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THE LEGAL NATURE OF COLLECTIVE BARGAINING AGREEMENTS*

Archibald Cox†

I

One reflecting upon the legal nature of a collective bargaining agreement can hardly avoid beginning with the thought that the institution has flourished outside of the courts and administrative agencies and often in the face of legal interference. The law had fallen into disrepute in the world of labor relations because it failed to meet the needs of men. Collective bargaining agreements were negotiated and administered without regard to conventional legal sanctions. Grievance procedures and arbitration evolved into an intricate and highly organized, private judicature. Many experienced and perceptive observers argued that the conventional sanctions for commercial contracts should not apply to labor agreements.¹

The national labor policy is now set upon another course. Section 301 of the Labor Management Relations Act² supplied legal sanctions for collective bargaining agreements, and no one supposes that time will reverse the decision. There are increasing numbers of direct suits to enforce rights under labor contracts.

Arbitration cases may also bring the courts farther into the administration of collective bargaining agreements. Textile Workers Union v. Lincoln Mills of Alabama³ affords an opportunity to compel a recalcitrant party to proceed to arbitration, but in doing so it also necessarily grants the party who is reluctant to arbitrate a forum in which to raise questions of arbitrability; heretofore he supposed that he was forced to take his chances with the arbitrator or risk the accusation of bad faith. In the unhappy event that the federal courts embrace the Cutler-Hammer doctrine, they will

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¹ Much the best exposition of this philosophy is Shulman, "Reason, Contract, and Law in Labor Relations," 63 Harv. L. Rev. 999 at 1001-1002, 1024 (1955).
³353 U.S. 448 (1957).
frequently be called upon to decide whether the claim sought to be arbitrated raises a disputable issue or one so frivolous that arbitration should not be ordered—a formula which inevitably takes the court into the merits of the dispute.4

In my opinion both the institutions of self-government proliferated by collective bargaining and the surrounding legal system can gain strength from mutual support but, whether one approves or disapproves the trend, it must be recognized that section 301 and the Lincoln Mills case draw the courts a considerable distance into both the interpretation of collective bargaining agreements and the formulation of legal principles to govern their judicial enforcement. By instructing the federal courts to create a body of substantive law applicable to suits under section 301, the same case has given the profession an extraordinary creative opportunity. There are no settled rules governing rights and remedies under collective bargaining agreements.5 Whether judges apply existing contract doctrines blindly or accommodate the law to the needs of the industrial world will depend upon the imagination and attitude of labor lawyers.

4 In International Assn. of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917 at 918, 67 N.Y.S. (2d) 317 (1947), affd. 297 N.Y. 519, 74 N.E. (2d) 464 (1947), the court held: "While the contract provides for arbitration of disputes as to the 'meaning, performance, non-performance or application' of its provisions, the mere assertion by a party of a meaning of a provision which is clearly contrary to the plain meaning of the words cannot make an arbitrable issue. It is for the Court to determine whether the contract contains a provision for arbitration of the dispute tendered, and in the exercise of that jurisdiction the Court must determine whether there is such a dispute. If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." The doctrine is highly controversial. Compare Marceau, "Are All Interpretations 'Admissible'?" 12 ARB. J. 150 (1957), with Summers, "Judicial Review of Labor Arbitration," 2 BUFFALO L. REV. 1 (1952) and Cox, "Current Problems in the Law of Grievance Arbitration," 30 ROCKY MT. L. REV. 247 at 258-266 (1958). It is an open question whether the doctrine will be adopted by the federal courts. See, e.g., Local 149, American Federation of Technical Engineers v. General Electric Co., (1st Cir. 1957) 250 F. (2d) 922; In re Jacobson, (D.C. Mass. 1958) 42 L.R.R.M. 2070; New Bedford Defense Products Div. of Firestone Tire & Rubber Co. v. Intl. Union, UAW, (D.C. Mass. 1958) 160 F. Supp. 103.

5 There are scattered state decisions which the federal judges may use as precedents in the same way that one state supreme court looks to the decisions in another jurisdiction. Thus the Lincoln Mills opinion declares that "state law, if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." 353 U.S. 448 at 457. The general principles of contract law may also furnish decisional criteria. In each instance, however, the federal courts will have a power of choice until a federal law of collective bargaining agreements has been developed. It seems virtually certain that the federal substantive law will oust state law from the whole field of cases affecting interstate commerce. McCarroll v. Los Angeles County District Council of Carpenters, 49 Cal. (2d) 45, 315 P. (2d) 322 (1957).
The starting point is sure to be the familiar rules of contract law. Williston tells us that a "contract is a promise, or a set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."\(^6\) Pound and Corbin give essentially the same definition.\(^7\) Since 1947 a collective bargaining agreement has been a set of promises which the law will enforce. Indeed it is a contract within any acceptable definition.

Looking a little deeper it seems fair to say that voluntarism and bargain are the two fundamental qualities of contract. The very notion of contract implies acceptance of an obligation which the law does not impose. A promise is a consensual undertaking. Ordinarily a contract also involves exchange.

Voluntarism and bargain are also significant ingredients of a collective bargaining agreement. The law leaves the employer and the collectivity of employees free to agree or refrain from agreement subject only to the obligation that they bargain in good faith. The terms of the bargain are not determined by the government; in this respect both management and labor enjoy much greater freedom than a utility or insurance company dealing with the public.

In fact neither the employer nor the employees collectively have the freedom to disagree which characterizes typical contracts between business firms and individuals. Sooner or later the employer and employees must strike some kind of a bargain. For both the costs of delay can be very heavy. The compulsion has two relevant consequences. First, it partially explains the gaps and deliberate ambiguities in collective bargaining agreements which create distinctive problems of interpretation. The pressure to reach an agreement is so great that the parties are willing to contract although each knows that the other places a different meaning on the words and they share only the common intent to postpone the issue and take a gamble upon an arbitrator's ruling if decision is required.\(^8\) Second, the importance of having some

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\(^8\) The same phenomenon appears in legislation, probably more often than outsiders realize. The best example to come to my attention is NLRA §8(c), 61 Stat. 142 (1947), 29 U.S.C. (1952) §158(c). The House bill [H.R. 3020, 80th Cong., 1st sess. (1947)] immunized an employer's anti-union speech "if it does not by its own terms threaten force or economic reprisal." As passed by the Senate [S. 1126, 80th Cong., 1st sess. (1947)], the bill granted
agreement means that the arbitrator can hardly say that there was no meeting of the minds upon the question before him, that therefore there was no contract, and that the parties should go back and negotiate a solution.\footnote{The point is illustrated by a typical arbitration case. The issue was whether a company, at a time of very heavy cut-backs, could put foremen back to work in the bargaining unit according to seniority based upon total years of service with the company or, if not, then according to seniority accumulated between the date of first employment and the date of promotion. The contract was absolutely blind. It seems certain that the parties had never thought about the pending situation. I am certain, however, that both sides would have been outraged if I had said that this was an omitted case on which they should go back and negotiate because there had been no meeting of the minds. Indeed the company and union were negotiating a new agreement at the time they submitted the case for decision. In effect they wished me to write the relevant terms of the new agreement while construing the old.}

These consequences of the practical compulsion to sign and preserve collective agreements mean that interpretation must assume a more creative role than in most commercial or property litigation. I shall return to this point later but I take it that neither the practical qualifications nor their consequences can obscure the importance of the elements of voluntarism and bargain in both ordinary contracts and collective bargaining agreements.

If these reasons for thinking that contract will be the starting point in evolving a law of collective agreements seem too theoretical let me suggest a very practical reason: One must start somewhere and there is no better place to begin. If you doubt the force of this consideration, reflect upon the number of opinions by experienced labor arbitrators invoking ordinary contract principles as grounds of decision.

