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Comments

COMMENTS

"GOOD FAITH" IN COLLECTIVE BARGAINING—THE USE OF ECONOMIC PRESSURE IS NOT INCONSISTENT WITH DUTY TO BARGAIN IN "GOOD FAITH."—Collective bargaining is a procedure whereby employers and Unions seek to make collective agreements.[1] The making of these agreements requires that the parties deal with each other with open and fair minds.[2] Moreover, the employer and the accredited representatives of the employees must sincerely endeavor to overcome obstacles preventing stable employment relations and obstructing the free flow of commerce.[3] The theory of collective bargaining is that the free opportunity for negotiations between employer and Union will promote industrial peace.[4]

Industrial peace accomplished through collective bargaining necessitates bargaining in "good faith." [5] Originally only the employer was charged with the correlative duties to bargain collectively and to bargain in good faith.[6] (The amendment placing the duty upon the employee as well is discussed below.) Thus, the Wagner Act, passed in 1935, was aimed at protecting and implementing the rights of employees. This was accomplished not only by allowing employees to organize and join Unions of their own choosing, but also by requiring employers to bargain in good faith with the duly chosen employees' representatives.

EARLY DEVELOPMENTS

In an era of stark depression and tremendous unemployment, the Wagner Act was enacted ostensibly to free interstate commerce from the destructive effects of organizational strikes by eliminating employer interferences with the autonomous organization of employees. In reality, this statute was adopted as an inflationary measure to combat the depression by creating strong unions which, through collective bargaining, could achieve high wages and shorter work weeks thus providing more purchasing power and more jobs.

Because of the employers' overwhelming strength, the initial purpose of the Wagner Act was to create a necessary balance of power. Inherent in this balance was the restriction placed upon the employer to bargain in good faith. Congress not only insisted upon good faith from the employer, but

[1] Aluminum Ore Co. v. NLRB, 131 F.2d 485 (7th Cir. 1942).

[2] NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (2d Cir. 1952).

[3] Rapid Roller Co. v. NLRB, 126 F.2d 452 (7th Cir. 1942), cert. den. 317 U.S. 650, 63 S. Ct. 45, 87 L. Ed. 533 (1942).

[4] NLRB v. Duncan Foundry and Machine Works of America, 142 F.2d 594 (7th Cir. 1944).

[5] Penello v. International Union United Mine Workers of America, 88 F. Supp. 935 (D.C. 1950).

[6] National Labor Relations Act § 8(5), 49 Stat. 453 (1935), carried forward by Labor Management Relations Act (Taft-Hartley Act) § 8(a)(5), 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1952). It shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employee. . . ."

further imposed certain other unequivocal duties on him. Primarily these obligations fell into two groups: the first required the employer to meet and deal with the union negotiators[7]; the second compelled the employer to enter into negotiations with no conditions attaching to the negotiations.[8] Vio-

[7] National Labor Relations Board v. United States Cold Storage Corp., 203 F.2d 924 (5th Cir.), cert. den., 346 U.S. 818, 74 S. Ct. 22, 98 L. Ed. 340 (1953); National Labor Relations Board v. Lettie Lee, Inc., 140 F.2d 243, 248-49 (9th Cir. 1944). Meetings must be held at a place convenient to the plant. Compare NLRB v. P. Lorillard Co., 117 F.2d 921 (6th Cir. 1941), rev'd on other grounds, 314 U.S. 512, 62 S. Ct. 397, 86 L. Ed. 380 (1942) (insistence upon bargaining in New York City for a plant in Middletown, Ohio, held an unfair labor practice), and Westinghouse Pac. Coast Brake Co., 89 N.L.R.B. 145 (1950) (insisting upon bargaining in Pittsburgh for a West Coast plant held unfair), with National Grinding Wheel Co., 75 N.L.R.B. 905 (1948) (proposal that conferences be held fourteen miles from the plant not unfair when union objected only to the company's refusal to pay transportation costs).

[8] NLRB v. Hoppes Mfg. Co., 170 F.2d 962 (6th Cir. 1948) (refusal to negotiate unless union abandoned request for higher wages); American Laundry Mach. Co., 76 N.L.R.B. 981 (1948), enforcement granted, 174 F.2d 124 (6th Cir. 1949) (per curiam) (refusal to negotiate unless union withdrew unfair-labor-practice charge and abandoned strike). The cases dealing with the imposition of conditions, especially those dealing with performance bonds, are in an unnecessary state of confusion. Four categories of conditions should be recognized. (1) It is undisputably an unfair labor practice to attach any condition to entering into negotiations. (2) Sometimes a negotiator states that it must be a condition of any contract that the other party agree to a certain proposal; for example, that the union post a heavy performance bond. There are decisions which reason that since there is a duty to sign a contract if agreement is reached upon its terms, it is an unfair labor practice to refuse to sign unless the union takes steps to guarantee performance. Dalton Tel. Co., 82 N.L.R.B. 1001 (1949), enforcement granted, 187 F.2d 811 (5th Cir. 1951), cert. den., 342 U.S. 824, 72 S. Ct. 43, 96 L. Ed. 623 (1952); Scripto Mfg. Co., 36 N.L.R.B. 411 (1941); see Jasper Blackburn Products Corp., 21 N.L.R.B. 1240, 1254-55 (1940). This is a misconception. The general understanding in collective bargaining is that agreement on any particular point is tentative until there is agreement upon all the issues. To say that posting a performance bond is a condition to executing an agreement is simply a way of bargaining for this term in the over-all agreement. It is not an unfair labor practice per se. NLRB v. I.B.S. Mfg. Co., 210 F.2d 634 (5th Cir. 1954). But cf. Union Mfg. Co., 76 N.L.R.B. 322, 325 (1948), enforcement granted, 179 F.2d 511 (5th Cir. 1950). (3) Some demands or proposals may be evidence that the party making them is seeking to prevent agreement because he intends not to sign a contract upon any terms. It violates 8(a)(5) and 8(b)(3) (Labor Management Relations Act) to conduct sham negotiations in this state of mind. See Page 4 infra. The weight of the inference depends upon the nature of the demand, its timing, and other circumstances. Many anti-union employers who demanded performance bonds in the 1930's and 1940's were proved by other evidence to be going through the motions of bargaining with a fixed determination not to enter into a contract with a labor union. Very few employers who have accepted collective bargaining have demanded such an undertaking. It is proper therefore to treat a firm demand for a bond as evidence supporting a finding of bad faith. Standard Generator Serv. Co., 90 N.L.R.B. 790 (1950), enforcement granted, 186 F.2d 606 (8th Cir. 1951); Tower Hosiery Mills Inc., 81 N.L.R.B. 658 (1949), enforcement granted, 180 F.2d 701 (4th Cir.), cert. den., 340 U.S. 811, 71 S. Ct. 38, 95 L. Ed. 96 (1950); Jasper Blackburn Products Corp., 21 N.L.R.B. 1240 (1940) (containing broader dictum). (4) Making acquiescence to a proposed term of the contract a condition to entering into an agreement is an unfair labor practice if the proposed term would be unlawful or inconsistent with the policy of the Act. National Maritime Union (the

lations of the aforementioned requirements are deemed unfair labor practices because the duty to bargain collectively as defined in the Act is unqualified. Thus we see that the employer is not only duty-bound to meet with union negotiators, but is also obligated to negotiate with no preexisting qualifications.

Having thus brought the employer to the conference table, the vital restriction now incumbent upon the employer is to bargain in good faith. To examine this principle of "good faith" this comment will review: (1) initial Congressional intent in passing 8 (5) of the Wagner Act; (2) the National Labor Relations Board consideration of good faith; and, (3) the Court's interpretation of "good faith."

The Bill which later became the Wagner Act, made no requirement for compulsory bargaining on the part of the employer in its original form. Senator Wagner felt that this was an underlying principle and an essential ingredient of collective bargaining which needed no further articulation. His opinion was based upon the old National Labor Relations Board decision in the *Hounde Engineering case.*[9] However, the Senate Committee felt that the other rights guaranteed under the Act would be meaningless if the employer were not under an express obligation to confer with the Union in an effort to arrive at the terms of an agreement. This proposition was clarified in the following Senate Report:[10]

"The Committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is 'that either party shall be free to decide whether proposals made to it are satisfactory.' But, after deliberation, the committee has concluded that this fifth unfair labor practice should be inserted in the Bill. It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives . . . and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement."

So, in addition to four other enumerated unfair labor practices section 8 (5) of the Act was added, requiring the employer "to bargain collectively with the representative of his employees." The refusal to bargain with the union representing the employer's workmen was thus an unfair labor practice.

Now that the duty to bargain collectively was codified in the Wagner Act, Senator Walsh, chairman of the Senate Committee which prepared the Act, declared[11] "[w]hen the employees have chosen their organization, when

Texas Co. case), 78 N.L.R.B. 971 (1948), enforcement granted, 175 F.2d 686 (2d Cir. 1949), cert. den., 338 U.S. 954, 70 S. Ct. 492, 94 L. Ed. 589 (1950).

9 Hounde Engineering Corp., 1 N.L.R.B. (old) 35 (1934).

10 S. Rep. No. 573, 74th Cong., 1st Sess., p. 12.

11 Senator Walsh at 79 Cong. Rec. 7660 (1935).

they have selected their representatives, all the Bill proposes to do is to escort them to the door of the employer and say 'Here they are, the legal representatives of your employees.' What happens behind these doors is not inquired into and the Bill does not seek to inquire into it."

Congress clearly manifested an intention to elevate the labor union to a status from which it could bargain effectively with big business. Although branding certain actions unfair, Congress was still reluctant to place the substantive field of negotiation under the auspices of the National Labor Relations Board. In reality, Congress was satisfied with getting the employer and employees' representatives together to negotiate and the requirement to bargain collectively was added, not to place a duty upon the employer, but in the hope that the employer would make a reasonable effort to reach an agreement.

However, in spite of the apparent intention of Congress to bar the door of the conference room, the National Labor Relations Board desired more than "escorting the representative to the door of the employer." The Board in its first annual report declared:[12]

"Collective Bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground . . . . The Board has repeatedly asserted that good faith on the part of the employer is an essential ingredient of collective bargaining."

Although not codified, good faith became the keynote of collective bargaining. In addition, this doctrine received early judicial recognition.[13] Thus, from its inception, collective bargaining was concluded to be more than formal meetings between management and labor; it presupposed a desire to reach an ultimate agreement to enter into a collective bargaining contract.[14]

12 1 NLRB Ann. Rep. pp. 85-86. Also, early decision showed this to be true. Atlantic Refining Co., 1 N.L.R.B. 359 at 368 (1936) (". . . [C]ollective bargaining . . . means that employer is obligated to negotiate in good faith . . . and to endeavor to reach an agreement . . . ."); Globe Colton Miller, 6 N.L.R.B. 461 at 467 (1938) (". . . [c]ollective bargaining denotes . . . negotiations looking toward a collective agreement. If the employer adheres to a preconceived determination not to enter into any agreement . . . (he) does not fulfill his obligation under the Act"); Atlas Mills, 3 N.L.R.B. 10 at 21 (1937) (". . . [b]argaining must mean more than mere negotiation . . . (it must be) negotiation with a bona fide intent to reach an agreement"); Sands Mfg. Co., 1 N.L.R.B. 546 at 557 (1936) (". . . [t]he obligation to bargain collectively . . . effort must be made by the employer to reach a settlement of the dispute with his employees. Every avenue and possibility of negotiation must be exhausted . . . ."); Bethlehem Ship Building Corp., 11 N.L.R.B. 105 at 146 (1938); Highland Park Mfg. Co., 12 N.L.R.B. 1238 at 1248-1249 (1939), ("[t]he duty to bargain collectively . . . encompasses an obligation to enter into discussion and negotiate with an open and fair mind and a sincere purpose to find a basis of agreement . . . ."); Inland Steel Co., 9 N.L.R.B. 783 at 797 (1938).

13 NLRB v. Griswold, 106 F.2d 713 (3d Cir. 1939).

14 Heinz Co. v. NLRB, 311 U.S. 514, 61 S. Ct. 320, 85 L. Ed. 309 (1940).

EMPLOYERS' DUTY OF GOOD FAITH

The desire to make an agreement had to be manifested by more than formality. Merely going through the outward motions, knowing they were a sham, constituted a lack of good faith. Activities, although bearing the indicia of bona fide negotiations, but lacking in deep-rooted intention to strike a bargain were held violative of 8 (5).[15] The Courts have continually held that an intention must be manifested by more than outward appearances. One must demonstrate not only an open mind to negotiate but also a sincere desire to reach an agreement or common ground.[16] These cases deal with situations which on the surface appear to satisfy the statutory requirement of collective bargaining; however, when stripped of the aura and fanfare of negotiations, they lack the one essential ingredient necessary for reaching an agreement, the intention to negotiate.

