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The Ability of an Individual Employee to Sue His Employer on a Collective Bargaining Agreement

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NOTES AND COMMENTS

THE ABILITY OF AN INDIVIDUAL EMPLOYEE TO SUE HIS EMPLOYER ON A COLLECTIVE BARGAINING AGREEMENT

During the past fifty years a deceptive body of law has developed in respect to a suit by an employee on a collective bargaining agreement. While courts were struggling to develop theories which would give the individual legal standing to sue on such agreements, other obstacles were emerging which would tend ultimately to deprive him of the possibility of securing any satisfactory relief.

Standing to Sue

Several theories were developed early under which the individual employee could secure access to the courts. First, a collective agreement, while not thought to be itself enforceable by anyone, was considered to be a "custom or usage" which could be incorporated by the individual into his personal employment contract.[1] Second, the agreement was treated by a few courts as a "mutual general offer to be closed by specific acceptance."[2] Third, some courts thought the collective agreement itself was enforceable by the individual on the ground that the employees were parties to the agreement, the union merely negotiating it on their behalf as a duly authorized agent.[3] Fourth, a majority of courts allowed the individual to sue on the agreement itself on the theory that it was a third party beneficiary contract between the union and the employer for the benefit of the individual members of the union.[4]

Despite disapprobation by writers on the subject[5] and an occasional court,[6] these theories are still followed, the third party beneficiary theory being by far the most widely used.[7]

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1. *Hudson v. Cincinnati, N. O. & T. P. Ry. Co.*, 152 Ky. 711, 154 S. W. 47 (1913).
2. *Yazoo & M. V. R. Co. v. Webb*, 64 F. 2d 902 (5th Cir. 1933).
3. *Mueller v. Chicago & N. W. Ry. Co.*, 194 Minn. 83, 259 N. W. 798 (1935).
4. *Gulla v. Barton*, 164 App. Div. 293, 149 N. Y. Supp. 952 (3d Dep't 1914).
5. See Burstein, *Enforcement of Collective Agreements by the Courts*, 6 N. Y. U. Conf. on Labor 31 (1953); Hamilton, *Individual Rights Arising From Collective Labor Contracts*, 3 Mo. L. Rev. 252 (1938); Rice, *Collective Labor Agreements in American Law*, 44 Harv. L. Rev. 572 (1931); Witmer, *Collective Labor Agreements in the Courts*, 48 Yale L. J. 195 (1938); Anderson, *Collective Bargaining Agreements*, 15 Ore. L. Rev. 229 (1936); Gregory and Katz, Labor Law: Cases, Materials and Comments 1152 (1948).
6. See *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 210 F. 2d 623 (3d Cir. 1954).
7. Mutual general offer or custom and usage, *Gatliff Coal Co. v. Cox*, 142 F. 2d 876 (6th Cir. 1944); agency, *Hill v. United Public Workers Union*, 314 Ky. 791, 236 S. W. 2d 887 (1950); third party beneficiary, *Marranzano v. Riggs Nat. Bank of Washington, D. C.*, 184 F. 2d 349 (D. C. Cir. 1950).

Another theory has been advanced which more adequately explains the individual's standing to sue on the terms of a collective bargaining agreement.[8] Under this theory the so-called "normative"[9] provisions of the collective agreement (establishing schedules of wages, hours, and employment conditions) are by legislative declaration[10] imposed upon all employees as terms of their employment in the unit. It is not the collective agreement alone which confers rights upon the individual employees, but a combination of the agreement and the labor relations statutes which brings about such result.[11]

Although in the past the main problem of the courts was whether the individual had standing to sue, this is no longer a serious problem. Today it may be conceded that under one theory or another the courts are almost unanimous in recognizing the individual employee[12] as a proper party to bring suit on certain terms of a collective bargaining agreement.[13]

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8. See Lenhoff, *The Present Status of Collective Contracts in the American Legal System*, 39 MICH. L. REV. 1109, 1136-1138 (1941).

9. The "normative" provisions which control the individual employment relationships are to be distinguished from the "contractual" provisions which govern the conditions and obligations to be performed by the contracting parties themselves. To these latter provisions ordinary rules of contract law apply. See MATHEWS, LABOR RELATIONS AND THE LAW 309-310 (1953).

10. *E. g.*, Labor Management Relations Act, 1947, § 9 (a), 61 STAT. 136, 143 (1947), as amended, 29 U. S. C. § 141, 159 (a) (Supp. 1952) ("Representatives designated . . . by the majority of the employees . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ."); N. Y. LABOR LAW § 705 (1) (similar wording to that in the federal statute).

11. Until very recently, probably the nearest any American court had come to the use of the legislative theory occurred when the United States Supreme Court stated: "[A]n employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms." *J. I. Case Co. v. Labor Board*, 321 U. S. 332, 336 (1944). *But cf. Transcontinental Air v. Koppal*, 345 U. S. 653, 661 (1953). However, the leading exponent of the legislative theory is now, *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, *supra* note 6. This case, in addition clearly to applying the legislative theory, also explains and clarifies the nebulous wording of *J. I. Case Co. v. Labor Board*, *supra*.