Among the arbitration fraternity and in academic circles it has been fashionable to stress the uniqueness of collective bargaining agreements. Clyde Summers tells us:

"The collective agreement differs as much from the common contract as Humpty Dumpty differs from a common egg. The failure of the courts to see and remember the differences causes confusion and leads them to blunder. They misconceive the relationship, hobble arbitration, and misinterpret the agreement, and defeat the intent of the parties—all because they forget they are in a world quite unlike their own.\footnote{Summers, "Judicial Review of Labor Arbitration," 2 Buffalo L. Rev. 1 at 17-18 (1952).}"
Often the difference is important, but the time has passed when we could simply erect a "no trespassing" sign and separate industrial relations from the law. The law has moved into the sphere of grievance adjustment and contract administration. Labor relations has spilled over into judicial territory. Labor, management, and arbitrators must recognize that the law often expresses ideals and needs of society which limit their freedom of action. The law of contracts often embodies these ideals. It may also embody lessons of experience entirely applicable to collective bargaining agreements. Conversely the law can satisfy the needs of the industrial world only if there is a strong infusion of many of the ideas and conventions, heretofore unknown to law but appropriate to group action, which have gained acceptance in the world of labor relations. It is not enough to halt after taking the important first step of emphasizing the unique aspects of collective bargaining agreements.

First, we must press on to show how these peculiar qualities affect the application of the normal principles of contract interpretation and enforcement.

Second, we should seek a synthesis of our notions concerning collective bargaining agreements—an explanation of their inner logic—a coherent description not merely of the institution but of its legal consequences. Judges cannot be expected to perceive the legal nature of a collective bargaining agreement if those whose lives straddle labor relations and the law cannot articulate their perceptions.

It would be satisfying to offer a tentative thesis. This paper is only an effort to illustrate the interplay between some of the special institutional characteristics of collective agreements and the applicability of normal contract and agency rules.

II

A unique characteristic of a collective bargaining agreement is the number of people affected. The habit of speaking of a triangular relationship involving employer, labor union, and individual employees obscures the number of employees and the complexity of their interests. Under some contracts the number of individual employees reaches tens of thousands; it is usually more than fifty. The identity of the employees may change from day to day; Joe Smith quits but Annie Jones is hired. Often several employees have conflicting interests, as where the claim
is that some are being permitted to deprive others of work by doing jobs outside of their own classification. The second party—the labor union or collective bargaining representative—is in a very real sense only the third party—the individual employees—acting as an organized group through its agents and constitutional processes. Thus, if we think of the union as an agent and the employees as principals, we have the paradox that the agent is only the principals acting as an organization. The group interests, however, may conflict with the claims of individuals because several classes of individuals have divergent interests, because the demands of group organization and coherence clash with individual self-interest, or even because the union officialdom is not immediately responsive to the wishes of a numerical majority of the members. Since experience offers no factual parallel to these arrangements, no other legal conception is quite analogous.

A group cannot function effectively without rules for its government. When the group is a wholly voluntary association it may adopt its own rules, but under collective bargaining the group is only partly voluntary and the Railway Labor and National Labor Relations Acts provide rules for its government. NLRA section 9 (a) provides that the representatives designated by a majority of the employees in a bargaining unit shall be the exclusive representatives of all the employees in the unit. The National Labor Relations Board defines the bargaining unit and determines when and how the representative shall be chosen.

These outside rules seriously disturb any effort to analyze collective bargaining agreements according to the elementary principles of contract and agency. Under the principle of majority rule dissident members of the appropriate unit lose the power to act for themselves, unlike any ordinary principal to an agency relation. The practicalities of group organization deprive even a majority of the power to discharge their representative at will; although the ordinary agency is always revocable, a bargaining representative can be ousted only upon certain occasions. The agreements executed by the employer with the bargaining representative not only fix a man's wages but they may compel him to contribute a portion of his earnings to a trust fund,
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retirement\textsuperscript{15} or change his seniority without his consent.\textsuperscript{16} In my opinion the union may even compromise accrued claims under an existing contract, but the point may be doubtful.\textsuperscript{17}

Efforts have been made to assimilate all these cases to familiar contract law by saying that when an employee works in a bargaining unit covered by a collective agreement he enters into a voluntary contract of hire which incorporates its provisions.\textsuperscript{18} The words can be made to fit, but the formula has the taste of fiction. The individual employee may not even know whether the workers are represented by a labor union. Probably he does not know many of the major terms of the collective bargaining agreement. It may be said that this is also true of the farmer who insures his barn or the professor who ships his books by railway express, but I submit that Justice Stone provided us with a truer insight when he said, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents."\textsuperscript{19}

The rules provided by the government to meet the necessities of group organization also render many familiar contract rules inadequate for the analysis of the employer's contractual rights and duties. The point is most clearly illustrated by the problems which result whenever it is proposed to change the bargaining representative during the term of a collective bargaining agreement.

The opportunity to repudiate an unsatisfactory representative and either revert to individual bargaining or substitute another agent is a necessary corollary of the principle of freedom of choice. Orderly government dictates that the choice be made at intervals.

\textsuperscript{17} Cox, "Individual Enforcement of Collective Bargaining Agreements," 8 LAB. L. J. 850 (1957).
\textsuperscript{19} Steele v. Louisville & N. R. Co., 323 U.S. 192 at 202 (1944). Compare the following statement in Justice Murphy's concurring opinion, at 208: "Congress, through the Railway Labor Act, has conferred upon the union selected by a majority of a craft or class of railway workers the power to represent the entire craft or class in all collective bargaining matters. While such a union is essentially a private organization, its power to represent and bind all members of a craft or class is derived solely from Congress."
An otherwise appropriate occasion for raising the question of representation may fall within the term of an unexpired collective bargaining agreement which not only confers rights and liabilities upon the employees as individuals but also affects them in their group capacity because it confers rights and duties upon the incumbent union as an organization. One cannot give full effect both to the existing contract and to the choice of a new representative, i.e., the reformation of the group. The law might put sanctity of contract above freedom of choice and reason that the employees surrendered their right to change representatives when, through their designated representative, they executed the long term agreement.20 Or it might be said that although the employees may change their representative, they remain bound by the unexpired agreement in all other respects.21

Apparently this is the teaching of the law of contracts. If A, the owner of a house, designates B as his renting agent and B negotiates a five-year lease to C at $200 a month, A may not discharge B two years later, substitute D as his agent, and then avoid the lease and evict C unless the rent is raised to $250. The lease remains binding between A and C despite the change of agents.

The law of collective bargaining has not yet crystallized but the trend of development is against the analogy. The National Labor Relations Board took the first step when it held that a collective bargaining agreement was not a bar to a representation election after a reasonable period.22 The issue was conceived to turn on striking a balance between the interest in stability and the values of freedom of choice. At first the bar was for a year. Then it was lengthened to two years;23 and now the Board is apparently considering a still longer period.24 In establishing the rule the Board often protested that its action did not "ipso facto

20 Triboro Coach Corp. v. New York State Labor Relations Board, 286 N.Y. 314, 36 N.E. (2d) 315 (1941), points in this direction. See also New England Transportation Co., 1 N.L.R.B. 190 (1936).
21 In Pacific Greyhound Lines, 22 N.L.R.B. 111 at 145-146 (1940), Member Smith suggested that a supervening certification "result[s] merely in the termination by operation of law of the outstanding collective contract or its terms where they conflict with action by the certified representative . . . , and not in a termination of all substantive terms of the contract otherwise valid." In his view the recognition clause and union shop provisions fell in the former category, but the "provisions covering wages, hours of service, and other working conditions of these employees continued in force and were binding upon the bus drivers as principals after certification."
22 The Trailer Co., 51 N.L.R.B. 1106 (1943).
23 Reed Roller Bit Co., 72 N.L.R.B. 927 (1947).
24 See 41 LAB. REL. REP. 459 at 462 (1958).
set aside the contract, or necessarily affect whatever legal rights may have survived the destruction of the union which negotiated and signed it."  

One can hardly appraise the unstabilizing effect of a new election without considering its potential impact upon an existing collective bargaining agreement. If the new representative simply administers the old agreement until it expires by its terms, the change in representatives can hardly upset existing arrangements. The uncertainties are greater if the employer has a legal duty to negotiate changes in the existing agreement. If the contract is swept away by the change in representatives, it loses force as a stabilizing influence and an upheaval may result. But whether the NLRB analysis was disingenuous or simply incomplete, the rule is well established. It was a recognized part of our labor relations law when Congress made a thorough overhaul of the National Labor Relations Act of 1947 without reversing the doctrine. We are left to reason out the consequences.

