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Time limits in a collective bargaining agreement,[1] particularly as they apply to the grievance procedure, are very important. Filing or processing deadlines are taken as seriously in the context of these private documents and negotiated time limits as they are in the world of standard litigation, with deadlines that are imposed statutorily or otherwise. Management advocates often view the time limitation provisions as virtually the only thing employers gain, as opposed to give, in the bargaining relationship. Deadlines have been strictly, if reluctantly, construed by most arbitrators.[2]

The "continuing violation" provides a meaningful exception to the otherwise immutable time bar. As the violation continues, so

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1. The labor agreement normally controls the scope and nature of items that may be submitted to the dispute resolution process, often ending in binding arbitration. A standard clause dealing with time limitations might read as follows:

> A grievance protesting an alleged violation of the collective bargaining agreement must be filed within ten days of the time the grievant knew, or should have known, of the event giving rise to the grievance. Failure to file the grievance in a timely manner will result in its being considered void.

There are cases in which arbitrators have simply ignored time limits, somehow concluding that a ruling on the merits would benefit the parties, *see* Northeast Airlines, Inc. v. Airline Pilots Assn. Intl., 37 Lab. Arb. Rep. (BNA) 741 (1961) (Wolff, Arb.), but these cases are thankfully rare. To be sure, there are cases where the jurisdictional issue is so knotty, arcane and time consuming, and the central claims in the case are so straightforward and, significantly, without merit (one cannot grieve a grievance that is untimely) that the arbitration may properly bypass the procedural issue as a measure of judicial economy. It should be recalled, however, that parties may well have agreed to avoid bifurcating the case — arguing procedure first and merits at a later date — as an economy gesture of their own, with no thought that they would, by so doing, forego a threshold decision on arbitrability.

2. In *Painesville Township Local Schools v. Ohio Assn. of Public School Employees Local 324,* 108 Lab. Arb. Rep. (BNA) 333, 336-37 (1997) (Oberdank, Arb.), the arbitrator stated the majority view:

> Arbitrators are reluctant to dismiss disputes on procedural grounds but, as I have said in the past, time limits are a fact of life in industrial relations and strengthen the bargaining relationship between the parties by encouraging disputes to be brought forward when they occur and processed in an expeditious fashion. They add finality to the collective bargaining process by ensuring that the parties will not have to waste time or financial resources on stale claims. As much as the arbitrator may want to decide issues on the merits, he must refrain from doing so when the dispute is not timely.

On the other hand, arbitrators will resolve doubts against forfeiture of the right to process grievances when the labor agreement raises doubts as to the impact of the time limits or when the evidence shows, for example, a practice of lax enforcement. *See* City of Wooster v. Wooster Employees Assn., 109 Lab. Arb. Rep. (BNA) 230, 233-34 (1997) (Shanker, Arb.).

does the window of opportunity to protest it. The most important element in recognizing a new violation is the fact that the arbitrator will not consider the failure to grieve prior breaches fatal to the claim of one protesting the current actions. But defining what the continuing violation does is easier than understanding what it is. It is apparent that the term itself — "continuing violation" — is both a misnomer and a source of some confusion among the parties and in the minds of arbitrators as well, and that leads, on occasion, to conceptual dilemmas and errant results. The purpose of this discussion is to highlight the true nature of this very important concept.

An excellent, if divided, view of the continuing violation landscape, in a nonarbitration context, is provided in *United Air Lines, Inc. v. Evans.*[3] A flight attendant hired by United Airlines in 1966 was required to resign in 1968 because she married, breaching the company's no-marriage rule. The rule was subsequently found to violate Title VII of the Civil Rights Act.[4] In 1972, Ms. Evans was rehired, but as a new employee. She filed suit under Title VII, claiming the employer violated the statute by refusing to credit her with seniority for any period prior to February of 1972. She asserted that, by denying her seniority back to the starting date of her original employment, United was perpetuating the effect of past discrimination. The District Court dismissed her complaint. That her resignation was a result of an unlawful employment practice was irrelevant, in the court's judgment, because she had forfeited her opportunity to address her grievance when she failed to file a charge within ninety days of the date of her separation.[5] The Seventh Circuit Court of Appeals ultimately reversed that decision.[6]

The Supreme Court agreed with the District Court that her claim for seniority was untimely. The Court acknowledged that the seniority system did give present effect to a past act of discrimination: "United's seniority system does indeed have a continuing impact on her pay and fringe benefits."[7] But, it said,

> the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. She has not alleged

3. 431 U.S. 553 (1977).

4. *See* Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971).

5. *See* Evans v. United Air Lines, Inc., 12 Fair Empl. Prac. Cas. (BNA) 287 (N.D. Ill. 1975), *available in* 1975 WL 11902.