12. An employee who is not a member of the union has the same standing to sue that a union member has. See *Yazoo & M. V. R. Co. v. Webb*, *supra* note 2; *Gregg v. Starks*, 188 Ky. 834, 224 S. W. 459 (1920); *Coyle v. Erie R. Co.*, 142 N. J. Eq. 306, 59 A. 2d 817 (Ch. 1948), *rev'd on other grounds*, 1 N. J. 350, 63 A. 2d 702 (1949).

13. Individual suits have been limited almost exclusively to those for violations of provisions involving wages, seniority, and limits on the employer's right of discharge. See Note, 18 A. L. R. 2d 352 (1951). Although this appears to have been essentially a matter of the employee's choice, it may be contended that the individual probably has insufficient interest to sue on most of the other provisions of the agreement. See *Mac Kay v. Loew's, Inc.*, 182 F. 2d 170 (9th Cir.), *cert. denied*, 340 U. S. 828 (1950) (closed shop clause). In New York the individual is further restricted in that a provision limiting the employer's right of discharge is held to be not for the benefit of individual employees. See *Rotnofsky v. Capitol Distributors Corporation*, 262 App. Div. 521, 30 N. Y. S. 2d 563 (1st Dep't 1941). It should be noted that this case is not, as has sometimes been said, authority for the proposition that New York disapproves of the third party beneficiary rule.

OBSTACLES TO SATISFACTORY USE OF THE INDIVIDUAL SUIT

Of crucial importance today are the legal limitations and conditions which may tend to restrict the individual in his quest for satisfactory relief from his employer. Such limitations and conditions may be grouped under four headings: (1) available courts; (2) available forms of relief; (3) exhaustion of remedies; and (4) union-employer changes or settlements of individual rights.

Available Courts

In addition to an action in a state court, the employee may sue in a federal district court, but only if the requirements of diversity of citizenship and minimum jurisdictional amount are present.

Absent a dispute concerning the validity, construction, or effect of the Act, the Railway Labor Act[14] does not of itself confer original federal jurisdiction on the individual employee's suit where his cause of action stems entirely from the collective agreement.[15]

The Labor Management Relations Act, 1947, § 301 (a),[16] providing for suits in federal courts for violation of collective agreements regardless of citizenship and amount in controversy, has been interpreted to permit suits only by employers and labor organizations. An individual employee suing alone on a collective agreement is held not to be a proper party plaintiff under the section.[17] Consequently, the individual is precluded from using the federal courts in actions which, if brought by the union, would be entertained. There is language in a recent decision, however, which could open the door of § 301 (a) to the use of individual suits. In construing the statutory wording, "suits for violation of contracts between an employer and a labor organization," the court held the word "between" to refer to "contracts" and not to "suits."[18] By removing any restrictions from the word "suits"

14. 44 STAT. 577 (1926), as amended, 45 U. S. C. § 151 (Supp. 1952).

15. *Starke v. New York, Chicago & St. Louis R. Co.*, 180 F. 2d 569 (7th Cir. 1950); *Lewis v. New York Cent. R. Co.*, 25 L. R. R. M. 2087 (U. S. Dist. Ct. N. D. Ill. 1949). See *Transcontinental Air v. Koppal, supra* note 11.

16. 61 STAT. 136, 156, as amended, 29 U. S. C. § 141, 185 (a) (Supp. 1952).

17. *See United Protective Workers of America v. Ford Motor Co.*, 194 F. 2d 997, 1000 (7th Cir. 1952); *Schatte v. International Alliance*, 84 F. Supp. 669, 672 (S. D. Cal. 1949), *aff'd on other grounds*, 182 F. 2d 158 (9th Cir.), *cert. denied*, 340 U. S. 827 (1950); *Zaleski v. Local 401 of United Electrical, Radio & Machine Workers of America*, 91 F. Supp. 552, 553 (D. N. J. 1950).

18. *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, supra* note 6.

there is nothing in the wording of § 301 (a) to bar an individual suit.[19]

Available Forms of Relief

That the individual employee, as a successful party plaintiff, may recover damages is basic. That he may secure a declaratory judgment, where the requirements for such a suit are present, is probable.[20]

However, when the problem arises, whether the individual can get specific enforcement of, or an injunction against the violation of, a collective agreement, the position of the individual becomes more difficult.

Early cases usually denied such equitable relief by an application of three general equity doctrines: a) there is no specific performance of personal service contracts;[21] b) there is no mutuality of remedy or obligation between employer and employee;[22] and c) there is an adequate remedy at law.[23] Upon reflection, one might assume that none of these reasons would be followed today. It has been stated by the United States Supreme Court that a collective bargaining agreement is not a contract of employment.[24] The argument of mutuality has long been thought groundless.[25] The doctrine concerning the adequacy of the remedy at law has

19. It should be noted that the complete reasoning of the *Westinghouse* case would also lead to a bar of the individual suit under § 301 (a). Because of the holding under the legislative theory that the employee's cause of action is based on a violation of his individual employment contract, the suit therefore does not qualify as one for violation of a contract between an employer and a labor organization. It may well be contended, however, that such reasoning is unreal when applied to § 301 (a). If the employee's cause of action is technically held to be on his individual employment contract, still it should not be overlooked that such contract itself arises out of the terms of the collective agreement. Once hurdling the problem of the correct reference of the word "between", it would seem that it was not the legislative intent to foreclose by technical distinctions a suit based on the violation of an obligation initially created by a collective bargaining agreement.