The first question is whether the employer has a duty to bargain collectively with the new representative about subjects covered by the contract with the old bargaining agent. In *American Seating Company* the Board unanimously held that a refusal to bargain under these circumstances would violate section 8(a)(5):

"... if a newly chosen representative is to be hobbled in the way proposed by the Respondent [i.e., by binding it to the old contract], a great part of the benefit to be derived from the no-bar rule will be dissipated. There is little point in selecting a new bargaining representative which is unable to negotiate new terms and conditions of employment for an extended period."  

Member Rogers has indicated a disposition to change the rule, and the conservative Republicans occasionally propose its overturn by legislation. Thus far, however, the *American Seating* doctrine

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23 E.g., Container Corp., 61 N.L.R.B. 823 at 827 (1945).
24 Indeed it may be argued that §8(d) implicitly approved the doctrine in its concluding clauses. See note 30 infra.
26 Id. at 255.
27 During the consideration of the Kennedy-Ives bill in the Senate there were proposals to overturn the contract bar rule so that elections might be held at any time in interests of "union democracy," but to preserve the old contract until it expired by its terms in the interest of "stability." The amendments were defeated—I think wisely. The NLRB is apparently considering imposing this rule upon unions in cases in which a schism removes the normal contract bar to an election. See 41 Lab. Rel. Rep. 459 (1959).
stands as the latest NLRB ruling and while it has not been sub-jected to judicial review, one may safely hazard the guess that the courts will approve it for reasons stated below.\textsuperscript{30}

The critical question in comparing ordinary contract law to the evolving law of collective bargaining agreements is whether any obligations under the existing agreement survive the superven­ving certification. The \textit{American Seating} doctrine does not logically compel an affirmative answer because the employer might have a duty to bargain in good faith about proposed changes in terms and conditions of employment even though the contract remained in force and would continue to govern plant relationships except as changes were mutually agreed. On this question the books afford no precedent.

To make the issue concrete, suppose that an employer and the United Automobile Workers execute a four-year contract which fixes $2.00 an hour as the wage rate for assembly-line workers and $2.75 an hour for maintenance electricians. The contract provides pension and insurance benefits financed by matching payments of 7½ cents an hour with the employees' share deducted from their wages. A "no strike" clause provides, "The union promises that it will not call or sanction, and on behalf of the employees promises that they will not engage in, any strike, slowdown or other interruption of work during the term of this agreement."

\textsuperscript{30} See pp. 11-14 infra. There is also room for arguing that NLRA §8(d)(4), 61 Stat. 148 (1947), 29 U.S.C. (1952) §158(d)(4), implies congressional approval of this conclusion. Section 8(d) provides that a bargaining representative which is party to an existing collective agreement shall be deemed guilty of an unfair labor practice unless it gives notice of the desire to terminate or modify an existing contract, offers to meet and confer for the purpose of negotiating a new contract, and then "continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later." The next sentence provides that the foregoing duties "shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees. . . ." It is fair inference that the new representative is free to bargain and, so far as the NLRA is concerned, free to strike uninhibited by the old contract. The sentence also goes on to declare that "the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be re-opened under the provisions of the contract."

Although it does not compel the conclusion, the juxtaposition of these passages suggests that the draftsman assumed that a party would be required to discuss modification of the terms and conditions of employment in an existing contract upon the certification of a new representative.
After two years the International Brotherhood of Electrical Workers is certified as the bargaining representative of the maintenance electricians. Three ensuing questions deserve consideration.

(1) What remedies has the employer if the IBEW calls the electricians out on strike in support of a demand that their wages be raised from the $2.75 fixed in the UAW contract to $3.00 an hour? IBEW made no promises to the employer and while the law might conceivably compel the new representative to assume all the obligations of the old agreement, this hypothesis is inconsistent with the rule that it may bargain for new terms of employment. The obligations of the employees are less certain, for the UAW may well have had the power to bind the electricians as principals to obligations not released by the change of agents. If the conventional rules apply, the electricians could therefore be enjoined from striking in breach of contract and the IBEW from inducing the breach.

(2) After the certification would the employer be legally free to reduce the electricians' wages to $2.60 an hour—fifteen cents below the rate fixed in the UAW contract—as soon as it satisfied the duty to bargain with IBEW before taking unilateral action? If an electrician thought that he was underpaid, might he sue for breach of contract? These questions are not quite the same as the first inquiry because the intervening certification might be held to give the new bargaining representative an election to accept or disaffirm the old contract in the manner of a debtor in a reorganization proceeding.31

(3) What becomes of the UAW contract in relation to the segments of the old bargaining unit with respect to which UAW continues to be the bargaining representative? UAW might argue that any change in the electricians' wages or conditions of employment upsets intraplant relationships which were so basic to the old agreement that their disturbance discharges its obligations.

I am inclined to think that the law will ultimately be that the UAW contract is terminated, so far as the electricians are concerned, immediately upon the NLRB determination that the electricians have changed their group organization and chosen a new representative. There are three reasons for this conclusion.

First. Many important parts of the UAW contract cannot

316 COLLIER, BANKRUPTCY, 14th ed. (Moore & Oglebay) §3.23 (1957).
possibly be applied to the electricians without ignoring the NLRB certification. The recognition clause is a promise to bargain exclusively with the UAW, which could not be observed after the certification without violating section 8(a)(5). It would be highly incongruous, although probably not illegal, to continue to require electricians to maintain UAW membership as a condition of employment or to check-off UAW dues. In the *Modine Mfg. Co.* case the Sixth Circuit held that a labor union retains no rights under a collective bargaining agreement after it has been superseded as the employees' representative.\(^{32}\)

Possibly the parts of a collective bargaining agreement which confer rights upon the old representative as an organization can be severed while preserving the remainder,\(^{33}\) but I am inclined to think that once the obligations of the union shop, the check-off and the recognition clause have been swept away, the other clauses fall with them. Many substantive provisions are intertwined with the identification of a particular representative. In our hypothetical case there is a promise to make payments into a UAW trust fund for providing welfare and pension benefits. Surely the electricians would not continue to pay into a trust fund administered by UAW, yet if those payments were suspended the whole question of wages should be reopened, for the suspension would alter the burdens and benefits of the entire agreement.

Second. There are often clauses in a collective bargaining agreement which could be lawfully applied after an intervening certification but which would scarcely fit the new conditions. This is especially true in a case of craft severance. One can hardly imagine a small unit of pattern makers handling grievances under the complex provisions of the General Motors contract. Seniority clauses which were suitable while all the production and maintenance workers were in a single bargaining unit might become highly inappropriate after severance. The old union might have been equipped to participate in a complicated job evaluation and rating plan while the new union commands neither the skill nor the interest.

Third. Employees frequently change representatives because they are dissatisfied with existing substantive conditions of employ-

\(^{32}\) Modine Mfg. Co. v. International Assn. of Machinists, (6th Cir. 1954) 216 F. (2d) 326.

\(^{33}\) See note 21 supra.
ment and not merely with the manner in which their previous representative administered the agreement. As a matter of practical politics the new union must show that it can render better service and this requires making some kind of changes regardless of whether they actually benefit or merely seem to benefit the employees. Of course it might be argued that once the employees have become parties to a contract as principals, their dissatisfaction with substantive terms of employment is irrelevant so long as the contract endures. The question then becomes whether the law can force adherence to the old arrangement and still preserve a sound, efficient production unit governed with some measure of industrial justice. My only contention is that it is unrealistic to attempt to separate the question whether a new election shall be held from the question of the continued effectiveness of the old agreement. Once it is decided to certify a new representative termination of the old agreement is a practical necessity.

I know of no satisfactory way in which to explain this result in terms of normal contract theories. Possibly one could say that continued representation of the employees by the union which signs the contract is an implied condition of all its obligations somewhat as the survival of a particular soloist may be an implied condition of a contract for a concert. The explanation would not suffice, however, if the terms of the collective agreement negated the implication; and it seems unlikely that the law will permit the parties to change the rule by private agreement.