In addition to those acts which have been found "lacking in intent to bargain" various other activities have been declared as violating 8 (5) since, in reality, they have been employed to thwart agreements. Each in turn was declared to breach the good faith that is incumbent upon employers when dealing with representatives of their employees. Stalling and postponements have been held to violate 8 (5);[17] likewise, has clothing a representative with apparent authority to negotiate when in fact he had no authority to do so.[18] Moreover, the Board has held that good faith is lacking when the employer repudiates commitments after leading the Union to believe that the employer's representative has authority to conclude the agreement.[19] The use of interference, coercion or restraint during negotiations also has been outlawed.[20]

Problems also have arisen in drafting the agreement. When an employer has refused to insert a standard clause in the agreement, good faith was declared to be lacking;[21] so has the refusal to include a provision which is

15 NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943).

16 NLRB v. Reed & Prince Mfg. Co., 118 F.2d 876 (1st Cir.) cert. den., 313 U.S. 595, 61 S. Ct. 1109, L. Ed. 1548 (1941); NLRB v. Boss Mfg. Co., 118 F.2d 187 (7th Cir. 1941); Globe Colton Miller v. NLRB, 103 F.2d 9 (5th Cir. 1939).

17 NLRB v. National Shoes, Inc., 208 F.2d 688 (2d Cir. 1953): Stanislaus Implement and Hardware Co., 101 N.L.R.B. 394 (1952), enforcement granted, 226 F.2d 377 (9th Cir. 1955).

18 NLRB v. A. E. Nettleton Co., 241 F.2d 130 (2d Cir. 1957); NLRB v. Nesen, 211 F.2d 559 (9th Cir. 1954); Great So. Trucking Co. v. NLRB, 127 F.2d 180 (4th Cir. 1942); J. B. Cook Auto Mach. Co., 84 N.L.R.B. 688, 698 (1949), enforcement granted, 184 F.2d 845 (6th Cir. 1950). But see Lloyd A. Fry Roofing Co. v. NLRB, 216 F.2d 273 (9th Cir. 1954) (failure to give negotiators authority to make binding commitment not an unfair practice per se).

19 NLRB v. Shannon, 208 F.2d 545 (9th Cir. 1953); Gittlin Bag Co., 95 N.L.R.B. 1159 (1951), enforcement granted, 196 F.2d 158 (4th Cir. 1952) (per curiam).

20 NLRB v. Lettie Lee, Inc., 140 F.2d 243 (9th Cir. 1944); NLRB v. Dixie Motor Coach Corp., 128 F.2d 201 (5th Cir. 1942); Great So. Trucking Co. v. NLRB, 127 F.2d 180 (4th Cir. 1942).

21 Montgomery Ward & Co., 37 N.L.R.B. 100, 121 (1941), enforcement granted, 133 F.2d 676 (9th Cir. 1943).

based upon a statutory requirement.[22] Hence, the general duty imposed upon the employer is to reduce the agreement to writing; furthermore, he cannot refuse to sign the agreement on the grounds that certain statutory provisions or general claims are included.

Other dictates of good faith have been established, including the necessity to make counter proposals when the employer is dissatisfied with those suggested by the Union.[23] Today, however, this principle has limited application. Before the employer's action will be deemed violative of 8 (5), the representatives of the employees must show that a wide field of bargaining is open to the employees and that he has been unwilling to make some offer on which the parties may agree.[24]

Conversely, where the employer made offers, proposals or demands which were obviously unreasonable and by their very nature tended to obstruct negotiations, the Courts and the National Labor Relations Board have declared that such a situation constituted lack of good faith. Such activities are illustrated by situations in which the employer refused to execute a contract unless the established wages were reduced[25], and where the employer maintained that vacations had to be curtailed before the agreement could be signed.[26] The most flagrant violation of this type occurred where the employer refused to sign the agreement unless the wage rates of the Union employees would be below the wage rate offered to individual employees not affiliated with the Union.[27] However, it should be noted that the above cited instances are not violations per se. The employer, with a bona fide reason, may engage in the aforementioned activities. Thus, in addition to seemingly outrageous demands, other indications that the proposal did not represent the employers' honest judgment must be shown.

In addition to the preceding paragraphs relating to activities concerning both expressed and implied lack of intention to bargain, certain other activities are also outlawed. The Courts and the National Labor Relations Board declared certain acts to be per se violations of good faith.

The refusal of an employer to sign a written agreement has always been regarded as evidence of bad faith.[28] This clearly violates one of the basic

22 Reed & Prince Mfg. Co., 96 N.L.R.B. 850 (1950), enforcement granted, 205 F.2d 131 (1st Cir.), cert. den., 346 U.S. 887, 74 S. Ct. 144, 98 L. Ed. 391 (1953).

23 NLRB v. George P. Pilling & Son Co., 119 F.2d 32, 37 (3d Cir. 1941).

24 Cases holding that failure to make a counter proposal is not evidence of bad faith because only limited issues were under discussion include Harcourt and Co., 98 N.L.R.B. 892 (1952); Collins Baking Co., 90 N.L.R.B. 895 (1950), enforcement granted, 193 F.2d 483 (5th Cir. 1951). Cases using failure to make counterproposals as evidence of bad faith include NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir.), cert. den., 346 U.S. 887, 74 S. Ct. 144, 98 L. Ed. 391 (1953); NLRB v. O'Keefe & Merritt Mfg. Co., 178 F.2d 445 (9th Cir. 1949); David I. Cohen, 91 NLRB 1363 (1950); N. Ben Weiner, 71 N.L.R.B. 888 (1946).

25 C & D Coal Co., 93 NLRB 799 (1951).

26 NLRB v. Deena Artware, Inc., 198 F.2d 645, 648, 650 (6th Cir. 1952).

27 Northeastern Indiana Broadcasting Co., 88 NLRB 1381 (1950).

28 NLRB v. Highland Park Mfg. Co., 110 F.2d 632, 637-38 (4th Cir. 1940).

premises upon which collective bargaining rests,[29] the desire to reach an agreement binding upon the parties and sanctioned by law. Thus the Union is protected from participating for naught, thereby leaving employees in a position where they need not fear endless talk with no purpose being served. This principle received equal protection under 8 (d) of the Taft-Hartley Law.

During negotiations, unilateral action by the Employer is deemed to violate the good faith required in collective bargaining. This principle is founded upon the idea that the unilateral action will undermine the Union, because it tends to show the employees the insignificance of the Union when dealing with the employer. Thus, proof that a wage change was brought about by the unilateral action of the employer gave rise to the inference that the employer had no desire or intention of reaching an agreement with the employees' representatives.[30] Some Courts have held that the presumption of bad faith can be vitiated by showing that the exigencies of the circumstances demand immediate action on the part of the employer. However, the overwhelming weight of authority indicates that, during the course of employment, any unilateral action affecting wages or other terms of employment are violations per se.[31]

The withholding of information concerning wages, hours and other terms and conditions of employment is a violation per se. This principle received earliest Board approval in a case involving financial data.[32] In the *Pioneer Pearl Button* case,[33] the company sought to reduce wages. A union, which was quickly formed for the purpose of collective bargaining, requested an investigation into the company's books in order to determine whether the financial conditions of the company demanded a reduction in wages. Upon the refusal of the company to furnish the relevant information, the union appealed to the National Labor Relations Board. In a decision which established the above principle, the Board held that such retention of financial data was a violation of the requirement to bargain in good faith.

Following the *Pioneer Pearl Button* case, the Board and the Courts stated that the refusal to supply information relating to wages, hours and other conditions of employment constituted bad faith. Although the foundation for the above principle was laid in a case involving financial data, many

[29] H. J. Heinz Co. v. NLRB, 311 U.S. 514, 61 S. Ct. 320, 85 L. Ed. 309 (1941).

[30] NLRB v. National Shoes, Inc., 208 F.2d 688 (2d Cir. 1953); NLRB v. Barrett Co., 135 F.2d 959 (7th Cir. 1943); Stanislaus Implement and Hardware Co., 101 N.L.R.B. 394 (1952), enforcement granted, 226 F.2d 377 (9th Cir. 1955); J. B. Cook Auto Mach. Co., 84 N.L.R.B. 688 (1949), enforcement granted, 184 F.2d 845 (6th Cir. 1950).

[31] May Dep't. Stores Co. v. NLRB, 326 U.S. 376, 66 S. Ct. 203, 90 L. Ed. 145 (1945); General Motors Corp., 81 N.L.R.B. 779 (1949), enforcement granted, 179 F.2d 221 (2d Cir. 1950); Sullivan Dry Dock & Repair Corp., 67 N.L.R.B. 627 (1946). But see NLRB v. Bradley Washfountain Co., 192 F.2d 144 (7th Cir. 1951), 65 Harv. L. Rev. 697 (1952); McDonnell Aircraft Corp., 109 N.L.R.B. 930, 934 (1954). See generally, Bowman, An Employer's Unilateral Action—An Unfair Labor Practice?, 9 Vand. L. Rev. 487 (1956).

[32] Pioneer Pearl Button Co., 1 N.L.R.B. 837 (1936).

[33] Ibid.

other sources of information have been included. Thus where an employer refused to furnish the Union with a complete wage history of the employees included in the bargaining unit, the refusal was declared violative of good faith.[34]

In addition, refusal to furnish information concerning individual earnings,[35] job rating and classification,[36] merit increases,[37] pension data,[38] time study data,[39] incentive earnings,[40] piece rates,[41] and the operation of an incentive system,[42] have been deemed to violate the requirement to bargain in good faith.

Thus, the National Labor Relations Board, with the approval of the Courts, has transgressed the original Congressional-intended limits which left the employees' representatives at the door of the conference room. Moreover, the Board has indirectly taken part in the negotiations by requiring good faith and in addition has declared certain actions as violating this requirement.

This breach, or rather over-stepping of the original purpose of the Act, has been the cause of much concern. Great criticism was registered over the application of the Board's requirement of "good faith," since many felt that the Board in effect was controlling the method and substance of the negotiations. Thus, in an attempt to curb these far reaching powers, Congress enacted the Taft-Hartley Act. In effect, the Act by enacting a good faith test[43] of collective bargaining hoped to curb this dreaded trend. However, the same problem continued to arise.[44]

[34] Aluminum Ore Co. v. NLRB, 131 F.2d 485 (7th Cir. 1942).

[35] NLRB v. F. W. Woolworth Co., 352 U.S. 938, 77 S. Ct. 261, 1 L. Ed. 2d 235 (1956) (per curiam); Boston Herald-Traveler Corp. v. NLRB, 223 F.2d 58 (1st Cir. 1955); NLRB v. Item Co., 220 F.2d 956 (5th Cir. 1955); NLRB v. Whitin Mach. Works, 217 F.2d 593 (4th Cir. 1954).

[36] Taylor Forge & Pipe Works v. NLRB, 234 F.2d 227 (7th Cir. 1956); NLRB v. Boston Herald-Traveler Corp., 210 F.2d 134 (1st Cir. 1954).

[37] NLRB v. J. H. Allison & Co., 165 F.2d 766 (6th Cir.), cert. den., 335 U.S. 814, 69 S. Ct. 31, 93 L. Ed. 369 (1948).

[38] Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360, 366 (1952).

[39] NLRB v. Otis Elevator Co., 208 F.2d 176 (2d Cir. 1953).

[40] Dixie Mfg. Co., 79 N.L.R.B. 645 (1948), enforcement granted, 180 F.2d 173 (6th Cir. 1950).

[41] Vanette Hosiery Mills, 80 N.L.R.B. 1116 (1948), enforcement granted, 179 F.2d 504 (5th Cir. 1950).

[42] Dixie Mfg. Co., 79 N.L.R.B. 645 (1948), enforcement granted, 180 F.2d 173 (6th Cir. 1950).

[43] Labor Management Relations Act (Taft-Hartley Act) § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1952), "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

[44] NLRB v. Truitt Mfg. Co., 351 U.S. 149, 76 S.Ct. 753, 100 L. Ed. 1027 (1956);

UNIONS' DUTY OF GOOD FAITH

In addition, the Board and the Courts were now faced with a new problem; a problem created by imposing a duty to bargain collectively on the Unions.[45] Thus, another area of "good faith" interpretation was vested in the Board and subsequently in the Courts.