6. *See* Evans v. United Air Lines, Inc., 534 F.2d 1247 (7th Cir. 1976). A divided panel of the court first affirmed the district court decision, Evans v. United Air Lines, Inc., 12 Fair Empl. Prac. Cas. (BNA) 288 (7th Cir. 1976), *available in* 1976 WL 3803, then after the Supreme Court decision in *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976), reheard the case and unanimously reversed, *see* 534 F.2d at 1248.

7. *United Air Lines,* 431 U.S. at 558.

> that the system discriminates against former female employees or that it treats former employees who are discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason. In short, the system is neutral in its operation.[8]

In that case, then, the mere fact that a past, admittedly illegal, event had affected the calculation of seniority credit did not justify the finding of a continuing violation. Because the earlier act had not been challenged in a timely fashion, it maintained no present legal significance. "A contrary view," said the Court, "would substitute a claim for seniority credit for almost every claim which is barred by limitations."[9]

Justice Marshall's dissent voiced the mantra that so often leads to error: "In the instant case, the violation — treating respondent as a new employee even though she was wrongfully forced to resign — is continuing to this day."[10] This is an example, however, of improperly mixing a repetition of the offending act with the continuation of the effects of the acts. It is a distinction often overlooked.

In the arbitration arena, substantial confusion exists as to when a violation "continues."[11] In part, for reasons to be discussed, the misunderstandings flow from the terminology itself — and in part from the existence of multiple events and an inability to distinguish between the act, which is grievable, and its effects, which are not. The inability of arbitrators to understand this distinction causes uncertainty as to proper application of the continuing violation doctrine. As will be noted, the search for "continuity" can result in a wild goose chase. In the overwhelming majority of cases, the vitality of a grievance depends not on the continuing aspect of the alleged violation, nor even on its chronic or recurrent nature, but on the fact that it is a new act. In terms of timeliness considerations, any relationship to earlier occurrences is likely to be irrelevant.

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8. 431 U.S. at 558 (citations omitted).

9. 431 U.S. at 560.

10. 431 U.S. at 561-62 (Marshall, J., dissenting).

11. Parties have even argued a "continuing grievance" theory under the rubric of a continuing violation: Once filed, the argument is posed, a grievance should remain viable for the purpose of protesting similar actions taken at a later time. *See* Kroger Co. v. UFCW Local 455, 109 Lab. Arb. Rep. (BNA) 466, 469-70 (1997) (Baroni, Arb.). In that case, the arbitrator properly rejected the union's assertion that a grievant passed over for a position could use her grievance in that case to protest a later bypass, because of "continued mistreatment."

THE "CLASSIC" CASES

The issue can be better understood by examining hypothetical extremes.[12] *Consider first the case of an employer who, for pay purposes, accidentally assigns an employee a lower rate than is properly paid for his job classification. Thereafter, each pay period, the employee's pay is shorted by ten dollars. Assume further that the collective bargaining agreement provides ten calendar days within which one must grieve. The grievant does not immediately catch the error, and thus the grievance is filed after several pay periods have elapsed, thirty days after the first erroneous paycheck.* This type of case is often cited by arbitrators as a classic example of a continuing violation.[13] According to the rationale, each pay period the employee has suffered another contractual deprivation and therefore ought to be able to grieve, even beyond the original contractual ten-day deadline.

At the other end of the spectrum is the individual who is discharged. *Assume an employee is discharged for misconduct on June 15th. The labor agreement provides a ten-day period within which to grieve. However, a grievance is not filed until September 15th.* As in the case above, this person argues that the loss of pay each pay period amounts to a continuing violation. This, however, is the "classic" example of a case where the violation does *not* continue. Few would argue that the September grievance protesting the dismissal was somehow exempt from timely filing and that it could be entered into the grievance procedure then or thereafter without limits. That result would be entirely contrary to the reasons for the limits in the first place. In this context, the lost paychecks represent the continuing impact of the act, but do not, in and of themselves, give rise to new violations or additional filing deadlines. Thus, the conclusion that the discharged employee is out of time, and out of luck in terms of filing, is easily understood. To be sure, the grievant fails to receive a paycheck each and every week. But this is the result of a single act — discharge — that was fully implemented and completed some time ago. While the effects of the violation, if it was one, continue to be felt, the original act cannot now be con-

12. Throughout this discussion, hypotheticals (as distinguished from cases) will be set forth in italics.

13. *See, e.g.*, USS v. United Steelworkers of America Local 1219, 109 Lab. Arb. Rep. (BNA) 434 (1997) (Bethel, Arb.); Harding Galesburg Mkts., Inc. v. UFCW Local 951, 103 Lab. Arb. Rep. (BNA) 1158 (1994) (Daniel, Arb.); Titan Wheel Intl. v. International Assn. of Machinists & Aerospace Workers Local 2048, 97 Lab. Arb. Rep. (BNA) 514 (1991) (Smith, Arb.).

tested, and the lack of a paycheck does not represent a present violation.

