COLLECTIVE POWER AND INDIVIDUAL RIGHTS IN THE
COLLECTIVE AGREEMENT—A COMPARISON OF
SWEDISH AND AMERICAN LAW

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ONE of the central problems inherent in collective bargaining is defining the relative rights of the individual and the organizations in fixing and enforcing the terms and conditions of employment. Both Sweden and the United States have confronted this problem in its most insistent form, for in both countries government relies upon free collective bargaining as an instrument for regulating the labor market. Both countries by statute protect the right to organize and bargain collectively; both require recognition of unions and compel negotiations; and both make collective agreements legally enforceable. This public reliance on collective bargaining and legal protection of its processes imposes on the law a pressing obligation to define the status of the individual under the collective agreement.

Both countries have rejected the simple solution of giving the organization total dominance and wholly submerging the individual. Deeply rooted beliefs in the importance of the individual, and the desire to preserve for him some measure of independence have compelled the law to confront the difficult problem of accommodating the rights of the individual and the rights of the collective parties. The efforts in the two countries to resolve this problem provide interesting parallels and contrasts which illuminate the problem and suggest the range of possible solutions.

In the United States, the dominant pattern of collective bargaining, and the stereotype on which the law is built, is bargaining between a union and a single employer.¹ The problem of individual rights is therefore conceived solely in

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1. Four-fifths of all agreements cover workers in a single company. CHAMBERLAIN, LABOR 161 (1958). The National Labor Relations Act makes no explicit provision for multiple-employer units, but states that the unit appropriate shall be "the employer unit, craft unit, plant unit, or subdivision thereof." Section 9(b), 61 Stat. 143 (1947), 29 U.S.C. § 159(b) (1959). Doubts as to the National Labor Relations Board's power to certify multiple-employer units existed until 1957. See *NLRB v. Truck Drivers Union, AFL*, 353 U.S. 87, 93-96 (1957). However, multiple-employer bargaining is more prevalent than the stereotype suggests. Nearly 40% of all workers covered by collective agreements are in multiple-employer systems. COMMITTEE FOR ECONOMIC DEVELOPMENT, THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 131 (1961). Multiple-employer bargaining is particularly dominant in the Clothing, Construction, Coal Mining, Hotel, and Transportation industries. CHAMBERLAIN, *op. cit. supra* at 162.

terms of the employee-union relation. In contrast, the dominant pattern of bargaining in Sweden is collective on both sides, with employers typically represented by national employers associations organized along industrial lines.² A single association may bargain for hundreds, if not thousands of employers, many of whom are individual entrepreneurs with less than a dozen employees.³ The law, reflecting this bargaining structure, treats unions and employers associations as full equivalents. Both are protected in their right to organize by a statutory provision guaranteeing the "right of association"; and the binding effect of collective agreements is defined in terms of the obligations of "associations" and "members of associations." As a result, the problem of individual rights is more broadly conceived, and the legal rules governing the status of the individual under the collective agreement are equally applicable to employers and employees.

In defining the relative rights of the individual and the organization, it is essential to distinguish between the making of a collective agreement and its administration. The first consists of establishing the rules governing the terms and conditions of employment, and the second consists of interpreting and applying those rules. Although these two aspects of the bargaining process can not be neatly separated, they represent two essentially different functions. The law of both countries has recognized this distinction; the power of the union to make an agreement binding the individual, and its power to settle an individual's claim arising under an agreement are not the same. It is therefore necessary to examine separately the status of the individual in these two aspects of the bargaining process.

I. COLLECTIVE POWER IN THE MAKING OF THE AGREEMENT

Defining the power of the organization to make a collective agreement binding on an individual presents two questions—first, who is governed by the collective agreement; and second, what freedom does the individual who is governed retain to contract on his own behalf. Any meaningful comparison of the status of the individual in two countries requires not only an analysis of the answers which the law in each country has given to these questions, but also an

2. Approximately 100 employers associations with more than 70,000 employer members nearly blanket the Swedish labor market. The dominant organization is the Swedish Employers Confederation (Svenska Arbetsgivareföreningen, or SAF). It is a tightly knit federation of 44 employers associations covering most of trade and industry except banking, insurance, newspapers, restaurants, retail stores, shipping and agriculture. These have independent associations. The pattern is pervasive. The cooperative movement has had its own organization for collective bargaining, and various units of municipal, regional and national governments bargain through their associations. See SAF, *ARBETSGIVAREORGANISATIONER I SVERIGE* (1959).

3. The Swedish Building Industry Federation has 1,655 employer members with a total of 66,108 employees, and the Swedish Workshop Association has 1,341 employer members with a total of 236,058 employees. *STATISTISKA CENTRALBYRÅN, STATISTISK ARSBOK FÖR SVERIGE* 191 (1960). In the Swedish Employers Federation more than half of all the employer members have ten or less employees. *Id.* at 192.

inquiry into the actual impact which the collective bargaining system, operating within the legal framework, has on the individual in each country.

Who is Bound by the Collective Agreement

The basic legal theories in the two countries as to who is bound by the collective agreement stand in sharp contrast. In the United States the basic theory is expressed in Section 9(a) of the National Labor Relations Act,⁴ which provides that the union selected by the majority of the employees in the bargaining unit shall be the exclusive representative of all employees in the unit. The collective agreement negotiated by the majority union binds all employees in the unit, members and nonmembers alike. So long as the union retains its majority status, the employer is compelled to recognize it as the sole representative and is prohibited from bargaining with any other union or any individual employee.⁵ The majority union is thus vested by statute with exclusive authority to speak for and bind the individual, and his freedom of choice is limited to participating in the majority election which determines which is the union.

In Sweden the basic legal theory, made explicit in the Collective Contracts Act,⁶ is that the union (or employer's association) bargains only for its members and its collective agreement creates rights and duties only for its members.⁷ Employees who do not belong to the union stand beyond the bounds of the collective agreement. If they belong to another union, they are governed by that union's collective agreement; if they belong to no union, their rights and duties are based on their individual contracts of employment.⁸ The Swedish theory proceeds from the premise that the individual can not be contractually bound without his consent. By joining the organization he consents to be bound by its collective agreement.⁹

Individual consent, however, may be more theoretical than real, for under Swedish law the individual may be bound even though he did not consent to the particular agreement and is no longer a member. The Collective Contracts Act provides that all who are members at any time during the collective agreement are bound by it until it expires.¹⁰ A member who withdraws from mem-

4. 61 Stat. 143 (1947), 29 U.S.C.A. § 159(a).

5. *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944). See Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556 (1945). The same rule applies under the Railway Labor Act. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944).

6. LAG OM KOLLEKTIVAVTAL, SVENSK FÖRFATTNINGSSAMLING 253 (1928).

7. BERGSTRÖM, KOLLEKTIVAVTALSLAGEN 70 (1948); SCHMIDT, THE LAW OF LABOUR RELATIONS IN SWEDEN 112 (1962).

8. AD 1946:63; AD 1941:123. Rights under the collective agreement are enforceable in the Labor Court, but rights under contracts of employment not governed by a collective agreement are enforceable only in the general courts.

9. See ADLERCREUTZ, KOLLEKTIVAVTALET 5, Ch. VII (1954); SCHMIDT, TJÄNSTEAVTALET 31, 59 (1959).

10. A collective agreement entered into by an association shall also be binding on members of the association in so far as the trades and sectors of industry specified in the agreement are concerned, whether such members became members of the as-

bership does not thereby cease to be bound by an existing contract. For example, five days after the Textile Workers made a national agreement, a local union seceded in protest to the agreement and later struck for better terms. However, because the striking employees had been members at the moment the contract was made, they continued to be bound and were held individually liable in damages for its breach.¹¹

To avoid being bound the member must leave the union before the agreement becomes effective, but this doorway may not be immediately open, for the right to resign may be restricted. Most union constitutions do not permit members to resign so long as they continue to work within the union's jurisdiction.¹² Members who are two months in arrears of dues can be expelled and thereby escape being bound by subsequent agreements,¹³ but the expulsion is not automatic and the union might instead sue for dues. The validity of these union rules, whereby the union would obtain irrevocable power, has not been tested in the courts, for delinquent members are usually expelled.¹⁴ Even so, because the individual can escape only by refusing to pay dues, he continues to be bound by collective agreements made several months after he has determined to withdraw from the union.¹⁵

The Swedish employer is equally bound by agreements made by his association, but his ability to avoid being bound by withdrawing from the association is even more restricted. The constitution of the Swedish Employer's Federation, for example, provides that resignation is effective only at the end of the calendar year in which six months expires after notice of termination.¹⁶ Thus, an employer must give notice before July 1 to withdraw on December 31. Since most contracts are negotiated between October and April, the individual employer can not escape even though he withdraws before negotiation begins. In contrast, the American employer who bargains through an association generally retains full freedom to withdraw and bargain independently anytime before negotiations

sociation before or after conclusion of the agreement, unless they are already bound by another collective agreement. If a member leaves the association, he shall not cease on that account to be bound by the agreement.

Section 2, cited in SCHMIDT, *op. cit. supra* note 7, at 243.

11. AD 1932:33.

12. The right to withdraw from the union is narrowly restricted to those who have transferred to work outside the union's jurisdiction, or who become employers or supervisors. A member wishing to withdraw must make application to the local executive board. See § 11, NORMALSTADGAR FÖR TILL LANDSORGANISATIONEN I SVERIGE ANSLUTNA FÖRBUND. [Hereinafter cited as NORMALSTADGAR.]

13. Section 12, NORMALSTADGAR.

14. There is serious question whether the union can, by its constitution, bind members to future contracts indefinitely. This would contradict the underlying premise that the binding effect of the contract is based on the individual's consent. An individual's agreement to give the union such power over his future would probably be unenforceable as violating good custom and morals. See BERGSTRÖM, *op. cit. supra* note 7, at 74.

15. AD 1935:31; AD 1941:16.

16. CONSTITUTION OF THE SWEDISH EMPLOYERS CONFEDERATION § 42 (1948).

on a new contract are begun,¹⁷ and he will not be bound by the contract if he withdraws before agreement is reached.¹⁸

The Compulsory Effect of The Collective Agreement

Although the law of the two countries differs as to who is bound by the collective agreement, the compulsory effect of the agreement on those who are bound is substantially the same. In both countries individual contracts cannot subtract from collective ones; the collective agreement controls unless it permits variations.¹⁹ If an employee agrees with his employer to work for less than the wage prescribed by the collective agreement, not only is the individual contract a nullity, but the employer is liable to the union for breach of contract and to the employee for the amount of the underpayment.²⁰ An individual contract for better terms than those in the collective agreement is equally void and constitutes a breach of the collective agreement,²¹ although the employer can not generally recover the overpayment.²² Significantly, in both countries the collective agreement has been likened to a legislative act, imposing compulsory terms on the individual employment contract.²³

In practice, the Swedish union member is somewhat more free to make an individual contract than is an American employee represented by a majority union. In the United States collective agreements almost never permit variations of their terms by individual bargaining, but in Sweden provisions permit-

17. Twentieth Century Press, 107 N.L.R.B. 292 (1953); W.S. Ponton of New Jersey, Inc., 93 N.L.R.B. 924 (1951).

18. If the multiple-employer unit meets the strict standards imposed by the NLRB, the employer cannot withdraw after negotiations have begun and obtain an election. Withdrawal may also be an unfair labor practice if it is for the purpose of frustrating all bargaining. However, the Board has ordered employers to sign the contract only where they have attempted to withdraw after agreement was reached. See *Cosmopolitan Studios, Inc.*, 127 N.L.R.B. 788 (1960); *Anderson Lithograph Co., Inc.*, 124 N.L.R.B. 920 (1959). If the multi-employer unit is not the statutory unit, then the normal rules of agency would apply and the employers association's authority clearly could be revoked any time before the contract was concluded.