Although the original Act made no provision for this aspect of good faith bargaining, the groundwork was laid for the amended proviso in the *Matter of Times Publishing Co.* case.[46] The Board therein held that the charge that an employer had not bargained in good faith could not be sustained where the Union had also failed to bargain in good faith. Even though the Act did not specifically require good faith on the part of the Union, the union good faith was considered a prerequisite to that of the employers. The circle had come full around. The Unions had now ascended to the helm. Since restrictions on employers' powers had already been enacted, it now became necessary to place similar restrictions on the Unions. Thus the Taft-Hartley Act was passed in 1947 imposing the collective-bargaining duty on Unions.

Now that "good faith" was required of the Union, the National Labor Relations Board was called upon to decide its meaning. In the first case[47] interpreting 8(b)(3), (the section imposing upon Unions the duty to bargain in good faith), the Board concluded that it was the purpose of Congress to impose upon labor organizations the same duty to bargain in good faith which had been imposed upon employers by section 8(5) of the Wagner Act. The Board based this conclusion both upon (1) the legislative history of the provisions of section 8(a)(5) and 8(b)(3), and (2) upon the fact that the standards and tests set forth in section (d) applicable to both employer and Unions closely paraphrased those established in decisions of the Board and the Courts in recent years.[48] The Board held that these decisions, although dealing primarily with employers' responsibility to bargain collectively under the Wagner Act, were nevertheless significant guide posts in determining the collective bargaining obligation of Unions under section 8(b)(3).

Thus, the initial conclusion by the Board was that the Unions have

NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 78 S. Ct. 718, 2 L. Ed. 2d 823 (1958).

[45] Labor Management Relations Act (Taft-Hartley Act) § 8(b)(3), 61 Stat. 142 (1947), 29 U.S.C. § 158(b)(3) (1952).

[46] Mater of Times Publishing Co., 72 N.L.R.B. 676 (1947); also see NLRB v. Express Publishing Co., 128 F.2d 690 (5th Cir. 1946).

[47] Matter of National Maritime Union, 78 N.L.R.B. 971 (1948); Rabouin d.b.a. Conway's Express Co., 87 N.L.R.B. 972 (1949); House Conference Report No. 205, 80th Cong. 1st Sess. p. 43.

[48] Matter of Harrison Hosiery Mills, 1 N.L.R.B. (old) 68 (1935); Matter of St. Joseph Stock Yard Co., 2 N.L.R.B. 39 (1936); H. J. Heinz Co. v. NLRB, 311 U.S. 514, 61 S. Ct. 320, 85 L. Ed. 309 (1941); NLRB v. George P. Pillings Co., 119 F.2d 32 (3rd 1941); Rapid Roller Co. v. NLRB, 126 F.2d 452 (7th Cir. 1942), cert. den., 317 U.S. 650, 63 S. Ct. 45, 87 L. Ed. 523 (1942).

the same duty to bargain as do employers. Unions must approach the bargaining table with open minds and an intent to reach an agreement. In addition, the accredited representative of the employees must carry on negotiations in good faith.[49] Moreover, the Union may not impose or insist upon unlawful conditions or press unlawful demands as prerequisites to bargaining prior to or during negotiations.[50]

The duty of labor organizations to bargain in good faith is defined in section 8(d) of the Act. This definition includes the duty by the Union to meet and negotiate with the authorized representative of the employer. Therefore, a Union's refusal to negotiate with the employer's agent because he was a former union officer was held to have violated section 8(b)(3).[51]

Various other activities which have been condemned as unfair labor practices, have been outlawed since they evidenced a lack of good faith. For example, bargaining is usually limited to an appropriate unit. However, voluntary bargaining for a unit wider than the one certified by the Board is lawful. This is predicated upon acceptance by both parties of the collective agreement. Where a Union certified for workers in a local area sought to compel bargaining for employees in a broader area, this activity was concluded to have violated the duty to bargain.[52] However, where upon the joint request of Union and employer the Board had refrained from determining an appropriate unit, no refusal-to-bargain charge could be upheld against the Union because of the absence of a unit.[53]

A Union may submit a proposed contract to the individual members of an employer association even though it has in the past negotiated with the association.[54] Such activity is usually regarded as demonstrating a lack of good faith. However, in a special situation, the Court concluded that the practice was justified.[55] The justification was based upon the facts that the agreements were signed individually by the employers, the employers were free to withdraw from the association and bargain for themselves, the contract submitted to the employer was identical with the one submitted to the association, and, in addition, the Union continued its bargaining with the association.[56]

Furthermore, where an impasse has arisen in the negotiations with the association, an economic strike against one member would not be an unfair labor practice.[57] However, where a Union went on strike for the purpose of compelling an employer to bargain individually rather than through the association, this was held to constitute an unfair labor prac-

[49] Supra note 43.

[50] Porto Rico Steamship Ass'n., 103 N.L.R.B. 1217 (1953).

[51] International Ladies' Garment Workers' Union A.F.L.-C.I.O., 122 N.L.R.B. 1390 (1959).

[52] Douds v. International Longshoremen's Association, Independent, 147 F. Supp. 103 (S.D.N.Y. 1956), aff'd. 241 F.2d 278 (2d Cir. 1957).

[53] Jones & Laughlin Steel Corp., 83 N.L.R.B. 916 (1949).

[54] Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576 (7th Cir. 1951).

[55] Id. at 581.

[56] Ibid.

[57] Supra note 54 at 582.

tice.[58] A Federal District Court has also held that it would be an unfair labor practice for a Union to refuse to bargain with an association where the Union has as its purpose the destruction of the association as the bargaining representative of the employer.[59]

Problems have arisen as to the effect of insistence upon specific terms in the proposed contract. The Board, with subsequent court approval, has examined the problem to determine whether the insistence is only a pretext and hence a refusal to bargain or whether the insistence emanates from a bona fide belief that the specific terms are vital to the contract. The Board has concluded that a Union's insistence upon a specific contract provision is not, in itself, a refusal to bargain.[60] Such insistence, however, would be unlawful if the Union was thereby avoiding the reaching of an agreement.[61] A good faith insistence on a wage increase or on a lawful union-security clause does not amount to a refusal to bargain merely because the demand results in an impasse.[62] In general, the insistence upon illegal or unlawful provisions has met with disapproval.[63] Therefore, a Union would not be justified in going out on strike to enforce illegal conditions of a contract,[64] or to insist upon the inclusion of unlawful provisions in a bargaining contract.[65] An interesting case developed where the Union insisted upon a performance bond because of previous employers' activities.[66] The Court therein concluded that although the demand would not be unreasonable, it would be improper because the tendency of such proposals would be to delay or impede bargaining negotiations.

Where the Union is bargaining for a pension or welfare fund, it must do so for all employees.[67] Therefore it would be an unfair labor practice if the Union insisted that such benefits be for the exclusive use of its members. Correspondingly, a Union may request payment for work not performed by the Union employees. The request is therefore not an unfair labor practice where the work is actually performed by a non-union employee.[68]

Inherent in the duty to bargain collectively is conduct which evidences a state of mind indicating a desire to reach an agreement. However, the Act does not compel either party to agree to a proposal or to a concession. Notwithstanding, in *American Newspaper Publishing Ass'n v. NLRB*,[69] the Court stated, "The respondents attempt to justify their action by the statement found in sec. 8(d) of the Act which provides that the obligation

[58] Supra note 54 at 581.
[59] Madden v. International Union, United Mine Workers of America, 79 F. Supp. 616 (D.C. 1948).
[60] Administrative Decision of NLRB General Counsel, Case No. K-206 (1956).
[61] Matter of National Maritime Union, supra note 47.
[62] Administrative Decision of NLRB General Counsel, Case No. K-116 (1955).
[63] Supra note 50; infra note 65.
[64] Supra note 50.
[65] American Newspaper Publishing Ass'n. v. NLRB, 193 F.2d 782 (7th Cir. 1951).
[66] Rabouin d.b.a. Conway's Express Co., supra note 47.
[67] Supra note 5.
[68] Rabouin d.b.a. Conway's Express Co., supra note 47.
[69] Supra note 65.

to bargain in good faith 'does not compel either party to agree to a proposal or require the making of a concession.' This provision does not mean that either party may comply with the duty to bargain by entering into and participating in negotiations with a fixed and determined purpose of avoiding the making of an agreement."[70] Maintenance of a "no contract" policy is unlawful; this being true even though the Union later modifies the policy but continues to assert that the "no contract" policy is legal.[71] Also, a stipulation that the contract must be limited to a short duration has been treated as analogous to the "no contract" policy.[72] Hence, where there is no legal or economic justification for insistence upon a short term contract, the Union will be declared not to be bargaining in good faith.[73]

Unions, with their growth, have often found it a disadvantage to bargain collectively. This stems from the restrictions placed upon their mode of bargaining and as a result, collective bargaining has limited union power. The duty imposed is unqualified. Therefore, it is an unfair labor practice to refuse to reply to an employer's request to bargain.[74] A Union, however, before it engages in bargaining, may request written proof of the authority of the employer's representative to bargain.[75] Although this may not be used with impunity, it is unlawful where the apparent and informal authority of another employer's representative had been revoked.

Generally, the Union is required to be vested with the authority to enter into binding contracts. However, in the absence of bad faith, a Union may properly require that the contract agreed upon during negotiations is subject to the approval of the Union members.[76] This practice is limited to bona fide requests and must not be for the purpose of delay. Thus, where an international Union participated actively in the bargaining by its local, it would violate good faith to require subsequent approval by Union members.[77] More over, the necessity of directing the bargaining request to the international Union would be removed.

Good faith bargaining, as interpreted by sec. 8(d) necessitates that the final agreement must be in writing if requested by either party. Discussions, therefore, as to the execution of a written contract do not constitute proper bargaining subjects.[78] An unwillingness to reduce the agreement to writing at the outset of the negotiations is clearly violative of good faith.[79] On the other hand, it would not be unlawful for a Union to demand that the employer formalize a contract by signing it[80] or sign an association-

70 Supra note 65 at 804.
71 Union Employers Section of Printing Industry of America Inc., 87 N.L.R.B. 1418 (1949), 193 F.2d 782 (7th Cir. 1951).
72 Supra note 65.
73 Supra note 65.
74 Supra note 5.
75 Rabouin d.b.a. Conway's Express Co., supra note 47.
76 NLRB v. New Britain Machine Co., 210 F.2d 61 (2d Cir. 1954).
77 Supra note 65.
78 Graphic Arts League, 87 N.L.R.B. 1215 (1949).
79 Chicago Newspaper Publishing Ass'n, 86 N.L.R.B. 1041 (1949).
80 Rabouin d.b.a. Conway's Express Co., supra note 47.

wide agreement to which, he, the employer is a party.[81] To require that an agreement be in writing necessarily presupposes the existence of an agreement.[82] Therefore, where it could not be proved that an oral agreement existed, the Board held that the Union had not committed an unfair labor practice.[83]

In the activities listed above, the Board and the Courts have found a lack of good faith in the bargaining process. Their views have been predicated either upon the fact that (1) the Union had refused to bargain at all, or (2) under the guise of collective bargaining, the Union by preposterous requests had in reality refused to bargain. Thus, the Board and the Courts have concluded that their activities have been conducted in a manner which indicated that the Union did not wish to bargain. Recently, however, a new problem has arisen in relation to good faith bargaining. The problem has been created by Union action which has been conducted during negotiations. Such activities have taken the form of "economic pressures" which have been exerted to implement the bargaining being conducted. The question therefore arises as to whether the use of economic pressure during negotiations evidences a lack of good faith.

The Board has interpreted such activities as incongruous with the dictates of good faith collective bargaining. This was the Board's conclusion in the *Personal Products* case.[84] However, it should be noted that this was the first time that the Board had proceeded upon the theory that this conduct evidenced lack of good faith. The conduct which prompted the Board's decision was that of a concerted harassing plan. This plan included unauthorized extension of rest periods from 10 to 15 minutes, refusal by employees to work special hours, slowdown, unannounced walkouts and inducing employees of a subcontractor not to work for the employer. It was decided that such actions were inconsistent with the duty to collectively bargain. Thus the Board's view was that regardless of the Union's good faith in conferring with the employer at the bargaining table for the purpose and with the desire of reaching agreement or contract terms, its questionable tactics during the course of the negotiations constituted a violation of good faith.

On appeal, the case was set aside.[85] The Court maintained that "There is not the slightest inconsistency between genuine desire to come to an agreement and use of economic pressure to get the kind of agreement one wants."[86] The Court concluded that: "Though the N.L.R.A. encourages negotiation and seeks to reduce industrial strife, aside from some specified conduct such as jurisdictional strikes and secondary boycotts, we do not

[81] Ibid.

[82] Administrative Decision of NLRB General Counsel Case No. K-523 (1956).

[83] Hamilton Foundry & Machine Co., 91 N.L.R.B. 139 (1950).

[84] Personal Products Case, 108 N.L.R.B. 743 (1954).