However, these classic examples, and others, deserve closer scrutiny. In the first case, for example, it is true that an individual deprived, week after week, of the appropriate pay stipend has a grievance. Yet, the ability to grieve the violation rests not on the fact that it has *continued,* as observed above, but rather on the fact that it is new. The shorted paycheck in any given week stands as a new and independent violation. The employee's ability to enter the grievance procedure in a timely fashion has nothing to do with past breaches. Nonetheless, depending on the arbitrator's assessment of whether the grievant sat on his rights too long, there may be questions as to the grievant's ability to collect retroactively.[14]

Moreover — and here is the real heresy — were it not for the accidental nature of the pay shortage in the above-cited "classic"

14. Indeed, there conceivably may be a case where a union's acquiescence in a policy requires a finding not that the complaint is necessarily untimely, but that it fails because the policy is now accepted through laches on the part of the union. Generally, care must be taken to distinguish issues of arbitrability from those of remedy and retroactivity. Finding that a grievance is arbitrable, due to a recurrent violation, does not require the conclusion that the grievant is entitled to back pay to the beginning of the violations. Consistent with the notion that the claim is based on a new act so, too, should the remedy be restricted to that act.

In *Harding Galesburg Markets,* the arbitrator considered the case of an employer who had failed to implement the terms of a settlement agreement that would have affected several employees' wages. There, too, the grievance had been filed outside the existing time limits. Said the arbitrator:

> The contract does, indeed, establish certain restrictions on the filing of grievances but this particular complaint has the unique aspect of a wage claim which is universally treated by arbitrators quite differently from ordinary contract disputes. The reason is that each time an employee receives a paycheck which is less than what is believed to be the proper amount there is created a right to complain and grieve. If the employee, for whatever reason, fails to take action within the specified period of time, the right to complain about that alleged shortage is lost and cannot subsequently be raised. However, each new paycheck constitutes a new opportunity for complaint — it is then a case of continuing violation and the right to grieve is reactivated regularly as paychecks are received. Normally, arbitrators would not permit such a grievance to reach back any further than the immediate paycheck which falls within the filing period. However, this contract provides that in such an event the back pay liability may extend retroactively to as much as ninety days prior to the event complained of. In fact, the parties here by having established such a ninety day period of retroactivity clearly intend such cases to be an exception to the normal filing period time limitations. For the reasons noted above the arbitrator finds that this grievance is timely filed and subject to arbitration though the remedy by way of any back pay would be limited by the contract provision.

Harding Galesburg Mkts., 103 Lab. Arb. Rep. (BNA) at 1163. This case and the discussion cited above highlight the true nature of a continuing violation. The arbitrator focused on the recurring paychecks as *new and independent actions* that were, because of their repetition, subject to a grievance. Significantly, it was not the loss occasioned by the initial action that supported the finding of a continuing violation. Indeed, the arbitrator noted that "[i]f the employee, for whatever reason, fails to take action within the specified period of time, the right to complain about that alleged shortage is lost and cannot subsequently be raised." 103 Lab. Arb. Rep. (BNA) at 1163. Rather, it was the series of new paychecks, each raising a new shortage issue, that justified the finding of a continuing violation.

case, this might not be considered a continuing violation at all. The relevance of the inadvertent deduction is that the grievant may not have been on notice of the violation until he became aware of the offending paycheck. But had management formally changed a policy, giving clear notice of its intent to adjust the pay structures, the existence of a series of diminished checks at a later date should be irrelevant.[15] The "paycheck-as-violation" approach is commonplace and, for reasons to be discussed below, often erroneous. Again, the error is in failing to distinguish between new acts, which are grievable, and the continuing impact of older acts, which are not.

In *USS v. United Steelworkers of America Local 1219,*[16] the company began to offset an employee's paycheck on February 10, 1996, deducting certain sickness and accident benefits the employee thought he was due. The grievance protesting these deductions was filed in May or June, in either event well after the contractually mandated thirty-day time limit for grieving. The arbitrator concluded that the issuance of the first check applying the offset satisfied the requirement of company "action" and that the thirty-day clock had thus begun to run at that point. It was therefore too late to protest the first offset. The arbitrator, however, found that the grievant's failure to file within thirty days of that action in no way prohibited him from protesting other offsets:

> As the Company sees it, the initial offset was an "action" that demonstrated the Company's interpretation of Section 10.41. Thus, Grievant was required to protest that interpretation within 30 days of the first offset or be forever barred, at least for the initial period of disability.