19. *Compare*: "[T]he individual contract cannot be effective as a waiver of any benefit to which the employee would be otherwise entitled under the trade agreement . . . We cannot except individual contracts generally . . . because some may be more individually advantageous," *J. I. Case Co. v. NLRB*, 321 U.S. 332, 338-39 (1944), with "If an agreement involving conditions divergent from the collective agreement is concluded between employers and employees who are bound by the same collective agreement, such agreement shall not be valid, except in so far as the divergences may be deemed to be permissible under the collective agreement." Section 3, Collective Contracts Act, cited in SCHMIDT, *op. cit. supra* note 7, at 243. See generally BERGSTRÖM, *op. cit. supra* note 7, at 75-77; GEIJER & SCHMIDT, ARBETSGIVARE OCH FACKFÖRENINGSLIDARE I DOMÄRSATTE Ch. 3 (1958).

20. *Compare* *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944), with AD 1932:55 (employee acknowledged full payment).

21. AD 1933:185; AD 1944:82.

22. AD 1930:64; AD 1938:16.

23. See, *e.g.*, *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944); see Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 COLUM. L. REV. 829 (1948), and BERGSTRÖM, *op. cit. supra* note 7, at 76; SCHMIDT, *op. cit. supra* note 9, at 27, 29.

ting such variations, though not common, are not unusual and a number of collective agreements permit payment of higher wages, individually bargained, to more efficient or senior employees.²⁴ However, this fragment of freedom for individual contracts is small and is constricted by the Labor Court's reluctance to find that the collective parties have intended to permit individual variances.²⁵ More important in giving the Swedish worker some measure of contractual freedom is that most collective agreements contain no seniority provisions. This means that lay-offs, recall, promotions, and other matters which in the United States are regulated by seniority rules of the collective agreement, are left largely to individual bargaining. In the white collar unions the individual may have much greater freedom. The collective agreement normally regulates such matters as vacation, sick pay, overtime, and notice of termination, but it usually does not fix the basic salary. This is established on an individual basis, and though the union negotiates on behalf of its various members, any individual is free to bargain for his own salary.²⁶

In one respect the Swedish worker is more tightly bound by the collective agreement than his American counterpart, for he is legally liable for his conduct which violates the collective agreement. The Collective Contracts Act imposes a statutory peace obligation on both the contracting organization and their individual members for the term of the agreement.²⁷ Any union member participating in a wildcat strike can be held personally liable in damages up to 200 crowns (\$40),²⁸ and this is regularly enforced. In the 1954 harbor workers strike, some 3,500 individual workers were ordered to pay damages totalling

24. SCHMIDT, *op. cit. supra* note 9, at 308; see for example, *Collective Agreement Between Swedish Metal Trades Employers Association and the Respective Trade Unions*, 4 April 1960, cited in SCHMIDT, *op. cit. supra* note 7, at 305, 308.

25. An agreement by employees to take 10% of their wages in the form of shares in the employer's business was held invalid. AD 1939:54. Similarly acceptance of a fixed salary instead of piece rates as prescribed by the collective agreement was prohibited even though the fixed salary was more advantageous for the employees. AD 1936:69. Although the variance was agreed to by a union representative under circumstances which led the employer to believe he had authority, the variance was still a nullity until it was agreed upon by the collective parties. AD 1933:122. Even if the collective contract provides that variances can be made on agreement by the collective parties, there must be an unequivocal showing of assent, and that assent probably must be evidenced by a written contract. AD 1956:27. See generally SCHMIDT, *op. cit. supra* note 7, at 114; Schmidt, *Kollektiv Arbetsrätt 1949-1957*, Sv. J.T. 209, 219-22 (1958).

26. This freedom has limited value, for the union normally negotiates salaries for most employees. This establishes a pattern which the employer will be reluctant to break. However, the individual may be able to persuade the employer that relative to the others he is underpaid, and can threaten to quit if his special worth is not recognized. A highly trained technical or professional employee who is specially competent may have substantial bargaining power as an individual.

27. Section 4, cited in SCHMIDT, *op. cit. supra* note 7, at 243-44. This statutory obligation cannot be waived or limited by provisions in the collective agreement, but the agreement may impose obligations more far-reaching.

28. Section 8, cited in SCHMIDT, *op. cit. supra* note 7, at 245. The collective parties can, by their agreement, impose a liability in excess of 200 crowns. AD 1953:23; AD 1947:66.

more than a half million crowns.²⁹ In the United States an individual employee normally can not be sued for striking in breach of the collective agreement.³⁰ However, he makes himself liable to discharge and loss of seniority, a penalty which may be far more severe than monetary damages.³¹ In practice this penalty is seldom enforced except on leaders of the walk-out. Collective agreements in Sweden commonly impose affirmative obligations on employees. For example, both the employer and employee are required to give notice of termination, and if an employee quits without giving the required notice he may be liable in damages for the amount he would have earned during the notice period.³² In contrast, the American worker, though protected against unjustified discharge, is free to quit at any time and generally has no legal liability under the collective agreement.

The Impact of the Collective Agreement On Those Not Legally Bound

The basic difference in the legal theories of the two countries is that in Sweden the collective agreement does not bind employees who are not members of the union. This contrast in theories, however, reverses reality, for in Sweden the collective agreement in fact governs members and non-members alike, and reaches much further than agreements in the United States.

The individual worker has relatively little bargaining power, even under Swedish conditions of full employment, and the employer is under strong pressures to apply uniform terms to all of his employees regardless of union membership. Variances create administrative difficulties, breed dissension in the work force, and invite opposition by the union which has its own compelling reasons to insist on uniformity of treatment. These pressures for uniformity are reinforced by legal rules and extended by the Swedish structure of collective bargaining.

29. See AD 1954:18 and AD 1954:39-50.

30. Section 301(b) of the Labor Management Relations Act provides: "Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." 61 Stat. 157 (1947), 29 U.S.C. § 185(b) (1959). The Supreme Court has declared that these words should not be given a "niggardly reading," and dismissed a suit for damages brought against individuals who participated in a strike which violated the union's obligation under the no-strike clause. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 249 (1962). The Court, however, reserved the question whether employees might be individually liable for engaging in a wildcat strike not authorized by the union and therefore not a violation of the union's obligation. *Id.* at 249 n.7. It would seem however, that an action against the members in tort would be preempted. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and that an action on contract could be maintained only if there were found an intent by the parties to impose such a liability on the individual employees. This is not normally contemplated, for the parties usually view the no-strike clause as imposing financial liability only on the union and employer.

31. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939). Section 8(d) of the LMRA specifically authorizes an employer to discharge employees who strike during the contract term. *But cf. Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

32. See, *e.g.*, AD 1947:66.

The collective agreement often expressly provides that the employer shall apply its terms to all employees, regardless of union membership. Although this does not legally bind the non-union worker, and he is theoretically free to bargain for different terms, the employer would thereby become liable to the union for breach of contract.³³ Even without an express provision, the collective agreement creates an implied obligation on the employer not to apply lesser terms to non-union employees.³⁴ If he gives them better terms than those in the collective agreement, he holds himself open to a charge of violating the right to organize.³⁵

Although the individual non-union employee is not bound by the collective agreement, its norms are imposed on his individual contract of employment in the guise of custom unless he and the employer expressly agree otherwise.³⁶ In one case a member of one union objected because money had been deducted from his earnings and paid over to a rival union for its services in computing earnings under complex piece rates. The employer knew that the employee neither wanted nor used this service but had the computation made by his own union. However, the court held that the employee had impliedly agreed that his employment conditions should be regulated in accordance with the collective agreement of the rival union under which the deductions were made. No express exception had been made in the individual's contract of employment³⁷—nor could the employer realistically agree to one in defiance of the rival union. The individual thus "consented" to support the rival union. The end result of both the industrial practice and the judicial decisions in Sweden is that the individual contract follows the collective contract; the terms of the collective agreement are in fact imposed on non-members.

Workers who seek to bargain through a separate union fare little better. The employer is even more unwilling to have a second collective agreement which departs from the terms of the dominant union's agreement; and the dominant union finds collective deviations even more intolerable than individual ones. Thus the Syndicalist unions, a small competing group, have had little choice but to accept collective agreements with terms identical to those already negotiated by unions in the dominant Swedish Confederation of Trade Unions (LO).³⁸

33. SCHMIDT, TJÄNSTEAVTALET 41 (1959).

34. AD 1931:93; AD 1932:95. This obligation is implied unless the contract clearly provides otherwise, AD 1943:96; AD 1957:26. It applies not only to non-union employees but to members of another union covered by another collective agreement with less advantageous terms, AD 1952:8; AD 1944:37.

35. AD 1936:78; AD 1947:72; AD 1948:52.

36. This is true even though the employer has no collective agreement, for the court will follow custom and usage in the industry, and in determining that will look to collective agreements of other employers. SCHMIDT, TJÄNSTEAVTALET 59-68 (1959).

37. N.J.A. 1948 s. 1.

38. The Syndicalists have a total membership of 17,000. SAC's Verksamhetsberättelse, 1959, p.e. The Swedish Confederation of Trade Unions has a membership of 1,467,117. LANDSORGANISATIONEN'S BERÄTTELSE 3 (1959). The Syndicalists are the only significant labor organization competing with the Confederation.

The subservience of separatist groups is dramatically demonstrated in a case involving a group of forest workers in western Sweden who, because of dissatisfaction with their representation by the national union, seceded and formed their own union. Although they negotiated separately with the employers association, the agreements followed the wording of the agreement with the national union. In 1955, the employers first negotiated with the national union, obtaining changes in various provisions. Then, in bargaining with the separate union, the employers insisted that a contract with different terms could not be considered. The state mediator proposed a contract of identical wording and this was finally accepted. Later a dispute arose as to sick pay under this contract. In the Labor Court the employers association argued that in negotiations with the national union it had been clearly understood that employees were not entitled to the claimed sick pay. The separate union declared that it knew nothing of this understanding and could not be bound by it. The employers, however, argued that they had insisted on identical contracts to avoid different terms for members of different unions and the separate union must be considered as impliedly agreeing to interpretations applicable to the national union. The national union submitted an affidavit accepting the employers' interpretation. The Labor Court, after observing that the parties to the national agreement were in accord as to its meaning, found that this interpretation was required by its wording.³⁹ Such cases make clear that although each union is legally free to negotiate separately, the dominant union is in fact the sole bargaining agent.

The impact of the dominant union's agreement is even more far-reaching than this portrays. Collective bargaining in Sweden is highly centralized, with national agreements made between national organizations along industry lines forming the prevailing pattern. The Swedish Employers Confederation (SAF) and other employers associations have sought to deal with national unions in each industry and to make a single agreement applicable throughout the industry.⁴⁰ They have succeeded in imposing this pattern and have effectively prevented employer members from making varying contracts with other unions.⁴¹ As a result, the union recognized by the employer association as dominant in the industry becomes in fact the sole bargaining agent for all employees of the association's members; its collective agreement regulates the terms and conditions of employment throughout the association. The unions which hold this power undoubtedly have as members a majority of employees in fact governed by their agreements. The effect, however, is to make the bargaining unit industry-wide and to leave employees in smaller units little freedom to choose separate representatives or to engage in individual bargaining.