In a number of cases the NLRB argued that a long term contract did not bar an election because it was "of unreasonable duration," thereby implying either that the representative had exceeded its authority or else that the agreement was against public policy. Member Reilly elaborated the first alternative at some length in a dissenting opinion in Container Corporation, saying in part, "I have always thought . . . that our justification rested upon the theory that these were not valid contracts and, hence, not a bar to a present redetermination of the bargaining representative."

There are two difficulties with attributing the ineffectiveness of the contract to a defect in the agent's authority. First, it does

84 6 CORBIN, CONTRACTS §1334 (1951).
85 NLRB SEVENTH ANNUAL REPORT 55 (1942).
86 61 N.L.R.B. 823 at 829 (1945).
not explain all the cases. The termination of the contract by a new certification after a schism\textsuperscript{37} or the disintegration of the incumbent union\textsuperscript{38} cannot be explained by any original defect in authority of the incumbent unless we are simply to tuck all our conclusions into the premise. Second, if the representative lacks authority to negotiate a contract for more than a reasonable period, then the contract must cease to bind the employer regardless of which union wins the election or even if there is no election. The third person can take advantage of defects in the authority of an agent as well as the principal.

There is no greater comfort in the suggestion that a contract is discharged upon a supervening certification because all contracts are subject to changes in domestic law or the exercise of rightful governmental authority.\textsuperscript{39} The problem is not whether the existing contract excuses observance of a government mandate or even whether the government mandate terminates the contract. The problem is how are we to explain and fit into a coherent body of law the government mandate which permits employees to choose new representatives under specified conditions and thus gain release from a contract which would continue to bind them if the representative had not been changed. The only possible explanation which I can see is that the rules necessary to group organization and collective bargaining require us frankly to disregard some of the normal rules of contracts and agency and to devise special corollaries to the propositions articulated by Congress and the National Labor Relations Board as its delegate.

III

The ease with which one can show that collective bargaining agreements have characteristics which preclude the application of some of the familiar principles of contracts and agency creates the danger that those who are knowledgeable about collective bargaining will demand that we discard all the precepts of contract law and create a new law of collective bargaining agreements. I have already expressed the view that the courts would ignore the plea but surely it is unwise even if they would sustain it. Many legal rules have hardened into conceptual doctrines which lawyers

\textsuperscript{37} Brenizer Trucking Co., 44 N.L.R.B. 810 (1942).
\textsuperscript{38} Container Corp., 61 N.L.R.B. 823 (1945).
\textsuperscript{39} See, e.g., American Seating Co., 106 N.L.R.B. 250 at 254, n. 22 (1953).
invoke with little thought for the underlying reasons, but the doctrines themselves represent an accumulation of tested wisdom, they are bottomed upon notions of fairness and sound public policy, and it would be a foolish waste to climb the ladder all over again just because the suggested principles were developed in other contexts and some of them are demonstrably inapposite. Any careful student of contracts would tell us that there are as wide differences in the substantive rules and precepts of interpretation applicable to different kinds of contracts as there are between what labor relations specialists call “ordinary contracts” and collective bargaining agreements. A long term requirements contract poses different problems from the sale of Blackacre. A contract to build a house is not a contract of marriage. Should not our attitude be one of inquiry into the pertinency of the reasons for each contract rule? Some contract rules stand up well in the new environment as I shall endeavor to show in this portion of my paper. They appear to be those which derive from functional aspects of commercial contracts that are also important characteristics of collective bargaining agreements. The doctrine of failure of consideration and the element of “bargain” or “exchange” furnish a prime illustration.

The idea of “exchange” lies behind a substantial part of the law of contracts. Section 266 of the Restatement of Contracts states that, with two immaterial exceptions, “In all bilateral contracts where the only consideration on each side consists of promises, all the promises on one side taken collectively and all the promises on the other side taken collectively are promises for an agreed exchange: . . . ”

The importance of the rule is that it makes the duties of the contracting parties mutually dependent. Section 274 states, “In promises for an agreed exchange, any material failure of performance by one party not justified by the conduct of the other discharges the latter’s duty to give the agreed exchange even though his promise is not in terms conditional. An immaterial failure does not operate as such a discharge.”

Since a collective bargaining agreement has a strong element of exchange, there would seem to be no a priori reason not to follow these doctrines whenever there is a breach. Surely the notion that it is unjust to require a person to perform his promise when he will not receive the agreed exchange is as applicable to management and labor as it is to commercial enterprises. There will be
differences, to be sure, in the way the rule works out, as I shall show in a moment, but the differences can be worked out in determining when the failure of consideration is "material."

The application of ordinary contract principles would have avoided the creation of ill-starred precedent in the *Mastro Plastics* case. During the term of a collective bargaining agreement with the United Brotherhood of Carpenters, Mastro Plastics Corporation engaged in a vigorous campaign of unfair labor practices designed to oust the Carpenters as bargaining representative in favor of another union. The campaign reached a climax with the discharge of Ciccone, a vigorous adherent of the Carpenters. The employees struck in protest. Mastro discharged the strikers, who later sought reinstatement by the NLRB on the ground that the strike was caused by unfair labor practices. One defense was that the strike violated a clause in an unexpired collective bargaining agreement by which the union agreed "to refrain from engaging in any strike or work stoppage during the term of this agreement." The NLRB overruled this defense on the ground that the "no strike" clause was to be interpreted as coextensive with the arbitration clause, which covered "differences . . . as to the meaning and application of this agreement. . . ." The court of appeals sustained the Board, saying:

"The right of employees to strike in resistance to unfair labor practices by an employer is a fundamental one which the statute recognizes and no contractual waiver of that right is to be inferred from general provisions in a collective bargaining contract which do not make it clear that strikes caused by the employer's unfair labor practices were included in the prohibition."

The Supreme Court held that "the contract did not waive the employees' right to strike solely against the unfair labor practices of their employers." Even the dissenting justices agreed with this conclusion.

Such unanimity should forestall criticism, but I submit that the judicial interpretation of the undertaking "to refrain from
engaging in any strike or work stoppage during the term of this agreement" both violates the plain and inherently sensible meaning of the words and also threatens normal collective bargaining practices. In discharge cases the claim is often made that the supervisor was motivated by distaste for the employee's activities in pressing grievances or otherwise assisting the union. Management is not infrequently charged with taking unilateral action in violation of a contract and presumably the unilateral action is also an unfair labor practice. I had always supposed, and I think that both companies and unions have usually supposed, that to call a strike by reason of isolated discriminatory discharges or unwarranted bits of unilateral action would violate a typical "no strike" provision. I still think that this attitude is the only one consistent with sound labor-management relations. The Supreme Court's approach, however, rejects this view for it leaves no room for distinctions based upon the seriousness of the employer's unfair labor practice. Surely a promise not to call "any strike or work stoppage" cannot be interpreted to cover strikes against little unfair labor practices but not against big ones.

The application of familiar contract principles would have led to the same result without distorting the words or creating the embarrassing precedent. By executing the collective bargaining agreement Mastro impliedly promised not to engage in conduct attacking the existence or representative status of the Carpenters Union. The words of a contract do not express all its obligations. It is an ancient principle that, "where a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct the other in doing that thing."\(^{44}\) Surely a gross attack upon the existence of a labor union increases the difficulty of performing its contract obligations. Williston tells us that there is also in every contract "an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing."\(^{45}\) A successful attack upon the status of the collective bargaining representative obviously deprives it of the fruits which


it expects to receive from the collective bargaining agreement. Under the doctrine that a material failure of consideration discharges the promise, the Carpenters Union was excused from performance of the "no strike" clause if Mastro's breach of its implied obligations was material. The unfair labor practices were numerous. They were part of a deliberate campaign to introduce another union as bargaining representative. Therefore the breach was undeniably material.

