals from the union's settlement his claim is that the settlement is contrary to the contract and therefore beyond the power of the grievance committee. See UAW Public Review Board Case No. 59 (Dec. 29, 1961). He may be able to use this clause, which was intended to protect the union from liability under § 301, to claim that the settlement was beyond the authority granted by him. It has also been suggested that such authorization clauses are invalidated by Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act, 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(4) (Supp. II, 1959–1960). The effect of such a constitutional provision is to bar the member from bringing an action to enforce his rights under the collective agreement, and thereby limit his rights to sue as protected by the Bill of Rights. See Powell, The Bill of Rights—Its Impact Upon Employers, 48 Geo. L.J. 270, 272 (1959). See also Allen v. Armored Car Chauffeurs, 185 F. Supp. 492, 495 (D.N.J. 1960); Food Fair Stores v. Raynor, 220 Md. 501, 503 n.1, 154 A.2d 814, 815 n.1 (1959).
very small. Through devices such as specific authorizations, notice of proposed settlements, or ratification, the unusual cases can be worked out without substantially disrupting the grievance process.

The structure of substantive law sketched here is both tentative and incomplete, for it seeks only to suggest the more obvious ways of resolving the more pressing problems. Many other details must be filled in to complete the design, and further reflection or experience might suggest other patterns of legal rules within the structure.  

The most important point here is that a framework of basic rules can be constructed which will express the statutory policies and reflect the needs both of the collective parties and of individual workers. As the details are filled in these needs can be further accommodated. As the structure takes shape it becomes increasingly evident that even with modest judicial inventiveness most of the needs can be met. Many of the problems which at first loom large shrink to manageable size or disappear when placed in the context of the total structure of rules. To be sure, these legal rules will require some changes by the collective parties in their habits of thinking and in their practices of administering agreements, for the rules proceed from the premise that collective bargaining is not merely a private device to serve their collective needs but also has the public purpose of improving the dignity and worth of the individual. There is no reason to fear that the institution of collective bargaining is so fragile or that the grievance procedure is so brittle as not to be able to adjust to a recognition of individual rights.

188. An alternative method of protecting the individual which has been strongly urged is implementation of the duty of fair representation. See Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 632-34 (1956); Hanslove, supra note 158, at 46-48. Although this theory has found favor with many courts, experience has shown that it gives almost no protection to the individual. As in the New York cases, cited notes 13-24 supra and accompanying text, it is almost without exception a form of words which holds the promise to the ear and breaks it to the heart. Even its advocates doubt its efficacy. As presently articulated, it has two critical defects: (1) the standards applied cannot reach the subtle forms of discrimination, insensitivity and other covert abuses in grievance handling; (2) the suit is directed toward the union when the employer is often the initiator of the protested action. Suing the union poses both psychological and procedural difficulties, and the union cannot provide the most needed remedy—reinstatement. To be sure these difficulties can be overcome. The standard might be made more definite by using the contract terms as a plumb-line. See Summers, Individual Rights in Collective Agreements: A Preliminary Analysis, 9 Buffalo L. Rev. 239, at 244-48. The employer might also be made liable. See Cox, Individual Enforcement of Collective Bargaining Agreements, 8 Lab. L.J. 850, 859 (1957). But such changes immediately create practically all the same problems as direct recognition of the individual's right under the contract.