39. AD 1944:60.

40. Although not all employers associations belong to SAF, see note 2 *supra*, there is no substantial competition between the associations for membership. With minor exceptions, each association dominates its industry.

41. The Constitution of SAF requires that all collective agreements made by a member employer be approved by the Board of SAF. CONSTITUTION OF THE SWEDISH EMPLOYERS CONFEDERATION § 35 (1948).

In contrast, the bargaining unit for which the American union is exclusive representative is typically much smaller. The National Labor Relations Board rarely certifies an industry-wide unit, and only under special conditions establishes multiple-employer units.⁴² The typical bargaining unit consists of the employees of a single employer, but the unit may be even smaller, for the Board frequently permits employees in different plants of the same employer or even different craft or occupational groups in the same plant to choose different bargaining representatives.⁴³ Furthermore, the union's statutory power to represent is limited to bargaining units in which it has a majority. If the union and the employer negotiate an agreement regulating the terms and conditions of employment of employees outside the bargaining unit, both are guilty of an unfair labor practice.⁴⁴ It is true that collective agreements often cover a large number of bargaining units, and bargaining in practice may be industry-wide.⁴⁵ However, each legal bargaining unit retains a substantial measure of freedom to act independently. It is also true that a collective agreement may have radiations on employees beyond those directly governed, and certain key contracts may establish patterns for whole industries.⁴⁶ The pattern, however, is not rigid and generally does no more than fix the level of economic benefits. There still remains substantial flexibility in determining how those benefits will be distributed and in adjusting non-economic terms of the collective agreement.

The end result is that although the basic legal theory in Sweden makes the collective agreement binding only on the union member, the legal rules and col-

42. The Board has frequently declared that a single-employer unit is presumptively appropriate and that to establish a broader unit there must be a history of bargaining on a multiple-employer basis. There must be an unequivocal showing of a desire by the individual employer to be bound in future collective bargaining by the group. *E.g.*, *Morgan Linen Service, Inc.*, 131 N.L.R.B. 420 (1961); *Shreveport-Bossier Cleaners & Laundries, Inc.*, 124 N.L.R.B. 534 (1959). The employer may escape the multiple-employer unit by a timely withdrawal which shows an intent to pursue a course of independent bargaining. *Jones & Anderson Logging Co.*, 114 N.L.R.B. 1203 (1955); *Coca-Cola Bottling Works Co.*, 93 N.L.R.B. 1414 (1951). See generally *Jones, The NLRB and the Multiple Employer Unit*, 5 LAB. L.J. 34 (1954).

43. The NLRB publishes no statistics on the types of bargaining units certified. However, the general rules followed by the Board in allowing different groups of employees of the same employer separate representation are indicated in the annual reports. See, *e.g.*, TWENTY-SIXTH ANNUAL REPORT OF THE NLRB 54-57, 64-67 (1961). The individual's freedom of choice is further enlarged by the Board's use of the employees' own desires as one of the tests in determining the size of the appropriate unit. See Note, 6 U. CHI. L. REV. 673 (1939). Such self-determination or "globe" elections are made mandatory by statute for professional employees. See Section 9(b), Labor Management Relations Act, 61 Stat. 143 (1947), 29 U.S.C. § 159(b) (1958).

44. *Cf. Douds v. International Longshoremen's Ass'n*, 241 F.2d 278 (2d Cir. 1957); *Local 164, Brotherhood of Painters*, 126 N.L.R.B. 997 (1960).

45. *PIERSON, MULTI-EMPLOYER BARGAINING* (1948); *BACKMAN, MULTI-EMPLOYER BARGAINING* (1951); *FEINSINGER, COLLECTIVE BARGAINING IN THE TRUCKING INDUSTRY* (1949).

46. See Seltzer, *Pattern Bargaining and the United Steelworkers*, 59 J. POL. ECON. 322 (1951); *MANAGEMENT EXPERIENCE IN THE RUBBER INDUSTRY*, CONFERENCE ON INDUSTRY-WIDE COLLECTIVE BARGAINING 1-7 (1949).

lective bargaining system in practice give the dominant union in the industry sole bargaining rights for the industry. Although the basic legal theory in the United States gives the majority union sole bargaining rights, the fragmented nature of bargaining units provides much greater flexibility and gives the employee a greater measure of freedom of choice.

The Swedish employer who does not belong to an employers association often stands in little better position than the unorganized worker. After a union negotiates a national agreement with the association, it then approaches the unorganized employer and insists that he accept the same terms, or perhaps even a little better "to make up for what he saves by not joining the association." In the construction industry the employer is simply presented a short printed form to sign which incorporates by reference the terms of the national agreement. In some cases the contract binds the individual employer in advance to changes or interpretations agreed upon by the union and the association. The individual employer is no match for the national union and has no choice but to be governed by the employers associations contract. This same pattern appears in the United States in unionized industries made up predominantly of small employers, such as trucking, construction, garment and printing. The significant difference is that in Sweden, because unions and employers associations so blanket the labor market, the pattern is far more pervasive. There is little real independence for either workers or employers who remain outside the organizations which dominate the labor market.

The Union's Duty to The Individual

The power of the union to represent employees and to make collective agreements binding on the individual carries with it certain obligations to the individual. The roots of this duty were laid bare by the United States Supreme Court in *Steele v. Louisville & N.R.R. Co.*⁴⁷ In that case the Brotherhood of Locomotive Firemen and Enginemen had negotiated a collective agreement which placed all Negro employees at the bottom of the seniority list and had the effect of ultimately eliminating them from firemen's jobs. The Court, in holding this agreement unlawful, declared:

Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, . . . but it has also imposed on the representative a corresponding duty . . . to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.⁴⁸

The source of the union's duty of fair representation is its statutory power to bargain and make binding collective agreements. Emphasis in this case was placed on the statutory source of the majority union's power to represent non-members—here, Negroes who were denied admittance to the union. But the Court also drew on broader concepts of an agent's duty to his principal, for it said:

47. 323 U.S. 192 (1944).

48. *Id.* at 202-03.

It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise that power in their behalf.⁴⁹

In *Syres v. Oil Workers Int'l Union*,⁵⁰ the emphasis shifted. The union had negotiated seniority provisions which served to keep Negroes, who were union members, in menial jobs. The union argued that the Negroes, by joining the union, had consented to its representing them. Therefore, the union's authority to represent did not rest on the statute and the union was not subject to any statutory duty to represent fairly.⁵¹ This argument was curtly rejected. The collective agreement was "the product not merely of private agreement, but also of the provisions of the law,"⁵² and the law imposed on the union the duty to represent fairly all employees, union or non-union alike.

The union's duty extends even beyond those for whom it bargains. In *Brotherhood of R.R. Trainmen v. Howard*,⁵³ the all-white Trainmen negotiated an agreement requiring the employer to give employees it represented jobs previously held by Negroes who were represented by another union. The Trainmen argued that since the Negroes were in another bargaining unit it owed no duty to them. The Supreme Court, however, held that this was "an unlawful use of power granted by a federal act." The duty was stated in broad terms—"Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers."⁵⁴ The source of the union's duty to the individual is not its statutory right to represent him but its statutory power to bargain and make binding agreements which in fact govern the individual's employment.

In Sweden the union's duty to individual employees in bargaining remains undeveloped. Only one case raising the question has been found, a case in which a white collar worker sued his union for failure to exert itself on his behalf. Although the court assumed that the union owed a duty to use reasonable efforts, it found that the union had done all that could be expected and dismissed the suit.⁵⁵ Legal scholars, however, have argued that according to general legal principles the union "must treat all members alike";⁵⁶ that the union must not "discriminate" in the sense that "one or more members' interest in an unreasonable degree is neglected in relation to others."⁵⁷ The source of this duty has not been clearly defined. In part it is based on implied terms in the union's constitution, and in part on the general duty of an association to its members. But

49. *Id.* at 202.

50. 223 F.2d 739 (5th Cir. 1955), *rev'd mem.*, 350 U.S. 892 (1955).

51. Showing of a statutory duty, as contrasted with a common law duty, was essential to give the federal court jurisdiction, as there was no diversity of citizenship. *Ibid.*

52. *Id.* at 745 (dissenting opinion).

53. 343 U.S. 768 (1952).

54. *Id.* at 774.

55. Stockholm Radhusrätt, 10 Jan. 1957; affirmed, Svea Hovrätt, 19 Sept. 1958.

56. SCHMIDT, *op. cit. supra* note 7, at 90.

57. BERGSTRÖM, *op. cit. supra* note 7, at 82.

the deeper root of the duty is the binding effect which the Collective Contracts Act gives to the collective agreement and its curtailment of the individual's freedom of contract—an echo of the reasoning in the *Steele* case. Indeed, the union is said to have the “power to ‘legislate’ through the collective agreement,”⁵⁸ and that guidance in marking the limits of the union's power may be found in the principles governing legislation.⁵⁹

The question has never been discussed in Sweden whether the union in bargaining is under any duty to non-members. When the collective agreement requires the employer to apply certain terms in the individual employment contracts of non-members, only in the driest technical sense can it be said that non-members are not governed by the collective agreement. The provision is made binding by the Collective Contracts Act, and is enforced through the special procedures of the Labor Court. Indeed, the Labor Court will itself read such a provision into the agreement, effectively curtailing the individual's freedom for the purpose of protecting the status of the union and the integrity of the collective agreement.⁶⁰ It would seem, therefore, that the union's duty should run also to non-members so subject to its control. It is true that Swedish unions do not lean so heavily on the law as American unions to protect their right to organize or to define their status as bargaining agents. However, reliance on the law to define rights under the collective agreements and make them binding is much more deeply rooted in Sweden than in the United States, and the union's practical power to regulate terms and conditions of employment is much more far reaching. The union's duty to individuals in bargaining might well be thought to be substantially the same.

The doctrine of fair representation has remained undeveloped in Sweden primarily because the problem is not posed with such sharpness or frequency. Racial discrimination, the breeding ground of the most glaring cases in the United States, has never been a serious problem in Swedish unions, nor has any other minority been marked for such invidious discrimination.⁶¹ Furthermore, seniority provisions, which are most productive of claims of unfairness because they inherently give some employees job priorities over others, are relatively uncommon; and Swedish employers have successfully insisted for the

58. *Id.* at 73.

59. *Id.* at 81.

60. See notes 33-37 *supra* and accompanying text.

61. Women have been commonly subjected to wage differentials, sometimes being paid 20 to 30 percent less than men for identical work, the differential even being applied to piece rates. No question was ever raised whether this discrimination, written into collective agreements, violated the union's duty to treat all members equally. In 1956, LO adopted resolutions to eliminate this differential. See PROTOKOLL, LANDSORGANISATIONENS KONGRESS, Motions 23-24 (1956). However, the differential continued under a policy of gradualism. In 1960, both LO and SAF opposed adoption of International Labor Organization Convention No. 100 on Equal Pay for Women, arguing that the problem should be solved by collective bargaining under a five year plan adopted by LO and SAF earlier in the year. See FACKFÖRENINGSNORELSEN 194, 306, 385 (1960). Ratification was rejected by the Parliament.

most part on retaining control over job assignments.⁶² The system of national agreements makes more difficult the designing of general provisions which will discriminate against any individual or group. Unfairness, however, is still possible, particularly in local negotiation of piece rates, but claims of substantial unfairness are extremely rare.

