Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining

By Sanford J. Rosen

The negotiation of a collective bargaining agreement can be likened to the drafting of an industrial constitution or basic statute; the grievance and arbitration procedures established in the agreement, to assure peaceful relations during its term, constitute a kind of administrative process. These are rough analogies at best and, although significant, the distinction between the legislative and administrative aspects of collective bargaining is not amenable to nice recitation. However, if we presume in this context to speak of legislation and administration, we are immediately compelled to recognize that which should by this day be abundantly clear—the collective bargaining process is vitally concerned with the establishment, legitimation and continuity of systems of industrial self-government.
These private industrial governments, of course, are not unregulated by the general community’s political institutions; yet, within the limitations established by law, something resembling real government does function at least in microcosm.

It is within the broad framework of collective bargaining that the apparently conflicting interests of union and management, themselves petit private governments, are institutionally accommodated. Moreover, important rights to be enjoyed by the individual workers are determined within the continuing dialogue conducted by these power-bearing organs. The principal reason, in fact, for the existence


8 See, e.g., Cox, supra note 1; Silver, Rights of Individual Employees in the Arbitral Process, 12 N.Y.U. ANN. Conf. Lab. 53, 56-57 (1959); Summers, supra note 4, Report of the Committee on Improvement of Administration of Union-Employer Contracts, ABA
of unions "is to speak for workers in negotiating terms of employment, to exercise the collective strength of workers in obtaining concessions, and to bind the workers by making collective contracts." Functioning as collective bargaining agencies, labor unions are thus in a position to affect significantly the interests of the individual workers.

Nevertheless, at least before labor unions gained significant power and stability in their relations with employers, before labor unions were substantially incorporated into the formal power structure of the American Establishment, the law assiduously avoided intervening to protect the individual from the organization's actions. It was widely believed that the state should not, except in the most extreme cases, interfere with the internal functioning of "voluntary private associations" like trade unions. But with the growth of a complex


9 Summers, supra note 6, 49 Mich. L. Rev. 806, Accord, Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609-610 (1959); Note, 35 St. John's L. Rev. 85, 95 (1960); see § 1 of the NLRA, 49 Stat. 449, 450, 29 U.S.C. § 151 (1958); Tannenbaum & Kahn, Participation in Union Locals 4-5 (1958); cf. Sherman, The Individual and His Grievance—Whose Grievance Is It?, 11 U. Pitt. L. Rev. 35, 36 (1949); Report, supra note 8, at 143. Professor Summers has subsequently had occasion to elaborate upon this subject:

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


11 See ibid. Blumrosen, supra note 6, at 1435-38; Chafee, Jr., The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993 (1930); Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1050-51 (1951); Note, 51 Yale L.J. 331 (1941).
industrial society, new considerations have necessitated re-examination of the concept of and approach to such "private associations." As Professor Blumrosen, speaking specifically of labor union development, recently observed:

Unionism emerged in the American industrial society to protect the economic and dignitary interests of employees. The national labor policy, developed in the 1930's, allowed employees to use their collective strength, channelled and developed through unions, to counter the power of the employers. In this process, the power of the labor union as an organization was enhanced. This increasing power over the economic destiny of employees has created problems not widely envisioned a generation ago.\(^1\)

In our contemporary mass society there is somewhat more of a tendency to recognize that the power exercised by labor unions and by many other such private associations is very like the political power of the state insofar as the exercise of such associational power greatly affects important interests of the subject individuals.\(^2\) Increasing recognition is being given to the possibility that union power will be exercised without a proper regard for the interests of the individual worker.\(^3\) It is now obvious that "union power can be exercised not only against the employer, but in cooperation with him; not only for the employees, but against them."\(^4\)

In the light of these not unfounded fears, added attention has been paid the question: How can the law promote such collective union activity as is essential to "equalize the imbalance of power between employers and individuals . . . and more accurately define the prerogatives of labor and increase their number,"\(^5\) while protecting the worker against undue disadvantages resulting from capricious exercise of union power? As if the mere statement of the question were not sufficient testament to the complexity of the problem, it must be noted as well that state activity here must be advertent to our continuing social preference for "pluralism." Briefly, the thrust of this concept is that the state as the first among many foci of power should not intrude so far in its necessary regulation of other power centers as to destroy their essential independent and private characteristics. This follows from a belief that efficient social activity and

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\(^1\) Blumrosen, supra note 6, at 1435.
\(^2\) Ibid. Miller, supra note 6; Developments in the Law, supra note 10. Comparatively early insights to this effect are to be found in Chaffee, supra note 11; Jaffee, Law Making by Private Groups, 51 Harv. L. Rev. 201 (1937).
\(^3\) See, e.g., Cox, supra note 9; Jacobs, supra note 10; Kanel, supra note 10; Summers, supra notes 4, 6.
\(^4\) Blumrosen, supra note 6, at 1435.
\(^5\) Note, 35 St. John's L. Rev. 85, 95 (1960). See also materials cited in note 9.
continued individual liberty require, to the extent possible, that power not be overly concentrated.17

It may well be that a fully satisfactory accommodation, through the agency of the law, of the various competing group and individual needs incident to exercises of union power is impossible. Nevertheless a number of legal responses to the problem, or to one or another of its phases, have been developed, and is most appropriate to continue the necessary process of examination within the context of this symposium.

Obviously, all areas of conflict between the individual and the union are important and all are largely interrelated.18 This discussion, however, will be primarily limited to consideration of the law’s response to conflicts of union and individual interest in collective contract negotiation and administration,19 and to an examination of the extent to which a satisfactory accommodation would be promoted by holding labor union officials individually responsible as fiduciaries upon the failure of a worker to receive his due from the union that represents him.

The Duty of Fair Representation

Various common law concepts have been pressed into service in efforts to describe the status of individuals under the collective bar-


18 See Aaron, Some Aspects of the Union’s Duty of Fair Representation, 22 Ohio St. L. Rev. 39 (1961); Blumrosen, supra note 6.

19 In the collective bargaining process the tension between group and individual needs obviously involves more than merely the relationship between the union and the individual. Here the employer is rather directly concerned with this interplay. However, this fact does not substantially alter the basic question that has been promulgated, i.e., how may the law aid in striking an appropriate balance between union power and individual interest. But cf., Humphrey v. Moore, 84 Sup. Ct. 363, 376-77 (Goldberg, J. concurring). As Professor Summers recently observed:

The needs of collective bargaining . . . inevitably look two ways—toward the interests of the collective parties and their relationship, and toward the interests of the employees and their individual rights. The need for an effective union to obtain benefits and establish rules carries with it a need for individuals to receive these benefits according to the rules. The need for the collective parties to resolve disputes and meet changed conditions during the contract has a concurrent need for the individual to be fairly treated according to general rules. In framing the legal rules, the multiple needs of collective bargaining cannot be sufficiently served by looking only to the collective relationship; for one of the major functions of collective bargaining may be frustrated if the employees’ interest in fair and equal treatment under established rules is not given significant weight.

gaining contract and to provide them with relief against arbitrary applications of collective power: Employees have been described as third party beneficiaries under the union-employer contract.\textsuperscript{20} It has been held that employees' contracts of hire "incorporate" terms negotiated by the union with the employer.\textsuperscript{21} The employees have been said to be principals and the union their agent, who negotiates the collective agreement on their behalf.\textsuperscript{22} And the employees have been held to be the \textit{cestuis que trustent}, owed a fiduciary duty of fair representation by the union, considered to be the trustee of the trust.\textsuperscript{23} None of these theories has in fact provided very extensive protection for the individual worker and they have been criticised as reflecting overly traditional or conceptualized approaches to the unique problems in the field of labor-management relations.\textsuperscript{24} “The problem presented is not [after all] one of choosing theories, for we can draw from them only the contents which we have placed in them. The problem is one of policy—what rights \textit{should} an individual have under a collective agreement? This problem is rooted in the need for reconciling the needs of the individual with the collective interests of the union and management.”\textsuperscript{25} Nevertheless, these theories, and particularly the last two, embodying fiduciary concepts and stating a policy


preference for "fair representation," have, over the past couple of decades, provided considerable attraction for judges and commentators alike. Judicial use of these theories is made, however, with increased recognition that these familiar legal concepts can only be applied with a generous appreciation of the unique realities and needs of the labor relations field.26

The first significant case involving the duty of fair representation was Steele v. Louisville & Nashville R.R.27 At issue was the power of a union to negotiate, with an employer, an agreement that had as its conspicuous purpose and consequence first the limitation and then the destruction of the employment opportunities of the Negroes represented by that union. The Supreme Court declared the contract to be unlawful. Building upon the federal statutory authority of the union to act as the exclusive bargaining representative for all the workers in the bargaining unit, the Court held that:

Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and to restrict the rights of those whom it represents . . . but it has also imposed on the representative a corresponding duty . . . to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.28

As initially formulated by the Supreme Court, the duty of fair representation only protected workers subject to the Railway Labor Act from racial discrimination on the part of the union actually representing them and the protection applied only to the negotiation and drafting of the written collective bargaining agreement.29 In time, however, the protection was extended. At present workers subject to the Labor Management Relations Act are also protected.30 And

27 323 U.S. 192 (1944).
28 323 U.S. 202-03. Congress had not explicitly imposed such a duty. The Court, rather, found this requirement in the statute in order to avoid deciding the question whether, in view of the delegation of statutory authority, unions must constitutionally avoid "hostile discrimination." See Humphrey v. Moore, 84 Sup. Ct. 363, 375 (Goldberg, J. concurring).
29 From the very beginning, actions for breach of the duty could be brought either in state court, Steele v. Louisville & Nashville R.R., 323 U.S. 192, reversing 245 Ala. 113, 16 So. 2d 416 (1944), or in federal court, Turnstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, reversing 140 F.2d 35 (4th Cir. 1944). The action can be one for damages or injunctive relief, Steele v. Louisville & Nashville R.R. supra at 207, and the employer can be joined as a party. See id. at 203-04; Cunningham v. Erie R.R., 266 F.2d 411, 416 (2d Cir. 1959).
30 See Humphrey v. Moore, 84 Sup. Ct. 363; Syres v. Oil Workers Int'l Union, 350
in some circumstances a union owes a duty of fair representation to workers for whom it does not actually function as collective bargaining agent.\textsuperscript{31} Moreover, the duty must be met not only when the collective agreement is negotiated and written, but also when the agreement is administered through grievance proceedings and the like.\textsuperscript{32} Finally, after initial hesitation by the lower federal courts,\textsuperscript{33} it is now clear that all invidious discriminations, not merely the racial variety, are prohibited.\textsuperscript{34}

The federal duty unquestionably is like a fiduciary obligation. As the United States Court of Appeals for the Fourth Circuit, in an opinion examining many of the significant decisions and articles on the subject, recently stated:

Although the Supreme Court has not explicitly characterized this obligation by the very term "fiduciary relationship," its treatment of the subject is tantamount thereto. It has in fact said that "Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers." While it is not always appropriate to transplant common law concepts to the field of labor relations, it is plain that in the Supreme Court's view the federal statutory duty of fair representation is not unlike a common law fiduciary obligation.\textsuperscript{35}

To the same effect are major state court decisions examining the state common law or statutory duties of fair representation as well as the federal requirement.\textsuperscript{36}


\textsuperscript{34} Humphrey v. Moore, 84 Sup. Ct. 363; Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191 (4th Cir. 1963), overruling Alabough, supra note 32; see cited sources in Thompson, 316 F.2d 198 n.15.