Analysis in terms of familiar contract principles thus not only sustains the result in the Mastro Plastics case but it also provides a more useful technique for future cases. A single discriminatory discharge or bit of unilateral action would not be a material breach and would not excuse counter-performance. More serious unfair labor practices would be material. Rules have been stated for determining materiality but in the end the test is whether it will "be more conformable to justice in the particular case to free the injured party [i.e., the union], or, on the other hand, to require him to perform his promise, in both cases giving him a right of action if the [company's] failure to perform was wrongful."46

Although the element of "exchange" makes the doctrines of dependent covenants and failure of consideration applicable to a collective agreement, some of its other qualities should affect the manner of their application. A collective bargaining contract is made to be broken. The number of people involved, both as employees and as supervisors, makes large and small violations inevitable. This is one reason for the grievance procedure and arbitration. Collective agreements are negotiated for substantial periods after much travails. There are enormous pressures to reach agreement. There will be no rules to govern the enterprise if the contract is set aside. These are proper factors to evaluate in determining whether a breach is material. They argue for continuing the contract and leaving the injured party to his legal or contractual remedies. Consequently, I am skeptical of the trend toward holding that a strike in breach of contract automatically gives the employer the right to terminate the agreement.47 There would seem to be room for judgment based upon the length of the strike,

46 Contracts Restatement §275, comment a (1932).
the number of employees affected, the injury to the employer, the
degree of fault upon the part of the union, and the likelihood that
the contract will be honored for the remainder of its term. Perhaps
the line will ultimately be drawn between a more or less sponta­
aneous uprising and a planned resort to economic pressure
sanctioned by union officials in the deliberate disregard of their
written obligation. In any event the judicial fault, if there is any,
is one of judgment and not in choosing the conventional contract
method of analysis.

IV

There are rules applicable to "common" or "commercial"
contracts which can be helpful in resolving cases arising under
collective bargaining agreements because they furnish the con­
ceptual tools of analysis even though the ultimate answer turns
less on the concepts than on evaluation of the functional aspects
of the agreement. This point is illustrated by the question whether
the union or the individual employee is the proper party to
sue to enforce, or to settle, a claim under a collective bargaining
agreement.

One early conceptual view was that although a collective
bargaining agreement gave no rights to individual workers, when­
ever a man went to work his individual contract incorporated the
union agreement as a local custom or usage so that every failure
to pay wages in accordance with the collective agreement was a
breach of the individual contract of employment.48 Of course the
parties to an ordinary commercial contract may stipulate that their
agreement does not include local usages but this difficulty was
surmounted by saying that under the Railway Labor and National
Labor Relations Acts the collective agreement is included in each
individual's contract of employment by force of law somewhat
as a carrier's tariff or the statutory provisions of an insurance
policy.49 Under this view, which was adopted by the Court of
Appeals for the Third Circuit50 and followed by Justice Reed in
the Westinghouse case,51 the legal relation between the employer,

49 J. I. Case Co. v. NLRB, 321 U.S. 332 at 334-335 (1944).
50 Assn. of Westinghouse Salaried Employees v. Westinghouse Electric Corp., (3d
Cir. 1954) 210 F. (2d) 623.
51 Assn. of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348
the union and the employees is conceived as two bilateral contracts. One contract—between the employer and the union—is made up partly of promises running to the benefit of the union as an organization, like the check-off or closed shop clauses, which the union alone can enforce, and partly of provisions relating to wages, hours and job security which the employer promises to incorporate in a second bilateral contract—the contract of hire between the employer and the individual employees. Under this theory the union may sue for breach of the first contract but since it is not a party to the second contract, only the individual may sue for the breach of promises running to his benefit. And since the claim for compensation is the individual's it must follow that the union has no power to make a binding settlement.

A second theory holds that a collective bargaining agreement is a third-party contract with the employer as promisor, the union as promisee, and the employees as third-party beneficiaries. In the Westinghouse case Circuit Judge Staley argued that this description does not fit the facts because such promises as the union shop and check-off do not benefit individual workers, but surely some of the promises in an instrument may run to the benefit of third parties while others benefit the promisee alone. The other objection to the third-party beneficiary theory—that the individual's labor is the sole consideration for the obligation to pay wages—is hardly an accurate description of the facts. In negotiating a collective agreement the employer promises a given wage scale as part of a package deal in return for various undertakings by the union including the promise not to strike, and it is rather unlikely that he would have agreed to the same wage scale without the union's promises. The individual's furnishing labor is consideration, but not the only consideration, for the employer's promise to pay. Under this theory either the union or the employee may sue for breach of the promises inuring to the benefit of individual workers. When the individual sues, judgment may be entered for the amount due him. When the union sues, the decree may be for spe-

specific performance or the company can be required to pay the money into the registry of court for distribution to individual workers in supplementary proceedings. In a suit by either an individual or the union alone, the judgment would not bind the absent party but the employer could protect himself against a second suit by impleading the absent party.

Third, the legal situation under a collective bargaining agreement may be somewhat loosely compared to a trust with a chose in action as the res. In this view the bargaining representative, which is subject to fiduciary obligations, holds the employer’s promises in trust for the benefit of the individuals. The trust is a common legal device for handling situations in which a single obligee is empowered to play a continuing role in the administration of contracts intended for the benefit of a large and ever changing group of beneficiaries who may have divergent interests. Massachusetts business trusts and mortgage indentures furnish familiar illustrations. According to this analogy the union would ordinarily be the only proper party to bring an action for breach of the collective agreement and the judgment would bind the individuals. The union can enter into binding settlements with the employer. The individual’s remedy is to show that the union’s handling of the claim did not meet its fiduciary obligations. In the latter case the individual could sue the union to compel it to perform its duties or he could join the union and the company as co-defendants and seek a judgment for the money alleged to be due him.

Such theories are highly useful in determining rights and remedies under collective bargaining agreements. They furnish tools of analysis. They help us to perceive the implications of particular issues—to see the relation between problems—so that we may achieve consistency and integrity instead of an illogical mass of ad hoc decisions. They remind us of the flexibility and adaptability of the common law. They become dangerous only when artificially selected concepts are allowed to dictate the decision. Any of the three theories is a sound abstraction. In the final analysis one must deal

56 See cases cited note 55 supra.
59 Judgments Restatement §§85 (1942).
60 Trusts Restatement §§192, 322 (1935); 2 Scott, Trusts §192 (1939); 3 Scott, Trusts §322 (1939).
61 Cases dealing with the remedy for breach of the duty of fair representation are collected in Cox, "The Duty of Fair Representation," 2 Villanova L. Rev. 151 at 173-177 (1957).
with the underlying questions of policy which make one theory more appropriate than another. Logic cannot replace wisdom.

Thus we are led back to consideration of the functional nature of a collective bargaining agreement. What are its purposes? What does it do? What legal conclusions about the right to enforce and settle claims against the employer result in better performance of the functions of the agreement?

In the community of the shop the collective bargaining agreement serves a function fairly comparable to the role of the Federal Trade Commission Act or National Labor Relations Act in the whole community. It is an instrument of government as well as an instrument of exchange. The point is highly important both in evolving substantive law and, as I shall seek to show later, in matters of interpretation.

The governmental nature of a collective bargaining agreement results partly from the number of people affected and the diversity of their interests. Harry Shulman aptly suggested other determining conditions:

"[The collective bargaining agreement] is not the typical offer and acceptance which normally is the basis for classroom or text discussions of contract law. It is not an undertaking to produce a specific result; indeed, it rarely speaks of the ultimate product. It is not made by parties who seek each other out to make a bargain from scratch and then go his own way. The parties to a collective agreement . . . meet in their contract negotiations to fix the terms and conditions of their collaboration for the future." 62

Perhaps "collaboration" is too optimistic a word. Perhaps there is a "typical" contract only in the sense that economists have a model. The point which Shulman caught and I am seeking to emphasize is that the collective agreement governs complex, many-sided relations between large numbers of people in a going concern for very substantial periods of time. "The trade agreement thus becomes, as it were, the industrial constitution of the enterprise setting forth the broad general principles upon which the relationship of employer and employee is to be conducted." 63

There are important differences of opinion as to the scope of

62 The quotation is from a mimeographed address entitled "The Role of Arbitration in the Collective Bargaining Process" which is used in courses in the Harvard Trade Union Program. I believe that it must have been delivered at a meeting of the National Academy of Arbitrators, but apparently it has not been published.

collective bargaining agreements. Sometimes they are viewed as tightly drawn concessions covering only specifically designated portions of the broad range of interests which both management and workers have in the conduct of the enterprise, leaving the managers to govern the rest. Others insist that collective agreements establish a framework for all matters of common interest. I shall comment on this issue later. Here I wish to emphasize only the breadth and variety of the subject matter covered under even the narrowest conception of a labor agreement. Furthermore, since it also operates prospectively over a long period, a labor agreement must provide for countless unforeseeable contingencies.