The protection which the duty of fair representation in fact gives the individual in the United States can be easily overestimated, for the standard imposed on the union is vague, if not illusory. The *Steele* case⁶³ recognized that the union could not be required to treat all employees alike, that the union must be able to make variations based on relevant differences even though this had unfavorable effects on some employees. But what are "relevant differences"? The Court went no further than to declare that "discriminations based on race alone are obviously irrelevant and invidious."⁶⁴ Later cases have neither clarified nor raised the standard, but only added equally unhelpful adjectives. The union must be allowed "a wide range of reasonableness . . . subject always to complete good faith and honesty of purpose in the exercise of its discretion."⁶⁵ Various writers have formed other phrasings, and sought to identify more tangible guides, but the standard remains low and elusive.⁶⁶ As a result, the only cases in which unions have been found to have violated their duty of fair representation in negotiating an agreement have been cases of racial discrimination. The difficulty is inherent in the problem. The union in bargaining seeks a variety of benefits for a wide range of groups whose interests compete or conflict. Bargaining is a process of exchange, compromise and surrender of a multitude of claims, and the parties are concerned with finding a formula for settlement. For the courts to weigh too closely the allocation of the benefits among the employees would plunge the courts into a task far beyond their competence and seriously hinder the parties in reaching an agreement.

II. INDIVIDUAL RIGHTS IN ADMINISTERING THE AGREEMENT

In both Sweden and the United States the courts early established that the individual acquired legal rights under the collective agreement. Thus, in 1915 the Swedish Supreme Court held in the leading *Stockholm Printers Case* that the individual member could sue for damages which he suffered because of a breach of his organization's collective agreement.⁶⁷ A year earlier a New York court had held that an employee could sue his employer for the wages due under

62. The Constitution of SAF provides that every collective agreement entered into by a member employer contain a provision recognizing "the right of the employer to engage and dismiss workers at his own discretion; to direct and allot the work; and to avail himself of workers belonging to any organization whatsoever, or to none." Section 35.

63. *Supra* note 47.

64. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203 (1944).

65. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

66. See Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO ST. L.J. 39 (1961); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958).

67. N.J.A. 1915, s 233.

the collective agreement even though he had agreed to work for less.⁶⁸ In both countries the law also recognized that the union acquired rights under the collective agreement and that it could sue the employer to enforce not only provisions protecting its institutional interests such as the union shop, but also provisions fixing terms and conditions of employment for individual employees.⁶⁹

Recognition that both the individual and the union have rights under the same provisions of the collective agreement raises difficult questions as to the interrelationship of those rights. It is clear that the individual's and the union's rights can not be wholly independent of each other and separately enforced. This would subject the employer to the burden of double litigation and the risk of conflicting results. The rights must be adjudicated in a single proceeding. It is also clear that the individual by litigating or settling his claim can not control the union's right. This would invite variances and prevent the union from protecting the rights of other employees. The critical question is, what control does the union have over the individual's rights? If an employee is wrongfully discharged, must he process his grievance through the union? And if the union refuses to proceed may he then proceed on his own? If a worker is not paid according to the collective agreement, can the union by settling with the employer for half the amount due destroy his right to the remainder? If an individual claims that his lay-off violates the seniority provisions of the collective agreement, can the union by accepting the employer's interpretation of the provision foreclose him from obtaining an adjudication of his claim?

These questions as to the relative rights of the individual and the union in administering the agreement are raised in substantially similar form in Sweden and the United States. However, the progress of the law in resolving them has been markedly different. In Sweden these questions were considered as early as 1910 in drafting proposed legislation on collective agreements.⁷⁰ Nothing was passed at the time, but in 1928 the Collective Contracts Act⁷¹ was enacted defining the rights and duties of both organizations and individuals under collective contracts. At the same time, the Labor Court was created with jurisdiction to decide disputes as to the meaning and application of collective agree-

68. *Gulla v. Barton*, 164 App. Div. 293, 149 N.Y. Supp. 952 (1914).

69. In both countries legal writers struggled to develop a viable legal theory which would fit collective agreements within the framework of traditional contract doctrines. The theories proposed were strikingly similar—theories of agency, third party beneficiary, and usage. All of these proved clumsy or artificial in rationalizing the legal results which were required to meet the practical needs of the collective bargaining relationship. Compare, e.g., Rice, *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 572 (1931); and Witmer, *Collective Labor Agreements in the Courts*, 48 YALE L.J. 195 (1938), with UNDÉN, *KOLLEKTIVAVTALET ENLIGHT GALLÄNDE SVENSK RÄTT* (1912); and ADLERCREUTZ, *KOLLEKTIVAVTALET* Ch. 7 (1954); and BERGSTRÖM, *KOLLEKTIVAVTALSLAGEN* Ch. 2 (1948).

70. See ADLERCREUTZ, *op. cit. supra* note 69, at 463; KUNGL. MAJ:TS PROPOSITION No. 96 (1910); AKERMAN & OLIN, *PROMEMORIA ANGAENDE LAGSTIFTNING OM ARBETSAFTAL* (1910).

71. Note 6 *supra*.

ments.⁷² The Labor Court Act expressly permitted the individual under certain conditions to bring his own case before the court.⁷³ Applying the guides of these statutes the Labor Court has developed a substantial body of law defining the relative rights of the individual and the organization under the collective agreement. In contrast, courts and writers in the United States showed no clear awareness of the problem, at least prior to 1945.⁷⁴ In a large number of cases individuals were allowed to sue,⁷⁵ but apparently in none of these did the employer defend on the grounds of prior settlement with the union.⁷⁶ The courts were thus not confronted with the issue.⁷⁷ However, with the growth of contractual provisions for grievance procedures and arbitration to settle disputes arising under the contract, employers began to argue that this procedure for enforcing the agreement was exclusive and that the union's settlement determined both the union's and the individual's rights. This argument was strongly endorsed by the unions, for they did not relish having their decisions challenged by individuals and their settlements found in violation of the agreement. Confronted squarely with the problem, the courts have seized upon a variety of solutions, and as cases presented different facets of the problem have produced a welter of conflicting decisions. The courts have not yet developed any consensus either as to analysis or underlying policy.

The lack of a cohesive body of American law makes any meaningful comparison with Swedish law impossible. But this may make study of the Swedish experience and the detailed rules it has developed all the more fruitful, for it may provide us helpful guides in working out our own solution. To provide perspective to this study it is necessary first to sketch briefly some of the solutions suggested in the United States and the policies on which they seem to rest.

72. LAG OM ARBETSDOMSTOLEN, SVENSK FÖRFATTNINGSSAMLING 254 (1928).

73. An association which has concluded a collective agreement may bring an action in the Labour Court on behalf of any person who is or has been a member of the association; and a member of an association may not himself bring an action unless he proves that the association has refused to take action on his behalf. . . .

Section 13 of Act Respecting the Labour Court, cited in SCHMIDT, *op. cit. supra* note 7, at 246.

74. See, e.g., Gregory, *The Collective Bargaining Agreement: Its Nature and Scope*, 1949 WASH. U.L.Q. 3; Burstein, *Enforcement of Collective Agreements by the Courts*, 6 N.Y.U. CONF. ON LABOR 3 (1953); Note, *The Ability of an Individual Employee to Sue His Employer on a Collective Bargaining Agreement*, 3 BUFFALO L. REV. 270 (1954).

75. See cases cited Annot., 18 A.L.R.2d 352 (1951).

76. See Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956).

77. The first clear confrontation with the problem was by the United States Supreme Court in *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945). The first writings exploring the problem were Sherman, *The Individual and His Grievance—Whose Grievance Is It?*, 11 U. PITT. L. REV. 35 (1949); Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 COLUM. L. REV. 731 (1950); *Report of the Committee on Improvement of Administration of Union Management Agreements*, 50 NW. U.L. REV. 143 (1955); Cox, *supra* note 76.

SOME AMERICAN SOLUTIONS

Court decisions and writings on individual rights under the collective agreement present a confusing medley of ideas and conclusions,⁷⁸ but these may be roughly grouped into three basic approaches or theories which lead to distinctly different solutions. Each approach has a multitude of variations, but there is no need here to delineate these details. It is enough to sketch the three approaches and articulate the assumptions on which they are based so as to reveal the sources of the conflicting results and the range of possible solutions.⁷⁹

1. *The Collective Control Approach.* The first approach emphasizes the power of the collective parties to control terms and conditions of employment, and is illustrated by the New York case of *Parker v. Borock*.⁸⁰ An employee, Parker, who claimed that he had been wrongfully discharged filed, a grievance with the union but the union refused to carry his case to arbitration. Parker himself then sought arbitration, but the court held that because the collective agreement provided only for the union to demand arbitration, an individual had no right to compel arbitration.⁸¹ He then sued the employer for damages. The court held that as a "direct beneficiary" he acquired rights under the provision prohibiting discharge without just cause. However, those rights were limited by the grievance and arbitration provisions which gave the union exclusive power to enforce, and when the union refused to proceed the individual's right terminated. The result is that the union controls the individual's right and can make a binding settlement without his consent.⁸²

The collective control approach relies on simple contract logic: the individual's rights are based on the collective agreement and are therefore subject to the conditions in the agreement. This, however, assumes that the collective parties are free to impose whatever conditions they see fit, not only on their own rights but also on the rights of individuals governed by their agreement; that the power to establish terms and conditions of employment binding on the individual includes the power to make the individual's rights depend on the union's willingness to assert them. This reasoning vests the union with the same plenary power to represent employees in the administration of the agreement that it has in the negotiation of the agreement. The individual is bound not only by the rules established in the collective agreement, but also by all the day by day variances, exceptions, and dispensations of those rules accepted in the

78. See Blumrosen, *Legal Protection For Critical Job Interests Union-Management Authority Versus Employee Autonomy*, 13 RUTGERS L. REV. 631 (1959); Hanslowe, *Individual Rights 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).

79. The various solutions have already been extensively belabored by the author in *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362 (1962).

80. 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959).

81. *United States v. Voges*, 124 F. Supp. 543 (E.D.N.Y. 1954).

82. For other illustrative cases see *Cortez v. Ford Motor Co.*, 349 Mich. 108, 84 N.W.2d 523 (1957); *Falsetti v. Local 2026, U.M.W.*, 400 Pa. 145, 161 A.2d 882 (1960); *Jenkins v. Schluderberg—T.J. Kurdle Co.*, 217 Md. 556, 144 A.2d 88 (1958); *Ostrofsky v. United Steelworkers*, 171 F. Supp. 782 (1959).

grievance procedure. The individual's rights are wholly subject to the union's control.