\textsuperscript{35} Thompson v. Brotherhood of Sleeping Car Porters, supra note 34, 316 F.2d at 201 (emphasis added) (discussing relevant Supreme Court statements). See Gregory, Fiduciary Standards and the Bargaining and Grievance Process, 8 Lab. L.J., 843 (1957).

While it is now clear that labor unions, and consequently union officers and officials, owe those whom they represent a fiduciary duty of fair representation, unfortunately the protection afforded is less real than apparent.\(^3\)

Initially, there are limitations inherent in the judicial character of the protection. To gain relief an expensive law suit must be conducted—this is usually out of the question for all but especially outraged workers.\(^4\) Such a law suit, in addition, is likely to be so time consuming as to dissipate real enjoyment of the fruits of any ultimate victory.\(^5\) In addition, a number of courts have compounded the general limitations incident to the judicial character of the remedy by imposing “numerous procedural and technical barriers which tend to restrict effective protection of employees.”\(^6\) The effect of these limi-

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The extent to which state law remains relevant in cases involving individual rights in collective bargaining appears to be decreasing, for the Supreme Court has taken steps moving far in the direction of pre-emption of the field by federal substantive law. State law is clearly pre-empted at least when the individual is able to bring a suit for breach of the collective bargaining agreement and it is probably pre-empted, as well, whenever a fair representation claim is raised. See Humphrey v. Moore, 84 Sup. Ct. 363 (1964) (to be discussed at length, infra); Thompson v. Brotherhood of Sleeping Car Porters, supra note 34, at 199; Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963); compare Falsetti v. Local 2026, UMW, supra, with Falsetti v. Local 2026, UMW, 55 LRRM 2552 (W.D. Pa., Feb. 27, 1964); see Blumrosen, supra note 19, at 1519-20; Summers, supra note 4, at 370-75.

\(^3\) See generally, Aaron, supra note 18, at 40; Blumrosen, supra note 6, at 1470-71; Gray, The Individual Worker and the Right to Arbitrate, 12 LAB. L.J. 816 (1961); Summers, supra note 25, at 244-48; Report, supra note 8, at 161; Note, 13 STAN. L. REV. 161, 164 (1960).

\(^4\) This difficulty might be overcome if the National Labor Relations Board were found to be empowered to enforce the duty of fair representation. See Blumrosen, supra note 6, at 1504-22; Cox, supra note 1, at 172-75; Sovern, The National Labor Relations Act and Racial Discrimination, 62 COLUM. L. REV. 563 (1962); Note, 112 U. of PA. L. REV. 711 (1964). But the second circuit has rejected such an approach, NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963) (denying enforcement of 140 N.L.R.B. No. 7 (1962)); but see Durandetti v. Chrysler Corp., 195 F. Supp. 653 (E.D. Mich. 1961), and the Supreme Court has not yet passed upon the question. Humphrey v. Moore, 84 Sup. Ct. 363, 369 (1964).

\(^5\) In Thompson v. Brotherhood of Sleeping Car Porters, supra note 34, 316 F.2d 192 n.1, the court stated: “We note the unhappy fact that the litigation was begun more than four years ago, a circumstance for which the District Judge who tried the case was in no way responsible. . . .”

\(^6\) Blumrosen, supra note 6, at 1471. Professor Blumrosen commented further that courts “have insisted on technicalities of pleading [n.93: e.g., Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir.), cert. denied, 371 U.S. 920 (1962); Wilson v. Ex-Cell-O Corp., 368 Mich. 61, 117 N.W.2d 184 (1962); Carlini v. Curtiss-Wright Corp., 71 N.J. Super. 101, 176 A.2d 266 (App. Div. 1961), cert. denied, 37 N.J. 133, 179 A.2d 569 (1962)], have applied doctrines restricting the suability of unions, have imposed an exhaustion of contract remedies requirement where such remedies seem unavailable [n.95: See Widuk v. John Oster Mfg. Co., 17 Wis. 2d 367, 399, 117 N.W.2d
tations is quite significant. A commentator who communicated with
the attorneys of record, in the reported fair representation cases in-
volving alleged racial discrimination, as to the present status or ulti-
mate disposition of each case has concluded that:

In theory, the doctrine of fair representation assures Negroes that
their jobs cannot be affected by unfairness on the part of their col-
llective bargaining representatives. In fact, Negro workers have made
extremely limited use of judicial coercion under the Steele standard;
and when they have tried to take advantage of its apparent protection,
they have secured only slight practical amelioration of their position.41

In non-racial cases, effective use of the judicial protection appears
to be even more limited. As already noted, some courts were initially
reluctant to extend the duty to cases other than those involving racial
affronts. By now, however, it is clear that the obligation does extend
to non-racial abuses of union power.42 Yet, in only a very few cases
have aggrieved parties won court decisions on the merits when unfair
representation of a non-racial origin has been alleged.43

aff'd, 313 F.2d 599 (2d Cir., 1963), and have hesitated to allow the employee to pro-
tect his interest in arbitration [n.96: In re Soto, 7 N.Y.2d 397, 165 N.E.2d 855, 198
N.Y.S.2d 282 (1960)]. But see Thompson v. Brotherhood of Sleeping Car Porters,
supra note 34 (where counsel did such a poor job that at one point the court commented
bitterly that "the thing has been poorly handled. . . "). 316 F.2d 197 n.8. Nevertheless,
reading the pleadings very liberally, the court held that a proper cause of action had
been stated and remanded the case for trial on the merits). See also Ferro v. Railway
27, 1964); Crowell v. Palmer, 134 Conn, 502, 58 A.2d 729 (1948); Rumbaugh v. Wini-

It is noteworthy that preclusion of punitive damages may be another limitation
imposed by the courts on the duty. See Brady v. TWA, Inc., 196 F. Supp. 504 (D. Del.
1961); Thompson, supra note 34, at 203.

41 Herring, The Doctrine of Fair Representation in the Hands of the Courts and the
on file at the Yale Law Library—Anticipated to be published in the Maryland Law
Review.

42 See notes 33 & 34 supra.

43 Notable examples of cases in which breaches of duty have ultimately been found
include: Clark v. Hein-Werner Corp., supra note 36; Wilson v. Hacker, 200 Misc. 124,
101 N.Y.S.2d 461 (Sup. Ct. N.Y. 1950); Moore v. Local 89, Teamsters, 356 S.W.2d
241 (Ky. Ct. App. 1963), reversed sub. nom., Humphrey v. Moore, 84 Sup. Ct. 363
(1964).

If the other theories upon which individual relief can be based are included, e.g.,
individual suits for breach of contract or to compel participation in grievance and arbi-
tration proceedings, the incidence of success would appear to be somewhat greater. See
generally Summers, Individual Rights in Collective Agreements and Arbitration, 37
N.Y.U.L. Rev. 362 (1962). A fully comprehensive approach to the group-individual
conflicts in at least the administrative phase of collective bargaining would examine all
the ways in which the individual might seek judicial redress of his grievances. See, e.g.,
The judicial tendency to circumscribe availability of the remedy and the reluctance to extend the duty to prohibit non-racial injuries reflects a continuation of the general judicial attitude against intervention in the sphere of private associational power and organization. Criticism has been leveled at the courts for being unwilling "to discard the doctrine of non-interference in the internal affairs of 'voluntary' organizations" even in applying the explicit statutory protection of Title I, "The Bill of Rights" provisions, of the Labor Management Reporting and Disclosure Act of 1959. Regardless of how inappropriate it may be for the courts to pursue only faintly this explicit legislative program to protect and promote internal union democracy, in the realm of collective bargaining, judicial reluctance to intrude deeply into the process of contract formation, through the judicially created entry of fair representation, is not altogether unwise.

In situations other than those involving necessary constitutional determinations, it is normally the responsibility of the legislature to determine, at least in the first instance, such important social policies as the extent to which and the manner in which private institutions and associations should be regulated by governmental agencies. And it is clear that Congress has chosen to promote collective bargaining as a system of "private ordering." The theory of government regulation here is not generally to prescribe in detail the manner of agreements the parties will make, but rather to require only that the parties conscientiously seek their own agreements, subject to some


47 See § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958); Duvin, The Duty to Bargain in Good Faith: Law in Search of Policy, 64 Colum. L. Rev. 248 (1964); Fleming, The Obligation to Bargain in Good Faith, 47 Va. L. Rev. 988 (1961); Welling-
legal prohibitions. This is somewhat in contrast to the thrust of the LMRDA where, to foster internal union democracy, Congress has superimposed detailed legislative strictures upon union structure and behavior. Unlike such a legislative program, the duty of fair representation was formulated as a judicial generality, erected upon presumed legislative intent, in order to avoid a hard constitutional question. By it the courts did not presume, nor should they for Congress would seem to have rejected such a program, generally and closely to supervise substantive collective bargaining decisions made in the course of drafting the contract. So far as consideration of the merits of collective bargaining decisions is concerned, at least when not yet presented with standards established by the parties themselves, the courts quite properly have sought only to render free from gross abuse of the worker the system of essentially private ordering that Congress has undertaken to promote.

When applied to test the substance or merits of collective bargaining decisions, in fact, all the duty of fair representation demands is that unions avoid "hostile discrimination," "invidious" discrimination, or "discrimination not based on . . . relevant differences." The Supreme Court's latest pronouncement on the subject is that this means that a union does not breach its "duty in taking a good faith position contrary to some individuals whom it represents nor in supporting the position of one group of individuals against that of another." At least until there is an actual collective bargaining agreement from which more precise standards can be drawn, this means that the courts are in a position only to remedy such abuses of power as are particularly gross for "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees or classes of employees. The mere existence of such differences does not make them invalid. The common

50 See note 28 supra.
plete satisfaction of all who are represented is hardly to be expected."

Particularly at the contract negotiation stage, the scope of judicial review is thus exceedingly narrow, for in negotiating the agreement, even one of a series of agreements, unions and management are concerned with the formulation of the broad outline of the system of peaceful self-government. In making its demands here, the union is almost invariably faced with the necessity of choosing among apparently legitimate but competing interests of different groups of workers. To assure optimal gain for all employees represented by the union, the union must be able to bargain from a position of virtually absolute strength, unattended at this bargaining table by dissent from those who it represents. Furthermore, until the basic agreement is established by the collective parties, a reviewing court is only in a position to examine a negotiation decision for conformity to relatively abstract and nebulous standards of fairness. The result is that, in the application of the duty at this stage, absent an actual demonstration of bad faith, bad faith cannot be inferred from classifications drawn in the agreement unless they are "invidious" in the sense that they are not based upon lawful distinctions. According to a recent Second Circuit decision, this means that if "a bargaining agent in representing the employees [were] to draw distinctions among them which are based upon their political power within the union," the bargaining agent would be in violation of its duty. In other words, in seeking to resolve conflicts, the union cannot rely upon the political element but must base its decision on more "rational standards."