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15. In *Eaton County Road Commission v. AFSCME Council 25,* 110 Lab. L. Rep. (BNA) (110 Lab. Arb. Rep.) 198 (1997) (Allen, Arb.), the arbitrator found that a notice to subcontract "should not always" require the immediate filing of a grievance: "To require the Union to file a grievance, before any details are known, or before a Special Conference, could result in premature or needless grievances." 110 Lab. L. Rep. (BNA) (110 Lab. Arb. Rep.) at 202. The arbitrator suggested in that case that the contents of the notice might determine whether time limits would be triggered at that point or whether, instead, each day of the subcontracting would constitute an additional violation. 110 Lab. L. Rep. (BNA) (110 Lab. Arb. Rep.) at 202. *See also* Selkirk Metalbestos v. Sheet Metal Workers Local 456, 107 Lab. Arb. Rep. (BNA) 1147 (1997) (Amis, Arb.). There the arbitrator found the matter timely when the union, having received notice of management's intentions, waited for the actual subcontracting to begin. Said the arbitrator:

> It is often the case that when management notifies the Union of its intentions for future action, as it did here in January 1996, the Union elects to wait until management acts to file a grievance. The Union thus has a concrete basis for its grievance rather than a speculative one. Indeed, where the Union grieves upon being given notice of management's intent, the Company often will argue that the grievance is premature and that nothing has happened to justify it.

107 Lab. Arb. Rep. (BNA) at 1149.

16. 109 Lab. Arb. Rep. (BNA) 434 (1997) (Bethel, Arb.).

> . . . But it does not follow that the action of issuing one check with an offset precludes an employee from contesting subsequent offsets. After all, each check is an "action" of the Company denying benefits to the employee. Of course, the failure to grieve a particular offset within 30 days of that offset will preclude a remedy for that action. But Grievant is not barred from grieving subsequent offsets. In this case, then, Grievance 96-046 properly protested offsets made subsequent to its filing as well as those made within 30 days of the filing.[17]

This is a textbook example of an arbitral response to the problem, including the standard — and, I argue here, potentially irrelevant — reliance on the "paycheck-as-violation" analysis. As will be noted, focusing solely on the existence of the check is not a sufficient answer: How does one satisfactorily distinguish between checks that are, in fact, new actions from those that are merely manifestations of an earlier act? The following hypotheticals and cases suggest some guidelines.

On January 1, management reviews a particular job, concluding it is properly paid at a Grade Level Five. The union believes it should be paid at Level Six, one grade higher. Thereafter, each paycheck is issued at the lower rate. Each time an employee receives a paycheck that is allegedly deficient, conventional wisdom suggests a grievance may be filed, as observed earlier. This approach is potentially problematic: May the employee perform the job for five years, only to claim that a misclassification occurred five years earlier? Such an outcome is unreasonable: If the job was, in fact, misranked, it ought to be grieved at the time, rather than having both parties work under a system that is both inaccurate and capable of generating further problems in later years with subsequent job changes.

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17. 109 Lab. Arb. Rep. (BNA) at 438. *But see* Georgia Pac. Corp. v. ILWU Local 6, 110 Lab. Rel. Rep. (BNA) (110 Lab. Arb. Rep.) 269 (1998) (Oestreich, Arb.). In this case, the company implemented a new incentive pay plan. The union did not grieve implementation of the plan but waited for the date of the first paycheck, which was well beyond the applicable filing time limits. The arbitrator concluded the filing was untimely. The union characterized the "occurrence of the event causing the grievance," 110 Lab. Rel. Rep. (BNA) (110 Lab. Arb. Rep.) at 272, as the first issuance of paycheck, thereby raising the "classic" continuing violation argument, 110 Lab. Rel. Rep. (BNA) (110 Lab. Arb. Rep.) at 271. The arbitrator, however, found the "occurrence" to be the implementation date of the new incentive plan, considerably earlier. 110 Lab. Rel. Rep. (BNA) (110 Lab. Arb. Rep.) at 274. This arguably aberrant decision can be rationalized in one respect: the arbitrator placed substantial emphasis on the *wording* of the grievance.

> To agree with the Union's contention would be inconsistent *with the wording of the grievance* filed by [the] Chief Steward . . . . To hold otherwise would entirely change the nature of the grievance filed in this case. If the "event causing the grievance" took place on [the date of paycheck issuance], we would see a grievance filed on behalf of specific employees who received a lower gain share payout for the month of March under the new plan than they would have received under the old plan.