20. See *United Protective Workers of America v. Ford Motor Co., supra* note 17; *Piercy v. Louisville & N. Ry. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923); *Burton v. Oregon-Washington R. & Nav. Co.*, 148 Ore. 648, 38 P. 2d 72 (1934); *Ralston v. Cunningham*, 143 Pa. Super. 412, 18 A. 2d 108 (1941). But cf. *Johnson v. Interstate Transit Lines*, 163 F. 2d 125 (10th Cir. 1947); *Beatty v. Chicago, B. & Q. R. Co.*, 49 Wyo. 22, 52 P. 2d 404 (1935).

21. *Chambers v. Davis*, 128 Miss. 613, 91 So. 346 (1922).

22. *Beatty v. Chicago, B. & Q. R. Co., supra* note 20.

23. *Mosshamer v. Wabash Ry. Co*, 221 Mich. 407, 191 N. W. 210 (1922); *Beatty v. Chicago, B. & Q. R. Co., supra* note 20. But cf. *Gregg v. Starks, supra* note 12.

24. "The result [of collective bargaining] is not, however, a contract of employment except in rare cases . . .. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established." *J. I. Case Co. v. Labor Board, supra* note 11 at 335.

25. WALSH, EQUITY c. 14 (1930).

been diluted to the extent that specific performance will now be decreed where such relief is better than damages.[26]

Nevertheless, the majority of courts today still blindly adhere to the old reasons and continue to deny equitable relief to the individual.[27] The few courts which appear to favor equitable enforcement of collective bargaining agreements apparently do so in situations in which the individual is technically still an employee, seeking protection of his seniority rights.[28] For example in *McMenamin v. Philadelphia Transp. Co.*,[29] the plaintiffs were suing for a mandatory injunction to compel reinstatement after discharge, which defendant contended was for cause. The court denied the equitable relief, basing its decision on the personal service contract rule. It did, however, indicate that a court of equity will enforce seniority rights, but that such relief was dependent upon the continuation of the employer-employee relation, under a valid subsisting contract of employment.

Such a distinction in the granting of equitable relief between the wrongful discharge and the seniority cases may have an element of validity. Behind the personal service contract rule is the policy of preventing an employer from having a personal relationship forced upon him. In the wrongful discharge cases, it is usually the employer's purpose to discharge the *particular* employee. In the seniority cases, the lay-off often has nothing to do with the employee as a person. *Some* employee has to be laid off, demoted, or promoted, and the determination is simply made on the basis of which employees have the greatest seniority. Since there is no personal reason for the lay-off, the policy behind the personal service contract rule is not violated in the seniority cases by the granting of equitable relief.

Yet such a distinction still appears to be somewhat unreal. Is it not tenuous scholasticism to allow one but technically an employee to compel reinstatement when he is laid-off, and not to be able to compel reinstatement when he has been discharged from employment? The signification of labels should be made of

26. *Id.* at 301.

27. See *United Protective Workers of America v. Ford Motor Co., supra* note 17 (wrongful discharge—adequate remedy at law); *Clay v. Callaway*, 177 F. 2d 741 (5th Cir. 1949) (wrongful discharge— lack of mutuality); *Mele v. High Standard Mfg. Co.*, 15 L. R. R. M. 541 (Conn. Super. Ct. 1944) (wrongful discharge—personal service rule and adequacy of damages); *International Union v. Elastic Stop Nut Corp.*, 140 N. J. Eq. 177, 53 A. 2d 339 (Ct. Err. & App. 1947) (seniority—lack of mutuality or consideration and adequacy of damages); *Glauber v. Patof*, 45 N. Y. S. 2d 69 (Sup. Ct. 1943) (wrongful discharge—personal service rule); *Butler v. American Airlines, Inc.*, 9 L. R. R. M. 686 (N. Y. Sup. Ct. 1941) (wrongful discharge—lack of mutuality of remedy); *Masetta v. National Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 112 N. E. 2d 15 (1953) (seniority—personal service rule and lack of mutuality).

28. See *Ledford v. Chicago, M., St. P. & P. R. Co.*, 298 Ill. App. 298, 18 N. E. 2d 568 (1939); *Dooley v. Lehigh Valley R. Co. of Pennsylvania*, 130 N. J. Eq. 75, 21 A. 2d 334 (Ch. 1941), *aff'd*, 131 N. J. Eq. 468, 25 A. 2d 893 (Ct. Err. & App. 1942).