But the complaining party has the burden of demonstrating that

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53 Ibid. In Steele, supra note 51, the Court further stated that the union's obligation does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of a bargaining representative of a craft, all of whose members are not identical in their interest or merit.

323 U.S. 203.

54 See notes 1-7 supra with text; notes 71-73 infra with text.


57 Ferro v. Railway Express Co., 296 F.2d 847, 851 (2d Cir. 1961).

58 Blumrosen, supra note 43, at 1480.
the union was improperly activated politically or was otherwise acting in bad faith or engaging in invidious discrimination, for at least when allegations of unfair representation at this stage are made, the union normally must merely show some proper reason for acting or some "reasonable" criterion for the classification that was drawn.\(^{50}\) And, it is seldom difficult for unions or the courts to find some apparently legitimate reason to justify almost any classification or action.\(^{60}\) Therefore, unless the classification is obviously based upon palpably unlawful criteria, such as race or, absent a valid union shop agreement, non-membership in the union,\(^{61}\) the courts will rarely be in a position to conclude on the merits that the negotiated provision is invalid. Once apparently legitimate reasons for the union's action are presented, the individual must then demonstrate that these reasons were pretextuous in order to prevail.\(^{62}\) Rarely will the union act in such a manner as to make available to the aggrieved individual evidence that its presumably valid reasons are mere pretext.

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\(^{50}\) Professor Wellington has critically described the judicial approach:

A heavy presumption of regularity, not unlike the presumption of constitutionality which quite properly attaches to judicial review of state economic action, is employed in court hearings on union action. This imposes a strenuous burden of proof on a plaintiff. . . .

Steele fails because courts, unable to find standards by which to test the fairness of economic distinctions in collective agreements, apply a heavy presumption of legality to union action. This is similar to the presumption of constitutionality federal courts accord to state action in the economic sphere—a presumption rooted in an altogether different relationship.

Wellington, supra note 56, at 1341-42, 1357.

See Report, supra note 8, 50 Nw. U.L. Rev. 143, 158 (1955); Gainey v. Brotherhood of Ry. Clerks, 177 F. Supp. 421, 430-31 (E.D. Pa. 1959) (dictum), aff'd, 275 F.2d 342 (3d Cir. 1960), cert. denied, 363 U.S. 811 (1960) ("The discrimination cases seem to be of two classes: a larger group which concerns racial discrimination—then a much smaller category comprising instances of arbitrary and capricious action within the union, in defiance of that union's own internal procedures. An overt, hostile and invidious discrimination must be demonstrated in order to raise such a ground").

\(^{60}\) See Ford Motor Co. v. Huffman, supra note 52 (discrimination in favor of military veterans upheld); Britt v. Trailmobile Co., supra note 52 (same); Whiteford v. United Steelworkers, Local 2708, 263 F.2d 546 (5th Cir. 1959), cert. denied, 360 U.S. 902 (1959) (apparent racial discrimination justified); cf. Cortez v. Ford Motor Co., 349 Mich. 108, 84 N.W.2d 523 (1957) (disparity of treatment based upon sex affirmed); see also Wellington, supra note 56, at 1342 n.77.


\(^{62}\) See Thompson v. Brotherhood of Sleeping Car Porters, supra notes 34 & 61. The court was impressed by the fact that a union official explicitly wrote that "there was nothing I could do until you became a full fledged member . . . ." 316 F.2d at 195. The Court was further impressed by the fact that the union had failed to explain why its "reasons" for not acting on plaintiff's behalf had not stopped it from acting on behalf of other, similarly situated, employees. 316 F.2d at 195-96.
After a collective agreement has actually been drafted, conditions for judicial review of union bargaining decisions are somewhat altered. The parties have themselves established a visible structure for their system of private ordering; they have established "standard[s] which both sides have agreed [are] the norm[s] in relation to which a dispute is to be settled," and which are suitable for judicial scrutiny. Thus, once an agreement has been adopted, it becomes possible for a reviewing court to judge union actions in administering it not only by vague external standards of fairness but also according to the contract terms or according to what the individual's reasonable expectations are under those terms. "The function of the collective agreement is," after all, "not only to stabilize the relationship of the collective parties, but also to establish terms and conditions of employment for the employees." Workers, consequently, attach great importance to the grievance procedure, for it is at this stage of collective bargaining that the individual has the greatest tangible interest. The determination of a grievance is likely to have a visibly direct, immediate and personal affect upon the individual. Depending upon the outcome, he may retain or lose his job, be promoted or passed over, gain or lose money, be disciplined or exonerated. Furthermore, since the grievance procedure is concerned more with particular claims than with the statement of general rules and classifications, "The grievance procedure is particularly susceptible to abuse, for through it individuals or groups may be singled out [more easily] for arbitrary treatment." Thus, not only is there more need here for review external

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64 Summers, supra note 43, at 389. Professor Summers is quoted further supra, notes 9 & 19; see notes 9 & 19 supra; see also Blumrosen, supra note 43, at 1475-77; Sligheer, Union Policies and Industrial Management (1941).


67 Summers, supra note 43, at 393. Professor Summers also indicated, id. at 393-94, other ways in which grievance processing differs from contract negotiation:
to the union but where the collective agreement is reasonably explicit
about wages, seniority and other benefits or conditions of employment,
a reviewing court is in a position to determine not only whether a
union has been fair according to external standards, but also whether
the individual has been given his due under the contract. While pro-
tection of individual interests might be promoted pursuant to the fidu-
ciary duty of fair representation, resort might also be made to contract
suits, against union and employer as equal parties, for breach of the
collective bargaining agreement.\(^6\)

It is not inappropriate to suggest that until the collective agree-
ment has been drafted, establishing somewhat precise or specific
standards, all the courts can hope to do in reviewing union bargain-
ing decisions is to apply a test analogous to that used to determine
whether a statute violates the equal protection clause of the fourteenth
amendment, \(i.e.,\) are the classifications that are established reasonable
or non-invidious. When, one the other hand, it is claimed that a bar-
gaining decision, made in the course of administering the contract,
violated the requirement of fair representation, courts may be in a
position to consider as well whether the grievant has been denied
“due process of law” under the contract, \(i.e.,\) that which he might
appropriately expect to accrue to him under the contract itself.\(^9\)

The individual’s interest may more often be vitiated without vindictive-
ness or deliberate discrimination. Incomplete investigation of the facts, reliance
on untested evidence, or colored evaluation of witnesses may lead the union to
reject grievances which more objective inquiry would prove meritorious. Union
officials burdened with institutional concerns may be willing to barter unrelated
grievances or accept wholesale settlements if the total package is advantageous,
even though some good grievances are lost. Concern for collective interests
and the needs of the enterprise may dull the sense of personal justice. . . .

Although the frequency of unfairness in grievance handling is impossible
to measure, there is no doubt that the danger to the individual can be substan-
tial. Within union groups cliques are not uncommon, political rivalries are often
sharp and factional fights are bitter. Refusal to process grievances or “botching”
them is a subtle but effective weapon. Seniority grievances are vulnerable to
group pressures, and “horse-trading” of grievances can become commonplace.
See also, Cox, supra, note 66, 8 LAB. L.J. 854; Dunau, supra note 63, at 759; Fleming,
Some Problems of Due Process and Fair Procedure in Labor Arbitration, 13 STAN. L.
Rev. 235 (1951); Kuhn, supra note 65; Sherman, supra note 55, at 49; Summers, supra
note 25, at 245; Report, supra note 8, 50 Nw. U.L. Rev. 143, 153-56; Comment, 6

\(^6\) See Humphrey v. Moore, 84 Sup. Ct. 363 (1964); Summers, supra note 43, at
370-75.

\(^9\) Cf. Summers, Judicial Review of Labor Arbitration or Alice Through the Looking
Glass, 2 BUFFALO L. Rev. 1, 24-25 (1953); but cf. Wellington, supra note 56, at 1340-42,
1357, quoted in part supra note 59.

Obviously, formal contract negotiation cannot refer only to the negotiation of
the very first agreement between the collective parties. That is the worker cannot be per-
mitted to claim that all his rights become fully “vested” and fixed to the extent that
To the extent that this distinction between contract negotiation and administration is valid, justified criticism has been leveled at the courts for tending to extend in full the principle of broad union discretion, initially formulated in cases involving formal contract negotiation and amendment, to review of union decisions made in the course of contract administration.\textsuperscript{70}

There are, however, substantial considerations that support the view that union discretion should be essentially as broad when administering the contract as during the contract drafting stages. This proposition is founded upon the basic and unassailable premise that “The grievance procedure is . . . a part of the continuous collective bargaining process.”\textsuperscript{71} More specifically, this view proceeds from a recognition that the complexity of the continuing relationship to be governed by the collective agreement necessitates that, by comparison, the agreement itself be relatively uncomplicated—dealing explicitly with only some of the most significant and difficult problems existing at the time of its drafting.\textsuperscript{72} As Justice Goldberg wrote, while still the Secretary of Labor,

In negotiating contracts the parties have reached large areas of mutual agreement long before the first bargaining session is convened. At the same time, in the administration of an agreement, it is an obvious oversimplification to assert that the contract contains the parties’ agreement on the many issues that are brought to arbitration [or are raised in the prior stages of the grievance process]. The


collective bargaining process is not so abrupt that all is disagreement before the contract and all agreement thereafter. Both agreement and disagreement concerning the relationships between the parties exist before and after the contract is signed. Not all issues are resolved by the contract, for the parties may over-generalize issues, realizing that a contract is more essential than the solution of every problem.\(^7\)

Consequently, although the typical collective agreement will contain some provisions announcing somewhat explicit rules to govern some aspects of the union-management-employee relationship, in large measure the agreement will be composed of broad standards that must undergo future interpretation. In this respect, the agreement is like an organic law or a constitution that does not presume to terminate collective bargaining; rather, the agreement is a *sub silentio* anticipation of the continuation of bargaining, normally within the procedures and processes, however, that it provides.