[85] Textile Workers' Union v. NLRB, 97 U.S. App. D.C. 35, 227 F.2d 409 (D.C. Cir. 1955).

[86] Id. at 410.

find that Congress limited the use of economic pressure in support of lawful demands."[87]

The Supreme Court granted certiorari[88] to review the judgment in the *Personal Products* case. However, in the light of intervening circumstances which indicate that the litigation had become less meaningful to the parties, the order granting certiorari was vacated and certiorari was denied.[89]

Although the enigma was not solved in the *Personal Products* case, the problem did not remain dormant. The Supreme Court granted certiorari[90] in a case which had a history similar to the *Personal Products* case.

The facts show that the Insurance Agents International Union had engaged in a concerted harassing plan. This plan, a "Work-Without-Contract" program, involved the following tactics: refusal for a time to solicit new business and refusal (after the writing of new business was resumed) to comply with the company's reporting procedures; refusal to participate in the company's "May Policyholders Month Campaign"; reporting late at district offices the days the agents were scheduled to attend them; refusing to perform customary duties at the offices, and engaging instead in "sit-in-mornings," "doing what comes naturally" and leaving at noon as a group; absenting themselves from special business conferences arranged by the company; picketing and distributing leaflets outside the various offices of the company on specified days and hours as directed by the Union; distributing leaflets each day to policy holders and others, and soliciting policyholders signatures on petitions directed to the company; and presenting the signed policyholders' petitions to the company at its home office while simultaneously engaging in mass demonstrations there. Upon these stated facts, the Employer (Prudential Insurance Co. of America) predicated its charge of refusal to bargain.

The Trial Examiner for the Board dismissed the complaint on the grounds that the case fell within the purview of the holding in the *Personal Products* case. Nevertheless, the Board rejected the Trial Examiner's report and, adhering to its previous decision, issued a cease and desist order.[91] Again, however, the Court of Appeals reversed the Board,[92] holding that the use of economic power was not inconsistent with bargaining in good faith.

Thus, until legislative action, the final determination of the problem of economic pressure was to be decided by the Supreme Court.

Justice Brennan, speaking for the majority of the Court, phrased the issue as follows: " . . . whether the Board may find that a Union which

[87] Supra note 85 at 411.

[88] Supra note 90 at 513, 80 S. Ct. at 439, 4 L. Ed. 2d at 477, 478. (1956).

[89] Textile Workers' Union v. NLRB, 352 U.S. 864, 77 S. Ct. 90, 1 L. Ed. 2d 73 (1956).

[90] NLRB v. Insurance Agents' International Union, 361 U.S. 477 80 S. Ct. 419, 4 L. Ed. 2d 454 (1960).

[91] NLRB v. Insurance Agents' International Union, 119 N.L.R.B. 768 (1958).

[92] NLRB v. Insurance Agents' International Union, 104 U.S. App. D.C. 218, 260 F.2d 736 (D.C. Cir. 1959).

confers with an employer with the desire of reaching agreement on contract terms has nevertheless refused to bargain collectively, thus violating that provision, solely and simply because during the negotiations it seeks to put economic pressure on the employer to yield to its bargaining demands by sponsoring on-the-job conduct designed to interfere with the carrying on of the employer's business?"[93]

In answering this question, the Court took issue with the Board's reasoning that the use of economic pressure was inconsistent with the duty to bargain in good faith. As viewed by the Court, economic pressure and good faith bargaining are concurrent factors. In fact, the Court, citing a leading writer on the subject, stated that "Economic force is a prime motive power for agreement in free collective bargaining."[94] Moreover, the Court concluded that the labor relations policy in this country is not only predicated upon the necessity of good faith bargaining but also upon the use of economic pressure by the parties so that they may achieve their desired ends.

The Court reasoned that the determination of lack of good faith must come from a deficiency of the Union's performance at the bargaining conference. Hence, the Board exceeded its statutory duty when it decided that use of economic pressure evidenced bad faith when the Union was, in fact, endeavoring to reach an agreement at the bargaining conference.

The Court stated that the Board in reaching its decision predicated its views upon two theories. The first was that the harassing tactics were not protected activities since there is a distinction between a total strike and the type of activity present here. The second theory was that since the activities were not protected, the employer may use self-help in alleviating the situation. In so doing, the employer might conduct wholesale discharging of employees. Since the Act is aimed at maintaining and keeping economic tranquillity, The Board concluded that the cease and desist order would be much milder than the mass discharge of personnel and would be less disruptive to commerce.

The Court held that the Board's reasoning was not tenable. In objecting to the Board's analysis, the Court stated that although Congress authorized the use of self-help by the employer to combat unprotected activities, this did not amount to a conclusive determination by Congress that the activities were outlawed as per se violations of good faith. Thus, a complaint alleging a refusal to bargain cannot be maintained simply on the ground that the activity is unprotected. To sustain this argument, the Court stated that whether or not an activity is protected is of no consequence. This is true since a protected economic strike is not bad-faith bargaining simply because it is a protected activity but more specifically because there is no inconsistency between the application of economic pressure and good-faith bargaining.

[93] Supra note 90 at 479, 80 S. Ct. at 421, 4 L. Ed. 2d at 458.

[94] C. W. Taylor, Government Regulation of Industrial Relations, P. 18.

In summing up, the Court concluded that the question of good faith bargaining is clearly within the province of the Board's determination. Justice Brennan stated: . . . [W]e do not mean to question in any way the Board's powers to determine the latter question drawing inferences from the conduct of the parties as a whole. It is quite another matter, however, to say that the Board has been afforded flexibility in picking and choosing which economic devices of labor and management shall be branded unlawful."[95]

In a separate opinion, Justice Frankfurter, who concurred with the decision, took issue with the reasoning. On the one hand, he could not agree with the majority's unequivocal dichotomy of "good faith bargaining" and economic pressure into two coexisting necessities of collective bargaining, and on the other hand, he could not agree with the emphatic stand that the Board took in declaring such activities to be inconsistent per se with the dictates of good faith bargaining. Although realizing that economic pressures are generally exerted by the parties to reach a desirable agreement, the Justice went on to say that the Board should not be denied the right to review such activities in the whole scheme of things.

As Justice Frankfurter pointed out, many acts appear lawful, but when viewed in connection with other activities or in relation to a plan these same seemingly lawful acts take on the aura of unlawfulness. Therefore, the acts should not be removed from the scope of review. However, labeling the use of economic pressure as violative per se of collective bargaining or as being entirely consistent with good faith bargaining, is to remove the activities from review. Hence, the true issue, the Justice concludes, is not determined, because good faith should be determined by an objective test of the state of mind of the actor by resorting to a review of all of his acts.

Although resorting to legal abstractions, such as state of mind, creates a problem of distinguishing between activities which indicate good or bad faith, Justice Frankfurter concluded that the test should not be a predetermined rule, but each problem should await a case-by-case resolution. The judgment, the Justice maintained, should be viewed through the eyes of experienced parties determining "the justification of the means and the severity of particular conduct in the specialized contest of bargaining."[96]

Continuing, Justice Frankfurter stated that the dictates of sec. (d) of the Act prohibit the application of a violation per se determination without objectively analyzing "state of mind." Implicit in this analysis is the necessity of considering the totality of the conduct in each case. Therefore, the Justice concluded, since the Board proceeded upon the erroneous assumption that bad faith could be inferred from the use of economic pressure without resort to the whole scheme of bargaining, the case should be remanded to the Board for further examination of the whole record.

In concluding, Justice Frankfurter stated: "Viewed as a determination by the Board that it could quite apart from the respondent's state of mind,

[95] Supra note 90 at 498, 80 S. Ct. at 432, 4 L. Ed. 2d at 469.
[96] Supra note 90 at 513, 80 S. Ct. at 439, 4 L. Ed. 2d at 477, at 478.

proscribe its tactics because they were not 'traditional' or were thought to be subject to public disapproval, or because employees who engaged in them may have been subject to discharge, the Board's conclusion proceeds from the application of an erroneous rule of law."[97]

CONCLUSION

A tension exists between two principles. On the one hand, the parties are compelled to confer with each other while on the other hand, they are not obligated to contract with respect to any specific terms.

Thus, a practical enforcement of the Act seems elusive. Moreover, the resolution of this paradox seems distant since the Board has ignored the underlying purpose of the Act as stated in *National Labor Relations Board v. Jones and Laughlin Steel Corp:*[98] "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever . . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of the employees is likely to promote industrial peace and may bring about the adjustment and agreement which the Act does not attempt to compel."

What the Act does require is a bona fide attempt in good faith to reach an agreement. Therefore, the initial resolution of "good faith" is left to the Board; the Board, by determining what constitutes "good faith," has in effect taken control of the pivotal position. By using this position, it may compel parties to bargain. In a recent case,[99] the Board declared that activities aimed at harassing an employer during negotiations violates good faith, in spite of the fact that the Union was bargaining with the employer. The Board declared that use of economic pressures during negotiations was an act which constituted a lack of good faith. This was a case involving the activities of employees' representatives. The courts have not yet decided the question of whether there would exist a breach of good faith where the employer engaged in harassing maneuvers, the use of economic pressures, i.e., threats of closing the factory permanently; or opening the factory late daily causing the employees loss of wages, and while so engaged nevertheless negotiated with the employees' representatives.

In line with the previous reasoning, it is probable that the Board would outlaw such activities. This determination by the Board would clearly involve an intrusion into the substantive aspects of the bargaining process. Lack of good faith would be determined not from any deficiencies in the bargaining process but exclusively from the use of economic pressure during the course of the good-faith negotiations. Therefore, the Board, in its determination of good or bad faith, could regulate the economic weapons which a party might summon to his aid.

It should be remembered that the original purpose of the Wagner Act

[97] Supra note 90 at 514, 80 S. Ct. at 440, 4 L. Ed. 2d at 478, 479.

[98] NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 at 45, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

[99] Supra note 91.

was to give economic power to the Unions in order to establish a balance in the scale of collective bargaining. Later, Congressional Acts were aimed at balancing the power by placing the same restriction upon employees. Collective bargaining was designed to be the battleground for two divergent forces where each side could wield the economic power to satisfy his respective needs. Each side is keenly aware of the opposing arsenal of economic weapons. Such knowledge, not only of one's own potential power, but also of the strength of the opponent, is a vital element in collective bargaining; in fact, it is most likely the catalyst for the negotiations. If the Board is allowed to declare the use of economic presures as violative of good faith bargaining, the very foundation of collective bargaining may collapse.

By limiting the devices of the parties, the government might be found to be entering directly into the negotiation of collective agreements. "The labor policy in the United States is not presently erected on a foundation of government control of the results of negotiation,[100] nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employers and Union."[101]

F.M.

LABOR LAW—THE INTERPRETATION AND ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENTS.

I. INTRODUCTION AND SCOPE

Collective bargaining has become an American institution and a substantial part of our industrial community is regulated by collective bargaining agreements. To an ever increasing extent the employer-employee relationship is being controlled by these labor contracts—yet it is acknowledged that "there is still no clearly established adequate system of legal principles and rules governing the status of collective agreements and their enforceability."[1] Although it is conceded that the collective contract creates rights and duties that are binding and enforceable, many vital questions remain unanswered: Upon whom are these rights and duties conferred? By whom and to what extent should collective agreements be enforced? To what extent should the law governing the interpretation and enforcement of "ordinary" contracts be applied to the collective labor agreement?

This article will consider these questions for the primary purpose of determining the role of the law in interpreting and enforcing collective bargaining agreements. However, the scope of inquiry will be limited to the federal courts with particular emphasis upon recent decisions of the United States Supreme Court. Primary attention will be focused on the large scale

100 S. Rep. No. 105, 80th Cong. 1st Sess. p. 2.

101 Supra note 90 at 490, 80 S. Ct. at 428, 4 L. Ed. 2d at 465.

1 Gregory, "Labor and The Law" p. 444 (2d rev. ed. 1958); "There are no settled rules governing rights and remedies under collective bargaining agreements." Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1, 2 (1958).

collective agreements between employers and employees engaged in businesses "affecting" interstate commerce. Preliminary to this discussion it will be necessary to examine the status of these contracts in the state courts prior to the passage of the National Labor Relations Act.