29. 356 Pa. 88, 51 A. 2d 702 (1947).

sterner stuff. In both cases the employee is without a job and in both cases there may be the same personal animosity between the employer and employee.

In the area of equitable relief it may be well to mention briefly the potential application of the anti-injunction statutes. Such statutes have rarely been discussed in suits by individual employees, possibly for the reason that relief is generally denied on the antiquated equitable grounds. Those courts which have faced the issue have often developed novel arguments in order to avoid meeting the problem squarely.[30] It would seem that a suit to enforce a collective bargaining agreement is not such a "labor dispute" as was intended to be encompassed by the anti-injunction statutes.[31] This is especially true in suits by individuals, where the controversy is not one between a labor union and management generally concerning terms of employment, but a private dispute between an employee and his employer concerning the violation of an already agreed upon obligation.

Although there appears to be a desire on the part of some courts to widen the scope of relief available to the individual employee (as evidenced by the equitable protection of seniority rights in certain cases), most courts almost exclusively limit the individual to a recovery of damages. This is a poor substitute to the worker who feels that he has been discharged without cause from a job that means more to him than the few dollars he receives each week in his pay envelope.

Furthermore, the principal reason for such inadequate relief is the adherence by the courts to doctrines which should have been discarded long ago. Even if courts feel that they must interpret collective agreements by the principles of established contract law, there appears to be no great obstacle in discarding here the very same doctrines which have been disapproved of and discarded in fields of law other than labor law.[32]

Exhaustion of Remedies

The problem of exhaustion may be subdivided into three areas: a) grievance procedure other than arbitration; b) arbitration; and c) statutory tribunal in railroad cases.

30. See *Sanford v. Boston Edison Co.*, 316 Mass. 631, 56 N. E. 2d 1 (1944), *rev'd on other grounds*, 319 Mass. 55, 64 N. E. 2d 631 (1946); *Ralston v. Cunningham*, *supra* note 20.

31. See Rice, *A Paradox of Our National Labor Law*, 34 MARQ. L. REV, 233 (1951); *cf. Milk and Ice Cream Drivers v. Gillespie Milk Prod. Corp.*, 203 F. 2d 650 (6th Cir. 1953).

32. The argument may also be raised that since awards of labor relations boards and arbitrators can be specifically enforced, there ought to be no obstacle to doing directly what can be done indirectly. *But see McMenamin v. Philadelphia Transp. Co.*, *supra* note 29 at 92-93, 51 A. 2d at 704 ("The power of any court which directs reinstatement is derived from legislation and limited to enforcement of a proper order of the respective labor relations board. No change has been effected in the jurisdiction or power of a court of equity."); *Mele v. High Standard Mfg. Co.*, *supra* note 27 at 543.

Grievance procedure other than arbitration. Ordinarily the employee must first exhaust the grievance procedure provided for in the collective agreement, whether or not he knew about it, before resorting to the courts.[33] Thus, if the agreement provides that a claim must be filed within a specified period of time, there must be compliance if there is to be a recovery.[34] Where there is a provision that a discharged employee must in writing request a hearing within a certain period after his dismissal or no claim thereafter may be made, such request is a condition precedent to the assertion of any rights arising from the dismissal.[35]

The federal courts have recently taken the position that in diversity cases they will apply the state's law as to whether there must be exhaustion of contract remedies as a condition precedent to court action.[36]

Arbitration. Under the common law rule an agreement to arbitrate all future disputes arising under the contract does not of itself constitute a bar to an action on the contract.[37] The arbitration provision is said to be collateral and independent of the other parts of the collective agreement, and while a breach of the arbitration provision will support a separate action for damages, such provision does not prevent an action on the other parts of the agreement.[38]

Some states, including New York,[39] have statutes which give effect to provisions for the arbitration of all future disputes arising under a contract. And yet in New York, it still cannot be said that a plaintiff fails to state a prima facie cause of action merely because the contract upon which the action is brought contains an arbitration provision, even though the agreement expressly states that the obtaining of an award shall be a condition precedent to

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33. *See United Protective Workers of America v. Ford Motor Co., supra* note 17 at 1001. However, such requirement will not be insisted upon where it can be shown that it would be useless to go through the various steps of the grievance procedure; as where the employer refuses to cooperate in the use of such procedure. *Id.* at 1002. Exhaustion of grievance machinery has also been waived in certain cases of the employer's own noncompliance with the collective agreement. See *Minor v. Washington Terminal Co.*, 180 F. 2d 10 (D. C. Cir. 1950) (breach of obligation to furnish each employee with a copy of the agreement).

34. See *Adams v. Republic Steel Corp.*, 254 Ala. 620, 49 So. 2d 214 (1950).

35. See *Davis v. Union Pacific Railroad*, 29 L. R. R. M. 2591 (U. S. Dist. Ct. D. Neb. 1952).

36. *Transcontinental Air v. Koppal, supra* note 11; *Ringle v. Transcontinental & Western Air*, 113 F. Supp. 897 (W. D. Mo. 1953).