In the course of this continued process of bargaining, the union will, just as prior to the drafting of the basic contract, find it necessary to resolve legitimate conflicts between the interests of different individuals and groups that it represents.\(^7\) Obviously, the moving grievants will not be the only persons concerned with the grievances that are to be processed.\(^7\) The individual’s interest appears to be most direct when the grievance to be processed is his own. However, an individual may have a very direct interest in the grievances of other workers. If the grievant is not laid off, the other individual may be laid off instead; if the grievant gains seniority, the other worker’s seniority may suffer.\(^7\) Even the determination of a wage, vacation or disciplinary dispute may have an affect on others than the named grievants, for the disposition of the grievance could be used as a quasi-precedent for the resolution of similar claims in the future.\(^7\)


\(^7\) See Cox, *e.g., supra* note 67, at 615-16; Note, 35 St. John’s L. Rev. 85, 95 (1960).

\(^7\) See, *e.g., Clark v. Hein-Werner Corp.,* 8 Wis. 2d 264, 99 N.W.2d 132 (1959), *rehearing denied,* 8 Wis. 2d 264, 100 N.W.2d 317 (1960), *cert. denied,* 362 U.S. 962 (1960); Cox, *supra* note 67, at 615; Summers, *supra* note 43, at 363-70, 393-95.


\(^7\) Cox, *supra* note 67, at 612, 615; Report, *supra* note 8, 50 Nw. U.L. Rev. 143,
Once it is recognized that substantial collective bargaining must continue even after the contract has been negotiated and drafted, it is not too difficult to become more concerned with the collective as opposed to the individual interest in grievance proceedings and consequently to conclude that the bargaining agent's discretion should be essentially as broad when administering the contract as when negotiating it. Professor Summers has suggested that,

Three uses of the grievance procedure in managing the collective relationship are particularly relevant in defining individual rights. First, the grievance procedure is used to complete the collective agreement... Second, the grievance procedure may be used to change the collective agreement and serve the needs of flexibility... Third, the grievance procedure may be used as a clearing house for balancing off unrelated claims.78

None of these uses could be said to be objectively improper in the sense of being corrupt, fraudulent or invidiously discriminatory. Consequently, if the focus of social concern were almost exclusively on the collective interest and managing the collective enterprise, invasion of individuals' interests could almost always be justified by each such use of the grievance procedure. It would follow from this that the duty of fair representation and the application of other theories of individual protection should at the administrative stage be limited to prohibition only of gross abuses of discretion or invidious discrimination as at the negotiation stage. The Supreme Court, in Humphrey v. Moore, its latest pronouncement on the duty of fair representation and related matters, however, would appear, in theory at least and over Justice Goldberg's earnest objection, to have accepted rather the view that the legal protection afforded the individual differs significantly from the contract drafting to the contract administration stage.

Humphrey v. Moore: Fair Representation and Suits for Breach of Contract

In the Humphrey case, the question was "whether the Kentucky Court of Appeals properly enjoined implementation of the decision of a joint employer-employee [union] committee purporting to settle certain grievances in accordance with the terms of a collective bargain-


ing contract. The decision of the committee determined the relative seniority rights of the employees of two companies, Dealers . . . and E & L . . . .”

As a result of legitimate business exigencies, E & L agreed to withdraw in favor of Dealers from the business of transporting new automobiles and trucks from the Ford Motor Company assembly plant at Louisville, Kentucky. This agreement was one portion of a more general adjustment of markets between the two companies and no exchange or sale of property was involved in this aspect of the transaction. After E & L withdrew, the amount of business conducted by Dealers decreased from the combined amount that had been conducted by the two companies in the Louisville market prior to the transaction; concomitantly there was a contraction in the total number of available jobs.

The employees of both companies were represented by the same union, Local 89 of the General Drivers, Warehousemen and Helpers [Teamsters]. Its president, understanding “that the transaction between the companies involved no trades, sales or exchanges or property but only a withdrawal by E & L at the direction of the Ford Motor Company . . . advised the E & L employees that their situation was precarious. When layoffs at E & L began three E & L employees filed grievances claiming that the seniority lists of Dealers and E & L should be ‘sandwiched’ and the E & L employees taken on at Dealers with the seniority they had enjoyed at E & L.”

These grievances were processed, but the Dealers employees were advised by the local president or his assistant that they had nothing to fear “since the E & L employees had no contract right to transfer under these circumstances.”

As a result of inclusion within a single multi-employer, multi-local union bargaining unit, almost identical collective agreements, a number of whose provisions concerned seniority, had been executed by both Dealers and E & L. Under this agreement, disputes were to be settled

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80 S4 Sup. Ct. at 365.
81 Ibid.
82 Ibid.
83 “According to Art. 4, § 1 of the contract ‘seniority rights for employees shall prevail’ and ‘any controversy over the employees’ standing on such lists shall be submitted to the joint grievance procedure. . . .’” S4 Sup. Ct. at 365-66.
Art. 4, § 5 provided:
In the event that the employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure.
Id. at 366.
pursuant to a multi-staged grievance procedure. Resort was made to each higher stage if a settlement was not reached on the lower one.

In this case, the local joint committee deadlocked over the E & L employees' grievance, and endorsed it, over the signature of the local president and the Dealers representative, and referred it to the Joint Conference Committee, the appellate board. Before that committee, having, according to the Court, been more fully advised as to the nature of the Dealers-E & L transaction, the local president supported the position of the E & L employees. The Court further found that the Dealers employees were represented at the hearing before the Joint Conference Committee by three shop stewards who, just prior to the hearing, were informed of the local president's new position by the union. After a full hearing, the Joint Conference Committee accepted the view of the E & L employees and determined that in accordance with the provisions of the contract the E & L and Dealers employees should "be sandwiched in on master seniority boards using the presently constituted seniority lists and the dates contained there-in . . . ."

As a consequence of this decision, a large number of Dealers employees were to be laid off "to provide opening for E & L drivers" with greater seniority. Moore, an aggrieved Dealers employee, brought a class action against the union and Dealers in a Kentucky state court, to enjoin the execution of the Joint Conference Committee's decision or, in the alternative, to recover damages. Allegations were made to the effect that the union had breached its duty of fair representation, by fraudulently deceiving the Dealers employees, by conniving with the E & L employees and by essentially failing to represent the Dealers employees at all before the Joint Conference Committee. It was further alleged that "The decision of the Joint Conference Board was . . .
arbitrary and capricious, contrary to existing practice in the industry and violative of the collective bargaining contract."\textsuperscript{87}

Seemingly deciding the issues under state substantive law, the Court of Appeals of Kentucky held that the contract provision relied upon by the Joint Conference Committee was inapplicable and that the decision of the committee was therefore not binding. The court further concluded that in the circumstances of the case, representa-
tion of the two antagonistic interests by a single advocate, the union (which had, according to the court, an interest of its own—enhancement of union power), rendered the committee’s decision invalid as being “arbitrary and violative of natural justice.”\textsuperscript{88} In an opinion by Justice White, the Supreme Court took a somewhat different view of the case.

In the first place, while agreeing that this was “an action to enforce a collective bargaining contract,”\textsuperscript{89} the Supreme Court held that the issues raised, although justiciable in the state courts, were to be de-
cided strictly according to federal, not state law.\textsuperscript{90}

The Court construed the pleadings to raise what would appear to be two claims: First, a direct cause for breach of the collective bargaining agreement and second, a cause for violation of the duty of fair representation.

Specifically the Court said:

First, Moore challenges the power of the parties and of the Joint Conference Committee to dovetail seniority lists of the two companies because there was no absorption here within the meaning of section 5 of article 4 [see note 83, supra] and because, as the court below held,

\textsuperscript{87} Id. at 367.

\textsuperscript{88} 356 S.W.2d 246. A similar conclusion was reached by the Wisconsin Supreme Court in Clark v. Hein-Werner Corp. supra note 75. There, in a seniority dispute that went to arbitration, the union had adopted one group of employees’ position while re-
jecting that of another group. Despite the fact that the other group’s interest coincided with that of the employer, and consequently was represented by the employer, the court held that the union, since it could not represent both groups simultaneously, had, as a matter of law, breached its duty of fair representation. 8 Wis. 2d 272, 99 N.W.2d 136-137. The remedy imposed by the court compelled the collective parties to allow the “unrepresented” employees to participate themselves in the arbitral process. 8 Wis. 2d 275, 99 N.W.2d 138. There has been extensive comment on this decision. See e.g., Aaron, Some Aspects of the Union’s Duty of Fair Representation, 22 Ohio St. L. Rev. 39, 50-54 (1961); Note, 44 Marq. L. Rev. 115 (1960); Note, 58 Mich. L. Rev. 796 (1960); Note, 13 Stan. L. Rev. 161 (1960); Note, 46 Va. L. Rev. 802 (1960); Note, 1960 Wis. L. Rev. 324.

\textsuperscript{89} Id. at 369. See Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1961); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1961); Steele v. Louisville & Nash-
ville R.R., 323 U.S. 193 (1944). See also supra notes 29, 36.
that section granted no authority to deal with jobs as well as seniority. His position is that neither the parties nor the committee has any power beyond that delegated to them by the precise terms of section 5. Since in his view the Joint Committee exceeded its power in making the decision it did, the settlement is said to be a nullity and his impending discharge a breach of contract.

Second, Moore claims the decision of the Committee was obtained by dishonest union conduct in breach of its duty of fair representation and that a decision so obtained cannot be relied upon as a valid excuse for his discharge under the contract.\textsuperscript{91}

According to the Court, however, both claims were based upon alleged breaches of the collective agreement for it held that as to both complaints the action was "one arising under section 301 of the Labor Management Relations Act"\textsuperscript{92} which provides that:

\begin{quote}
Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . 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 respect to the citizenship of the parties.\textsuperscript{93}
\end{quote}

The reasoning employed by the Court to support its holding that the fair representation claim involved an action to enforce the collective agreement is especially interesting in that it seems an attempt to limit this conclusion to the particular facts at hand. The Court initially held that the allegations of specific union misconduct were "sufficient to charge a breach of duty by the union in the process of settling the grievances at issue under the collective bargaining agreement."\textsuperscript{94} It did not thereupon say that it followed that the suit was one for breach of the agreement. The Court found it necessary first to implicate the employer in the wrong doing. The relationship of the alleged breach of the duty to the Joint Committee's decision and the employer's action was considered. Allusion was then made to the fact that half of the members of the Joint Committee were affiliated with the international union. Next the Court commented that while no fraud was alleged

\textsuperscript{91} Id. at 367-68.
\textsuperscript{92} Id. at 368-69.
\textsuperscript{93} 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (emphasis added). By this holding the Court was able to avoid the question whether a violation of the duty of fair representation is an unfair labor practice under the LMRA and therefore within the exclusive primary jurisdiction of the National Labor Relations Board. San Diego Bldg. Trades Council v. Gormon, 359 U.S. 236 (1959); In re Green, 369 U.S. 689 (1962); Ex parte George, 371 U.S. 72 (1962). This is because "even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts, Smith v. Evening News Ass'n, [371 U.S. 195 (1962)] . . . ." 84 Sup. Ct. 369.
\textsuperscript{94} Id. at 368.
against the employer, the implication to be drawn from the complaint
was that the employer was neutral or that "the employer considered
the dispute a matter for the union to decide."