Giving the union complete control over the individual's grievances has been justified on the claimed practical needs of collective bargaining. Thus it is claimed that to allow the individual to assert his claim "would create a condition of disorder and instability and would be disastrous to labor as well as industry."⁸³ Collective bargaining should be a continuous process of adjusting competing and conflicting interests day by day—"a relationship in which grievances are treated as problems to be solved, and contract clauses are only guideposts in a dynamic human relationship."⁸⁴ The settlement of grievances, it is argued, is an integral part of the continual process of contract making and in all parts of that process the union must have complete control to determine individual rights. Advocates of this approach recognize that giving the union untrammelled control over grievances creates grave risks to the individual, for settling particular grievances offers opportunities for discrimination which do not exist in negotiating general rules. They would protect the individual by enforcing the union's duty of fair representation.⁸⁵ However, as the discussion in the preceding section has suggested, the standard imposed by this duty is extremely vague and has provided little protection against discrimination in making the agreement. It can provide even less protection against discrimination in grievance handling where the forms of unfairness are more subtle and the problems of proof more difficult. Even the advocates of this test doubt its efficacy to give the individual any practical protection. Many courts have declared that unions have such a duty in handling grievances, but almost no decisions have held that the union has violated that duty.⁸⁶

2. *The Individual Rights Approach.* The second approach to this problem emphasizes the right of the individual in his contract of employment, and is illustrated by the case of *Alabama Power Co. v. Haygood*.⁸⁷ Again, an employee who claimed that he had been wrongfully discharged filed a grievance, but the union refused to carry the case to arbitration. He then sued the employer who sought to dismiss the case on the grounds that the collective agreement provided for enforcement only through arbitration. The court rejected this argument and held that although the individual must seek to enforce his rights through the administrative procedures provided by the agreement, the agreement here gave

83. *Bianculi v. Brooklyn Union Gas Co.*, 115 N.Y.S.2d 715, 718 (Sup. Ct. 1952).

84. *Cox*, *supra* note 76, at 632.

85. *Cox*, *Individual Enforcement of Collective Bargaining Agreements*, 8 LAB. L.J. 850, 854 (1957); *Hanslowe*, *supra* note 78, at 46.

86. That the duty of fair representation is often a dead end is demonstrated by the New York cases, see *Summers*, *supra* note 79, at 364-66. See also *Union News Co. v. Hildreth*, 295 F.2d 658 (6th Cir. 1961); *Bailer v. Local 470, Int'l Teamsters*, 400 Pa. 188, 161 A.2d 343 (1960). For two exceptional cases where the duty of fair representation was used to deprive the union of the power to represent the individual because its interests were adverse to those of the individual, see *Clark v. Hein-Werner Corp.*, 8 Wis. 2d 264, 99 N.W.2d 132 (1959); *Guzzo v. United Steelworkers*, 47 L.R.R.M. 2379 (Cal. Super. Ct. 1960).

87. 266 Ala. 194, 95 So. 2d 98 (1957).

him no right to arbitration and he could therefore bring his action in court. The unavailability of arbitration did not destroy his right but allowed him to enforce it in another forum.⁸⁸

The logic of this approach is that the employee has rights under his individual contract of employment, and though that contract must conform to the collective agreement, the rights are not created by the collective agreement but by the individual's accepting employment.⁸⁹ The rights are therefore vested in the individual and can not be divested by the union's refusal to enforce. In contrast to the collective control theory, the individual rights theory assumes that the power of the collective parties over the individual is limited—that they can not by their agreement impose on the individual's employment contract a provision giving the union exclusive control over enforcement. The individual rights approach seeks to protect the individual from the dangers of unfairness in grievance handling by giving him an independent right. As indicated above, it has been criticized as weakening the union's control and destroying the flexibility needed in the bargaining relationship.

Although the individual rights approach limits the union's control, it does not assert that enforcement of the agreement is totally independent of the union, for the courts generally require the individual to exhaust the contract procedures.⁹⁰ The union is thereby given first opportunity to enforce and protect its interests, and the claim is channelled through the orderly processes for settling disputes arising under the agreement. But the union by refusing to proceed and blocking the grievance process can not thereby destroy the individual's rights.

This approach, however, does not give the individual the right to arbitration. The logic of contract controls; the employer can be compelled to arbitrate only in accordance with his agreement, and an agreement to arbitrate with the union will not be read as including arbitration with an individual.⁹¹ But if he refuses to arbitrate, the individual can enforce his rights in court.

3. *The Statutory Approach.*⁹² The third approach emphasizes the statutory status of the union as representative and looks to the provisions of the National

88. Further illustrative cases are *Pattenge v. Wagner Iron Works*, 275 Wis. 495, 82 N.W.2d 172 (1957); *Marranzano v. Riggs Nat'l Bank*, 184 F.2d 349 (D.C. Cir. 1950); *Food Fair Stores, Inc. v. Raynor*, 220 Md. 501, 154 A.2d 814 (1959); *In re Norwalk Tire & Rubber Co.*, 100 F. Supp. 706 (D. Conn. 1951); *Nichols v. National Tube Co.*, 122 F. Supp. 726 (N.D. Ohio 1954).

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

90. See Blumrosen, *supra* note 78, at 642-51; Hanslowe, *supra* note 78, at 36; Comment, *Exhaustion of Remedies Under Collective Bargaining Agreements: A Reappraisal*, 54 Nw. U.L. REV. 605 (1959).

91. See, e.g., *Arsenault v. General Electric Co.*, 147 Conn. 130, 157 A.2d 918 (1960); *Mello v. Local 4408, C.I.O. United Steelworkers*, 82 R.I. 60, 105 A.2d 806 (1954); *United States v. Voges*, 124 F. Supp. 543 (E.D.N.Y. 1954). If the union requests arbitration, the right of the individual to participate in the arbitration proceedings is uncertain. Compare *Clark v. Hein-Werner*, *supra* note 86, with *In the Matter of Soto*, 7 N.Y.2d 397, 165 N.E.2d 855, 198 N.Y.S.2d 282 (1960) and *Bailer v. Local 470, Int'l Teamsters*, *supra* note 86.

92. This approach has been explored much more fully by the author in *Individual Rights in the Collective Agreement and Arbitration*, 37 N.Y.U.L. REV. 362 (1962).

Labor Relations Act for guides in defining the relative rights of the individual and the union.⁹³ This focuses attention on Section 9(a) which grants and limits the authority of the majority union as statutory representative. This section provides that the majority union:

shall be the exclusive representative 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 group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.⁹⁴

The words of the statute, reinforced by its legislative history, lead to the following conclusions: First, the statutory status of the union in negotiating an agreement is different from its statutory status in settling grievances. The union has plenary power to make an agreement but not to settle grievances. Second, the individual has a statutory right to have his grievance adjusted without intervention of the bargaining agent which would bar him from asserting his claim or obtaining an adjustment. Third, the union can not by use of its statutory power to make an agreement, encroach on the individual's statutory right to have his grievance adjusted. A provision in the collective agreement giving the union exclusive control over grievances would be contrary to the statute and unenforceable. These conclusions parallel the reasoning of the Supreme Court in *Elgin, J. & E. Ry. v. Burley*,⁹⁵ which arose under the Railway Labor Act, and held that the union could not make a binding settlement of an employee's grievance without his authorization or consent.

This approach has not been elaborated by the courts, but the statute suggests further guides. The union has a right to be present at the adjustment of the grievance and insist that the adjustment conform to the collective agreement. Neither the union nor the individual has the power to make a settlement binding on the other, and if they and the employer can not agree, the dispute must be adjudicated either by arbitration or in the court.

The statutory approach builds upon the distinction between contract making and contract administration, between the establishment of general rules and their application to particular cases. This does not assume that the collective agreement is clear or complete, or that bargaining ends with the signing of the agreement. All it assumes is that in resolving ambiguities and filling gaps in the

93. Rights under the collective agreement are now governed exclusively by federal law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). Federal substantive law must be applied whether suit is brought in the federal or state courts. *Local 174, Int'l Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962).

94. Labor Management Relations Act § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958).

95. 325 U.S. 711 (1945).

agreement the parties intend to follow the guideposts of the agreements, and that in settling grievances they will not ignore the agreement. All that this approach requires is that the individual who has a claim shall have access to a neutral arbiter and an opportunity to demonstrate that the collective parties have exceeded the limits of their general rules. The collective parties remain free to change the rules by negotiating a new agreement or formally amending the old, but they can not set aside general rules in particular cases through the grievance procedure.

THE SWEDISH SOLUTION

In 1910 proposals were made in the Swedish parliament for legislation concerning employment contracts and collective agreements, and for creation of a Labor Court.⁹⁶ These proposals, which laid the foundation for later legislation, put to the side theoretical conceptions of the collective agreement, and instead sought to fit the law to the needs and purposes of the collective agreement.⁹⁷ In the studies and the debates, one of the recurrent problems was defining the relative rights of the individual and the organization.⁹⁸

One of the central premises of the proposal was that the individual employee obtained rights under the collective agreement and could independently enforce those rights. To the argument that only the collective parties should be allowed to sue in the Labor Court it was replied that this would mean that the individual would be hindered in enforcing his rights because of his organization's refusal to cooperate. This, it was emphatically declared, would be clearly unreasonable, for the organization might refuse to enforce valid claims for reasons other than their merit. To force the individual to sue in the general courts on his employment contract would deprive him of the court with special qualifications to decide these matters and might lead to conflicting results.⁹⁹

The original proposal gave the individual almost complete independence in enforcing his rights. When his rights were violated, he could sue. If the organization brought suit, he could bar it from litigating his portion of the claim or collecting damages on his behalf.¹⁰⁰ This was criticized because the employer, especially in lockout cases, might be subjected to multiple suits and the courts would be overburdened.¹⁰¹ The whole proposal was ultimately defeated by a legislative impasse, but for reasons unrelated to this provision.¹⁰² Revised versions were also proposed in 1911¹⁰³ and 1916,¹⁰⁴ but likewise failed.

96. KUNGL. MAJ:TS PROPOSITION No. 96 (1910).

97. See generally ADLERCREUTZ, *KOLLEKTIVAVTALET* 462-64 (1954).

98. See AKERMAN & OLIN, *op. cit. supra* note 70, at 108-11.

99. See KUNGL. MAJ:TS PROPOSITION No. 96, 77 (1910).

100. Section 11, *id.* at 74.

101. *Id.* at 148-49.

102. For the political debate around this legislation and the reasons for its passage by one chamber of the parliament and its defeat by the other, see WESTERSTAHL, *SVENSK FACKFÖRENINGSRÖRELSEN* 312-26 (1945).

103. KUNGL. MAJ:TS PROPOSITION No. 43 (1911).

104. K. SOCIALSTYRELSEN, *UNDERDANIGT UTLATANDE MED FÖRSLAG TIL LAG OM VISSA ÅTGÄRDER TILL FRÄMMANDE AV ARBETSFRED* (1916).

The proposals of 1910 finally bore fruit in 1928 in the Collective Contracts Act and the Labor Court Act. Again the problem of defining the rights of the individual under the collective agreement were studied and debated. The premises which underlay the earlier proposals were fully accepted; discussion centered on fitting these to the practical needs of the parties. The committee of experts proposed that the organization be empowered to sue on behalf of their members if the members themselves did not sue.¹⁰⁵ Again, giving the union sole power to enforce was emphatically rejected. "An individual member of an organization would in this way become wholly thrown upon the organization's discretion."¹⁰⁶ The original proposal was modified, for it was recognized that in allowing an individual alone to litigate the validity or contents of the agreement, he might by defective handling create a dangerous precedent. But it was still emphasized that "one can not deprive him of all possibility in this regard if the organization will not help him."¹⁰⁷

The relative rights of the individual and the organization to enforce the collective agreement are set forth in Section 13 of the Labor Court Act which provides:

An association which has concluded a collective contract may bring an action in the Labor Court on behalf of any person who is or has been a member of the association; and a member of the association shall not himself bring an action unless he proves that the association refuses to take action in his behalf.