One consequence is that many provisions of the labor agreement must be expressed in general and flexible terms. The concept of "just cause" is an obvious illustration. Sometimes it is not possible to do more than establish an appropriate set of procedures for resolving certain issues; witness the provisions for fixing work loads and piece rates in many of the textile contracts. A collective agreement rarely expresses all the rights and duties falling within its scope. One simply cannot spell out every detail of life in an industrial establishment, or even of that portion which both management and labor agree is a matter of mutual concern.

It is largely for these reasons that collective bargaining agreements provide their own administrative or judicial machinery. Of course arbitration long antedates collective bargaining and there are thousands of commercial contracts and construction contracts under which arbitration is a daily occurrence. Sometimes, as in a large scale government construction contract, the functions of the "arbitrator" may resemble his functions under a labor agreement. By and large, however, there is this distinct difference: the commercial arbitrator finds facts—did the cloth meet the sample—while the labor arbitrator necessarily pours meaning into the general phrases and interstices of a document written somewhat in the generalities of basic regulatory legislation. Furthermore, because management and employees are involved in continuing relationships, it is at least possible for the arbitrator's rulings to become a body of subordinate rules for the future conduct of the enterprise. I say "subordinate rules" because the contract may change them. They are rather like the judge-made law—the rubrics which the judges put upon statutes, the precepts which govern where the statute is silent, the context into which new bits of statutory law will be intruded.
Of course this body of shop law is not made up exclusively or even largely of arbitration decisions. "The parties to a collective agreement start in a going enterprise with a store of amorphous methods, attitudes, fears and problems."64 The agreement "is based upon a mass of unstated assumptions and practices as to which the understanding of the parties may actually differ."65 The assumptions and practices which have prevailed in the past and as they develop in the future are not only the background of the agreement but the flesh and blood which gives it meaning.

Individual workers would receive the most protection against arbitrary treatment under the theory that the provisions of a collective bargaining agreement relating to wages and hours become effective by incorporation into bilateral contracts of hire between the employer and each employee. On the other hand it seems to me that giving the union control over all claims arising under the collective agreement comports so much better with the functional nature of a collective bargaining agreement as to make the third legal theory the most satisfactory. Allowing an individual to carry a claim to arbitration whenever he is dissatisfied with the adjustment worked out by the company and the union treats issues which arise in the administration of a contract as if there were always a "right" interpretation to be divined from the instrument. It discourages the kind of day-to-day cooperation between company and union which is normally the mark of sound industrial relations—a relationship in which grievances are treated as problems to be solved and contract clauses are only guideposts in a dynamic human relationship. When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group,66 but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside arbiter.

There are other considerations to be evaluated in resolving

64 Note 62 supra.
65 Ibid.
66 The limits should be imposed under the duty of fair representation. See Cox, "The Duty of Fair Representation," 2 Villanova L. Rev. 151 (1957).
this issue. The only point upon which I wish to insist is the relevance of the governmental aspects of the collective bargaining agreement in deciding who may assert and compromise claims for its violation. I dwell upon them partly for this reason and partly because they also lead to problems of contract interpretation with which I shall close this paper.

V

The governmental nature of a collective bargaining agreement should have predominant influence in its interpretation. The generalities, the deliberate ambiguities, the gaps, the unforeseen contingencies, the need for a rule although the agreement is silent—all require a creativeness quite unlike the attitude of one construing a deed or a promissory note or a three-hundred page corporate trust indenture. Perhaps the requisite attitude can be suggested by likening the interpretation of a collective agreement to the construction of a basic statute creating an administrative agency, although the analogy may assume too readily that the "look-in-dictionary" school of statutory interpretation has given way to willingness to read basic statutes "not as theorems of Euclid but with some imagination of the purposes which lie behind them."

The interpretation of a statute is the proliferation of a purpose. In a sense it is misleading to speak of the legislative intent. No one supposes that the tens of senators and hundreds of representatives who vote for a bill have one common state of mind. I trust, also, that arbitrators who speak of "the intent of the parties" do not mean to imply that they are concerned with the secret, unexpressed intent of either party. Those who listen seriously to the testimony of negotiators concerning what they understood or supposed or intended run the risk of imposing upon one side the unilateral suppositions of the other. The true standard of interpretation must be objective. To speak of intent as if the congressmen or negotiators had reached a conclusion upon the specific issue is also misleading. The troublesome issues during the administration of a statute or contract are usually those which the

68 Lehigh Valley Coal Co. v. Yensavage, (2d Cir. 1914) 218 F. 547 at 553, cert. den. 235 U.S. 705 (1915).
69 Contracts Restatement §20 (1932).
authors either refused to face or failed to anticipate. Yet to speak of intent, when the word is properly understood, serves two useful functions. It reminds the interpreter that the statute or contract is a purposive instrument. The metaphor also cautions the interpreter that it is his duty to effectuate the will of the Congress—or of the parties to the contract—even though he himself might reach an infinitely wiser decision. What the interpreter must strive to do, therefore, is to give the instrument the application which the author would have provided if he had consciously determined the issue. 70

In the case of a statute the best guide to this meaning is its policy or purpose. Behind the words there usually lies a general aim, an objective, which embodies specific meanings, half-understood, half-unarticulated; and by these one may judge specific cases.

"Life overflows its molds and the will outstrips its own universals. Men cannot know their own meaning till the variety of its manifestations is disclosed in its final impacts and the full content of no design is grasped till it has got beyond its general formulation and become differentiated in its last incidence. It should be, and it may be, the function of the profession to manifest such purposes in their completeness if it can achieve the genuine loyalty which comes not from obedience, but from the according will, for interpretation is a mode of the will and understanding is a choice." 71

Many questions of interpretation can be handled in this fashion under collective bargaining agreements. The most ambiguous phrase may be directed to a practical problem, and it is an obvious mistake to read the words without attention to the problem. Because the problems are usually unfamiliar and are often subtle,

70 As good an illustration as any is NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). The issue was whether newsboys could properly be found to be "employees" within the National Labor Relations Act despite the employer's want of control over the manner in which the work was done. According to the conventional common law view there is no employment relation unless the putative employer enjoys a right of control. The NLRB argued for a broader standard which would determine the applicability of the statute in doubtful situations by the underlying economic facts showing whether the particular workers were subject to evils the statute was intended to eradicate and whether the remedies were appropriate rather than by technical, previously established legal classifications. The Supreme Court observed that the Wagner Act sometimes adopted and sometimes rejected established legal classifications. In choosing between the alternatives the Court inquired which interpretation was the more consistent with the fundamental purposes of the act, and therefore rejected the conventional, common law definition.

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counsel may find it hard to persuade the judge to read the provi­
sions of a labor contract “not as theorems of Euclid, but with
some imagination of the purposes which lie behind them.” It may
sometimes be extraordinarily difficult to convey a sense of purpose
through testimony, briefs and oral argument; but these are all
familiar tasks of advocacy which hardly affect the nature of the
issues.

Unfortunately, many of the most important questions of in­
terpretation are not soluble by reference to the fundamental
purposes of the collective agreement—at least not in the sense in
which that term is usually understood. The difficulty arises from
the fact that management and labor often have conflicting aims
and objectives, and the interpretation put upon the contract may
depend upon which objective is chosen as the major premise. The
point is illustrated by a dispute which I heard as arbitrator some
years ago over the meaning of a clause in the grievance procedure.
The clause stipulated that a grievance which could not be settled
with the foreman should be taken up in a second step—“Between
the Shop Committee (including the steward in the department
where the grievance originated) and the Division Superintendent.”