Finally, the Court observed that since the grievance award had not been implemented
at the time the suit was filed, the employer was on notice that the union
was charged with a breach of its duty in procuring the decision of
the Joint Committee. "In these circumstances," the Court held that
"the allegations of the complaint, if proved, would effectively under-
mine the decision of the Joint Committee as a valid basis for Moore's
discharge." Only after the foregoing explanation did the Court con-
clude that "for these reasons this action is one arising under section
301 of the Labor Management Relations Act."

To the extent that this complicated explanation was motivated by
a desire to limit sharply the announced rule, it would appear that the
Court has failed in its task. The Court has taken facts that add up to
something like implied consent or implied ratification and found the
company to have been a party to the breach. Rare indeed will be
the case in which a willing court could not find similar implications
of employer ratification. Furthermore, in the course of criticizing the
bare holding that any claim for breach of the duty of fair representa-
tion could be supported as a cause of action under section 301 for
breach of a collective agreement, Justice Goldberg appropriately sug-
gested that it is more difficult to treat the fair representation claim
as one for "breach of the collective bargaining contract ... where, as
here, 'no fraud is charged against the employer'." Surely, under the
Court's reasoning, if subsequent contract administration cases were
to involve not merely allegations of implied ratification but allegations
of active employer collusion in the union's breach of its fiduciary duty,
jurisdiction would also be properly invoked under section 301. It
would appear that only by clear opposition to the union position would
an employer be reasonably certain of avoiding implication in the
union's alleged breach of its duty and thereby possibly keeping the
grievant from making his fiduciary obligation suit sound in contract.
But this is not necessarily inappropriate. If given reasonable notice of
employee dissent from the union position, a "neutral" or "colluding"
employer should not be able to rely upon the contract interpretation—
it has been warned. On the other hand, if the employer truly opposes
the union's position and, presumably, supports that of the dissident

95 Ibid.
96 Ibid.
97 Id. at 368-69.
98 Id. at 375.
employee, hardly more can be expected of the employer. If the union prevails in arbitration or, because of economic power, in grievance negotiation, it is not the company's fault. Besides, the employee can still proceed against the union. Perhaps the company should be able to rely upon such a contested collective determination, subject, however, to the possibility that in many cases the aggrieved employee should be personally represented in the grievance and arbitration proceedings, and subject further to the fact that the relief sought by the grievant, such as reinstatement, may be ineffective unless the employer can be joined.100

After concluding that the plaintiff was properly in court, the Supreme Court then held that he had failed to prove his case.

Although holding that both claims stated a cause of action under section 301, in passing on the merits of the complaint, the Court faced separately the questions whether the facts demonstrated that the collective agreement had been breached because the grievance determination was ultra vires its terms and whether the union had violated its duty of fair representation with the consequence that the collective agreement had been breached.

First the Court addressed the question whether the Joint Conference Committee's decision was in violation of or unauthorized by the collective agreement and was therefore invalid. In disposing of this question, the Court did not squarely resolve the plaintiffs' contention that collective parties are limited, in grievance proceedings, by the precise terms of the existing agreement. Instead, it reviewed the Joint Committee's actual construction of the agreement and held that the decision of the Joint Committee was not in violation of any of its provisions and its action was in fact empowered by the agreement.101

The implication that can be drawn from the Court's approach is that the parties are bound by their prior existing agreement. In Justice


100 Professor Blumrosen suggests that: "Agreements which violate the union's duty of fair representation are voidable, and management may not rely on them. Thus, the duty of fair representation is binding on the employer as well as on the union." Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 Mich. L. Rev. 1435, 1493 (1963); see Steele v. Louisville & Nashville R.R., supra note 90, at 203-04; Jenkins v. Wm. Schuderberg-T. J. Kurlie Co., 217 Md. 556, 144 A.2d 88 (1958); but see Parker v. Boroch, 5 N.Y.2d 156, 161-62, 156 N.E.2d 297, 300, 182 N.Y.S.2d 577, 581 (1959); In re Soto, 7 N.E.2d 397, 400, 165 N.E.2d 855, 856, 198 N.Y.S.2d 282, 283-84 (1960).

101 84 Sup. Ct. at 369-71.
Goldberg's view, this treatment of the issue was as much as a holding to that effect.102

Having disposed of the first, or what may be called the true, contract action, the Court next considered whether the union's conduct constituted a violation of its duty of fair representation. At the outset the Court found that there was no "adequate support in this record for the complaint's attack upon the integrity of the union and of the procedures which led to its decision"103 and that there was "insufficient proof of dishonesty or intentional misleading on the part of the union."104 Then the Court rejected the view of the Court of Appeals of Kentucky that the union's representation of two antagonistic interests (or more properly its failure or practical inability to represent both interests simultaneously) rendered the Joint Committee's decision invalid. Relying upon Ford Motor Co. v. Huffman,105 the Court held that in grievance proceedings, just as in contract negotiation, there is no "breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another,"106 for,

Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.107

By its separate treatment of plaintiff's two claims, the Court gave the appearance that it was avoiding the suggestion that judicial inquiry in fair representation cases may itself involve close consideration of whether the union's position, if implemented, would on its face breach the terms of the existing collective agreement. In this case, as in all other such cases, the Court's basic inquiry, in determining whether the union had breached its duty of fair representation, was whether the union had taken a good faith position on the grievance. In so proceeding, the Court has indicated that at all stages of collective bargaining the question of whether fair representation has been afforded will generally depend upon judicial application of standards external

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102 Id. at 373-74, quoted infra with note 110.
103 Id. at 371.
104 Ibid.
106 84 Sup. Ct. at 371.
107 Id. at 372.
to the existing collective agreement. The Court did not, however, necessarily imply that there could be no case in which such application of external standards would not itself require some consideration of whether the union's decision, if implemented, would violate the terms of the collective agreement. In the present case, it was unnecessary for the Court to resolve this question, for it was able to test the grievance decision for fidelity to the collective agreement in the course of resolving the other or true cause of action for breach of contract.

Thus, although the majority opinion, unfortunately, wants for general clarity, one thing at least is clear: Once a binding collective agreement has been negotiated, subject employees are entitled to more than just objectively non-invidiously discriminatory treatment by their union. They can, at least in theory, insist upon their due under the existing agreement. Here the contention that the grievance decision was unauthorized by the agreement was, to be sure, not squarely considered in the course of the Court's determination of the fair representation claim; it was decided separately. But even this fact of separate consideration, which the Court did not label but which might with care be conceptualized under a third party beneficiary theory, reflects a significant enhancement of the apparent protection that employees may invoke regarding contract administration. To the extent of that enhancement, it is perhaps to engage in hair splitting to be concerned with whether the task is performed within the sweep of the fiduciary obligation claim or whether the courts must rather consider an independent cause of action for breach of contract.108 It is possibly enough that the Court has adopted a public policy protective of the individual and has demonstrated a willingness to examine the contract in order to determine whether the interpretation by the collective parties has violated the employees' rights.

Goldberg, J. Dissenting (Concurring in the Result)

The majority's willingness to consider a breach of contract claim that was independent of the fair representation claim provided the first source of disagreement for Justice Goldberg, who was joined by

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108 See Summers, Individual Rights in Collective Agreements: A Preliminary Analysis, 9 BUFFALO L. REV. 239, 240-41 (1960) (quoted in the text with note 25, supra). This double-barreled approach may, however, make a difference in one respect. Section 301 is inapplicable to employees covered by the provisions of the Railway Labor Act, 49 Stat. 450 (1935), as amended, 61 Stat. 137, 29 U.S.C. § 152(3) (1958). Consequently, it may be that employees subject to the Railway Labor Act will have less substantive protection than those subject to the LMRA.
Justice Brennan in a concurring opinion. Justice Goldberg would have ruled that the plaintiff could not state a cause of action for breach of contract under section 301. He interpreted the majority's act in reviewing and affirming the Joint Conference Committee's construction of the collective contract as essentially a holding "making the words of the contract the exclusive source of rights and duties" in grievance proceedings. Expressing great concern for the collective interests in the continuing and unforeseeably contingent collective bargaining process, he stated his opinion that "a mutually acceptable grievance settlement between an employer and a union, which is what the decision of the Joint Committee was, cannot be challenged by an individual dissenting employee under section 301(a) on the ground that the parties exceeded their contractual powers in making the settlement." Unlike arbitration where the arbitrator is bound by the collective agreement, he contended that contract provisions do not immutably bind the collective parties. Specifically in this case "The presence of the merger-absorption clause did not restrict the right of the parties to resolve their dispute by joint agreement applying, interpreting, or amending the contract."

Turning his attention to the Court's interpretation, or rather what he considered to be its misinterpretation, of the duty of fair representation, Justice Goldberg stated that a claim for breach of that duty could not "properly be treated as a claim of breach of the collective bargaining contract supporting an action under section 301(a) . . . particularly . . . where, as here, 'no fraud is charged against the employer . . .'." In part, Justice Goldberg's objection was also conceptual for, as he reminded the Court, the "duty [was] derived not from the collective bargaining contract but [was] implied from the union's

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109 Justice Douglas, concurring separately, agreed with Justice Goldberg's reasons for concluding that the litigation was properly brought in the state court, but agreed with the majority's reasons for concluding that on the merits no cause of action had been made out. 84 Sup. Ct. 377.

110 Id. at 374.

111 Id. at 373. Justice Goldberg believed that this result was required under the Court's earlier decision in Ford Motor Co. v. Huffman, 345 U.S. 330 (1952). See note 120 with text infra.

112 Id. at 374.

113 Id. at 375.

114 Id. at 376.
rights and responsibilities conferred by federal labor statutes." But conceptually it is possible to contemplate that an alleged breach of the statutory duty would also constitute a breach of the collective agreement. It is, as well, not so very clear on the facts that the Court was being unduly inconsiderate of a non-culpable employer's reliance upon the original agreement or the grievance determination. Actually, Justice Goldberg's real objection to the majority's treatment of the subject is that, because of the way he views the social interests in collective bargaining, he is of the opinion that a fair representation inquiry should in no way be concerned with whether fairness has been accorded pursuant to the standards to which the collective parties have agreed in the existing collective agreement. Just as he rejected the notion that under the first cause of action the contract provision might "restrict the right of the parties to resolve their dispute by joint agreement applying, interpreting, or amending the contract,"
361 he would limit the duty of fair representation, at all stages of collective bargaining, to a proscription only of distinctions which are not based upon differences "relevant to the authorized purposes of the contract,"
3617 without reference to what the individual may have legitimately expected under prior agreements or the prior existing contract. Thus, on this level of policy, i.e., what rights should the individual have in collective bargaining, Justice Goldberg insists that the two causes of action cannot really be approached separately--and, as to each, he would firmly strike a balance in favor of the collective parties and flexibility.

