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THE NATURE OF THE COLLECTIVE BARGAINING AGREEMENT

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Although the traditional bi-parte legal contract is an accepted element in our commercial and personal relations, it does not follow that the body of law built up around such a contract can successfully be applied in the field of industrial relations. It is commonly known that issues arising from the interpretation and enforcement of a labor "contract" are in many cases the source of industrial instability, and frequently the effects of these issues reach far beyond the limits of the particular company directly involved. This being true, it is incumbent upon those who interpret and enforce the agreement to understand its true nature. Yet an examination of the legal history of the labor contract indicates that the courts have rarely understood its real significance, or if they have understood it, they have been confined by traditional concepts in dealing with it. The recent attempt in Congress to make the labor contract "enforceable" on the national level by making unions amenable to process under the Taft-Hartley Law indicates that the legislators share with the courts a lack of realistic insight into this so called contract.[1]

Early decisions of the American courts denied any legal enforceability to the collective bargaining agreement either to the principal parties collectively, or to the individual workman as a member of the contracting union.[2] Since the turn of the century, however, in an effort to protect the individual worker, and to give him some standing in a court of law, the courts, apart from any statute, evolved three fictions or theories of enforcement of the labor contract; namely, (1) the collective bargaining contract considered as a memorandum of usage or custom; (2) the contract considered as establishing an agency relationship; and (3) the agreement considered as a contract for the benefit of third parties, the individual workmen, both members and non-members of the contracting union.

Those courts purporting to follow the custom or usage theory have held that the agreement between the union and the employer establishes a custom or usage which may or may not enter into and become a part of the individual contract of employment, depending upon proof that its terms were adopted as part of the individual hiring. The leading case enunciating this principle is

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1. This reference is to Section 301(a) of the Labor-Management Relations Act, 1947 (Pub. L. No. 101 80th Cong., 1st Sess. (1947); 29 U.S.C.A. Sec. 141 *et seq.* (Supp., July 1947) known as the Taft-Hartley Law. This provision will be discussed in detail.

2. St. L., I.M. and S.Ry. v. Matthews, 64 Ark. 398, 42 S.W. 902 (1897). This decision was followed in Petty v. Missouri & Arkansas Ry. Co., 205 Ark. 990, 167 S.W.2d 895 (1943).

Hudson v. Cincinnati, New Orleans & T.P. Ry. Co.[3] In this case, the plaintiff was discharged from the defendant railroad for an infraction of the company rules. He based his cause of action for damages for wrongful discharge upon a covenant contained in a collective bargaining agreement between the company and a union of which he was a member. The court ruled for the defendant, stating that the collective bargaining agreement has legal force only when the individual contract of employment was made with reference to it, a fact not proved in this case. The court remarked further that the agreement was not a "contract" as there was no consideration for its execution, and was "not an offer as none of its terms could be construed as a proposal. . . ."[4] In a case presenting fundamentally the same facts as the *Hudson* case, where recovery was denied, the plaintiff employee recovered damages from the employer under the agreement for lost earnings as a result of wrongful discharge.[5] Under this theory damages have been recovered for overtime,[6] and for breach of seniority provision.[7] The employee has also been able to receive an injunction against the employer for interfering with his seniority rights,[8] and in another case, a declaratory judgment was obtained to uphold his seniority rights.[9]

It is obvious that the application of the usage theory is inadequate to solve current problems arising out of the collective bargaining process. In the first place, the collective bargaining agreement may be rejected by the employee contracting on other expressed terms,[10] and in the second place, beneficial provisions of the contract may not be utilized by the plaintiff worker in the absence of affirmative proof that the individual contract of employment was entered into with "knowledge" of the union agreement.[11] Furthermore, although this theory purports to protect the individual worker, it presupposes

3. 152 Ky. 711, 154 S.W. 47 (1913).

4. The *Hudson* case was used as a basis for recovery by the plaintiff in a suit by the employee to enjoin the union and his employer from deducting his dues, and to cancel his union membership. Braddom et al. v. Three Point Coal Co., 288 Ky. 734, 740 (1941). The principal case was used to defeat the plaintiff in Ill. Central Ry. Co. v. Moore, 142 F.2d 959, 964 (C.C.A. 5th 1940).

The most recent case relying on the *Hudson* case is Gatliff Coal Co. v. Cox, 142 F.2d 876, 880 (C.C.A. 6th 1944). The court held for the plaintiff employee, and miscited the principal case for the following proposition:

". . . When the collective agreement is signed by the individual members of the employers' association and the collective bargaining agent of the labor organization, no other contract being shown, it becomes, until abrogated, the rule of the individual employer and any person who thereafter continues in the employment of the employer or takes new employment with him becomes entitled to all the benefits of the collective agreement and incurs all its obligations."