This section is built upon the basic premise that both the individual and the organization have rights under provisions of the collective agreement which directly benefit the individual. The major elements of the section are clear. First, the organization can sue to enforce the agreement, not only to protect its collective interest but to assert rights of individuals bound by the agreement. Second, the organization is not only a proper party to enforce individual rights, but shall have the first opportunity to do so, for the individual can sue only if the organization refuses to take action on his behalf. Third, the individual has an indestructible right to have enforced the provisions of the agreement made for his benefit, for his claim is neither settled nor barred by the organization's refusal to seek enforcement. Fourth, the individual's claims, whether asserted by the organization or the individual, are adjudicated in the Labor Court, the tribunal specially created and specially competent for resolving disputes arising under collective agreements.

It is immediately apparent that these major elements of the Swedish law drawn from Section 13 bear a marked similarity to the essential elements of the American statutory approach drawn from Section 9 of the NLRA. Study of the Swedish law and experience under Section 13 may be particularly valu-

105. KUNGL. MAJ:TS PROPOSITION No. 39 (1928), Sakkunnigas Utkast, Section 13.

106. *Id.* at 191.

107. *Id.* at 192. The proposal was modified to make completely clear that the union could not defeat the individual's claim either by failing to take action or by starting a suit and then withdrawing it. *Id.* at 244.

able in developing our own statutory approach and separating real from imaginary problems.

The Scope of Individual Rights

The central thrust of the Swedish statutory provision is that the individual has rights under the collective agreement which his organization can neither bar nor barter away. The breadth of that thrust is forcefully illustrated by three cases. An employer, in making promotions, consulted the union and reached an agreement with it on who should be promoted. When an employee who had been passed over protested that under the terms of the contract he was entitled to promotion, the employer defended on the grounds of his agreement with the union. The employee then brought suit in the Labor Court. The court held that although the union was bound by its settlement, the individual's right to promotion must be governed by the provisions of the collective contract and not by the union's consent. The court found that the employee met the requirements of the contract and ordered him promoted.¹⁰⁸ In another case the collective agreement provided that either of the collective parties could demand arbitration.¹⁰⁹ An employee claimed that he had been underpaid during a period of six years, but the union disagreed and refused to demand arbitration. When the employee brought suit in the Labor Court, the employer argued that the court had no jurisdiction because the collective agreement required disputes as to the meaning to be submitted to arbitration. The court curtly rejected this argument, holding that because the agreement contained no provision corresponding to Section 13 of the Labor Court Act but allowed only the collective parties to demand arbitration, the individual could assert his claim in the Labor Court.¹¹⁰ The third case makes clear that Section 13 also protects an individual, here an employer, from having his rights altered by his organization waiving any provisions. The union claimed that an individual employer had made improper deductions from wages due a group of workers. When local negotiations failed, the dispute was referred to the national union and employers association, but they were unable to settle. The contract provided that suit must be brought within two months after negotiations were terminated. After fifty days had passed, the union was given an extension of time by the employers association without any notice to or consent by the individual employer. When the union later brought suit the employer set up the defense that the suit had not been brought within the prescribed time. The Labor Court held that the individual employer had a right under the agreement that suits be brought within the prescribed time, and the association could not under Section 13 of the Labor Court Act surrender this right without his consent. The fact that the organization negotiated on his behalf gave it no authority to surrender his rights, nor is

108. AD 1946:31.

109. Section 11 of the Labor Court Act provides that "A dispute which would otherwise be heard in the Labor Court may instead be referred by agreement to arbitration for decision. . . ."

110. AD 1945:27.

he legally obligated "to submit to a disposition which he believes violates his rights under the collective agreement."¹¹¹

The primary concern here is how this very substantial protection of individual rights has functioned, what problems it has confronted in accommodating collective and individual rights, and what rules or guides have been developed in working out that accommodation. A total of forty-five cases have been brought to the Labor Court by individual employees under Section 13, and in nine of these the individual has won. The kinds of cases brought vary widely. Nineteen involved wage claims, including piece rates, overtime, vacation pay, sick pay and expense allowances; eighteen involved discharges; four involved job priority claims such as lay-off, recall or replacement; three were promotion cases; and one was a demand for a favorable letter of reference.

Availability of Individual Suits—The Number and Types of Cases

In both 1910 and 1928 when Section 13 was discussed, fears had been expressed that allowing individuals to sue would bring a flood of cases to the Labor Court. These fears have proven unfounded. The largest number of cases in any one year was six in 1953, and in each of the last two decades there has been an average of less than two a year. Even success does not incite others to bring such cases. In 1946 individuals bringing suit won three out of four cases, but the next three years produced only three cases; and in 1958, nine individuals won a noted victory in the *Stockholm Bachelor Hotel Case*,¹¹² but no individual cases were brought the following year. Nor is the small number of individual cases due to the collective parties' avoiding their responsibility to settle cases, and carrying a multitude of worthless or trivial cases to adjudication. In recent years less than fifty cases a year are carried to the Labor Court under collective agreements covering more than two million workers; other grievances are settled by negotiation.

Individual cases are probably deterred in part by the costs of litigation. If the individual wins, the court will award him legal costs, including attorney's fees, but if he loses, the court can and often does tax him with the legal costs. These may range from 200 to 2,000 crowns, or the equivalent of from a week to two months income. The availability of legal aid funds prevents legal costs from being any bar to an individual enforcing his rights, but he is deterred from litigating worthless claims by the fact that he must ultimately pay these costs according to his ability. The small number of individual cases is probably due more to the confidence which the individual has in his organization and his willingness to accept its decision as fair.

111. AD 1947:13. In this and other cases the Labor Court has not diluted the individual's right by finding that he has authorized the organization to act in his behalf. Although such authority might be explicitly given, the Labor Court has refused to find any implied authority in the fact that he permitted the organization to negotiate concerning the grievance, or that the union had tried to further his interests. Nor has the Labor Court been willing to find any general authorization in the union's constitution. AD 1958:23.

112. AD 1958:23.

Reasons For The Union's Refusal to Sue

Under Section 13, the individual can sue only if his organization refuses to do so. Some understanding of the functioning of this provision is added by inquiring into the reasons why the union has refused to proceed in these cases.¹¹³ In a few, the individual's claim appears to have no support in the collective agreement and seems clearly worthless.¹¹⁴ However, in the majority of cases the individual's claim appears to be at least arguable and often the arguments either for or against the claim seem nearly evenly balanced. In a few cases, like the promotion case described earlier,¹¹⁵ the union has either agreed with the employer in advance to the very conduct which the individual claims is contrary to the contract¹¹⁶ or has worked out a compromise solution which gives the individual only part of what he claims.¹¹⁷ The union has thereby foreclosed itself from proceeding on a claim which it might otherwise deem meritorious. In the typical case the claim is doubtful and the union, after full consideration, has decided that in its judgment the claim lacks sufficient merit to be worth processing and has either settled the case or refused to proceed. The individual sues because he disagrees with the union's judgment as to the merits of the case.

The union's refusal to proceed may evidence a lack of aggressiveness in protecting the employee's interest. This may lead it to surrender cases which could be won. In one case, a warehouse employee arranged to buy a bicycle which had been used as a display model in the showroom. Instead of obtaining a purchase order, paying the cashier and then surrendering his receipt in return for the bicycle, he simply paid the money direct to the salesman who said he would make up the papers and hand the money to the cashier. The salesman, however, kept the money. When this was discovered the purchasing employee was discharged for his failure to follow the prescribed procedures and making possible the loss. The union, after discussing the case with the employer, agreed that the discharge was justified. The Labor Court, however, in the individual's suit, found otherwise. The employee had indeed violated the rules, but he had no reason to suspect the salesman and had acted in good faith under mitigating circumstances which made the discharge unjustified.¹¹⁸ The union may also surrender valid claims because it is too willing to accept the employer's version of the facts. For example, a seaman claimed that his termination with only

113. The reasons for the union's refusal to proceed often does not appear in the report of the case. The files in the Labor Court which include all of the documents in the cases have been examined to determine so far as possible the union's reasons for refusal to proceed.

114. The individual's interpretation of the agreement may be clearly erroneous, see AD 1952:20; AD 1947:79; AD 1944:60; AD 1940:16; or his version of the facts not supported by the evidence, see AD 1960:5; AD 1960:2; AD 1953:56; AD 1953:22; AD 1945:61.

115. Note 108 *supra*.

116. See, *e.g.*, AD 1958:23; AD 1953:19; AD 1944:41; AD 1932:168.

117. See, *e.g.*, AD 1952:7; AD 1944:57; AD 1933:112.

118. AD 1949:19; *cf.* AD 1942:99.

seven days notice was improper. He admitted that because he was not fully qualified as a first machinist he could be replaced by a qualified person on such short notice, but claimed that the employer had not obtained such a replacement. The employer stated that a fully qualified first machinist had been hired before notice was given but that he later took another job. The union conceded the correctness of the employer's action, and the seaman was compelled to carry his own case to the Labor Court. There the alleged replacment was questioned for the first time. He testified that although he had been offered the position, he had not accepted. This evidence, which the union had apparently not attempted to obtain, was decisive in winning the case for the individual.¹¹⁹

In none of the cases does it appear that the union's refusal to take the cases to the Labor Court was due to arbitrariness, favoritism or vindictiveness. However, if the individual's predicament is a result of his own violation of the contract or union rules, the union may deny any responsibility. For example, a crew of building workers agreed to accept less than the contract scale if the employer would continue with the project. After it was completed, they claimed the full amount and the union refused to help them even though their claim was clearly valid. Their own violation of the contract and union rules had created their problem and the union felt no responsibility.¹²⁰ The union may also deny responsibility for protecting those who are no longer members of the union even though they are still bound by the contract. Thus the union has refused to sue on behalf of those who are delinquent in dues,¹²¹ who are in bad standing¹²² or who have seceded from the union.¹²³ In four cases, however, the union's refusal to proceed has no apparent explanation other than indifference to the member's rights.¹²⁴

Participation By The Collective Parties And The Individual

The fact that the union refuses to take the case to the Labor Court does not preclude it from participating in the proceedings when an individual sues under Section 13. The court has recognized that the decision in an individual's case may affect collective interests, and has allowed or even requested the union to present its views. This is particularly important in questions of interpretation.¹²⁵ Usually the union simply states that it agrees with the employer's interpretation, but it may give more specific support by testifying to the history

119. AD 1956:38. See AD 1954:7, where the union refused to process a member's claim for a sick pension because he had earlier refused to take a physical examination, although four doctors had separately certified that he was disabled by mental illness. See also AD 1958:26, discussed note 137 *infra*.

120. AD 1932:68. Where the union feels that the individual has been the victim of overreaching by the employer, it will come to his aid. See AD 1932:55.