**Group v. Individual: A Partial Conclusion**

On balance, the majority's position, at least in substance if not in conceptual formulation, represents a healthier judicial approach to the total collective bargaining relationship than does Justice Goldberg's. It is very easy to become so consumed with concern for flexible management of the collective enterprise that sight is lost of the legitimate interests and expectations of the individual workers. It is easy as well to lay captive to the idea that only through maximum enhancement of group stability and decision can the interests of the individual workers ever really be promoted. But the individual does exist apart from the group and, to the extent that the provisions of the collective agreement are clear, he should generally be able to rely upon and expect benefits

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115 Id. at 375.
116 Id. at 374.
that the group has promised him. Furthermore, acceptance of the
majority's policy choice does not mean that the group should or will be
overthrown with the resulting chaos, nor does it imply that the courts,
rather than the collective parties, should henceforth manage the col-
llective relationship.

The majority's position contemplates, at most, that when the col-
ellective parties themselves have formalized some basic agreement, the
individual worker may then rely somewhat upon the specific provisions
of the agreement. This does not mean that legitimate collective inter-
est are to be stymied by recalcitrant individuals, nor does it mean
that the individual can insist in court upon his interpretation of contract
provisions to the same extent that the union could insist upon its inter-
pretation in negotiations with the employer. The Court's decision
on the merits in Humphrey makes it clear, in fact, that only in the
unusual case will the collective parties be held, on judicial review of
the merits of a grievance determination, to have transgressed the
bounds of permissibility.

In circumstances involving contract ambiguities, or matters not
expressly covered by the existing agreement, or perhaps even matters
that, while apparently covered by the provisions, were not really antici-
pated or contemplated when the contract was negotiated, it can
realistically be expected that the actual scope of judicial review on
the merits will be essentially the same as it is during the contract draft-
ing stages. In other words, to the extent that the substantive contract
provisions are flexible and the parties have provided procedurally for
mutual resolution of ambiguities and the like through the grievance
process, judicial review of the merits is really unchanged from the
contract drafting to the contract administration stage.

This limitation of review is quite necessary for

the collective agreement by which the individual and the collec-
tive parties are governed is not limited to the four corners of the

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118 This, of course, is not to state a fact capable of empirical proof, nor does appreci-
ation of the statement depend upon the particular labels the law may apply in promot-
ing it. The statement is a value judgment made upon an assay, already undertaken here,
of the realities and needs of industrial life and upon an appreciation of the general social
interests in group-individual conflicts. See notes 1-79 supra, with text. As to the height-
ened interest of workers in grievance determinations see notes 64-69, supra, with text.
See also Aaron, Some Aspects of the Union's Duty of Fair Representation, 22 Osso St.
L. Rev. 39, 47-49 (1961) (suggestion that the employee may gain certain "vested" rights
under the collective agreement); Jaeger, Collective Labor Agreements and the Third
Party Beneficiary, 1 B.C. Ind. & Com. L. Rev. 125, 133 (1960); Silver, Rights of Indi-
vidual Employees in the Arbitral Process, 12 N.Y.U. Ann. Conf. Lab. 53, 55-57 (1959);
Note, 35 St. John's L. Rev. 85, 95 (1960).

written instrument. It is the whole agreement, including industrial customs, established practices, understandings and precedents which infuse the contractual words with life and meaning. The collective agreement inevitably includes incomplete terms and unresolved ambiguities; and the individual's rights, like those of the collective parties, are subject to these gaps and uncertainties.\footnote{120}

It does not even follow from the \textit{Humphrey} decision that the collective parties will be absolutely prohibited from frustrating the individual when he appears to have a very clear contract right. In an earlier case, the Court in fact held that a union could agree to an amendment of a collective bargaining agreement that impairs rights recognized under the old agreement without violating its duty of fair representation.

In \textit{Ford Motor Co. v. Huffman},\footnote{121} the union and the company formally amended the collective agreement to modify its seniority provisions in order to give some new advantage to returning war veterans. In a suit brought by employees whose seniority under the old contract thereby suffered, the Supreme Court held for the union. It treated the question as if it were simply one involving initial contract negotiation, without regard to the possibility that the grievants' rights may have vested under the original agreement or that legitimate expectations were being defeated. That is, to determine whether there had been a breach of the duty of fair representation, the Court applied the test of whether, according to standards wholly external to the contract, the union's decision was based upon "relevant differences" with the burdens of proof and persuasion being placed on the plaintiffs.

The majority in the \textit{Humphrey} case treated the fair representation claim, but not the true contract cause, as being controlled by \textit{Huffman}.\footnote{122} In Justice Goldberg's opinion, the true contract cause should also be controlled by \textit{Huffman}. His position was that under no legal theory were the collective parties to be bound by the terms of the existing collective agreement from modifying it by means of a mutually acceptable grievance determination. In his opinion, the only distinction between the two cases was that in \textit{Humphrey} the contract was allegedly modified in the course of a grievance determination, \textit{i.e.}, by application and interpretation, whereas in \textit{Huffman}, the contract was modified by the negotiation of a formal amendment. To Justice Goldberg this distinction does not make a legal difference.\footnote{123} But, notwithstanding Justice Goldberg's objection, the law should take account of

\footnote{120}{\textit{Ibid.} See notes 71-73 \textit{supra} with text.}
\footnote{121}{345 U.S. 330 (1952).}
\footnote{122}{See notes 101-107 \textit{supra} with text.}
\footnote{123}{84 Sup. Ct. 374-76.}
the distinction between formal negotiations to amend a contract or draft a new one, where it is clear to all that something new or different is to result, and grievance negotiations applying or interpreting the existing contract, where the new result may be passed off not as a modification but as an extension of the old agreement. Moreover, Justice Goldberg ignores the fact that there is yet another distinction to be drawn between the cases. In *Humphrey* two causes of action were raised, fair representation and true breach of contract; in *Huffman* no question was raised of a possible breach of contract giving rise to jurisdiction under section 301. This was probably because section 301 had questionable status when *Huffman* was decided. A couple of years after *Huffman*, in fact, the Court decided that section 301 would not support an action either by an individual worker or on behalf of his personal contract rights. Although slowly eroded, it was only recently that this rule was expressly overturned.

124 Professor Summers has presented, in a somewhat different context, cogent reasons why change by formal amendment differs significantly from modification by grievance determination:

> [T]he collective parties can change the general rules governing the terms and conditions of employment, either by negotiating a new agreement or by formally amending the old. The individual has no right to have the contract remain unchanged; his right is only to have it followed until it is changed by proper procedures. Although contract making (or amending) and contract administration are not neatly severable, they are procedurally distinct processes. Most union constitutions prescribe the method of contract ratification, and it is distinct from grievance settlement; the power to make and amend contracts is not placed in the same hands as the power to adjust grievances. [n.145: Many union constitutions require that all collective agreements be approved by the international union, some create special committees or conferences to negotiate and approve agreements and a substantial number require ratification by membership votes. National Industrial Conference Bd., Handbook of Union Government Structure and Procedures 49-54 (1955). In contrast, grievance settlements, particularly at the lower steps, are commonly made by the local officers or shop stewards.] Indeed, many union constitutions expressly bar any officer from ratifying any action which constitutes a breach of any contract. Through the ability to change the agreement, the collective parties retain a measure of flexibility. They are not free, however, to set aside general rules for particular cases, nor are they free by informal processes to replace one general rule with a contrary one.


To the extent that the Court intended to keep the two causes of action in *Humphrey* separate, its prior decision in *Huffman* had no binding effect on its *Humphrey* holding as to the true contract cause while, on the other hand, all suits for breach of the fiduciary duty of fair representation are, evidently, to be fully limited by the *Huffman* statement of the scope of protection. Yet, under both causes, the crux of the individual's complaint is that he thinks that he has been deprived of his contract rights. And, as Justice Goldberg implies, since the social question of group interest versus individual interest does not differ from one cause of action to the other, this compartmentalized conceptualization is inappropriate. He further contends, however, that both causes should be governed by the *Huffman* rule, with the consequence that the true contract cause be ruled non-existent.\(^{127}\) Justice Goldberg may be correct in his implication that drawing substantial differences between the two causes of action may prevent formulation of a consistent judicial approach in this realm. But, a more satisfactory step toward consistency would be a re-evaluation by the Court of *Huffman*, limiting its force in fair representation suits to the formal contract making or amending processes. Since it can be expected that the true contract cause is to be limited generally to allowing judicial review of the merits of only collective actions undertaken during the administrative stage of collective bargaining,\(^{128}\) the scope of protection under both causes of action would therefore be essentially coincidental.

Under the *Humphrey* true contract cause of action it is possible that if an individual seems rather clearly entitled to X under the collective bargaining agreement, he may not, in all save perhaps extreme cartoon cases, be deprived of X in the course of the administrative phase of collective bargaining. Such an approach might be an unfortunate judicial overcompensation, giving the individual more than his proper due. It might moreover lead to overly stringent judicial supervision of the merits of administrative collective bargaining. To the extent that judges are to review the merits of collective bargaining decisions, it might be more appropriate for the Court to use its decision in *Humphrey* as something like a device to shift the burden of proof. That is, *Humphrey* might be interpreted to mean that when an individual's contract right appears rather clear, the union (or the collective parties) will be required to persuade the reviewing court that the deviation from the contract terms was necessary or compelled by very substantial consideration, not that it was reasonable or that it

\(^{127}\) See notes 109-12 *supra* with text.

\(^{128}\) See note 124 *supra* with text.
had some rational basis. In other words, once the aggrieved individual presents a clear claim under the collective agreement, the burden of proof—both of going forward and persuading—would shift to the union or to the collective parties.

Substantive or Procedural Rights: Public Policy and Private Ordering—Brief Comments

Under the alternative interpretations of the Humphrey decision as to the true contract cause of action, there is a danger that reviewing courts will be either too stringent or too lax in protecting individual interests. The scope of judicial review could fluctuate, depending in part upon the particular judge or court, between the original Huffman rule and the absolutely vested interest approach. Moreover, there obviously can be a very broad range of judicial opinion as to whether a particular aggrieved individual's right is sufficiently clear under the existing collective agreement to warrant enforcement. The foregoing is only illustrative of the great danger run when judicial review of the merits of collective bargaining is expanded beyond minimum review to assure against caprice or invidiousness as determined according to general societal standards of fairness. The danger is that the courts will exercise too much substantive supervision over the merits of collective bargaining decisions, thereby substituting public for private ordering. It matters not that the collective parties may almost invariably be vindicated if they must carefully justify their actions in court. The necessity of having collective decisions ratified by a public agency in this manner is itself a significant burden as well as a continual demonstration of close and substantive public control.