37. *Gatliff Coal Co. v. Cox, supra* note 7; *Latter v. Holsum Bread Co.*, 108 Utah 364, 160 P. 2d 421 (1945). *But cf. Pettus v. Olga Coal Co.*, ___ W. Va. ___, 72 S. E. 2d 881 (1952), in which it was held that the parties had either expressly or by necessary implication made submission to arbitration a condition precedent to an action on the agreement.

38. *See Gatliff Coal Co. v. Cox, supra* note 7 at 881.

39. N. Y. Civ. Prac. Act §§ 1448-1469.

any right of action on a claim.[40] The *exclusive* remedy for the person against whom an action has been brought in violation of an agreement to arbitrate is to move for a stay[41] of the proceedings until arbitration has been had (it being even improper for the defendant in such an action to plead the arbitration agreement as a defense or counterclaim).[42] Such a stay will be granted as long as the dispute is an arbitrable one, even though arbitration may no longer be had, the time for it having expired.[43]

The great obstacle confronting the employee as a result of such a stay being granted arises from the fact that apparently an individual employee cannot compel arbitration,[44] at least unless there is an express provision in the agreement permitting him to do so,[45] or the public policy of the state favors giving the utmost effect to arbitration provisions.[46]

This obstacle could best be overcome by legislation,[47] or if necessary, by following the reasoning of a lower New York court.[48] This court took the position that if the employer insists upon arbitration, obtains a stay, and the individual and employer cannot agree on an arbitrator, the court will appoint one. If the employer is then unwilling to proceed under such an arbitrator, the stay will be vacated and the employee will be permitted to proceed with his original action. However, in the absence of legislation, or if the above reasoning is not followed, there is a potential danger that, in states which have statutes similar to that of New York, an action by an individual employee may be stayed, even though the individual is later unable to compel arbitration. In such a case the individual would, for all practical purposes, be foreclosed from effective access to the courts.

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40. *American Reserve Ins. Co. v. China Ins. Co.*, 297 N. Y. 322, 79 N. E. 2d 425 (1948).

41. In New York, under CIV. PRAC. ACT § 1451.

42. *River Brand Rice Mills v. Latrobe Brew. Co.*, 305 N. Y. 36, 110 N. E. 2d 545 (1953); *American Reserve Ins. Co. v. China Ins. Co., supra* note 40; *Marvin v. Thomas J. Hoffman, Inc.*, 280 App. Div. 616, 117 N. Y. S. 2d 697 (4th Dep't 1952).

43. See *River Brand Rice Mills v. Latrobe Brew. Co., supra* note 42; *Ott v. Metropolitan Jockey Club*, 282 App. Div. 946, 125 N. Y. S. 2d 163 (2d Dep't 1953).

44. *Sholgen v. Lipsett, Inc.*, 116 N. Y. S. 2d 165 (Sup. Ct. 1952); *Biancuili v. Brooklyn Union Gas Co.*, 115 N. Y. S. 2d 715 (Sup. Ct. 1952); Petition of *Minasian*, 14 N. Y. S. 2d 818 (Sup. Ct. 1939); *Floyd v. Wisconsin Employment Relations Board*, 13 L. R. R. M. 849 (Wis. Cir. Ct. 1943).

45. See *Fagliarone v. Consolidated Film Industries*, 20 N. J. Misc. 193, 26 A. 2d 425 (1942).

46. See *Myers v. Richfield Oil Corporation*, 98 Cal. App. 2d 667, 220 P. 2d 973 (1950).

47. For a practical solution through the use of a simple and clear legislative enactment, see Lenhoff, *The Effect of Labor Arbitration Clauses Upon the Individual*, 9 ARB. J. 3 (1954).

48. Matter of *Wile Sons & Co.*, 199 Misc. 654, 102 N. Y. S. 2d 862 (1951).

Statutory tribunal in railroad cases. The Railway Labor Act,[49] as construed by *Slocum v. Delaware, L. & W. R. Co.*,[50] confers upon the National Railroad Adjustment Board *exclusive*[51] jurisdiction as the final step in disputes growing out of grievances or the interpretation or application of collective agreements covering railroad employees, where the interpretation would affect the future employment relations between the railroad and its other employees. However, based on the *Slocum* case and its interpretation of *Moore v. Illinois Central R. Co.*,[52] wrongful discharge cases present a special problem. If the employee accepts his discharge as final, his employment as terminated, and seeks damages for breach of contract (as in the *Moore* case), he may directly pursue his common law or statutory remedies in the courts. But if the employee refuses to recognize the discharge as valid, maintains that his employment is continuing, and seeks reinstatement and back pay, the Board has exclusive jurisdiction.[53]

Apparently the *Moore* case is being strictly limited to its facts. Even though the individual is suing for money damages only, unless he considers himself as no longer in the employ of the railroad, the court will not decide the case.[54] If he asks for both damages *and* reinstatement in a wrongful discharge case, the action as thus framed will not be determined since that part dealing

49. *Supra* note 14.

50. 339 U. S. 239 (1950).