110 Lab. Arb. Rep. (BNA) at 274 (emphasis added).

On January 1, a bargaining employee is notified her job is to be discontinued; her employment will be severed, effective immediately. Consistent with the collective bargaining agreement, she is entitled to a severance payment that is calculated in accordance with a contractually established formula involving her years of service. The employee is presented with a document that, in her judgment, misapplies the severance payment formula. The document requests that she elect whether to receive the payment in a lump sum or in the form of an annuity, payable monthly over twenty-five years. The employee opts for the annuity payment. Does this mean she now has twenty-five years to challenge, monthly, the application of the formula? In this case, the mere choice of payment form should not serve to modify the time limits applicable to the grievance. The grievant was advised, on January 1, of all the facts constituting grounds for the grievance. Had she received the payment in a lump sum on that date, no one would seriously argue that she could contest the calculation twenty or twenty-five years later. Merely modifying the payout format should not have any impact.[18]

On January 1, the results of a competitive promotion are announced. The grievant is not among those selected and, accordingly, he fails to qualify for a pay raise. Each paycheck thereafter represents a diminished amount, compared to what he would have received with the promotion. But that does not provide license to file a grievance in perpetuity. The act complained of is the issuance of the promotion list, and notice to the grievant would presumably have been provided at the time the list was posted. Any other re-

18. In *Allegheny Airlines v. ALPA,* No. USX-96-087 (1997) (Bloch et al., Arbs.) (unpublished decision on file with author), a pilot informed the company in October 1995 that he wished to retire, effective immediately. The company denied his request, claiming a lack of notice. It said, however, he could resign, and he did. At a later date, the pilot sought to claim his retirement benefits. The company denied him the free pass privileges that normally would be granted to retiring employees, citing a company regulation requiring pilots to go *directly* from active service to retirement. The interim resignation, the company claimed, should operate to deny his claim. The pilot grieved the lost pass privilege in March 1996, well beyond the sixty days contractually allowed for filing grievances. Conceding that the grievance was filed beyond the sixty-day limit, the union maintained that the denial of the pass benefits was a continuing violation because the violation of the pilot's retirement benefits was ongoing. *See Allegheny Airlines,* No. USX-96-087, slip op. at 3.

The System Board of Adjustment held that the matter was untimely filed:

> We do not conclude here that the company's actions in declining the grievant's attempt to retire were necessarily proper. That question comprises the merits of this case. Our decision is limited to the finding that it was the company's actions on October 17, 1995 that precipitated the current dispute. They should have been grieved within the negotiated 60-day period. . . . While the grievant suffered the loss of pass privileges because of [the company's October actions], there was no repeated act, standing prohibition . . . or continuing actions by the company thereafter, only the effects of the original action.

Allegheny Airlines, No. USX-96-087, slip op. at 7-8.

sult would be manifestly unfair to, among others, the successful job aspirant who may work in the classification for months or years, only to find a late-blooming claim that the promotion process was for naught. The promotion is a one-time, discrete act directed at an individual, as distinguished from, for example, the setting forth of general policies that will potentially apply to particular workers in limited instances.

These hypothetical cases involve clearly defined acts — job classification, severance payment, and promotion — that affect salary, to be sure, but that are capable of being understood, reviewed, and challenged at the point they are announced. Other cases, however, are not as easily defined.

The "Double Act" Dilemma

Perhaps the most difficult issue conceptually arises in the context of management's unilaterally issuing a general policy or work rule. Parties and arbitrators often believe that, assuming the rule is somehow unfair — and therefore violative of the just cause requirement or otherwise contrary to an existing contractual requirement — its issuance creates a continuing violation situation. Thus, management's edict may be grieved any time it is applied; it is not necessary to protest within a certain period following its issuance.

On the one hand, it is not unreasonable to suggest, in the interest of certainty and predictability in the industrial relationship, that management be aware, early on, that the policy it has attempted to promulgate is contractually offensive. Management may argue with some justification that, after years of application and with full conformance to its mandates, the policy should not suddenly be subject to challenge the first time the employee is disciplined for breaking its rule. On the other hand, there is merit in the standard rejoinder: the union should not have to speculate as to the nature of the discipline or the impact of the rule. It is by no means unreasonable simply to await its application to test the integrity of the policy.

These competing demands are accommodated by recalling that, with rare exception, one premises a finding of timeliness on the existence of an act that, while possibly repetitive, is nevertheless new. This means that, in this context, there may be two or more viable events constituting acts — issuing the policy and enforcing it.[19]

19. In *Dyncorp Wallops Flight Facility v. International Assn. of Machinists & Aerospace Workers District 74,* 101 Lab. Arb. Rep. (BNA) 1033 (1993) (Jones, Arb.), the company declined to discharge an employee who was failing to retain his membership in good standing

On January 1, management issues a new set of work rules requiring, among other things, that employees be "clean shaven — no mustaches or beards."[20] *Two employees are affected by the new rules: the first has grown a beard and has been threatened with suspension until he shaves it off. The second has requested permission to grow a beard but has been denied and told he will be disciplined if he does.*

On February 15, the first employee files a grievance contending the policy is unreasonable, unnecessarily infringing the personal prerogatives of otherwise well-groomed employees who either would like to grow a beard or mustache or keep the one they have. Management objects on the basis of timeliness, citing a ten-day limit.[21] *The grievant is told he is too late: he, or the union, should have challenged the rule within ten days of its issuance. Having failed to do so, the rule must be assumed reasonable and his grievance nonarbitrable.*

An arbitrator would likely make short work of the company's protest in this case. Even if it were too late to challenge the underlying rule, the issue of reasonableness may properly be tested as applied to a disciplinary situation. This is a situation in which an existing policy may not be challenged, but the discipline may.