II. THE STATES AND THE COMMON LAW

"[A] collective labor agreement, is a term used to describe a bargaining agreement entered into by a group of employees, usually organized into a brotherhood or union on one side, and a group of employers or a corporation . . . on the other side. Such agreements may be a brief statement of hours of labor and wages, or . . . it may take the form of . . . an exhaustive pamphlet regulating, in the greatest minuteness, every condition under which labor is to be performed, and touching upon such subjects as strikes, lockouts, walkouts, seniority, apprentices, shop conditions, safety devices, and group insurance."[2]

Most courts would agree that this is a satisfactory definition of the collective bargaining agreement, but beyond this there has been general disagreement as to the legal nature and effect of the labor contract. One line of decisions viewed the contract as establishing a custom or usage which was incorporated into the individual employment contracts. Under this theory the collective agreement, by itself, had no legal force: "There is on its face no consideration for its execution. It is therefore not a contract. It is not an offer, for none of its terms can be construed as a proposal. It comes squarely within the definition of Usage . . . 'an estabilshed method of dealing, adopted in a particular place, or by those engaged in a particular vocation or trade, which acquires legal force, because people make contracts in reference to it.' "[3] Failure to pay wages in accordance with the collective agreement was a breach of the individual hiring contract, giving the individual employee, and *not* the union, a cause of action against the employer. According to this theory, ". . . a modification of the terms of the usage by the parties creating it will not bind dissenting individuals whose contract rights are deemed vested under the old usage."[4]

A second approach was to consider the union as the employee's agent in negotiating the bargaining agreement; the employee could not sue on the agreement unless he either authorized the making of the collective contract or subsequently ratified it.[5] Under this theory a non-union employee obtained no rights under the contract, because, when it was executed, the union did not act as the employee's agent.[6]

[2] Rentschler v. Missouri Pac. R.R., 126 Neb. 493, 253 N.W. 694, 696, 697 (1934).

[3] Hudson v. Cincinnati N.O. & T.P. Ry., 152 Ky. 711, 154 S.W. 47, 50 (1913).

[4] Anderson, Collective Labor Agreements, 15 Oregon L. Rev. 229, 237, 238 (1936); for additional cases and material on the custom and usage theory, see Byrd v. Beall, 150 Ala. 122, 43 So. 749 (1907); Yazoo & M.V.R.R. v. Webb, 64 F.2d 902 (5th Cir. 1933); 15 Ore. L. Rev. 229, 236-239 (1936); Teller, Labor Disputes and Collective Bargaining, vol. 1, Sec. 159 (1940).

[5] Gray v. Central of Georgia Ry., 44 Ga. App. 120, 160 S.E. 716 (1931).

[6] Shelly v. Portland Tug & Barge Co., 158 Ore. 377, 76 P.2d 477 (1938); for addi-

A third theory, and the one utilized by the majority of courts, regarded the employees as third party beneficiaries of the collective agreement with the union bargaining, not as the employees' agent, but rather as their principal.[7] Both union and non-union employees could sue on the collective contract,[8] and sometimes the union itself was recognized as a proper party to enforce those provisions by which it was particularly affected (e.g., check-off, closed shop).[9] Contract terms for the benefit of the employees alone, such as wages, hours, and seniority provisions, could only be sued upon by the employees, individually.[10] The technical application of this theory left the employer without any remedy against the individual employee, because of the well settled contract rule that a third party beneficiary is under no obligation to the promisor. Another problem with this approach was that the employee had difficulty enforcing a collective agreement which the union had made with an employer's association instead of with a single employer.[11]

Thus the collective agreement, a newcomer to the judicial arena, was interpreted in terms of established contract law. Though this proved helpful to some extent in determining rights and duties under a collective contract, the various theories were not in harmony. Given a similar set of facts, different courts would reach opposite results depending upon which theory was applied,[12] and sometimes the same court was inconsistent in the theories it used.[13] Under such conditions the status of the collective agreement remained uncertain and ill-defined, and the common law seemed unable to cope with the problems of collective bargaining.[14]

tional material on the agency theory, see 168 of Teller work cited at note 4 supra; 15 Ore. L. Rev. 229, 239, 240 (1936).

[7] Yazoo & M.V.R.R. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931); Donovan v. Travers, 285 Mass. 167, 188 N.E. 705 (1934); and see Teller work note 4 supra, cases cited at Sec. 168, p. 499, n.83.

[8] Supra note 7.

[9] Christiansen v. Local 680 etc., 126 N.J. Eq. 508, 10 A.2d 168 (1940).

[10] See 18 A.L.R.2d 352 (1951).

[11] See 15 Ore. L. Rev. 229, 241, 242 (1936); for additional material on third-party-beneficiary doctrine see § 168 of Teller work cited at note 4 supra; 18 A.L.R.2d 352 (1951).

[12] See 15 Ore. L. Rev. 229, 243-249 (1936); sometimes a combination of theories was used to decide a single case. See, e.g., H. Blum & Co. v. Landau, 23 Ohio App. 426, 155 N.E. 154 (1926) where the court applied both the agency and third-party-beneficiary doctrines in order to allow the employee to recover against an association of employers; for combination of theories see, 8 Lab. L.J. 316, 319 (1957), cases cited in last paragraph of footnote 16.

[13] *Mississippi:* Yazoo & M.V.R.R. v. Sideboard, cited at note 7 supra (third-party-beneficiary); Yazoo & M.V.R.R. v. Mitchell, 173 Miss. 594, 161 So. 860 (1935) (Agency).

Missouri: McCoy v. Saint Joseph Belt Ry., 229 Mo. App. 506, 77 S.W.2d 175 (1934) (custom and usage); Hall v. St. Louis-San Francisco Ry., 224 Mo. App. 431, 28 S.W.2d 687 (1930) (third-party-beneficiary).

[14] See generally, Rice, "Collective Labor Agreements in American Law," 44 Harv. L. Rev. 572 (1931); "Collective Bargaining Agreements," 15 Ore. L. Rev. 229 (1936); Witmer, "Collective Labor Agreements in the Courts," 48 Yale L.J. 195 (1938); "The Present Status of Collective Labor Agreements," 51 Harv. L. Rev. 520 (1938); Teller,

Prior to the New Deal this situation was not too alarming. There were relatively few collective agreements in existence, and collective bargaining had little chance to flourish because of the courts' hostile attitude toward the activities of organized labor. Clinging to the common law view that the collective activities of labor (strikes, picketing, etc.) constituted a criminal conspiracy in restraint of trade,[15] the courts persisted in enjoining such activities and continually frustrated workers in their attempts to apply collective pressure on employers.[16] However, with the passage of the Norris-La Guardia Act in 1932,[17] the courts' power to issue labor injunctions was drastically curtailed, and in 1935 Congress put its stamp of approval on collective bargaining by enacting the National Labor Relations Act.[18] Tens of thousands of collective labor agreements came into existence where previously there had been only a handful, and collective bargaining became, as Harry Shulman put it, ". . . the means of establishing industrial democracy as the essential condition of political democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens."[19] It was now incumbent upon the courts to review their attitude with respect to the collective bargaining agreement.

III. CONGRESS AND THE SUPREME COURT

With the passage of Sections seven[20] and eight[21] of the National Labor Relations Act, the laborer gained a decisive victory in his long struggle to obtain equality in bargaining power. Using Art. 1, Sec. 8 of the Federal Constitution as authority for its entrance upon the labor scene, Congress explained that the "object of collective bargaining is the making of agreements that will stabilize business conditions and fix standards of working

"Labor Disputes and Collective Bargaining," vol. 1, §§ 154-177 (1940); 95 A.L.R. 10 (1935); 18 A.L.R.2d 352 (1951).

15 In re Debs, 158 U.S. 564, 155 S. Ct. 900, 39 L. Ed. 1093 (1894).

16 Vegelahan v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896) (workers struck for higher wages and were enjoined from picketing regardless of whether or not it was peaceful. Holmes, J. delivered another of his prophetic dissenting opinions).

17 47 Stat. 70 (1932), 29 U.S.C.A. 101 (1958).

18 49 Stat. 449 (1935), 29 U.S.C.A. 151 (1958).

19 Shulman, "Reason, Contract, and Law in Labor Relations," 68 Harv. L. Rev. 999, 1002 (1955).

20 49 Stat. 452, C. 372, § 7 (1935), 29 U.S.C.A. 157 (1958):

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

21 49 Stat. 452, C. 372, § 8 (1935), 29 U.S.C.A. 158 (1958):

"(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . . (5) to refuse to bargain collectively with the representative of his employees. . . .

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ."

conditions."[22] Congressional intent was further clarified by the statement that "collective bargaining is not an end in itself; it is a means to an end and that end is the making of collective agreements stabilizing employment relations for a period of time, with results advantageous both to the worker and the employer."[23] Thus Congress encouraged the execution of collective bargaining agreements as a means of stabilizing labor relations and promoting the peaceful settlement of disputes between management and labor in order to avert the economic warfare (strikes, picketing) that is so damaging to commerce.[24] The Wagner Act, however, contained no provisions for the interpretation and enforcement of these collective agreements.[25] (This can be attributed, not to congressional oversight, but rather to the uniqueness and experimental nature of the collective bargaining process.) It was left to the states to interpret and enforce collective contracts, with the federal courts applying the state law in cases where jurisdiction was based on diversity of citizenship.

The National Labor Relations Act, though it did not contain the ultimate answers for determining rights and duties under the collective bargain, became the primary guide for the judicial interpretation of collective agreements made between employers and employees engaged in businesses affecting interstate commerce.[26] This is clearly illustrated in *J. I. Case Co. v. NLRB*[27] where the Supreme Court was called upon to determine the relationship between collective agreements and individual hiring contracts. The statute obliges the employer to bargain in good faith with the union representative as to hours, wages and conditions of employment.[28] What then was the status of the individual hiring contracts which contained similar provisions? Were they to be superseded by the collective agreement, and was the latter to operate as a contract of employment? The Wagner Act contained no direct answers to these questions. The Case Company had entered into one year hiring contracts with most of its employees; the contracts contained provisions relating to hours, wages, maintenance of hospital facilities, compliance with factory rules, and other conditions of employment. Before these contracts had expired the C.I.O. was certified as the exclusive bargaining representative of the production and maintenance

[22] Senate Report No. 573, 74th Congress, 1st Sess., p. 13 (1935).

[23] House Report No. 1147, 74th Congress, 1st Sess., p. 20 (1935).

[24] "[T]he signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing . . . strikes and industrial strife." H. J. Heinz Co. v. NLRB, 311 U.S. 514, 524, 61 S. Ct. 320, 325, 85 L. Ed. 309, 317 (1941).

[25] "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42 (1948).

[26] Whether activities of a business affect interstate commerce so as to bring it within the scope of the national labor laws, depends solely on the circumstances of each case. In close cases the tendency is to hold that the business does "affect" interstate commerce. See, Local Union No. 12, Etc. v. NLRB, 189 F.2d 1 (7th Cir. 1951), cert. denied, 342 U.S. 868, 72 S. Ct. 109, 96 L. Ed. 653 (1951).

[27] 321 U.S. 332, 64 S. Ct. 576, 88 L. Ed. 762 (1944).

[28] Supra note 21.

workers, in matters relating to hours, wages and conditions of employment.[29] The employer refused to bargain with the union on questions already covered by the existing contracts, claiming that these contracts contained binding promises that could not be altered or abrogated by negotiating with the union. The Company contended that it should not be obliged to bargain with the union on matters already included in the hiring contracts, until such contracts had expired. The Supreme Court did not agree:

"Individual contracts . . . may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining . . . nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. . . .

". . . since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract can not be effective as a waiver of any benefits to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group."[30]

Based upon this reasoning and declaration of purpose, the court reached several conclusions concerning the nature of the collective contract and the rights created thereunder. The collective contract was deemed not to be a contract of employment but to be more like a trade agreement and ". . . an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the . . . trade agreement and may not waive any of its benefits. . . ."[31] Thus the Supreme Court considered the collective agreement to be "somewhat" like a third-party-beneficiary contract, and stated that the employment contracts could not "subtract" from the trade agreement, but that they could add to it, provided their terms were not "inconsistent" with the collective bargain, and that by force of the statute the trade agreement was incorporated into the individual hiring contracts. In arriving at these conclusions, the Court was primarily concerned with carrying out the purpose of the Wagner Act. It was made clear, as it had been on other occasions,[32] that collective rights must be exalted

[29] The certification of the bargaining representative is regulated by § 9 of the National Labor Relations Act as amended by the Labor Management Relations Act, 29 U.S.C.A. 159 (1958). The certification procedure is under the control of the National Labor Relations Board. Sec. 9(a) of the Act reads as follows:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

[30] Supra note 27 at 337, 338, 64 S. Ct. at 580, 88 L. Ed. at 767, 768.

[31] Id. at 336, 64 S. Ct. at 579, 88 L. Ed. at 766, 767.