51. Whether the Board has exclusive or merely exclusive *primary* jurisdiction is unclear. The *Slocum* decision speaks in terms of exclusive jurisdiction. However, when relying on this case, some later decisions, although quoting the words of the Supreme Court, nevertheless speak in terms of exhaustion of remedies by first going to the Board. See, *e. g., Spires v. Southern Ry. Co.*, 204 F. 2d 453 (4th Cir. 1953); *Cepero v. Pan American Airways*, 195 F. 2d 453 (1st Cir.), *cert. denied*, 344 U. S. 840 (1952); *Davis v. Southern Ry. Co.*, 256 Ala. 202, 54 So. 2d 308 (1951). On the other hand, in his dissent in the *Slocum* case, Justice Reed states, after construing the word exclusive to means exclusive primary: "The extent of judicial review of awards other than money awards is doubtful, and it is highly questionable whether even a money award can be reviewed in the courts if only the carrier wishes review. Most important, the statute provides no relief for a petitioning party—be he union, individual, or carrier—against an erroneous order of the Board." 339 U. S. at 252. It would seem, therefore, that even though the Board may technically have only primary jurisdiction, exclusive may be said to be the appropriate word for all practical purposes. Under such a construction, the place of the Board in the grievance procedure is different from that of the ordinary arbitrator, the latter having only a primary jurisdiction. However, once submitting to either, the individual is barred from later prosecuting an independent suit for the same cause. See *Fagliarone v. Consolidated Film Industries*, 137 N. J. L. 52, 57 A. 2d 566 (1948) (arbitration); *Michel v. Louisville & N. R. Co.*, 188 F. 2d 224 (5th Cir. 1951); *Wilson v. St. Louis-San Francisco Ry. Co.*, 362 Mo. 1168, 247 S. W. 2d 644 (1952) (Railroad Adjustment Board).

52. 312 U. S. 630 (1941).

53. See *Butler v. Thompson*, 192 F. 2d 831 (8th Cir. 1951); *Piscitelli v. Pennsylvania-Reading Seashore Lines*, 8 N. J. Super. 557, 73 A. 2d 751, *aff'd*, 11 N. J. Super. 46, 77 A. 2d 810 (1950).

54. See *Davis v. Southern Ry. Co., supra* note 51; *Marchitto v. Central R. Co. of N. J.*, 18 N. J. Super. 163, 86 A. 2d 795 (1952); *Cassaro v. Pennsylvania R. Co.*, 125 N. Y. S. 2d 3 (Sup. Ct. 1953).

with reinstatement falls within the jurisdiction of the Board. However, instead of dismissing the complaint absolutely, a court will often grant permission to the individual to amend his complaint to state his cause of action for damages only,[55] or else on its own treat the action as one solely for damages.[56]

Thus, with the exception of an action solely for damages for wrongful discharge, an aggrieved railroad employee's only recourse after exhausting the normal grievance procedure is an appeal to the Adjustment Board. If the Board decides against him on the merits (a not unlikely situation in view of the Board's composition), it is doubtful under the statute that the individual can appeal the adverse award. If the Board refuses to hear the case on jurisdictional grounds (the most likely result),[57] it would seem, in theory at least, that there should be nothing to prevent the individual from then turning to the courts. However, there are apparently no decisions to support this proposition. Once again there emerges a finding in which the individual employee seems unable to secure effective relief in the courts.

Union-Employer Changes or Settlements of Individual Rights

Often forming the background of a suit by an individual employee is an atmosphere of hostility between the individual and the union. Otherwise the individual might normally have invoked the aid of the union in processing his grievance. For this reason, it is especially critical to determine whether it is possible, without the consent of the individual, for the union and management to deprive him of benefits to which he might otherwise be entitled under the collective agreement. Such deprivation could take the form of a) a modification or interpretation of a collective agreement or b) a grievance settlement.

Modification or interpretation of a collective agreement. The benefits of a collective agreement are virtually nonwaivable[58] by the individual employee, but such benefits can be changed by the

55. See *Kendall v. Pennsylvania R. Co.*, 94 F. Supp. 875 (N. D. Ohio 1950); *Keel v. Illinois Terminal R. Co.*, 346 Ill. App. 169, 104 N. E. 2d 659 (1952); *Haggquist v. Hudson & Manhattan R. Co.*, 106 N. Y. S. 1002 (Sup. Ct. 1951).

56. See *Newman v. Baltimore & O. R. Co.*, 191 F. 2d 560 (3d Cir. 1951).

57. *See Steele v. L. & N. R. Co.*, 323 U. S. 192, 205 (1944).