Theoretically the collective parties must already persuade the courts that their administrative determinations conform to the provisions of the existing collective bargaining agreement. In Textile Workers Union v. Lincoln Mills, the Supreme Court held, well before Humphrey, that suits for breaches of collective bargaining agreements

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129 In Huffman, for example, the national statutory policy of favoring returning military veterans was held to justify the collective parties' formal amendment of the collective agreement. 345 U.S. at 339-42. Under the alternative interpretation of Humphrey, this national policy might, as well, have justified modification of the collective agreement in a less formal fashion.

130 An approach similar to this was recently employed in the Fourth Circuit where the court indicated that when the plaintiff has adduced direct and/or significant circumstantial evidence to the effect that the union's relevant reasons for discriminating were pretextuous, the burden was then on the union both to present evidence and to persuade the trier of fact that its reasons were not mere pretext. Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191 (4th Cir. 1963). See note 62 supra.

131 See notes 45-50 supra with text.

are to be entertained under section 301 and they are to be governed on the merits by a federal common law of labor relations to be formulated by the courts. It might be said that in *Humphrey* all the Court did was to extend the *Lincoln Mills* doctrine to include suits brought by individuals, but the extension is obviously very significant. Prior to *Humphrey* the collective parties could generally avoid judicial intervention by privately resolving their disputes within the grievance process or by providing for binding arbitration in the event the parties themselves could not resolve their disagreement. But, since individuals may now sue when aggrieved by administrative collective bargaining decisions, and thereby gain judicial review of these decisions, the courts, despite the mutual efforts of the collective parties, may be insinuated into a more real and general supervisory role.

If no satisfactory alternatives were available, to assure a proper regard for the interests of the individual workers, this judicial role might be accepted without further comment. But there is an alternative approach that, without completely negating the expansion of judicial review of the merits, could minimize the necessity for its invocation. The proposal is that where the individual has a non-frivolous interest in a grievance, not merely when his right under the collective agreement appears rather clear, but also when the provisions are ambiguous or incomplete, the law should require that he be permitted to appear and participate in the grievance and arbitral processes, if his collective bargaining agent is unable, unwilling or neglects to represent his position. To return to constitutional law analogies, the

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133 See notes 125-26 supra.
135 The proposition and the extensive debate generated by it are much more complicated than this formulation may itself appear. Careful examination of this realm of possible response to the problems of group-individual conflict in collective bargaining is beyond the scope of this article, concerned as it is with the substantive duties that are owed the individual. A study of these matters will, however, be undertaken by the author in an article to appear in the near future in an issue of the Maryland Law Review. But it is worth noting now that much of the truly fruitful scholarly and judicial research and colloquy on the subject of the individual's place in collective bargaining has been conducted in terms of this proposition. See, e.g., materials, supra notes 88 & 99; Elgin, Joliet, Eastern Ry. v. Burley, 325 U.S. 711 (1945); Brandt v. U.S. Lines, Inc., 55 L.R.R.M. 2665 (S.D.N.Y. 1964); Ostrofsky v. United Steelworkers, 171 F. Supp. 782 (D. Md. 1959), aff'd per curiam, 273 F.2d 614 (4th Cir. 1960), cert. denied, 363 U.S. 859 (1960); Blumrosen, supra note 24, at 1465-501; Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy*, 13 Rutgers L. Rev. 631 (1959); Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956); Cox, Individual Enforcement of Collective Bargaining Agreements, 8 Lab. L.J. 850 (1957); Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 Colum. L. Rev. 731 (1950); Gray, *The Individual Worker and the*
alternative or supplementary proposal is to assure to the individual procedural, as distinguished from substantive, due process of law. By this approach, rather than to prescribe the substance of collective decisions, the law prescribes something of the form to be followed in reaching decisions. With the law concerned more with procedural regularity than substance, less risk is run of substituting public for private order. The individual, who "has no right to have the contract remain unchanged,"¹³⁸ is assured fair consideration of his position and interest, while the collective parties are assured needed flexibility without any unfortunate appearance of unfairness being an incident to their deliberations. Of course, regardless of how fair a grievance proceeding might appear, the law would still not permit the collective parties to implement substantively unfair, e.g., arbitrary, invidious or capricious, determinations. If disputes were to be taken to neutral arbitration, however, with participation there by aggrieved employees, the occasion for judicial review of the merits would be even less frequent, since it is now clear that there is to be only minimal substantive judicial review of arbitration decisions.¹³⁷

In Humphrey the Court indicated, again over Justice Goldberg's objection, that it is receptive to this approach. A final question considered by the majority was whether the aggrieved Dealers employees were "deprived of a fair hearing by having inadequate representation at the hearing" before the Joint Conference Committee, since the union opposed their position.¹³⁹ The Court implied that in circumstances such as those before it, where the union could not possibly represent all the conflicting views of contending employees, there may be some requirement, under the duty of fair representation, of adequate notice and representation, for the dissident employees, at the grievance proceeding. The Court did not define the scope of such a requirement. It did note, however, that the Dealers employees had notice of the hearing, were aware of the controversy and were in fact represented at the hearing, at union expense, by three stewards who "were given


¹³⁸ 84 Sup. Ct. at 372.
every opportunity to state their position."  

Observing that "the Dealers employees made no request to continue the hearing until they could secure further representation and have not yet suggested what they could have added to the hearing by way of facts or theory if they had been differently represented," the Court concluded that there was no indication that a different presentation would have altered the result.  

This portion of the majority opinion no doubt induced Justice Goldberg's statement that "trial-type hearing standards . . . [should not] be applied so as to hinder the employer and the union in their joint endeavor to adapt the collective bargaining relationship to the exigencies of economic life."  

Protection of Individuals and the Personal Liability of Union Officials  

To the extent that, under the doctrines of true contract breach and fair representation, unions are required to observe decent behavior and adhere to "wholesome principles of trusteeship" in representing workers in collective bargaining, the officer[s], agent[s], shop steward[s], or other representative[s] of unions are obligated as well to conform to the court announced standards. In collective bargaining, after all, a union can only act through the individuals who make up its officialdom or its bureaucracy. Consequently, if the union is required to give the workers fair representation, the union's officials must perform this obligation and presumably will be bound by any judicial orders requiring specific acts to promote the union's duty.  

Even if this obligation on the part of union officials did not necessarily follow from the existence of the obligation on the part of the union, it is now very likely that union officials are specifically required by statute to act, in collective bargaining, pursuant to a personal fiduciary obligation. By section 501(a) of the LMRDA, "Fiduciary Responsibility of Officers of Labor Organizations," Congress has provided that:  

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139 Ibid.  
140 Ibid. (emphasis added).  
141 Id. at 377.  
142 Trailmobile Co. v. Whirls, 331 U.S. 40, 68 (1947) (Jackson and Frankfurter, J. J., dissenting on other grounds).  
143 LMRDA § 3(q), 73 Stat. 521 (1959), 29 U.S.C. § 402(q) (Supp. IV, 1963): [W]hen used with respect to a labor organization, [each term] includes elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority), but does not include salaried nonsupervisory professional staff, stenographic, and service personnel.
The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in matters connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.\textsuperscript{4}

Under section 501(b), upon the failure of the union to move with reasonable dispatch against an erring official, any “member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages, or secure on accounting or other appropriate relief for the benefit of the labor organization. [But] No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte.”\textsuperscript{145} Rather than belonging personally to the plaintiff, the suit under section 501 is very like a “stockholder’s derivative action.”\textsuperscript{146}

Professor (now Solicitor General) Cox has nevertheless described


Provision is made in this subsection for allotment by the trial court of a portion of any recovery to compensate the complaining member for counsel fees and other “expenses necessarily paid or incurred by him in connection with the litigation.” See Comment, 73 Yale L.J. 443 (1964).

Section 501(c), 73 Stat. 536, 29 U.S.C. § 501(c) (Supp. IV, 1963), provides criminal sanctions of imprisonment and fine for embezzlement, theft, and the like, by union officials.

this section as “potentially the most important” in the entire LMRDA.147 He further reports that “The principles stated in section 501(a) were drawn from the Restatement of Agency in an effort to incorporate the whole body of common law precedents defining the fiduciary obligation of agents and trustees with such adaptations as might be required to take into account ‘the special problems and functions of a labor organization . . . ’.”148

While the main thrust of this section is obviously to assure against financial misfeasance on the part of union officials, it has become clear that the provision encompasses much more than this. The courts have adopted a generous view of the scope of the provision, so generous that one district court has interpreted it to mean that “The duties are thus as broad as human experience in the labor field.”149 And the court of appeals in affirming this determination held that section 501 “imposes fiduciary responsibility in its broadest application and is not confined in its scope to union officials only in their handling of money and property affairs.”150 No contrary judicial or scholarly opinion has


149 Nelson v. Johnson, supra note 146, 212 F. Supp. at 240. After exhaustive review of the relevant legislative history, id. at 284-96 (see generally NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (1959)), the court made the following conclusions as to its scope:

Congress was fed up with the discarded rights of the union member; Congress was incensed at the conduct of union officials unconcerned with the responsibilities of their office. Congress wished to stop the outrageous conduct of the thugs and the gangsters, but Congress also wished to stop lesser forms of objectionable conduct by those in positions of trust. In the place of corruption, greed, and large and small abuses of power Congress wished to substitute obedience to a high standard of honor and loyalty to the union member whom the union official was chosen to serve.

212 F. Supp. at 295.

Section 501 is no parsimonious dole by the Congress, to be niggardly measured out by the Federal courts. Congress meant the remedy to be no less sophisticated than the problem—the cure to be co-extensive with the malady.

212 F. Supp. at 296.

As to additional examinations of the legislative history of § 501 see Druker, Fiduciary Responsibility of Union Officials, in Symposium, supra note 148, at 519; Dugan, supra note 146; Ostrin, supra note 148.

150 Nelson v. Johnson, supra note 146, 325 F.2d at 651.
been noted, and furthermore, it has been suggested that, in its great breadth, the fiduciary duty under section 501 extends to the sphere of collective bargaining. This interpretation gains support from the congressional statement of findings, purposes and policy that: "it is essential that labor organizations ... and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their labor organizations, particularly as they affect labor-management relations." And one attorney, in fact, has already argued to the Supreme Court that:

[The "broad declaration" of the fiduciary duty in section 501(a) is not limited to "pecuniary matters" ... The legislative history ... makes clear that the ... duty extends particularly to the collective bargaining context. Section 501 was the congressional response to the findings of the McClellan committee with regard to sweetheart contracts, discrimination against political opposition, "sellout" of locals by international officials, and other abuses of official power, both large and small. The section "is no parsimonious dole by the Congress," but was intended to remedy all the mischief which it called forth. ...]