[32] See Order of Ry. Telegraphers v. Export Agency, 321 U.S. 342, 64 S. Ct. 582, 88 L. Ed. 788 (1944).

over individual rights in order to promote industrial peace and stability. In applying the statute to this situation, the Court found it fairly easy to do so in a manner consistent with legislative intent. When it came, however, to determining the manner and method of enforcing the rights under a collective contract, the task proved to be more difficult.

Prior to 1947 the federal courts entertained actions on collective agreements only when there was diversity of citizenship. This was changed, however, by Sec. 301 of the Labor Management Relations Act (Taft-Hartley Act) which permitted suits for violation of collective contracts to be brought in federal courts without regard to the parties' citizenship or the amount in controversy.[33] The Supreme Court Justices have been in serious disagreement over the significance of this change and the conflict between the members of the Court was vividly displayed in *Assn. of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*[34] Under the collective agreement Westinghouse was required to pay its salaried employees their full wages regardless of whether they missed a day's work, unless the absence was due to "furlough" or "leave of absence." Four thousand of these employees were absent from work on April 3, 1951, and the employer deducted a day's pay from their salary checks. The union sued under Sec. 301 to compel Westinghouse to reimburse these 4000 employees, claiming that the wages had been withheld in violation of the contract, since the absences were not occasioned by furlough or leave of absence. The Federal Court of Appeals dismissed the action on the ground that the employees, and not the union, should be the party bringing suit since the alleged violation related to the individual employment contracts and not to the collective agreement.[35] The Supreme Court affirmed, but on other grounds Justices Burton and Minton joined Justice Frankfurter, who wrote the main opinion, in declaring that Sec. 301 was only a "procedural provision" enabling unions to get into federal courts without diversity of citizenship but did not give the courts jurisdiction over a suit such as this one:

"[W]e might be disposed to read Sec. 301 as allowing the union to sue in this case. With due regard to the constitutional difficulties which would be raised . . . we conclude that congress did not will this result. There was no suggestion that congress . . . intended to open the doors of the federal courts to a potential flood of grievances based upon an employer's failure to comply with terms of a collective agreement relating to compensation, terms peculiar in the individual benefit . . . and which, when violated, give

[33] 61 Stat. 156 (1947), 29 U.S.C.A. 185 (1958):

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) . . . Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . ."

[34] 348 U.S. 437, 75 S. Ct. 489, 99 L. Ed. 510 (1955).

[35] 210 F.2d 623 (3d Cir. 1954).

cause of action to the individual employee. The employees have always been able to enforce their individual rights in the state courts."[36]

The constitutional problem referred to by Justice Frankfurter was that traditionally the states had jurisdiction over suits on collective contracts, and, with no better authority than the general language of Sec. 301, the federal courts should not be permitted to encroach upon or preempt the state law. He felt, therefore, that the statute did not authorize the federal courts to create any substantive law for the interpretation and enforcement of collective agreements, and that existing state common law should be applied to suits brought by or against a union under Sec. 301. Justices Warren and Clark were not troubled by any constitutional difficulties and apparently thought that Sec. 301 did permit the Court to formulate federal substantive law. They denied recovery, however, on the grounds that Congress did not ". . . authorize a union to enforce in a federal court the uniquely personal right of an employee . . ."[37] Justice Reed was of much the same opinion, expressing his views in the following language:

"[T]he claim for wages for the employees arises from the separate hiring contracts between the employer and employee. The union does not undertake to do work for the employer or even furnish workers. The duty . . . to pay wages to an employee arises from the individual contract between the employer and employee, not from the collective bargaining agreement. Therefore there is set out no violation of a contract between an employer and a labor organization as is required to confer jurisdiction under Sec. 301."[38]

Justice Douglas, in a vigorous dissenting opinion, joined by Justice Black, stated his belief that "We make mountains out of molehills in not allowing the union to be the suing as well as the bargaining agency for its members as respects matters involving the construction and enforcement of the collective bargaining agreement."[39]

Certainly the *Westinghouse* case did little to settle the status of the collective agreement, and the same discord that prevailed among the state courts seemed to have found its way into the Supreme Court. Although much of this discord related to problems of constitutional construction, congressional intent and contract interpretation, there appeared to be a more basic conflict over the nature of the subject matter itself, i.e., the collective contract and its function in the industrial community. It is essential, therefore, to identify some of the distinctive features of the collective bargaining agreement which might affect the method of interpretation and enforcement.

A unique characteristic of the labor contract is the number of people involved. In speaking of an agreement between the "parties" or of a "third-party-beneficiary contract," there is a tendency to overlook the number of

[36] Supra note 34 at 437, 75 S. Ct. at 500, 9 L. Ed. at 524, 525.
[37] Id. at 461, 75 S. Ct. at 501, 99 L. Ed. at 525.
[38] Id. at 464, 75 S. Ct. at 502, 503, 99 L. Ed. at 527.
[39] Id. at 465, 466, 75 S. Ct. at 503, 99 L. Ed. at 528.

people and the variety of interests. In the *Westinghouse* case, for example, the so-called third-party-beneficiary consisted of no less than 4000 employees.

The scope of the collective agreement is vast, and it encompasses a wide variety of interests, such as insurance, pensions, wages, hours, job classifications, grievance procedure, working conditions, vacations, union security, seniority, etc.[40]

Another distinctive feature of the labor contract is the manner in which it is negotiated. The employer and the union are under great pressure to strike a bargain and to do it as quickly as possible. This is so, first, because the statute requires the parties to bargain in good faith with respect to wages, hours and conditions of employment[41] and, secondly, because the parties are both dependent upon the same enterprise, which is adversely affected in the event of protracted negotiation over contract terms.

As a result of these characteristics, many terms of the collective agreement are set forth in general and flexible language. "A collective agreement rarely expresses all the rights and duties falling within its scope. One simply cannot spell out every detail of life in an industrial establishment, or even that portion which both management and labor regard as matters of mutual concern."[42] The labor contract is ". . . essentially an instrument of government; not merely an instrument of exchange."[43] The unique characteristics of the collective bargain cannot be overemphasized,[44] and labor scholars have repeatedly criticized the judicial failure to recognize these characteristics and have warned against thinking about the agreement solely in terms of artificial legal concepts.[45]

This judicial tendency to force the collective contract into familiar legal categories is illustrated by the reasoning of Justices Warren, Clark

[40] For different forms and types of collective agreements, see Teller, "Labor Disputes and Collective Bargaining," vol. 3, pp. 1551-1679 (1940).

[41] Supra note 21.

[42] Cox, "The Legal Nature of Collective Bargaining Agreements," 57 Mich. L. Rev. 1, 23 (1958).

[43] Cox, "Reflections Upon Labor Arbitration," 72 Harv. L. Rev. 1482, 1492 (1959); "The trade agreement thus becomes . . . the industrial constitution of the enterprise setting forth the broad general principles upon which the relationship of employer and employee is to be conducted." NLRB v. Highland Park Mfg. Co., 110 F.2d 632, 638 (4th Cir. 1940).

[44] "The collective bargaining agreement is not the typical offer and acceptance which normally is the basis for classroom or text discussions of contract law. It is not an undertaking to produce a specific result; indeed, it rarely speaks of an ultimate product. It is not made by parties who seek each other out to make a bargain from scratch and then go his own way. . . . Though cast in an adversary position, both are dependent upon the common enterprise . . . . They meet in their contract negotiations to fix the terms and conditions of their collaboration in the future." Address by the late Dean Shulman, "The Role of Arbitration in the Collective Bargaining Process," delivered at University of California on March 5, 1949; this quotation may be found in 57 Mich. L. Rev. at p. 22 and in 72 Harv. L. Rev. at p. 1492.

[45] "The principles determining legal rights and duties under a collective bargaining agreement should not be imposed from above; they should be drawn out of the institutions of labor relations and shaped to their needs." Cox, "Rights Under a Labor Agreement," 69 Harv. L. Rev. 601, 605 (1956).

and Reed in the *Westinghouse* case.[46] There is nothing logically wrong with these views, for it is *possible* to distinguish union rights from those of the employees, and certainly the parties *could* agree that the latter be given effect only through the individual hiring contracts. However, the practical considerations discussed in the preceding few paragraphs would seem to indicate that the union should be permitted to sue for wages on the collective contract. Requiring 4000 employees to bring individual actions is a good way to promote industrial friction rather than the desired peace and stability. The necessary expenses and delays of individual suits, with resulting work stoppages because of the employees' participation therein; the fact that the collective agreement may cover employees working in plants located in different states thus creating the possibility of inconsistent interpretations of the agreement; the likelihood that some employees, whether in the same or different plants would be successful in their actions while others would be denied recovery,[47]—all these are reasons for permitting the union to maintain an action on the collective agreement itself instead of requiring many individual suits on the hiring contracts.

Preoccupation with familiar legal concepts seemed to have blinded the Court to the realities of the industrial community.[48] However, in the recent case of *Lewis v. Benedict Coal Corp.*[49] the Court displayed a more realistic approach to the labor contract. The collective agreement contained a provision requiring the employer to contribute to the union welfare and pension fund. The Benedict Coal Corporation was one of several employers who agreed to pay into the fund a royalty of 40¢ for each ton of coal produced for use or for sale. From March, 1950 through July, 1953, Benedict produced coal upon which royalties were due in the amount of $177,000, and it paid $100,000 of this amount into the fund, but withheld $77,000. The trustees of the fund sued to recover the $77,000 and the employer cross-claimed against the union for damages sustained as a result of the union's strikes and work stoppages, which were in violation of the collective contract. The amount of damages incurred was the $77,000[50] withheld from the fund, and the company contended that it was entitled to set off this money against the trustee's claim on the theory that the trustees were third-party-beneficiaries of the contract between the union and Benedict,

[46] Supra notes 37 and 38.

[47] "To allow the individual to press his own claim . . . would create a 'potential source of competition and discrimination that could be destructive of the entire structure of labor relations in the plant.'" Cox, "Individual Enforcement of Collective Bargaining Agreements," 8 Lab. L.J. 850, 856 (1957).

[48] This statement applies primarily to Justices Warren, Clark and Reed, who saw no constitutional difficulties in permitting the union to sue under Sec. 301 in an appropriate case, but reached the conclusion that the *Westinghouse* case was not an appropriate one.

[49] Lewis v. Benedict Coal Corp., 361 U.S. 459, 80 S. Ct. 489, 4 L. Ed. 2d 442 (1960).

[50] For simplification, and without affecting the legal issue, the figure has been changed to equal the amount set off. Actually Benedict's damages were less than the amount it owed to the fund.

and the duty of the promisor (Benedict) to pay royalties to the trustees was excused when the promisee (union) breached the agreement by engaging in strikes and work stoppages. The contract stated that "This agreement is an integrated instrument and its respective provisions are *interdependent*." It further stipulated that the no-strike clause was "part of the consideration of this contract."

The Supreme Court, with Justice Frankfurter dissenting, did not allow the set off, and rejected the argument that the company's duty to pay into the fund was dependent upon the union's performance of its obligations. Justice Brennan, speaking for a majority of seven, found the controlling language to be, not the integrated and interdependent clause, but rather such provisions as: the money "shall be paid into such Fund . . . on each ton of coal produced for use or for sale," and the "obligation . . . to so pay such sums shall be a direct and continuing obligation." He concluded that the union's performance of its promises was not a condition precedent to Benedict's obligation to contribute to the fund.—". . . the parties meant that the duty to pay royalty should arise on the production of coal independent of the union's performance."[51]

The Court did not let the case rest with this conclusion but proceeded to consider the question of whether or not Benedict's damages should affect the amount of the trustee's recovery. It is accepted practice in a two party contract that a promisor, when sued on a promise to pay money, may set off damages he has sustained against the amount he owes.[52] Should the same rule apply to three party contracts? The answer is apparently, yes—"It may . . . be . . . just to make the right of the beneficiary . . . subject (as in the case of an assignee) to counter-claim against the promisee—at least if they arise out of a breach by the promisee of his duties created by the very same contract on which the beneficiary sues."[53] Therefore, the question before the Court was, whether this rule of construction, which may be applicable to ordinary third-party-beneficiary contracts, should also be applied to the collective bargaining agreement? In answering this question in the negative, the Court made some intensely practical observations about the industrial community and the relationship between the parties to a collective contract:

"The collective bargaining agreement . . . is not a typical third-party-beneficiary contract. The promisor's interest in the third party here goes far beyond the mere performance of its promise to that third party, i.e. beyond the payment of royalty. It is a commonplace of modern industrial relations for employers to provide security for employees and their families. . . .