58. The United States Supreme Court has stated that an agreement between the individual and his employer "cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case Co. v. Labor Board, supra* note 11 at 338. Thus, an employee can actually agree with his employer to accept a lower wage than that set by the collective agreement, and later sue the employer for the difference and recover. See *Marvin v. Thomas J. Hoffman, Inc., supra* note 42; *McNeill v. Hacker*, 21 N. Y. S. 2d 432 (N. Y. City Ct. 1940); *Reichert v. Quindazzi*, 6 N. Y. S. 2d 284 (N. Y. Mun. Ct. 1938). *Contra: Huston v. Washington Wood & Coal Co.*, 4 Wash. 2d 449, 103 P. 2d 1095 (1940).

concurrence of the union and the employer. A statement of the latter situation is well expressed in *Donovan v. Travers*:[59]

> The substantial issue is whether the rights of the plaintiffs are fixed by the terms of the agreement between the union and the railroad as it stood when the several plaintiffs entered upon their service interpreted only in the light then available; or whether as the agreements changed from time to time, the modifications and possible changes in interpretation of terms agreed upon by the union and the railroad modified and affected the individual contracts of those already in the railroad's employ. We think the latter to be the proper position . . . The employee stands no higher than the union. If it modifies the agreement with the employer, the employee must acquiesce.

This general statement has become slightly qualified today. It might be set down as a composite rule that a collective agreement may, by agreement operating prospectively, not only be amended and interpreted but also entirely superseded as long as there is an absence of any arbitrary, unfair, or capricious action on the part of the employer and labor union.[60] Thus, if the modification, usually taking the form of a deprivation of pre-existing seniority rights, is made because of changed economic conditions,[61] or in the general interest of the union or its members,[62] it will probably be upheld, even though it may have unfavorable effect on some of the members of the unit. However, if the deprivation of rights is effected in palpably bad faith,[63] or is to apply to one or at best a minority of employees without some corresponding benefit in the general interest,[64] it will in theory not be upheld.

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59. 285 Mass. 167, 173, 188 N. E. 705, 707 (1934).

60. *Edelstein v. Duluth, M. & I. R. Ry. Co.*, 225 Minn. 508, 31 N. W. 2d 465 (1948); *Hartley v. Brotherhood of Ry. and S. S. Clerks*, 283 Mich. 201, 277 N. W. 885 (1938); *accord, Elder v. New York Cent. R. Co.*, 152 F. 2d 361 (6th Cir. 1945).

61. See *Hartley v. Brotherhood of Ry. and S. S. Clerks, supra* note 60; *Perras v. Terminal R. Ass'n of St. Louis*, 154 S. W. 2d 417 (Mo. App. 1941).

62. It is usually found today that unless other specific unfairness can be pointed out, a modification, if approved by a majority of union members, will be upheld. See *Mayo v. Great Lakes Greyhound Lines*, 333 Mich. 205, 52 N. W. 2d 665 (1952); *Leeder v. Cities Service Oil Co.*, 199 Okla. 618, 189 P. 2d 189 (1948); *Belanger v. Local Division No. 1128*, 256 Wis. 479, 41 N. W. 2d 607 (1950) (Apparently, the same change which previously had been held invalid as being arbitrary, 254 Wis. 344, 36 N. W. 2d 414 (1949), was approved when it was passed by a secret majority vote of the employees).

63. See *Steele v. L. & N. R. Co., supra* note 57 (racial discrimination).

64. See *Piercy v. Louisville & N. Ry. Co., supra* note 20. Because of its broad language, this case is often cited for the proposition that the union cannot waive an individual's seniority rights. However, on its facts it is just an example of a patently unfair and arbitrary deprivation of an employee's seniority rights, since the transfer was not for any unfitness or lack of ability, nor for greater efficiency of the railroad, but merely because the union requested it. *But cf. Hughes v. Chicago, R. I. & Pac. R. R.*, 26 L. R. R. M. 2317 (U. S. Dist. Ct. W. D. Okla. 1950). Here, under the guise of an "agreed interpretation", a prospective change, apparently made specifically to prevent plaintiff from securing a position to which he might otherwise be entitled, was upheld by the court.

But in practice there are found very few cases, other than those involving racial issues, in which an employer-union modification of a collective agreement has been condemned.

Therefore, although an individual may be theoretically entitled to relief because of a discriminatory modification or interpretation, it is unlikely in the average case that he will be able to secure such relief. Because of the difficulty of proving "arbitrary, unfair, or capricious" action, and because of the ease by which most changes can be rationalized to be "in the general interest of all union members," the individual employee is once more found to be "out in the cold."

Grievance settlement. The problem here is brought to prominence in cases wherein an individual, who is dissatisfied with a grievance settlement concluded between the union and employer, attempts to challenge the settlement or to seek an independent adjudication of the grievance before the courts in suits against his employer.

The leading case is *Elgin, J. & E. R. Co. v. Burley.*[65] By examining both Supreme Court opinions together, probably all that may be said is that, at least in theory, before a union may irrevocably "settle" an individual's grievance with the employer, the individual must have authorized the union to do so in some legally sufficient manner. This authorization does not have to be proven solely by common law agency rules,[66] but may also be shown by what the Court terms custom or usage.[67] In addition, the burden of showing non-authorization is placed on the employee. It is difficult to determine exactly what the Court was holding, after the second opinion, but it did expressly declare what it was not holding, and this may be of some help. "[W]e did not rule [in the first opinion] . . . that an employee can stand by with knowledge or notice of what is going on with reference to his claim . . ., allow matters to be thrashed out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights."[68] This would seem to indicate that unless the individual

65. 325 U. S. 711 (1945), *aff'd on rehearing,* 327 U. S. 661 (1946).