The contract was executed after a long strike which almost
wiped out the local union. The International took the president
of the local out of the plant in an effort to rebuild and put her on
a full-time salary with the sole task of serving the employees in
the mill in question. As an employee she had been on the shop
committee. TWUA wished her to continue to be present at the
second step of the grievance procedure. The company objected on
the ground that one who was not an employee could not be a
member of the “shop committee.” There is some force to the
verbal argument but it can be countered with the contention that
the clause should not be taken as an exclusive list of the persons
who might participate because this interpretation would exclude
everyone on the company’s side except the division superintendent.
Verbally the case was a stand-off. The president of the local union
had some familiarity with the ways of collective bargaining; she
was self-possessed, quick and articulate. The employees on the
shop committee were unusually inexperienced and inarticulate. If
one started from the premise that the grievance procedure was
intended to be a forum in which both sides of a question should
be presented effectively in the hope of reaching a reasoned deci­sion, the local president should be allowed to attend with, or as
a member of, the shop committee. The third and fourth steps would be handled by officials of the International Union. I assume that this was roughly the purpose which the union attributed to the grievance procedure. The employer’s reputation was strongly anti-union. At this particular mill, one of its few unionized plants, the union had almost disintegrated because of the strike. It seems realistic to suppose that the company hoped that the union’s administration of the contract would be so inefficient and inept that the employees would lose interest. From this premise one would logically come to the view that Step 2 should be narrowly interpreted in order to keep the union ineffective. Thus the issue really turned upon whether one took the union’s purpose or the company’s purpose as the guiding premise. I ruled for the union and would do so again, but candor compels me to recognize that this conception of the collective bargain as an instrument intended to operate effectively was imposed upon the parties from outside in defiance of the employer’s intent, which must have been known to the union, because the arbitrator chose to be guided by the national labor policy or perhaps by a personal predilection for effective union participation.

Although the preceding illustration may seem unimportant, the type of conflict which it illustrates lies at the bottom of many of the toughest problems of interpretation. Let me use two common examples, one involving discharge and the other subcontracting, in order to bring out the difficulty.

Suppose that an employee is discharged for what the union thinks is insufficient cause during the term of a collective bargaining agreement which contains most of the customary provisions, including recognition, seniority, grievance, and arbitration clauses but which imposes no express limitation upon the management’s power to discharge. Of course the exact words of the contract make a difference but one reading the opinions gets the feeling that it is not the language which leads courts to deny relief while arbitrators examine the merits of the discharge. In Coca-Cola Bottling

Co. of Boston Saul Wallen reasoned that "... the meaning of the contract, when viewed as a whole, is that a limitation on the employer's right to discharge was created with the birth of the instrument. Both the necessity for maintaining the integrity of the contract's component parts and the very nature of collective bargaining agreements are the basis for this conclusion." 74

There is little force to the argument that the implication of a clause limiting discharges to cases of just cause is necessary to preserve the integrity of a seniority clause or grievance procedure. The integrity of the seniority and grievance clauses would not be affected by the arbitrary and capricious discharge of a junior employee who had no grievance.

Mr. Wallen's reliance upon "the very nature of collective bargaining agreements" cuts much deeper. He thereby asserts that a company which signs a collective bargaining agreement automatically assumes some obligations and submits certain management actions to the jurisdiction of the arbitrator even though the agreement says nothing about them. The dissenting member of the arbitration board spoke the truth when he protested that the majority "have taken a contract which contained no language which could possibly be construed as a limitation on the Company's right of discharge and have implied a very stringent limitation on that right," 75 but this assertion did not meet the basic contention that employees had rights cognizable by the arbitrator in addition to those which the contract expressly gave them.

Some of the subcontracting cases which have been so much debated in recent years raise the same kind of issues although others may turn upon narrower reasoning. Suppose that a manufacturer of heavy steam valves is a party to a contract which makes no mention of subcontracting but contains, in addition to the arbitration clause, such customary provisions as a recognition clause, a seniority clause, a discharge clause and a schedule of wage rates. The manufacturer sublets the machining of certain parts to an independent concern instead of following his previously unbroken practice of doing all his own production. There are layoffs and a reduction of overtime. The union protests that the contract has been violated and takes the case to arbitration. There

75 Id. at 590.
is precedent for the view that subcontracting is a reserved right of management. There are also decisions upholding the union's contention on grounds reminiscent of Mr. Wallen's reasoning in the Coca-Cola case:

"... the Recognition clause, where considered together with the Wage clause, the Seniority clauses, and other clauses establishing standards for covered jobs and employees limits the Company's right to subcontract during the term of the Contract ... To allow the Company, ... to lay off the employees and transfer the work to employees not covered by the agreed standards would subvert the contract and destroy the meaning of the collective bargaining relation."

I suggested earlier that the collective bargaining agreement, unlike most other contracts, is an instrument of government because it regulates diverse affairs of many people with conflicting interests over a substantial period of time. One can phrase the basic problem of interpretation in the discharge and subcontracting cases by saying that the parties differ with respect to the kind of government which they propose to establish. Is it a monarchy except insofar as the employer has assumed the obligations explicitly stated or fairly implied from the contract? Or has the whole realm of matters of mutual concern to employer and employees been brought within the joint authority of the company and union under a regime in which the legislative process is performed in annual contract negotiations and the executive and judicial process is carried out under a grievance procedure ending in arbitration? Usually the realm of matters of mutual concern is divided, part to be regulated by the employer and part to be governed by joint authority under the regime established by the contract. The issue then becomes, which matters are regulated by one form of government and which by the other. Did the Coca-Cola contract move discharges into the area of collective bargaining, i.e., of joint responsibility, or were they left to the sole responsibility of man-


agement? What about subcontracting? It is to the basic conflict over the size of the area subject to joint responsibility that I refer when I speak of the lack of a common purpose on the part of both management and labor to which questions of interpretation can be referred. Going a step further, I suggest that this is the very essence of large parts of a collective bargaining agreement—it has the nature of an armed truce in a continuing struggle, yet the armistice line has not been put on a map.

Before discussing the significance of this highly tentative conclusion I should like to insist upon two distinctions. First, I submit that problems of the kind illustrated by the discharge and subcontracting cases will sometimes yield to analysis in terms of familiar contract principles. The notion that ordinary commercial contracts spell out all their obligations is a silly canard. Every contract, whether a typical commercial contract or a labor agreement contains "an implied covenant of good faith and fair dealing." One who sells a retail milk business impliedly promises that he will not solicit former customers. A lease of coal lands in exchange for a schedule of royalties implies an obligation to mine the coal diligently. Under the Coca-Cola-type contract there should be no hesitation in setting aside a discharge aimed at circumventing seniority or defeating a grievance even though the contract says nothing about discharges because such a discharge destroys the right of the employees to have the fruits of their bargain. Upon this familiar principle of contracts one might fairly conclude in the absence of other evidence that the provisions of a collective bargaining agreement establishing wages and labor standards imply an obligation not to seek a substitute labor supply at lower wages or inferior standards. The implied promise would prohibit subcontracting for this purpose. But there are limitations to the covenant of honesty and fair dealing. A manufacturer who sells goods when the price is high is not precluded from doubling his output because this would impair the value of the buyer's purchase. A collective bargaining agreement does not imply a promise that the employer will not deprive the union and the employees of its benefits by closing an obsolete plant or dropping an unprofitable line of business. Similarly, the implied

80 Mendota Coal & Coke Co. v. Eastern Ry. & Lumber Co., (9th Cir. 1931) 53 F. (2d) 77.
covenant of good faith and fair dealing can hardly be supposed to reach subcontracting which is based upon business considerations other than the cost of acquiring labor under the collective agreement. In such a case either management is free to act or some limitation must be found in the very nature of a collective bargaining agreement.