". . . [T]his is an industry-wide agreement involving many promisors. If Benedict and other coal operators . . . may curtail royalty payments the burden will fall in the first instance upon the employees and their families across the country. Ultimately this might result in pressures upon other coal

51 Supra note 49 at 466, 80 S. Ct. at 494, 4 L. Ed. 2d at 447.
52 Corbin, Contracts, vol. 3, § 709, p. 783 (1951).
53 Corbin, Contracts, vol. 4, § 819, p. 278 (1951).

operators to increase their royalty payments to maintain the planned schedule of benefits . . . in order to protect those of their number who might have become involved in local labor difficulties.

"Finally a consideration which is not present in the case of other third-party-beneficiary contracts is the impact of the national labor policy . . . this[54] evidences a congressional intention that the union as an entity . . . should in the absence of agreement be the sole source of recovery for injury inflicted by it. . . . It [national labor policy] seems to us to apply to protecting the interests of beneficiaries of the welfare fund, many of whom may be retired, or may be dependents, and therefore without any direct voice in the conduct of union affairs.

"[W]e hold that the parties to a collective bargaining agreement must express their meaning in unequivocal words before they can be said to have agreed that the union's breaches of its promises should give rise to a defense against the duty assumed by an employer to contribute to a welfare fund. . . ."[55]

It should not be inferred from all this that ordinary contract rules must be abandoned when dealing with the labor agreement. On the contrary, it would be as inadvisable for courts to attempt to create, inadvertently, a new law of collective bargaining, as it is for them to close their eyes to the realities of the industrial community. Many labor agreement problems can be solved through the application of familiar contract rules and when such problems do arise, the courts should not complicate the issue by creating unnecessary precedents.[56] Though Justice Frankfurter was of the opinion that the Court did just this in the *Benedict* case by not allowing the employer to set off its damages,[57] it would seem that this criticism was not justified in view of the realities of the situation.[58]

[54] The Court is referring to § 301(b) of the Taft-Hartley Act; 61 Stat. 156 (1947), 29 U.S.C.A. 185(b) (1958):

". . . 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."

[55] Supra note 49 at 468-470, 80 S. Ct. at 495, 496, 4 L. Ed. 2d at 449, 450.

[56] See Professor Cox's critique of Mastro Plastics v. NLRB, 350 U.S. 270, 76 S. Ct. 349, 100 L. Ed. 309 (1956) in 57 Mich. L. Rev. 1, 16-18 (1958), where it is suggested that the Court distorted the words of the contract and created an "embarrassing" precedent, which could have been avoided by applying familiar contract rules.

[57] For Justice Frankfurter's dissenting opinion, see supra note 49 at 471, 80 S. Ct. at 496, 4 L. Ed. 2d at 450.

[58] Justice Frankfurter concludes his opinion by quoting the following language from Professor Cox: "'The ease with which one can show that collective bargaining agreements have characteristics which preclude the application of some of the familiar principles of contracts and agency creates the danger that those who are knowledgeable about collective bargaining will demand that we discard all the precepts of contract law and create a new law of collective bargaining agreements.'" Id. at 476, 80 S. Ct. at 498, 499, 4 L. Ed. 2d at 453; it is doubtful whether Professor Cox would deem this remark applicable to the *Benedict* case. The language of note 45 supra seems more appropriate.

IV. Grievance Arbitration and Section 301 of the Taft-Hartley Act

Much of what has been said might be considered academic in view of the fact that most collective bargaining agreements contain their own procedure for settling disputes and provide for arbitration as the final step. The general and vague language in which many provisions of the contract are expressed, the broad scope, number of people and variety of interests encompassed by it, the expenses and delays of litigations and the traditionally unsatisfactory judicial attitude toward the problems of labor, these are all reasons which have caused the parties to collective agreements to provide their own methods for settling disputes relating to the contract.[59] Grievance arbitration "is a clear illustration of unions and employers forging ahead of the law. They have been providing their own forums for the settlement of disputes arising out of their collective agreements . . . grievance arbitration in the labor field . . . is doing the job of enforcing collective agreements far better and far more cheaply than our courts can ever do it."[60]

This is all well and good, and it is obvious that under an extensive system of grievance arbitration a "common law of the plant" is being created without particular regard to legal sanctions. What happens, however, when the grievance procedure breaks down, and one of the parties refuses to arbitrate? Should the courts compel arbitration at the suit of the other party[61] or should the law, as one arbitrator has suggested,[62] stay out of the picture altogether? In discussing these questions it will be necessary to consider, first, the matter of compelling the arbitration of a dispute

[59] A typical grievance procedure would involve the following steps: *First,* the aggrieved employee files his claim with his foreman and shop steward. If it is turned down here, then *Second,* it goes to the superintendent of the grievant's department and/or to the general manager. If the claim is not settled here, then it may be submitted to *Three,* a joint committee composed of union officials and top management and if not resolved here, then *Fourth,* the employee can request the union to submit the claim to arbitration; See supra note 40 for various types of grievance procedures.

[60] Gregory, "Labor and The Law," pp. 466, 467 (2d rev. ed. 1958); see Taylor, "The Voluntary Arbitration of Labor Disputes," 49 Mich. L. Rev. 787, 796 (1951).

[61] Reference to parties means union and employer. In most collective contracts the union has control of the grievance procedure beyond the first step, and the arbitration clause applies only to cases in which the union is not satisfied with the final step or where there is a disagreement between the employer and the union. Therefore, the rule seems to be that an employee cannot compel arbitration, since that right is granted only to the union and the employer. See Parker v. Borock, 5 N.Y.2d 156, 156 N.E.2d 297 (1959); Howlett, "Contract Rights of the Individual Employee as Against the Employer," 8 Lab. L.J. 316, 323 (1957).

[62] "[Arbitration] is a means of making collective bargaining work and thus preserving private enterprise in a free government. When it works fairly well, it does not need the sanction of the law of contracts or the law of arbitration. It is only when the system breaks down completely that the courts' aid in these respects is invoked. But the courts cannot, by occasional sporadic decisions, restore the parties' continuing relationship; and their intervention in such cases may seriously affect the going systems of self-government. When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on the arbitration award? I suggest the law stay out—but, mind you, not the lawyers."
Shulman work, supra note 19 at 1024.

that is clearly within the scope of the arbitration clause, and second, to consider the question of arbitrability, i.e. whether or not the reluctant party agreed to arbitrate the grievance in question.

It was seen in the *Westinghouse* case[63] that a union did not have standing under Sec. 301[64] to sue an employer for wages withheld from employees in violation of the collective agreement between the union and the employer. The reasons given were two: first, that Sec. 301 was merely procedural, permitting the union to get into federal court without diversity of citizenship, but providing no substantive law for determining the action,[65] and, second, that the action for wages belonged to the employees and was based on their individual hiring contracts and, therefore, was not predicated on a "contract between an employer and a labor organization."[66] It should be noted that there was no arbitration clause in the *Westinghouse* collective agreement. Suppose, however, that the contract had provided for arbitration of the wage disputes, and that the employer had refused to arbitrate after the other grievance procedures had been exhausted.[67] Suppose further that the union had sued, not to recover wages, but rather to compel specific performance of the arbitration clause. Under these circumstances would the union have prevailed under Sec. 301?

Textile Workers v. Lincoln Mills and its two companion cases *(General Electric Co. v. Local 205* and *Goodall-Sanford v. Textile Workers)*[68] has answered this question in the affirmative. In the *Lincoln Mills* case the grievances concerned the work loads and work assignments of 10 employees.[69] The *General Electric* case involved the alleged wrongful discharge of one employee and the improper payment of wages to another.[70] The *Goodall-Sanford* case concerned the grievances of 1136 employees, who claimed that they had been discharged in violation of the collective contract, and that such discharges had resulted in the loss of certain fringe benefits (insurance, pensions).[71] In all of these cases the contracts contained a grievance procedure ending with arbitration, and in each case the employer refused to arbitrate after the grievances had been taken to the final step. The union sued under Sec. 301 to compel arbitration, and Justice Douglas, speaking for a majority of five, granted specific performance.

Justice Douglas's first task was to overcome the common law prohibition

[63] Supra note 34.

[64] Supra note 33.

[65] Supra note 36.

[66] Supra notes 37 and 38.

[67] Failure to exhaust the grievance procedure is a bar to a suit to compel arbitration. See Howlett work, supra note 61 at 321.

[68] Textile Workers v. Lincoln Mills, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957); General Electric Co. v. Local 205, 353 U.S. 547, 77 S. Ct. 921, 1 L. Ed. 2d 1028 (1957); Goodall-Sanford v. Textile Workers, 353 U.S. 550, 77 S. Ct. 920, 1 L. Ed. 2d 1031 (1957).

[69] Id. at 449, 77 S. Ct. at 914, 1 L. Ed. 2d at 976.

[70] Id. at 548, 77 S. Ct. at 922, 1 L. Ed. 2d at 1029.

[71] Id. at 551, 77 S. Ct. at 920, 1 L. Ed. 2d at 1032.

against the enforcement of executory agreements to arbitrate.[72] This was accomplished by his finding that "§ 301(a) is more than jurisdictional—that it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements."[73] Thus Sec. 301 was to provide the necessary legal remedies and it was to be the vehicle for carrying out the purpose of the Wagner and Taft-Hartley Acts. This purpose was, according to the majority, not merely to recognize the validity and utility of collective agreements, but it was also the purpose of the statutes to create a federal policy to the effect that federal courts should have the power to specifically enforce these agreements in order to maintain industrial peace.[74] Justice Douglas saw no serious constitutional problems but reasoned that "Article III, Sec. 2, extends the judicial power to cases 'arising under . . . the Laws of the United States. . . .' The power of congress to regulate these labor-management controversies under the Commerce Clause is plain. A case or controversy arising under Sec. 301(a) is, therefore, one within the purview of judicial power as defined in Article III."[75]

"The question then is, what is the substantive law to be applied in suits under Sec. 301(a)? We conclude that the substantive law to apply in suits under Sec. 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law. . . . Other problems will lie in the penumbra of express statutory mandates. . . . The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of Sec. 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights."[76]

Justices Harlan and Burton concurred in the result but were still pre-

[72] Agreements to arbitrate future disputes were not enforceable at common law. Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 44 S. Ct. 274, 68 L. Ed. 582 (1924); though this rule has been changed by the United States Arbitration Act, 43 Stat. 883 (1925), 9 U.S.C. 1 (1957), the Act has been interpreted as excluding collective bargaining agreements. United Steel Workers v. Gatland-Henning Mfg. Co., 241 F.2d 323 (7th Cir. 1957); Penna. Greyhound Lines v. Amalgamated Assn., 193 F.2d 327 (3d Cir. 1952).

[73] Supra note 68 at 450, 451, 77 S. Ct. at 915, 1 L. Ed. at 977, 978; the Court drew heavily from the opinion of Judge Wyzanski in Textile Workers Union v. American Thread Co., 113 F. Supp. 137 (D.C. Mass. 1953); for attitude of federal courts on § 301, see 17 A.L.R.2d 614 (1951).

[74] The collective agreement in the Lincoln Mills case contained a "no strike" promise by the union. In granting specific performance under § 301, the Court placed considerable weight on what it deemed a congressional intent that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." Supra note 68 at 455, 77 S. Ct. at 917, 1 L. Ed. 2d at 979.

[75] Supra note 68 at 457, 77 S. Ct. at 918, 1 L. Ed. at 981.

[76] Id. at 456, 457, 77 S. Ct. at 918, 1 L. Ed. 2d at 908, 981.

occupied with forcing the collective agreement into a familiar legal mould. "The District Court had jurisdiction over the action since it involved an obligation running to a union—a union controversy—and not uniquely personal rights of employees sought to be enforced by a union."[77]

Certainly Justice Douglas had extracted a great deal from the general language of Sec. 301, and Justice Frankfurter in a strong dissenting opinion argued that, based on his ruling in the *Westinghouse* case, Sec. 301 gave the federal courts jurisdictional power only. "The Court has avoided the difficult problems raised by Sec. 301 of the Taft-Hartley Act . . . by attributing to the section an occult content."[78] The problems raised by Justice Frankfurter cannot be dismissed lightly, and one has cause to wonder whether the *Lincoln Mills* decision has not created more problems than it solved.[79]

On the difficult question of legislative intent, Justices Douglas and Frankfurter searched the congressional records in their *Lincoln Mills* opinions and each claimed to have found the correct meaning of Sec. 301. Perhaps Professor Gregory has come closest to the truth by stating that "Congress was not entirely sure what it meant in section 301 or what its constitutional powers were."[80] Without deciding the right or wrong of this matter[81] it is important, for the purposes of this article, to realize that Sec. 301 and the *Lincoln Mills* case have brought about vital changes in the law of labor relations and for "better or worse they bring the courts into grievance adjustment by providing a forum in which to compel or resist arbitration, and they seem likely to bring in their wake influential decisions upon the interpretation and significance of collective-bargaining agreements."[82]

With the federal courts thus empowered to "fashion a body of federal law" for the enforcement of collective contracts, it is apparent that the fate of grievance arbitration rests ultimately in the hands of the Supreme Court. Taken by itself, the *Lincoln Mills* decision indicates that the Court

[77] Id. at 460, 77 S. Ct. at 919, 920, 1 L. Ed. 2d at 982, 983.