121. AD 1960:26; AD 1951:17; AD 1945:27.

122. AD 1961:13; AD 1941:149.

123. AD 1946:63; *cf.* AD 1932:33.

124. AD 1956:41; AD 1946:69; AD 1946:70; AD 1941:155. Examination of the Labor Court files in these cases leaves the union's refusal to proceed all the more difficult to explain.

125. See, *e.g.*, AD 1956:38; AD 1953:2; AD 1941:149; AD 1940:16.

of the provision and the reason for its inclusion,¹²⁶ to the intention of the collective parties when they adopted the provision,¹²⁷ or to the practices of the parties under the provision.¹²⁸ Where the union has agreed in advance to the employer's conduct, the union may for practical purposes be a codefendant in the case and oppose the individual's claim with as much vigor as the employer.¹²⁹

In permitting the union to participate, the court seeks to protect two interests. First, it seeks to protect the union's collective interest in the agreement. Before adopting the employer's interpretation in a case which may establish a precedent, the court needs to know whether the union agrees or has refused to proceed for some other reason.¹³⁰ The union may agree in the particular case but may want to avoid too broad a precedent. For example, a collective agreement provided that employees could be discharged without notice for "misconduct of more gross nature" and further provided that "[a]s misconduct of more gross nature should be considered dishonesty and intoxication on the job." The employee was discharged for working on another job while receiving sick pay. The union conceded that under the circumstances this could be considered dishonesty and grounds for discharge, but opposed the employer's broader contention that discharge could be for offenses other than the two listed, dishonesty and intoxication.¹³¹ Second, the court seeks to protect its own interest in making an informed judgment. Thus, the union may give its version of the facts even though it has no collective interest in the particular case, and in cases involving complicated piece-work rates in construction the court may seek the expert opinion of union officials.¹³² The guiding principle in the proceeding is to permit participation by all who may have an interest or who may aid in developing the facts. For example, in a suit brought by an individual against his employer, not only the union but the national employers association was allowed to participate, even though the employer was not a member.¹³³ The contract had incorporated by reference the national agreement and the court was required to interpret that agreement. The case thus involved four parties, each representing independent interests and views.

The court has never confronted directly the other half of the problem of the right of participation—the right of the individual to participate in suits brought by the union to enforce his rights under the collective agreement. It would

126. See, *e.g.*, AD 1961:9.

127. See, *e.g.*, AD 1953:56.

128. See, *e.g.*, AD 1950:54.

129. See, *e.g.*, AD 1958:23; AD 1953:19; AD 1946:31.

130. In AD 1956:41, when the union was requested to state its position it supported the individual's interpretation of the contract, and in AD 1958:23, Part I, the union did not oppose the individuals' claim but instead stated that it had refused to proceed because the employer had agreed to follow the rules which the individuals sought to have the court declare. *Cf.* text accompanying note 151 *infra*.

131. AD 1950:54.

132. See, *e.g.*, AD 1960:10.

133. AD 1956:41.

seem, however, that he would be entitled to participate in such proceedings. If the union sues, the individual is barred by Section 13 of the Labor Court Act from bringing an independent suit, but the purpose of this is not to deny his rights under the agreement but to prevent multiple litigation.¹³⁴ The suit adjudicates both collective and individual rights, and both interests are entitled to be fully represented. These interests may not always coincide. Indeed, when the dispute is one in which employees have prior rights to particular jobs, the union's position may be directly opposed to those of some members.¹³⁵ Putting to the side the possibility that the collective parties might use the procedure as a sham to make a binding settlement of the individual's rights, the individual may want to present different arguments or evidence in support of his claim. There would seem no reason to depart from the court's guiding principles of allowing all to participate who have substantial interests to protect or who may aid the court in making a fully informed judgment.

The importance of full participation, and the court's willingness to provide it, is illustrated by a case in which an employer had deducted from the wages of six carpenters damages for their alleged breach of the collective agreement. The union brought suit in the Labor Court admitting the breach of contract, but contesting the employer's right to deduct damages from wages due. The carpenters, insisting that they had not breached the agreement, sued in the general courts for their wages. This was referred to the Labor Court, which ordered it consolidated with the union's suit.¹³⁶ At the hearing both the individuals and the union participated. During the course of the hearing the union changed its position, claiming that the employer had not informed it of all the relevant facts, and supported the individuals' contention that they had not acted in breach of contract.¹³⁷ This contention, which was upheld by the court, might never have been explored but for the participation of the individuals whose views and interests differed from those of the union.

Interpretation of The Agreement And Continued Bargaining

The most difficult problem in accommodating the relative rights of the individual and the union grows out of the inherent ambiguity of the collective agreement and the continuing need of the parties to give it meaning case by case. This poses the problem: to what extent is the individual bound by the interpretation of the collective parties? If the collective parties have unlimited freedom to interpret, then the individual's rights are wholly subservient; if the collective parties have no freedom to interpret they are bound in a strait-jacket. The Labor Court and Swedish writers have struggled with these problems and developed some helpful guides.¹³⁸

134. See KUNGL. MAJ:TS PROPOSITION No. 96, 74, 148 (1910); PROPOSITION No. 39, 180, 244 (1928).

135. See, e.g., AD 1946:61.

136. AD 1958:2.

137. AD 1958:26.

138. See SCHMIDT, *THE LAW OF LABOUR RELATIONS IN SWEDEN* 81-91 (1962).

The Labor Court has stated two basic principles which place outer limits on the power of the collective parties to bind the individual by their interpretation. First, they can not by their interpretation change the collective agreement.¹³⁹ The individual has rights under the agreement and these can no more be destroyed or surrendered under the guise of interpretation than any other way.¹⁴⁰ If at the time the contract was made, the parties had a clear intent as to its meaning, whether its words were clear or not, the parties can not later agree that the contract shall have a different meaning. This principle does not bind tightly, for when the words are unclear the parties can testify to their original intent, and even seemingly plain words may prove ambiguous.¹⁴¹ Second, the collective parties can not mislead those bound by the agreement as to their rights and obligations. If the original intent of the collective parties conflicts with the clear words of the contract, the individual's rights are governed by the words of the contract until he is informed of the original intent.¹⁴² His expectations can not be defeated by the secret intent of the parties. This principle, like the first, does not bind tightly, for the words must be completely clear. Any uncertainty as to the meaning or application of the contract prevents the individual from claiming any fixed expectations or firm reliance.¹⁴³

These principles, although they fix boundaries, do not solve the difficult cases for they apply only where the intent of the parties or the words of the contract are clear. But in many cases neither the intent nor the words are clear. The parties may have failed to foresee the problem or, having foreseen it, postponed solving it by keeping silent or being deliberately ambiguous. The collective agreement is, by its nature, incomplete and must be filled out by the parties in their day-to-day settlement of disputes. Interpretation becomes a process of completion; it does not discover terms in the contract but adds terms to the contract. In principle, Section 13 creates no obstacle to this process of completing the contract. The individual has rights in terms agreed upon by the parties, but he has no rights in terms left unsettled.¹⁴⁴ The parties retain their freedom to continue their contract making.

The Labor Court has recognized this special character of the collective contract and has not attempted to dissect its words or search the minds of the parties in order to discover agreement which was never there.¹⁴⁵ The court has

139. AD 1947:13; AD 1946:31.

140. The fact that the union knows of a long continued practice and made no objection can not work a change of the agreement. AD 1958:23.

141. See, *e.g.*, AD 1932:168.

142. AD 1944:4.

143. AD 1953:19; AD 1941:154.

144. Thus the parties may, by their agreement, expressly provide that certain matters such as job transfers and upgrading shall be agreed upon by the parties from time to time and the member is subject to these determinations. AD 1950:65; AD 1941:29. If the parties reserved by express provision a blanket power to agree on any interpretation whatsoever for any term of the collective agreement, the rights of the individual would be undercut. Such a provision probably would be void as contrary to the purpose of Section 13.

145. See Schmidt, *Kollektivarbetsrätt* 1949-57, Sv. J.T. 217 (1958).

left the process of completion to the parties and given them a wide range of freedom in filling out the terms of the agreement. This freedom to complete, however, is not unconfined, for it is restricted by two other limiting rules. First, the parties' interpretation must follow the general guides of the agreement; gaps are to be filled, not the contract remade. Although the court often says that a member is bound by his organization's interpretation, close examination of the cases indicates that the court does not blindly accept the organization's interpretation. Instead, the court carefully scrutinizes that interpretation to determine whether it is reasonable in the light of the settled terms of the agreement.¹⁴⁶ Second, the interpretation must be consistently applied; the meaning of the contract can not be changed from case to case.¹⁴⁷ If the parties have interpreted a provision in one case, they are bound by that interpretation in subsequent cases.¹⁴⁸ In effect, the parties may fill the gaps and complete the contract by establishing general rules, but they can not then set aside those rules in particular cases any more than they could set aside other contract terms. Indeed, this principle that disputes arising under a collective agreement are to be decided according to general rules and not according to the unchannelled discretion of the collective parties expresses the purposes at the heart of Section 13 and adds life and color to the other limits on the collective parties' freedom to interpret the contract.

The collective parties are not irretrievably bound by their agreement, for they are free at any time to amend the agreement or negotiate a new one.¹⁴⁹ Section 13 was never intended to compel the parties to continue an unsatisfactory contract until its termination date; it was only intended to secure the individual's rights until the contract had been changed by regular procedures.¹⁵⁰ Thus, Section 13 assumes a working distinction between contract making and contract administration. Although the functions of these two processes overlap, for the contract is completed by grievance settlement, the two processes are in practice procedurally distinct. The procedures used by unions and employers associations to make and amend collective agreements are markedly different from those used for settling disputes arising under the agreement. The power to make contracts is not normally placed in the same hands as the power to settle grievances, for both the organizations and their members consider these functions to be of a significantly different order. Section 13, built upon this practical and functional distinction, prescribes that an individual's rights under the agreement be changed only by the procedures established for making and amending contracts.

146. See, *e.g.*, AD 1961:9; AD 1958:23; AD 1957:34; AD 1953:56; AD 1947:66; AD 1941:149; AD 1940:16.

147. AD 1953:19.

148. AD 1932:168.

149. Under § 1 of the Collective Contracts Act, collective agreements must be in writing. Any modification of the contract must also be in writing. AD 1958:23; AD 1945:10.