To be sure, the end result of challenging the disciplinary event, as contrasted to the policy underlying it, may be the same. If the policy is found wanting in circumstances that are broadly applicable to the workforce, the result of setting aside one employee's discipline will be indistinguishable from setting aside the policy. But this does not change the underlying rationale: To take another avenue to contest a particular policy is wholly consistent with the premise that by disciplining, management had engaged in a new act. The

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with the union. The arbitrator noted that if, in fact, the labor agreement required the company to discharge the employee when requested by the union, "then every day (or month) that the Company continues to allow [the employee] to work without rendering to the Union the required minimum service fees, another occurrence of the aggrieved issue takes place." 101 Lab. Arb. Rep. (BNA) at 1036. Here, too, the violation — failing to honor the union security agreement — was being repeated from day to day, albeit as a result of the employer's inaction rather than action.

20. For some reason, the "hair cases" no longer play as visible a role as they did in the 1960s and 1970s. Perhaps this is a fashion statement. Or perhaps it is simply because this is the 1990s.

21. Conceivably, management may also claim the grievance is not ripe and therefore not properly before the arbitrator inasmuch as there has been no discipline meted out for a breach of the regulation. *See, e.g.,* Northwest Airlines v. Brotherhood of R.R., Airline and Steamship Clerks, 68 Lab. Arb. Rep. (BNA) 31 (1977) (Bloch et al., Arbs.). As to that issue, the arbitrator concluded that it was not necessary for an employee actually to subject himself to discipline in order to test the reasonableness of the rule. 68 Lab. Arb. Rep. (BNA) at 33.

challenged act in this case is the enforcement of the rule; *that* event provides the new set of time limits.

The second employee, wishing to grow a beard, also challenges the rule on February 15. Here, too, management raises a timeliness objection, contending, once more, that a grievance challenging the rule should have been registered within the contractual time limits following issuance of the policy.

There are compelling practical reasons to conclude that, notwithstanding the need for certainty in the administration and application of work rules, one should not require an immediate challenge to the issuance of general work rules. A new absenteeism program, for example — particularly the so-called no-fault programs[22] — may incorporate a variety of arcane mechanisms for counting absences. Assuming, as is often the case, that the program has not been negotiated with the union, but rather imposed as an exercise of managerial authority, the union cannot be expected to have reviewed or discovered each and every potential application and to have tested it against any existing just-cause requirement. The union is likely to determine that it makes more sense to test the rule as applied. Beyond that, it is true that, from the employees' standpoint, nothing has happened: it is management's action in disciplining or, alternatively, in declining permission to engage in a certain activity,[23] that triggers the time limits as applied to an independent event.

Does this mean an established policy is forever subject to challenge? Do time limits simply not apply to implementation of a policy? Is the policy vulnerable to being overturned, without limitation at any time? How does one distinguish between events that, when repeated, constitute a series of new acts, on the one hand, and those events that are merely evidence of continuing impact, on the other?[24] The answer is: It depends on the specific nature of the employer policy or plan. One must pay careful attention

22. As distinguished from programs where management scrutinizes each proffered reason for absence, some employers opt to assume all absences valid, but to charge points in every instance. Discipline or dismissal follows upon attaining a certain point level.

23. One might properly inquire whether it is always necessary for an employee to incur discipline for the purpose of testing a rule. Practically speaking, one should not demand that sort of "test case." The continuing nature of the labor relationship strongly suggests that the parties should be able to submit jointly such a question for resolution or that, at the least, the parties should be able to test the issue by means of a formal request for permission that, when denied, would be grieved. *See Northwest Airlines,* 68 Lab. Arb. Rep. (BNA).

24. Finding that a grievance is timely, as in the case of a protest to discipline administered under a long-standing policy, is not a guarantee that the policy will be overturned. Evidence may well persuade the arbitrator that the policy has been mutually accepted in practice or by acquiescence.

to the nature of the act. When management issues a general policy or work rule, not yet fleshed out through application, it is reasonable to consider the possibility of testing the policy "on its face" at the time it is issued or, alternatively, to await its actual application to test it "as applied." An attendance policy, for example, may have wide applications in a variety of circumstances. A union should not have to review, for possible challenge, every imaginable variation and application at the time of issuance. But when the new policy, pronouncement, or plan is directed to a discrete event — changing an existing pay plan, for example — management has a strong argument that the act or event is then definable, complete, and reviewable and that it must, therefore, be grieved at that point. The argument that subsequent paychecks will have been improperly modified will, in such case, be unavailing, for those payments will be properly regarded as the impact of the act, rather than the act itself. Consider, in that context, the following cases.