The second distinction which I wish to press is a differentiation between (1) implying obligations within the general area of terms and conditions of employment brought under the regime of the collective bargaining agreement and (2) implying restrictions upon management by drawing the boundary line more favorably to the union. One could put the discharge and subcontracting cases in more familiar terms than I have used by saying that the critical issue is whether a collective bargaining agreement is simply a document by which the union and the employees have imposed upon management limited restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must always fail unless he can point to a specific contract provision on which the claim is founded. But this reserved-rights phraseology obscures the very distinction which I wish to press. Management and labor are certainly free to bring some areas of mutual concern under the regime of collective bargaining and to assign others exclusively to management. This is true as a matter of legal theory, and the freedom is exercised as a matter of practical living. Within the area put under the regime of collective bargaining, however, it is hardly practicable to make the contract the exclusive source of rights, remedies and duties. There are too many people, too many problems, too many unforeseeable contingencies, too many variations—one cannot reduce all the rules governing the community of an industrial plant to fifteen or even fifty pages. The logic of the governmental nature of the process of collective bargaining therefore creates a strong presumption that within the sphere of collective bargaining the parties, if they had thought about it, would have acknowledged the need and therefore the existence of a common law of the shop which furnishes the context of, and also implements, the agreement. Interpretation should give effect to this presumption arising from the very nature of a collective agreement unless the agreement states a contrary rule in pretty plain language.

A good many people experienced in management may spontaneously challenge the statement that the contract cannot be the
exclusive guide to all questions arising thereunder but I suspect that when pressed, most of them will concede the accuracy of my presumption in the only sense in which I intend it. Many contracts limit the employer's right to discharge employees to cases where there is "just cause" but say nothing about the power to impose lesser discipline. Does anyone deny an arbitrator appointed under such a contract the power to decide whether there was just cause for a disciplinary layoff even though his jurisdiction is limited to the "interpretation and application of any provision of this agreement"? Again, suppose that a contract fixes a seven-day time limit upon the appeal of grievances from the foreman's ruling and that the employee and shop steward wait ten days to appeal upon the strength of the personnel director's specific assurance that the company will not enforce the time limit. Surely there are only a few stern literalists who would deny the grievance without examining the merits if the company invoked the time limit as a bar to arbitration. The customary disposition would be to ignore the time limit upon grounds of waiver or estoppel. These doctrines obviously grant remedies, if not rights, based upon motions of justice which are not spelled out in the agreement. And does not an arbitrator resort to such a body of law when he grants reinstatement with back pay as a remedy for an unjustified discharge? 81

Occasionally arbitrators and courts have come into conflict because of the court's failure to perceive this need for an industrial jurisprudence within the area of labor-management relations brought under the joint authority of management and labor. A Remington Rand contract provided: "Seniority . . . is defined to mean length of service with the Company since the last date of hire at whatever location and in whatever capacity employed." An employee who had resigned was rehired on September 25, 1950. As a result of a mistake, however, the company record gave him the seniority date of May 21, 1945, which was the date of his original employment prior to the resignation. The erroneous date was carried forward for five years in published seniority listings. It was the basis upon which two prior grievances had been adjusted at the local level. Thereafter the company attempted to correct

the seniority date in offering an opportunity for promotion. The arbitrator held that the seniority list had become frozen despite the mistake. "[T]here must come a time when past errors which have not been challenged or corrected by either party, or by individual employees, must be accepted as the agreed understanding and no longer subject to change." 

The Supreme Court of New York vacated the award upon the employer's motion. The judge declared that the ruling "flies in the face of the words of the contract" and expressed wonderment that "highly qualified and sincere arbitrators" could have reached such a result. The explanation is both simple and revealing. The arbitrator recognized that every contract must be interpreted and applied through an industrial jurisprudence. The judge felt bound to the written word, although courts have exercised greater liberality for centuries in applying the Statute of Frauds. In my opinion the judge made a serious error.

The imperative which requires a body of "common law" in the area marked off by the contract for government under the regime established by the contract has no place in deciding what area has been marked off. There is nothing in the function of a collective bargaining agreement which makes the reserved management rights view, when confined to this issue, either more or less serviceable than the opposing view sometimes espoused by labor unions. Nor can guidance be found in an underlying purpose or intent unless those words include a purpose to strike a compromise, for on this issue management and union usually stand in opposition. Where then is the judge or arbitrator to turn in deciding the discharge or subcontracting question, or any other issue concerning the scope of area marked off for government under the contract but on which the contract is silent?

I have no answer to these questions—only a conviction that the search is one which ought to be pursued more consciously in general terms, even though the answer is the pot of gold at the end of the rainbow. Ideally the parties should write the answer into the contract, for the choice is theirs, but often the difference of opinion is too deep and too enduring for either party to express in writing even its temporary acceptance of the position of the other. While arbitrators can get along by saying that each case

must be decided on its merits, the courts can hardly be expected to accept this view unless it is made part of a coherent philosophy. And as I suggested in the beginning, LMRA section 301 and the *Lincoln Mills* decision make it impossible for arbitrators to go their separate way much longer brushing off judicial attitudes as the result of immersion in ordinary contracts and ignorance of the peculiarities of collective bargaining agreements.

One possible course is to accept the "reserved rights" view subject to the two qualifications already suggested. Most judges appear to adopt this position without the qualifications, although few of them have felt impelled to state the doctrine squarely. Professor Gregory may overstate the case when he says that apart from its unpopularity with unions the doctrine is generally accepted, but I suspect that a poll of arbitrators would give the doctrine a majority, provided that the ballot was secret. Furthermore, it is at least historically accurate to describe collective agreements as instruments by which the unions have gradually taken away the erstwhile prerogatives of management.84

The alternative may be stated as follows. Every collective bargaining agreement is by its very nature the product of conflicting desires concerning the sphere of joint government established by the collective agreement. Sometimes the sphere is expressly delineated with all the rest reserved as management prerogatives but as often as not the impossibility of making an explicit compromise, coupled with the impossibility of not reaching an agreement, results in a more or less ambiguous silence. The task of finding where the boundaries would have been drawn if the parties who signed the contract had drawn them explicitly is then a problem of interpretation within the jurisdiction of the arbitrator who is given power to decide questions concerning the interpretation and application of the agreement. For it is the agreement that draws the boundary line even though it does not draw it expressly. The interpreter must remember that the contract goes a distance but also that it stops, because it is a product of competing wills and its policy inheres as much in its limitations as in its affirmations. Nor is the interpreter left wholly without guidance. Even a vague

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84 The reserved rights theory may have to be modified in order to accommodate it to the theory of collective bargaining developed under the National Labor Relations Act. See Cox and Dunlop, "The Duty To Bargain Collectively During the Term of an Existing Agreement," 63 Harv. L. Rev. 1097 (1950). At the moment I am concerned only with what is brought under the rule of the contract.
management-functions clause suggests that the boundaries may be narrower than under a contract without it. An integrated writing clause bespeaks narrow interpretation. Surely an open-ended arbitration clause indicates a wider area of joint sovereignty than a clause limiting the arbitrator to the interpretation and application of the contract. In the discharge case it would not be implausible to conclude, if the words of the contract are otherwise blind, that review of discharges to determine whether there is just cause is more consistent with a contract granting other forms of job security and industrial justice than is the reservation of untramelled power to discharge for any reason which the employer deems sufficient. The plausibility is less, if indeed there is any, in the case of subcontracting or shift schedules.

These last suggestions are the common stuff of arbitration decisions, but there is need for a coherent rationalization if this conception of the arbitrator's task is to find its way into the law of collective bargaining agreements. The suggestions made here are hardly a beginning. A single word may be added in conclusion. In the final analysis the arbitrator or the judge must make a choice. He may be an activist and impose his view upon the agreement when its words leave scope, bringing doubtful territory into the joint realm because he thinks that he knows that this is fair and good industrial relations. A wise and respected man may do much good through this conception of the arbitrator's function. It may also be right to follow the quieter role which Learned Hand assigns a judge in interpreting a statute the reach of which was sharply disputed.

"... But the judge must always remember that he should go no further than the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop, for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for theirs; otherwise it would not be the common-will which prevails, and to that extent the people would not govern."85

The parties can make the choice when they select their arbitrator.