150. AD 1949:39.

Even the freedom to amend the collective agreement, however, may be limited if the amendment affects the rights of some individuals retroactively. In the *Stockholm Bachelors Hotel Case*, several desk clerks in these hotels had over a long period worked extra hours and received no overtime pay as required by the contract. They protested and this practice was ultimately corrected, but there remained the claim of back pay for more than a year. After several months of discussion, the union and employers' association made a compromise settlement. On the same day they signed a new collective contract which incorporated by reference the settlement agreement. The desk clerks rejected this compromise and sued for the remainder of the back pay. The Labor Court held that even though the settlement was made in connection with a new collective contract, the union could not surrender a claim which was "already earned" without the members' authority or consent.¹⁵¹ The claim here was for back pay for work performed, and the court gave no clue whether other "acquired rights" would be equally protected against changes by a new contract, nor what might be classified as "acquired rights." Swedish writers have discussed this problem but have reached no consensus as to rationale or results.¹⁵²

The Individual and Time Limits in The Contract

One of the potential stumbling blocks for an individual in enforcing his rights is the time limit for bringing his suit. Most collective agreements provide that if the parties are unable to settle a dispute at the final step of the procedure, appeal to the Labor Court must be taken within a certain time limit after negotiations are concluded—commonly 60 days or three months. The court has held that this time is binding on the individual as well as the union. The individual faces two difficulties. First, he may not know within the limited time whether or not the union will carry his case to the court. In one case the individual called the union the day before the time expired and was told that the union would probably do nothing, but the union made no decision for ten days and delayed three months before giving the individual notice of its decision. The individual thereupon began suit, but the court held that he was barred for failure to bring suit within the prescribed time.¹⁵³ This does not mean that the union by its delay can destroy the individual's claim, for all the individual needs to show to sue in his own behalf is that the union has failed to bring suit.¹⁵⁴ Thus, it was enough for him to show that the union had said that it had not

151. AD 1958:23.

152. See BERGSTRÖM, *op. cit. supra* note 7, at 82-91; FAGERHOLM, *ARBETSMARKNADS-JURIDIK*, SVENSK TIDSKRIFT 291 (1948); SCHMIDT, *op. cit. supra* note 7, at 90-91. Much of the discussion has focused on the power of an employer's association to make a collective agreement bind on a member employer retroactively to the termination date of the prior agreement. It has not focused on the surrender of the specific claims of a few arising under a preceding contract as a part of the making of a new contract such as was involved here.

153. AD 1944:20.

154. AD 1947:38.

decided to sue, nor decided not to sue, nor decided when it would decide.¹⁵⁵ But the burden is put on the individual to determine what the union has done and, if it fails to act, to take the initiative of bringing suit within the time limits himself. The second difficulty for the individual is that he may not know when negotiations are concluded and the limitation time thereby started running. It is clear from the cases that he is not entitled to formal notice; actual knowledge will be enough.¹⁵⁶ The court has never confronted a case in which the individual did not have actual knowledge, but it would seem that the collective parties could not by their hidden act destroy his rights.¹⁵⁷ Negotiations at the last step are usually at the national level, and may be protracted or delayed. To require the individual, in order to protect his rights, to make repeated inquiries of the parties as to the negotiations in the case not only puts an undue burden on the individual but invites harassment of the parties. The cases show that the Labor Court has in fact been relatively liberal in enforcing the time limits against individuals,¹⁵⁸ and in those cases in which the individual has been barred, the delay has been due to his own neglect.¹⁵⁹

The Non-Union Individual

The individual employee who is not a member of the union has a greater measure of independence than a union member in enforcing rights growing out of the employment relation. According to Swedish theory his rights rest not on the collective agreement but on his individual contract of employment. Enforcement of this is completely within his control. However, he must enforce these rights in the general courts, for the Labor Court can enforce only rights under collective agreements. The non-union individual, therefore, is relegated to the general courts whose procedure is more cumbersome and who lack the special competence of the Labor Court. He is thereby deprived of those very advantages which were specially sought when the Labor Court was created. These suits in the general courts also raise problems for the collective parties. Because the individual contract of employment normally incorporates the terms of the collective agreement, the general courts must in fact interpret the collective agreement, and in a proceeding in which the union is not a party. This anomaly serves neither the interests of the individual nor the interests of the

155. AD 1932:68.

156. See AD 1951:17; AD 1944:57.

157. When the Labour Court Act was proposed in 1928, § 13 provided that an individual could sue only if he showed that the union had decided not to bring suit. It was pointed out that the individual might lose his claim in two ways: (1) the union avoided suing without making any decision and (2) if the union began the suit and later dropped it. The section was changed to meet both of these objections by requiring the member to show only that the union failed to take action in his behalf. KUNGL. MAJ:TS PROPOSITION No. 39, 244 (1928).

158. See AD 1952:10.

159. See AD 1944:57 (suit six months after notified by union that it would not take case to Labour Court); AD 1953:6 (suit seven months after told that union would not appeal); AD 1954:28 (suit more than year after union decided not to appeal).

collective parties but invites the very lack of uniformity within the collective bargaining system which the Labor Court has sought to avoid.¹⁶⁰

Evaluation of the Swedish Solution

Study of the cases coming before the Labor Court provides only a limited basis for evaluating the practical operation of the Swedish solution. However, after nearly thirty-five years of experience with Section 13 certain conclusions are reasonably clear.

First, the dangers foreseen by those who opposed giving the individual any right to sue have proven unreal. The Labor Court has not been flooded with individual suits; such suits have constituted less than two percent of all cases coming before the court. Nor has Section 13 led the union to processing worthless claims lest the individual discredit the union leaders by appealing his case and winning. Although the number of individual suits has tended to increase somewhat in later years, the number of all cases taken to the Labor Court has decreased from over 200 a year in 1932 to less than 40 in each of the last five years, while the coverage of collective agreements has tripled. The fears that the parties would be deprived of needed flexibility in administering the collective agreement have not been realized. The contract can be completed by interpretation. The limits on interpretation developed by the Labor Court keep the collective parties within bounds but do not put them in a straight-jacket or immobilize them from working out their problems.

Second, the individual is given a significant, though limited, measure of protection. He is protected not only against the union's arbitrarily surrendering or trading his rights but also against the union's indifference or negligence. Section 13 has proven to have its greatest practical value where the union honestly fails to recognize the merits of the individual claim. The protection has limited reach, for the Labor Court gives substantial weight to the views of the collective parties both as to their interpretation of the agreement and their version of the facts. The individual who appeals from a settlement carries a heavy burden of demonstrating that the settlement was wrong. The individual, however, does have an opportunity to present his case to the court and demonstrate its merit. The fact that this recourse is available to the individual may cause the parties to be more considerate of his rights and, by its mere presence, provide substantial protection.

Third, there seems to be genuine acceptance by the collective parties that the individual should have independent rights under the collective agreements. Neither the employers associations nor the unions seem seriously disturbed by the idea that an individual member can challenge their collective decisions by such suits. They do not consider it a repudiation or a threat to their security

160. Proposals to broaden the jurisdiction of the Labor Court to include suits on individual contracts have been made from time to time. Studies are presently being made of the problems and possibilities of such a change. See ANDRA LAGUTSKOTTETS UTLATANDE No. 19 (1960).

but rather a part of the system of rights and duties. Four of the seven members of the Labor Court are representatives of the collective parties and they inevitably bring to the court the viewpoints of the collective parties.¹⁶¹ However, the judgments of the court in these cases seems quite objective. There is no evidence of special sensitivity to individual rights nor desire to extend their protection. But there is also no evidence of hostility to individual suits nor efforts to warp the facts or contractual provisions to defeat his claims.

CONCLUSION

Under Swedish legal theory an employee is bound by a collective agreement only if he consents by becoming a member of the union, but in the United States he is bound by the majority union's agreement even though he repudiates both the union and the agreement. Logically, it might be thought that a Swedish employee by joining the union consented to the union's settling of grievances arising under the agreement, but that an American employee bound against his will would have greater independence in enforcing his rights under the collective agreement. Such has not been the case. Sweden early recognized the need to give the individual member rights independent of his union and has developed a substantial body of law defining and protecting those rights, but in the United States the courts have frequently denied the individual any rights. Although Congress in amending the NLRA in 1947 sought to give increased recognition of the right of the individual to process his own grievance by elaborating the proviso of Section 9(a), state courts have almost uniformly ignored this provision. Many of them, relying on claimed practical needs of collective bargaining, have given complete control over individual rights to the collective parties.

The Swedish law closely parallels the proviso to Section 9(a). Both are built upon the practical distinction between contract making and contract administration; both assume that the individual and the organization each have interests in enforcing the collective agreement; and both assert that the organization can not surrender or compromise the rights of the individual without his consent. The central premise is that the collective agreement consists of a system of general rules governing terms and conditions of employment, and that all parties—collective and individual alike—are governed by those rules until they are changed by proper procedures.

161. For a searching study of Labor Court decisions to determine how members representing the collective parties have reflected the interests of the parties in their opinions, see GEIJER & SCHMIDT, *ARBETSGIVARE OCH FACKFÖRENINGSLIDARE I. DOMARSÄTTE* (1958). When the interests of the collective parties are the same, they may combine to overrule the public members of the court. *Id.* at 87-111. However, this is exceptional, and the lay members of the court attempt to be as objective as possible. In 1941, when a union member of the court was criticized by union members for some of his decisions, he replied that he did not want to be on a Court if its members were to be "a sort of puppets who were expected to make up their minds on the questions at bar when prompted by a telephone call from the union," SCHMIDT, *THE LAW OF LABOR RELATIONS IN SWEDEN* 43-44 (1962).

The fact that this solution has served in Sweden to give the individual substantial protection without interfering with the needs and functioning of the collective bargaining system does not mean that it will work in the same way in this country. There are certain obvious differences which are particularly relevant. First, the range of interests which an individual has under a collective agreement is not the same in Sweden and in the United States. Seniority provisions are relatively rare in Sweden so that a union is seldom faced with the problem of deciding between two competing groups of employees. In addition, the Swedish collective agreement gives little protection against discharge other than to require notice of termination. This means that in both lay-off and discharge cases the individual's interest is greatly reduced, and his actual injury is further reduced by the prevailing conditions of full employment which enable him to find another job. A second significant difference between the Swedish and American context is the great amount of trust which Swedish workers repose in their union officers. This is largely a product of experience that they can be trusted. There is little fear that the officers will play favorites or use their power in a vindictive fashion. The traditional honesty, responsibility, and adherence to rule which union officers have shown increases the willingness of members to accept their decisions in grievance settlements.

Because of these differences it is probable that if the law in this country afforded as clear a recognition of individual rights as does the law in Sweden, the number of cases would be relatively much greater. With greater interests at stake and less trust in union officers, individuals would be more ready to challenge grievance settlements. At the same time, these very differences increase the need for giving the individual independent rights. The individual has at stake not merely a claim to back pay but his seniority rights; in settling his grievance the union is disposing of his future livelihood. Similarly, the lack of full confidence in the union officers—a fear not always unfounded in fact—multiplies the need for the individual to obtain review over their decisions. Seniority rules can be manipulated to favor some and eliminate others, and discharges of disliked individuals may not be vigorously contested. The availability of individual enforcement curbs temptation to so misuse power and gives the distrustful individual an opportunity to test the fairness of the settlement. If there were relatively more cases in this country than in Sweden, it would be largely because the need to give the individual this right is greater.

The Swedish experience suggests that the dangers in permitting individual enforcement can be easily overstated. The fact that collective agreements are incomplete and ambiguous does not prevent recognition of individual rights. Swedish collective agreements are written in at least as broad if not broader terms than American agreements. This is particularly true because national agreements for an entire industry must be applied to a multitude of shops throughout the country. The broad terms of the agreement must be filled out by day to day grievance negotiation as in this country. The collective parties have not found that their being confined within the bounds of their agreement

and general rules has deprived them of the flexibility needed to work out their problems.

Perhaps the most important lesson we can learn from the Swedish experience is that once we cast aside the sterile logic of legal theories and search for working solutions, the problems may prove less difficult than portrayed. It is easy to mistake existing practices for inescapable necessities, and to view established procedures as inherent in the structure. Looking at solutions to similar problems in another country might at least free us from such preconceptions. Collective bargaining, at its best, has been a pragmatic system capable of adjusting to felt needs. The Swedish solution suggests that the protection of individual rights within the framework of collective bargaining is not only possible but can be achieved with no disruption of the essential process.