In late 1992, the employer, a wastewater treatment facility, announced a reorganization plan, part of which required that two Treatment Plant Foreman positions be reclassified as Operators, lower-rated jobs. The effective date of that reclassification was February 1, 1993. Some fifteen months later, in May 1994, the union concluded that the job to which the grievants had been transferred was improperly classified. It requested that the employer make the appropriate modifications, but this was denied. Accord-

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In *Larry's Markets v. UFCW Local 1105,* 105 Lab. Arb. Rep. (BNA) 795 (1995) (Lehleitner, Arb.), the employer issued a commitment to the neighborhood community that employees would be prohibited from parking on residential streets. The employer posted the restriction on August 4, 1994. The grievance protesting the restriction was not filed until six months later, well beyond the applicable 60-day limitation for filing grievances. 105 Lab. Arb. Rep. (BNA) at 798-99. The arbitrator found a continuing violation, concluding *inter alia*, that "each day that employees are prohibited from parking on City streets, a new, alleged violation occurs. Stated differently, the facts of this case represent a classic example of a continuing violation, which is not subject to time limits." 105 Lab. Arb. Rep. (BNA) at 799.

This case well reflects the double act syndrome. The act at issue is the existing prohibition on parking. From a purely conceptual standpoint, the prohibition is issued anew each day: Were an employee to request permission to park, it would be denied. That denial could be grieved. Yet delay is not necessarily cost-free. That is, a grievant could challenge the cost, for example, of alternative parking on a given date — and thereby challenge the prospective vitality of the rule — but likely would be proscribed from seeking retroactive compensation. Moreover, it is entirely possible an arbitrator would entertain the grievance as timely, but conclude that, inasmuch as the policy had been in existence for an extended time, free from challenge and actually in effect — employees had, in fact, stopped parking in the neighborhood — the union must be seen as having acquiesced in the policy.

Such a finding may require evidence as to the particular rule and the nature of its application. If, for example, the rule has existed but has been essentially dormant, never having been applied and, therefore, never having been tested, one may conclude there is no reason to find acquiescence or acceptance by the union. If, on the other hand, the rule has been routinely enforced, an arbitrator may well find that the union's silence has amounted to acquiescence and that, having effectively slept on its rights, it is too late to challenge.

ingly, the union grieved in June 1994. The arbitrator concluded that, as concerns the original reclassification, the matter was untimely. The union had sufficient knowledge of all relevant facts in 1993 and should have grieved within the applicable ten calendar days. He found that the later grievance, however, was timely because the misclassification, if any, was a continuing violation.[25] Said the arbitrator:

> the grievance can be characterized as "continuing" in the sense that each day there is a separate occurrence of the act complained of, as opposed to a single completed event or transaction. In these types of grievances, arbitrators have not strictly enforced grievance time limits, although any remedy awarded typically runs only from the filing of the grievance.[26]

The reclassification case is an example where management's action is clear, well-defined, and, significantly, fully executed upon its completion. The judgment has been made; there is nothing else to accomplish. This is not an inchoate act or response awaiting appropriate circumstances for its application. In this case, if a grievance protesting the original reclassification is in fact untimely, it makes little sense to conclude that the *same* claim should later be considered timely. Surely, this is a situation involving the continuing impact of the initial management decision. To the extent the arbitrator's decision ignores that fact, it is in error.[27]

In *Titan Wheel International v. International Assn. of Machinists & Aerospace Workers Local 2048,*[28] the union contended that the company violated the labor agreement by failing to pay certain classified jobs incentive rates rather than standard hourly rates of pay. The company argued, among other things, that the union had been aware of the company's position for some five years and that it had filed several grievances and withdrawn them. Therefore, the arbitrator should consider the matter untimely. The arbitrator found the grievance was of "the continuing type"

> in that there is the basis for a grievance each time the employee receives a paycheck. If the positions are not properly classified under the terms and conditions of the Agreement, then the Company's fail-

25. *See* Municipality of Anchorage v. Plumbers & Steamfitters Local 367, 108 Lab. Arb. Rep. (BNA) 97 (1997) (Landau, Arb.).

26. 108 Lab. Arb. Rep. (BNA) at 99.

27. Nor is it accurate to state that arbitrators somehow apply time limits loosely in the case of a continuing violation. If, in fact, there has been a recurrent breach, the time limits apply with complete precision because a new triggering date has been established.

28. 97 Lab. Arb. Rep. (BNA) 514 (1991) (Smith, Arb.).