66. In its first opinion the Court had stated: "Authority might be conferred in whatever ways would be sufficient according to generally accepted or 'common law' rules for the creation of an agency, as conceivably by specific authorization given orally or in writing to settle each grievance, by general authority given to settle such grievances as might arise, or by assenting to such authority by becoming a member of a union and thereby accepting a provision in its constitution or rules authorizing it to make such settlement." 325 U. S. at 738 n. 38.

67. The Court stated that the fact that the Railway Labor Act provides that grievances "shall be handled in the usual manner" is an indication that custom and usage may be as adequate a basis of authority as a more formal authorization. 327 U. S. at 663. However, the Court did not indicate how the employee was to prove that a manner of settlement used was not the custom.

68. *Id.* at 666-667.

protests during, or soon after notification of, the grievance settlement he may be held to have acquiesced.

The problem is more serious in the case of a union member than where a nonmember is involved, since frequently the constitutions or by-laws of labor organizations expressly state that the union shall represent the member in grievance settlements. Mere membership under such rules may be held to be implied authorization for the union to settle the individual's grievance. Since in the case of a nonmember no such implied consent can be shown, it may be easier for him to show non-authorization. In both cases, however, the burden is on the employee to prove nonconsent. But if he is able to show that there was no authority in the union to settle his grievance, even an award by the Adjustment Board will not be a bar to an action in the courts.[69]

Once there has been a settlement, a further difficulty arises. If the settlement occurred at an early stage, the individual may be prevented from immediately resorting to the courts on the ground that he has not exhausted the procedure provided in the agreement. On the other hand, if he proceeds through the proper channels and still get no satisfaction, an argument based on nonconsent may be ineffective on the ground that he has now participated in the grievance procedure and should be bound by it.[70] This problem could be obviated by a recognition that once a settlement has been made the grievance procedure is over as to the individual, and any steps taken by him after that point are in the nature of appeals, the antithesis of consent.

We find, therefore, that theoretically a union-employer settlement of an individual grievance is not conclusive unless it was authorized by the employee. Practically, it will be very difficult to prove the nonauthority of the union, if not for the nonmember at least for the union member who often unknowlingly gives implied consent by virtue of a union constitution or by-law.[71]

Conclusion

It appears evident that the position of the individual employee is somewhat disturbing. While it may be conceded that he is a proper party plaintiff in a suit against his employer on a collective agreement, the case holdings seem to indicate that his chances

69. See *Wilson v. St. Louis-San Francisco Ry. Co., supra* note 51.

70. See *Williams v. Atchison, T. & S. F. Ry. Co.*, 356 Mo. 967, 204 S. W. 2d 693 (1947), *cert. denied*, 333 U. S. 854 (1948).

71. At least one court seemed to be disturbed about the potential barring of individual rights where a suit involving such rights was brought by the union. See *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, supra* note 6.

for obtaining satisfactory relief are extremely limited. Several major obstacles stand in his way. It may be noted, however, that despite the barriers of available courts, available forms of relief, and exhaustion of remedies, the seeds from which reform could grow are in existence. On the other hand, when we reach the obstacle created by a union-employer change or settlement of individual rights, a more difficult problem is presented. Here a cure to the present inequity would seem to involve a basic evaluation of the position which the individual should have in the whole collective bargaining structure. If the individual is to be completely subordinated, in order better to effectuate the collective system, let this be recognized. But if he is to be given effective and enforceable rights, then a legislative act would seem to be required in order to give some strength to these rights.

Jerome D. Adner

THE RIGHT OF PRIVACY AND DUE PROCESS OF LAW

An Historical Introduction

The well-known maxim, "Every man's house is his castle," adequately describes that right of privacy which has long been held in the highest esteem by the citizen. It has been fashioned as a part of our Constitutional Law by the inclusion of the Fourth Amendment to the United States Constitution.[1]

This Amendment was inserted to arrest a series of abuses of this cherished privacy by English officers acting under Parliamentary authority.[2] The colonists' loathing for the obnoxious writs of assistance has been frequently assigned as one of the flames which ignited the American Revolution. A controversy arose in Boston in 1761 over the use of these writs by British revenue officers. The writs empowered them, in their discretion, to search suspected places for smuggled goods. This James Otis thunderingly denounced as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that was ever found in an English lawbook." "Out of this controversy," said John Adams, "The child of independence was born!"[3]

1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the person or things to be seized."

2. E. g., 13 & 14 Car. 2, c. 11, § 5 (authorizing the issuance of writs of assistance).

3. A full account of this discussion will be found in 2 Works of John Adams 523-525. See also vol. 10 at 183 et seq. For a history of the English use of search warrants, see 2 Hale, Pleas of the Crown 113-114, 149-151; 2 Hawkins, Pleas of the Crown 130, 133; 1 Chitty, Criminal Law 64 et seq. (5th ed. 1847).