[78] Id. at 460, 461, 77 S. Ct. at 923, 1 L. Ed. 2d at 983.

[79] The "problems" referred to are: What becomes of the traditional state jurisdiction over suits on Collective agreements—Is it to be preempted by federal law or may the state courts participate with the federal courts in the enforcement of collective contracts, and if so, will this not lead to forum shopping? For a discussion of these issues, see Van de Warter & Petrowitz, "Federal-State Jurisdiction and the Constitutional Framework in Industrial Relations," 31 So. Cal. L. Rev. 111 (1958); Wollett & Wellington, "Federalism and Breach of Labor Agreements," 7 Stan. L. Rev. 445 (1955); the following cases hold that state and Federal jurisdiction is concurrent: McCarroll v. Los Angeles County, Etc., Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), cert. denied, 355 U.S. 932, 2 L. Ed. 2d 415, 78 S. Ct. 413 (1958); Springer v. Powder Power Tool Corp., — Ore —, 348 P.2d 1112 (1960).

[80] Gregory, "The Law of the Collective Agreement," 57 Mich. L. Rev. 635, 637 (1959).

[81] Compare Bunn, "Lincoln Mills and the Jurisdiction to Enforce Collective Bargaining Agreements," 43 Va. L. Rev. 1247 (1957) (supports Justice Douglas's view) with Feinsinger, "Enforcement of Labor Agreements," 43 Va. L. Rev. 1261 (1957) (supports Justice Frankfurter).

[82] Cox work, supra note 43 at 1483.

will strengthen the system of grievance arbitration by putting the force of the law behind promises to arbitrate. This is only part of the picture, however, for in *Lincoln Mills* and its companion cases the promises to arbitrate were clear, and the Court simply compelled the parties to abide by their promises. The other aspect of this situation concerns the question of arbitrability, that is, did the reluctant party actually agree to submit the particular dispute to arbitration. Grievance arbitration is a product of contract, and a party cannot be compelled to arbitrate a matter if he did not promise to do so. In dealing with the question of arbitrability the Court is confronted with the important task of developing the substantive law that it claims it was authorized to create under Sec. 301.

The Supreme Court faced this task in *United Steelworkers of America v. Warrior & Gulf Nav. Co.*[83] The collective agreement contained "no strike" and "no lockout" provisions and a detailed grievance procedure with a stipulation to arbitrate any "differences . . . between the Company and the Union . . . as to the meaning and application of the provisions of this Agreement, or . . . any local trouble of any kind . . . ."[84] The contract also included a provision stating that issues "which are strictly a function of management shall not be subject to arbitration."[85] Twenty employees in the bargaining unit were laid off because the employer contracted out to other companies maintenance work which had formerly been performed by its own employees. The employees filed a grievance claiming, that the company had arbitrarily contracted out work that could have been, and previously had been, performed by them, and that the company had therefore violated the contract by inducing a lockout of employees who would otherwise be working. The grievance was not settled, the company refused to arbitrate, and the union sued under Section 301 to compel arbitration. The company's defense was that contracting out was "strictly a function of management" and therefore not subject to arbitration.

The dispute here concerned the scope and meaning of the arbitration clause, and since the arbitration clause is part of the contract, it could be argued that there was a dispute "as to the meaning and application of the provisions of this agreement" which the parties had agreed to submit to arbitration.[86] The Court, however, declared that "Congress has by Sec. 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate."[87] Given this rule that the court, not the arbitrator, must decide initially whether the defendant has agreed to arbitrate the particular grievance, would this not necessitate a judicial inquiry into the merits of the grievance, an inquiry which had just been declared to be the task of the

[83] 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409.

[84] Id. at 576, 80 S. Ct. at 1349, 4 L. Ed. 2d at 1414.

[85] Ibid.

[86] Prof. Gregory is inclined to favor this view. See Gregory work, supra note 80 at 648 n.47.

[87] Supra note 83 at 582, 80 S. Ct. at 1353, 4 L. Ed. 2d at 1417.

arbitrator and not the court.[88] If matters which are "strictly a function of management" are not subject to arbitration, then could it not be argued that a determination of the arbitrability of the grievance depends upon whether contracting out was strictly a function of management, and thus the court would have to become immersed in a substantive examination of contract terms in order to determine whether there were any restrictions on contracting out?

The District Court proceeded in this manner, examining past dealings between the parties, which seemed to indicate that both the union and the company regarded contracting out as a management function only, and the court concluded that the grievance was not subject to arbitration.[89] The Court of Appeals affirmed,[90] and the Supreme Court reversed with Justice Douglas, speaking for a majority of four, again displaying his keen insight into the problems of collective bargaining. He reasoned, and the three concurring Justices Frankfurter, Brennan and Harlan, agreed, that due regard for the national labor policy[91] and the special nature of grievance arbitration warn against a judicial inquiry into the merits of the grievance, beyond that which is necessary to determine whether or not the reluctant party promised to arbitrate the particular dispute. "Doubts should be resolved in favor of coverage."

The management function exclusion clause was not considered to be meaningless, but was held to refer only to those matters over which the contract gives management exclusive control. In order to determine arbitrability, however, the Court should not be allowed to determine what matters are under management control and what are not, because such a judicial inquiry would undermine the purpose and effectiveness of the arbitration clause. A "collective bargaining agreement may exclude contracting-out from the grievance procedure. . . . Here, however, there is no such provision. . . . In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. . . . The grievance alleged that the contracting-out was a violation of the collective bargaining agreement. There was, therefore, a dispute 'as to the meaning and application of the provisions of this Agreement' which the parties had agreed would be determined by arbitration."[92]

88 "The courts . . . have no business weighing the merits of the grievance . . . . The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic values which those who are not a part of the plant environment may be quite unaware." United Steel Workers of America v. American Mfg. Co., 363 U.S. 564, 568, 80 S. Ct. 1343, 1346, 1347, 4 L. Ed. 2d 1403, 1407 (1960).

89 168 F. Supp. 702 (S.D. Ala. 1958).

90 269 F.2d 633 (5th Cir. 1959).

91 "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of a existing collective bargaining agreement." 61 Stat. 156 (1947), 29 U.S.C.A. 173(d) (1958).

92 Supra note 83 at 584, 585, 80 S. Ct. at 1354, 4 L. Ed. 2d at 1419.

It seems then that the Court has adopted the advice of Professor Cox, that "[A]rbitration should be ordered in an action under section 301 whenever the claim might fairly be said to fall within the scope of the collective-bargaining agreement. If the latter contention be made but is patently frivolous, arbitration should be denied."[93] The court is, therefore, permitting judicial examination of the substantive provisions of the contract but only to the extent of determining whether the grievance falls within the scope of the agreement, i.e. whether the defendant promised to arbitrate the particular dispute. Such judicial inquiry does not extend to grievances which are clearly within the scope of the arbitration clause, and when the clause is broad, such as this one, the situation has been summarized by the Supreme Court as follows:

"Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement."[94]

The *Warrior & Gulf* case indicates that the Supreme Court is willing and able to recognize and give effect to the essential character and purpose of the collective bargaining agreement, which is as Justice Douglas stated, "an effort to erect a system of industrial self-government."[95] The grievance procedure ending with arbitration is the nucleus of this governmental system; it is "part of the continuous collective bargaining process." This reaches the heart of our inquiry into the role of the law in the interpretation and enforcement of collective agreements, and we find that the court is confronted with the task of balancing two conflicting views, both of which Congress has declared to be part of the national labor policy.

On the one hand, there is the need for maintaining and strengthening the industrial system of self-government, and of allowing unions and employers to settle their disputes in a manner they have agreed upon.[96] The courts cannot delve into the merits of a grievance, because this would serve to weaken the governmental structure and undermine the process of collective bargaining. On the other hand, the collective agreement is supposed to serve as an instrument for the stabilization of industrial relations,[97] and, therefore, collective bargaining cannot be allowed to run rampant. There is a need to give effect to these agreements by way of specific enforcement.

Apparently the courts are confronted with a partial dilemma. Labor contracts should be enforced and disputes arising under them must be settled—yet in so doing it is important not to encroach upon the industrial system of government. However, in its *Lincoln Mills*[98] interpretation of

93 Cox, "Reflections Upon Labor Arbitration," 72 Harv. L. Rev. 1482, 1516 (1959).
94 Supra note 83 at 581, 80 S. Ct. at 1352, 4 L. Ed. 2d at 1417.
95 Id. at 580, 80 S. Ct. at 1351, 4 L. Ed. 2d at 1416.
96 Supra note 91.
97 Supra notes 22 and 23.
98 Supra notes 73 and 76.

Sec. 301 the Supreme Court seems to have found a satisfactory way of dealing with the situation. This is the optimistic view taken by Professor Gregory: "In a fluid quasi-legislative fashion they [federal courts] may conduct experiments in the field and can produce something eventually that is bound to be revolutionary—and no doubt a triumph—in law making."[99] The *Warrior & Gulf* case[100] and the *Benedict* case[101] both seem to bear out this contention.

V. CONCLUSION—WHAT SHOULD BE THE LAW OF COLLECTIVE BARGAINING AGREEMENTS

As to the question of *who* can bring an action on a collective agreement, it would seem that the union should be the *only* party to bring a suit. Some of the Supreme Court Justices continue to raise questions about contract rights which belong to the union and those which belong to the employees, concluding that the union has no standing to sue on the latter. There are several reasons why courts should not attempt to draw a line between union rights and individual employee rights. The first reason is that it is not always possible to draw the line accurately, if at all. There is no problem with such provisions as wages, hours, and check off; but what about subcontracting or even the arbitration clause? The employees had filed essentially the same grievances in the *Westinghouse* case[102] as in the *Lincoln Mills* case[103] i.e. they were all "uniquely personal," yet in the former case the union was not the proper party to sue, while in the latter case it was, and the difference, according to the concurring Justices,[104] was simply that in *Westinghouse* the action was to recover wages, while in *Lincoln Mills* the suit was to enforce the promise to arbitrate the wage dispute. It is difficult to see how a promise to arbitrate wage disputes is a "union obligation" in the sense that it benefits the union. This distinction seems tenuous, and though it was not the basis for decision in either case (the Court opinions were based on jurisdiction under Sec. 301) it is still with us, because *Lincoln Mills* did not overrule *Westinghouse*.

A second reason why the union should be the party bringing the action in all suits on the collective contract, is that it is disruptive of industrial peace to require employees to press their claims individually.[105] "A prime function of a grievance procedure is to secure coherence and uniformity in interpreting the contract and building up a 'law of the plant' for omitted cases. . . . To permit individual suits for breach of contract would invite divergent rulings."[106]

Thirdly, allowing the union to be the only suing party is in harmony

[99] Gregory work, supra note 80 at 654.
[100] Supra notes 83 and 94.
[101] Supra notes 49 and 55.
[102] Supra note 34.
[103] Supra note 68.
[104] Supra notes 37, 38 and 77.
[105] Supra text.
[106] Cox work, supra note 47 at 855.

with the national labor laws, which declare the union representatives to be the *exclusive* representative for the purposes of collective bargaining[107] and stipulate that the union can sue or be sued without distinguishing between union rights and employee rights.[108] Under this view the individual employee would not be without a remedy, but could resort to an action against the union if it failed to represent him properly.[109]

Much emphasis has been placed on the unique character of the labor agreement and the process of collective bargaining. Certainly it is true that a recognition of the governmental nature of the collective contract should be the primary consideration in matters of interpretation and enforcement, and the courts' traditional failure to meet this situation gave experienced arbitrators good cause for doubting the capacity of the courts to deal with the problems of collective bargaining.[110] However, the common law has usually been able to expand to cope with new situations, and there is no reason why it cannot do so in the field of labor relations. True, the process of expansion is often tediously slow, but the future looks bright under *Lincoln Mills* and Sec. 301. "In my opinion both the institutions of self government proliferated by collective bargaining and the surrounding legal system can gain strength from mutual support."[111] E. S. M.

[107] Supra note 29.

[108] Supra note 33.

[109] See Cox work, supra note 47 at 859; Cox, "The Duty of Fair Representation," 2 Vil. L. Rev. 151, 175-177 (1957).

[110] Supra note 62.

[111] Cox, "The Legal Nature of Collective Bargaining Agreements," 57 Mich. L. Rev. 1, 2 (1958).