> ure to properly remunerate the employee is basis for a grievance as long as the violation continues.[29]

Yet if one assumes the company's position as to incentive rates was clearly announced at the time of its imposition, it is unclear why the arbitrator should not require a timely challenge at that point. Here, as in a promotion case, the management action is clearly defined, identifiable, and complete. It affects pay, to be sure. But the prospect of continuing paychecks neither changes the requirement of a timely protest nor salvages an otherwise untimely claim. Once the time limits have expired, the paychecks are merely the continuing impact of the uncontested act.[30]

In *Great Falls Public Schools v. International Union of Operating Engineers Local 400*,[31] two bargaining-unit employees worked on Memorial Day, 1996. They received holiday pay at the rate of double the regular hourly rate. The union maintained the employees were entitled to triple time. The parties discussed the issue then and, indeed, in subsequent contract negotiations thereafter. Ultimately, however, they were unable to agree, and the union grieved the matter on October 11. The parties had established a five-day limit for filing grievances.[32] The arbitrator found the matter arbitrable. First, he concluded, this was a "union grievance filed on behalf of all the bargaining unit members in an attempt to have its

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29. 97 Lab. Arb. Rep. (BNA) at 519.

30. In *Excel Corp. v. UFCW District 540,* 108 Lab. Arb. Rep. (BNA) 1144 (1977) (Moore, Arb.), the union grieved the fact that employees in a particular department were being denied the opportunity to be paid "gang time" — pay based on work assigned to a particular department rather than based on the time the employee clocks in and out.

The union claimed the failure to pay on the "gang time" system was a violation of the contract and that each paycheck represented a "continuing violation." Management argued that the pay system had been implemented some ten years before and had survived scrutiny in intervening contract negotiations. It claimed, therefore, that the grievance was untimely. 108 Lab. Arb. Rep. (BNA) at 1146. The arbitrator concluded that, inasmuch as the manner of payment to the grievants had been established ten years ago and that the union had had the opportunity to address the matter during negotiations, it was untimely. 108 Lab. Arb. Rep. (BNA) at 1146-47.

Issues of notice frequently arise in such cases. Most often, work rules and employment-related policies, as distinguished from actual contract revisions, are unilaterally promulgated instead of bargained. There may well be a question of whether the union was properly apprised of the new policy for purposes of ascertaining the triggering moment of the time limits. In this case, then, it is conceivable that the first pay period might represent such notice, assuming inadequate notice prior to that time. Given the significance of the time limits, factual questions of notice are scrutinized carefully.

31. 108 Lab. Arb. Rep. (BNA) 998 (1997) (Calhoun, Arb.).

32. Art. XX sec. 20.1.2 of the Collective Bargaining Agreement provided that "[i]f the matter is not resolved under the preceding provision or if the immediate supervisor fails to give his answer within the time provided, the aggrieved employee and his representative if desired shall have five (5) working days to reduce the grievance to writing and present same to the District." 108 Lab. Arb. Rep. (BNA) at 999.

interpretation of the collective bargaining agreement upheld."[33] "Union grievances," he opined, "are by nature continuing."[34] He also concluded the matter had been filed "in anticipation of what the union had every reason to believe would be a contract violation as soon as a bargaining unit employee worked a holiday."[35] There is no support for his first conclusion that union grievances are somehow exempt from time limits. The second rationale reflects another, more common, misunderstanding.[36]

If, as is apparently the case, the union was protesting solely the employer's interpretation of the Holiday Pay provision — first made apparent on Memorial Day, 1996 — the grievance protesting that interpretation should be considered untimely. Save for the fact that the Holiday Pay itself was not a consistent paycheck element, this case is indistinguishable from those in which the management action was, in fact, fully executed. The payments, then, were the manifestations of the changed policy and did not give rise to the type of new event that would generate new time limits.

SUMMARY

Clear and consistent application of time limits benefits all participants in the collective bargaining relationship. Stale claims are avoided, there is less chance of festering problems, and as a general matter, the parties operate with a more current, more precise concept of the bargain they have negotiated. The search for "continuing violations" must focus on the existence of new and independent actions that may be claimed as contract violations without regard to any nexus to past events. In particular, parties must avoid the urge to treat altered wage payments as a *sine qua non* for timeliness. Such events may, indeed, be new, albeit repeated, violations. But they may also represent nothing more than the impact of a clearly defined management action that, assuming proper notice and disclosure, should have been challenged at its inception. Recognizing these concepts will serve to avoid the conceptual pitfalls and definitional uncertainties that often attend these issues.

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33. 108 Lab. Arb. Rep. (BNA) at 1001.

34. 108 Lab. Arb. Rep. (BNA) at 1001.

35. 108 Lab. Arb. Rep. (BNA) at 1001. Unaccountably, he also concluded that the grievance was *not* a request for an advisory opinion.

36. Inasmuch as the grievance was denied, it is unclear whether the arbitrator considered the grievances of the two bargaining-unit employees arbitrable or whether, instead, he was focusing solely on the timeliness issues surrounding "union grievance." For purposes of this discussion, however, one may assume he would have found the five-month-old event outside the scope of the time limits.