While it is probable that the fiduciary duty under section 501(a) does extend to the collective bargaining context, the class of persons protected under that section is more limited than the class protected under the statutory duty of fair representation. This is because section 501(a) is limited to protection of "members" of the labor organization employing the errant official, while "the duty of fair representation derived from the union's statutory status as exclusive bargaining representative of all employees in the bargaining unit, regardless of union membership." Furthermore, the standards of fiduciary conduct de-


152 See Wollett, supra note 146, at 285-86. There is substantial support in the legislative history of the Elliott bill, which contained exactly the same fiduciary provision as the LMRDA, for this interpretation. See H.R. Rep. No. 741, 86th Cong., 1st Sess. 81-82; Statement of Representative Elliott, read by Representative Bolling, 105 CONG. ROLL. 14212-13 (daily ed. Aug. 11, 1959).


"Member" is defined in LMRDA § 3(o), 73 Stat. 521 (1959), 29 U.S.C. § 405(o) (Supp. IV, 1963):

"Member" ... includes any person who has fulfilled the requirements for membership in such [labor] organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after
manded by section 501(a) are not likely to afford significantly more protection—and may not even provide any additional protection—than is already available to aggrieved workers under the duty of fair representation or pursuant to their ability to bring suits for breach of the collective bargaining agreement. In interpreting and applying section 501(a), the courts in fact have adopted substantially the approach used in deciding cases of breach of the collective bargaining agreement. They have specifically taken the view that Congress intended them to fashion a new federal labor law in much the same way that the federal courts have fashioned a new substantive law of collective bargaining contracts under section 301(a) of the Taft-Hartley Act. [See Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).] In undertaking this task the federal courts will necessarily rely heavily upon the common law of the various states. Where the law is lacking or where it in any way conflicts with the policy expressed in our national labor laws, the latter will of course be our guide.

We turn to section 501, not expecting to find a detailed command or prohibition as to the particular act complained of, but rather to find a general guide which, properly developed, will lead us to an answer.

To the extent that Humphrey v. Moore may be indicative of the kind of creative approach contemplated, it is highly unlikely, with the federal courts thus left pretty much to their own devices, that individuals will find substantive relief in the collective bargaining context, under section 501, in any but clear cases of "sweetheart" contracts, fraud, particular malice or obdurate refusal by union officials to obey court orders.

Another possibly substantial limitation results from the fact that an aggrieved member must procure permission to sue, "for good cause shown," from the court. See § 501(b) quoted in the text, supra, with note 145.


Highway Truck Drivers & Helpers Local 107 v. Cohen, supra note 156, 182 F. Supp. at 617; accord Nelson v. Johnson, supra note 146, 212 F. Supp. 241-42; see materials cited note 148, supra. Comment on the sparse and confused state of the law regarding fiduciary duties in the field of labor relations, and the limitations of resort to analogy, has been made by Wollett, supra note 146, at 276-77; Comment 73 Yale L.J. 443, 449-52 (1964).

There has, to date, been only one reported case in which a clear holding was made as to the relation of section 501(a) to the collective bargaining process. In that case, *Parks v. IBEW*, the Maryland federal district court concluded that, as a consequence of collusion with employers and other presumed improper acts, some of which were also performed in the course of collective bargaining, the president of an international union had breached his fiduciary duty under section 501(a) to the members of a local union. This determination was reversed on appeal. The Fourth Circuit Court of Appeals, dividing two to one, while implying that some fiduciary duty might be owed under section 501(a) in collective bargaining, accepted the district court's findings of fact but ruled that the facts demonstrated no impropriety. Close reading of the appeals court's decision makes it clear that it engaged in a quest for a reasonable or rational basis for the international president's action much in the same fashion as, under the *Huffman* test of fair representation, the courts seek to determine if the union's action was unfair in the sense of being arbitrary, capricious or invidious. Unless the Supreme Court rejects the fourth circuit approach, it is clear that the scope of the fiduciary duty imposed in collective bargaining on the individual official under section 501(a) will be no broader than that already imposed on the union body pursuant to the duty of "fair representation."

Since the union official, as an agent of the union, and possibly in his own right, is bound to accord the workers he represents "fair representation," it remains to be considered whether the protection of the individual workers would be appropriately enhanced by the imposition of personal tort or other financial liability upon the union official. It is of course by now understood that such an official would be subject to any injunction against the union and might himself, in some circumstances, be enjoined.

A number of relatively early commentators and courts did, in fact, propose that liability be generally imposed upon the particular union official who had perpetrated the wrong against an aggrieved individual,

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159 *Parks v. IBEW*, supra note 151, 314 F.2d 886.
160 *Id.*, 314 F.2d at 925-26.
161 See *id.*, 314 F.2d at 904-14.
162 The Supreme Court denied *certiorari* in *Parks*, supra note 151.
163 Of course where liability is imposed pursuant to "stockholders" derivative-like action, see supra notes 142-62 with text, this inquiry is technically moot—except to the extent that it may illuminate further consideration of what scope should be found for use of § 501 as a protection in collective bargaining.
rather than upon the union. Such suggestions were based primarily upon two considerations:

First, there was likely some anxiety lest the union's treasury and its general effectiveness be sapped as a result of vexatious or even justified suits. Since most suits by aggrieved individuals against unions were brought by members or expelled members, who sought reinstatement as well as damages, it was thought to be in the plaintiff's own interest to avoid injury to the union body. It was, consequently, believed that the integrity of the union would be best preserved and the individual best protected if the union were immunized from suit, and liability were cast instead upon its erring agent.

Second, there were conceptual difficulties that made it all but impossible for the union itself to be sued. The major difficulty was that in the absence of statutes to the contrary, courts in most jurisdictions held that a labor union was not an entity distinct from its membership and, therefore, could not be sued in its own name or by a member. Thus, to assure some protection for the aggrieved individual, suit was held to lie against the union official through whom the union had wrongfully acted.

These reasons for holding union officials personally liable are no longer significant. First, national policy and the law has moved far in the direction of holding unions to be entities for purposes of suit. This was, in fact, a basic reason for the passage of section 301 of the LMRA, therefore entity problems no longer exist in suits by indi-


165 See Chafee, Jr., supra note 164, at 1010-12; Developments in the Law, supra note 151, at 1089-90.


167 See Marchitto v. Central R.R. of New Jersey, supra note 164; Atkinson v. Thompson, supra note 164; DeVillars v. Hessler, supra note 164.


viduals for breach of the collective bargaining agreement.\textsuperscript{170} Furthermore, there has never been any difficulty in enforcing the federal duty of fair representation in suits brought against unions in their own names.\textsuperscript{171} It has, indeed, recently been held by one court that a fair representation suit cannot properly be brought against a union official, for the claim will support only an action against the union.\textsuperscript{172} Thus, in reality unions are now themselves being sued by individuals with no apparent crippling effect to their treasuries or to their general usefulness to the workers.\textsuperscript{173}

Aside from the fact that there appears to be no need to hold the union official himself liable, unless he willfully disregards a court order, it is probably less inhibiting to union activity if the union rather than the official stands responsible for damages that result from collective bargaining wrongs.\textsuperscript{174} An analogy might be drawn to the immunity enjoyed by governmental officials, who are charged with administrative discretion, from tort liability for acts performed within the scope of their offices.\textsuperscript{175} The reason for such immunity is that it is thought to promote effective government and to avoid “dampen[ing] the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.”\textsuperscript{176} Just as “again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put

\textsuperscript{170} Humphrey v. Moore, 84 Sup. Ct. 363 (1964).


\textsuperscript{172} Falsetti v. Local 2026, UMWA, supra note 171, 400 Pa. at 172-73, 61 A.2d at 896: The fiduciary duty owed the member-employee is by the Union, and not by its individual representatives. Officials of the Union, acting in their authorized capacities, cannot be held liable in damages to a member-employee for failure to process a grievance since they are but agents responsible only to the Union itself. It is the Union that is the proper target of appellant's complaint. See Nobile v. Woodward, 200 F. Supp. 785 (E.D. Pa. 1962) (impliedly limiting Falsetti to state causes of action and not necessarily those arising under the Railway Labor Act.)


\textsuperscript{174} See Comment, 73 \textit{Yale L.J.} 443, 449-50 (1964); cf. Katz, supra note 148, at 552; Wollett, supra note 146, at 281-83.

\textsuperscript{175} See generally, 3 Davis, Administrative Law § 26.01 (1958); Gray, Private Wrongs of Public Servants, 47 Cal. L. Rev. 303 (1959); James, Tort Liability of Governmental Units and Their Officers, 23 U. Chi. L. Rev. 610 (1955).

to it to satisfy a jury of his good faith,"\(^{177}\) the interest of the workers and the collective parties often calls for action in the administration of the collective agreement which may turn out to be wrong or improper and which the union official would “be hard put to it to satisfy a [court] of his good faith.”\(^{178}\) And just as “there must indeed be means of punishing public officials who have been truant to their duties,” other than by laying them open to tort suit,\(^{179}\) other means, e.g., resort to internal political processes, should generally be employed to punish truant union officials.\(^{180}\)

**Conclusion**

It is difficult to call this a conclusion for so far as the law is concerned, especially the law in public realms such as labor relations, there are no conclusions in the sense of even reasonably final answers—there really are only ways of approaching or temporarily solving problems. The questions considered here dealt with group-individual conflict, and particularly as to such questions there are no final solutions. Yet, however limited or unclear the substantive protection that individuals may be able to expect pursuant to section 501 and to the doctrines of fair representation and contract breach, these are useful vehicles for the continual examination of the tensions between group and individual in collective bargaining. Perhaps a better legal accommodation could be achieved by stressing procedural rights rather than these substantive obligations. The procedural approach of course has the virtue of minimizing public control and scrutiny of the merits of collective decisions. But, in the hands of careful and responsive judges, the fiduciary and contract breach approaches can provide useful alternatives or at least supplemental means of assuring the individual some safety from group power while a proper regard is maintained for the primacy, if not quite all the desired privacy, of the collective relationship.

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\(^{179}\) *Ibid.*


To the extent that § 501 of the LMRDA is applicable, suit will of course lie against the union officials for damages to be paid to the union. See § 501(b) *supra* note 145 with text. In the light of the foregoing, it becomes all the more persuasive that invocation of § 501 in collective bargaining should be limited to rather clear cases of fraud, corruption, and actual malice. See *supra* notes 158-62 with text. The courts might achieve this result by refusing to certify that other suits invoking § 501 in collective bargaining are brought “for good cause shown,” see § 501(b), *supra* note 145 with text, or by more formally adopting a narrow construction of section 501 in this area.