5. Cross Mt. Coal Co. v. Ault, 157 Tenn. 461, 9 S.W.2d 692 (1928).

6. Keysaw v. Dotterweich Brewing Co., 121 App. Div. 58, 105 N.Y.Supp. 562 (1907).

7. Earle v. Ill. Cent. R. Co., 25 Tenn. App. 660, 167 S.W.2d 15 (1942).

8. Gregg v. Starks, 188 Ky. 834, 224 S.W. 459 (1920), where seniority was considered in the nature of a property right entitled to the protection of equity.

9. Piercy v. L. & N. Ry. Co., 198 Ky. 477, 248 S.W. 1042 (1923).

10. *See* cases collected in Rice, *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 522, 586, 596 (1930).

11. Hudson v. Cincinnati, New Orleans & R.P. Ry. Co., *supra*.

no right of action by the employer or the union against one another under the agreement.

Another equally unsatisfactory theory is based upon principles of agency. Under this interpretation, the employee is the principal and the union is the agent of the individual members of the organization with the legal power to enter into binding contracts on their behalf. This principle was enunciated in the case of *Mueller v. Chicago & N.W. Ry. Co.*[12] where the court said:

> . . . But it is plain that, the contract having been made by the representative of the brotherhood on behalf of the "employees in train, engine and yard service," plaintiff is entitled to sue on the contract as one made in his behalf by a duly authorized agent. That is, this suit must be considered as one by a party to, rather than by a mere beneficiary of, the contract.

The flaw in this theory is clear even on a superficial examination of ordinary principles of agency. In the first place, this body of law rests upon the presupposition of a continuing "consentual relationship" between the agent and the principal,[13] a rule difficult to apply to these facts where the so-called "principals" to be bound are a shifting body of plant employees.[14] Futhermore, it is puzzling to see how the union members could under ordinary principles of agency sue the union as an agent on the contract for failure to carry out its provisions with the union theoretically not a party to the agreement, the same fundamentals precluding a suit by the union or the employer against each other. Finally, it is clear that the union is in many respects a principal contracting separately in its own interests apart from the employees involved.

A third and more recent theory considers the collective bargaining contract as a contract for the benefit of third parties. In other words, the union and the company, as primary parties, exchange mutually binding promises, with performance benefiting the employees as third party donee beneficiaries. The leading case is *Yazoo & M.V. Ry. Co. v. Sideboard*,[15] where the court rejected the *Hudson* line of cases as being anachronistic, and held that the nonunion member had a "sufficient interest" in the agreement to maintain suit.

> . . . the holdings now are that these agreements are primarily for the individual benefit of the members of the organization, and that the rights secured by these contracts are the individual rights of the individual members of the union, and may be enforced directly by the individual.
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> But the case here before us involves, as would seem apparent, a still further step, and that is whether appellee who is not a member of the union

12. 194 Minn. 83, 259 N.W. 798, 799 (1935). *See also* Gary v. Central of Ga. Ry. Co., 37 Ga. App. 744, 141 S.E. 819 (1928).

Piercy v. Louisville & Nashville Ry. Co., *supra* suggested that the union is the agent of members for limited purpose of securing fair and just wages and good working conditions, but cannot "waive any personal right" he may have.

13. RESTATEMENT, AGENCY § 20 (1933).

14. *See* 2 MECHEM, AGENCY, 187 *et seq.* (2d Ed. 1914).

15. 161 Miss. 4, 133 So. 669 (1931).

> which made the contract, but who has performed in accordance therewith, can rely and sue for its benefits . . . (1) when the terms of the contract are expressly broad enough to include the third party either by name as one of a specified class, and (2) the said third party was evidently within the intent of the terms so used, the said party will be within its benefits, if (3) the promissee had, in fact, a substantial and articulate interest in the welfare of the said third party in respect to the subject of the contract.

Yazoo & M.V. Ry. Co. v. Webb,[16] arose out of familiar facts. Both plaintiffs were non-union employees of the defendant railroad and brought suit under the agreement for additional wages. Sideboard filed suit in the state court and recovered upon the third party beneficiary theory, and Webb filed suit in the Federal district court in Mississippi and lost under the usage theory.

Another leading case involving the third party beneficiary concept is *Rentschler v. Missouri Pacific Ry. Co.*,[17] where the nature of the collective bargaining agreement was considered for the first time in Nebraska. After examining the cases, the court said:

> The only conclusion is that the decisions of our courts are in hopeless conflict, but the questions involved are so important, and the issues at stake so vital, that courts must not shirk the responsibility of a painstaking research of all the facts and law in each case presented to them. . .

Dismissing the defense of lack of mutuality, the court permitted the plaintiff union member to recover his back wages on a dubious third party beneficiary theory.[18]

The courts have occasionally used this third party beneficiary theory as a means of defeating the plaintiff employee. For example, the employee has been denied recovery against the employer for damages for breach of seniority provisions,[19] and has been denied an injunction against the employer for interference with seniority rights.[20]

This theory has two practical advantages over the preceding two discussed, since it permits a non-union employee to sue on the agreement,[21] and permits the principal parties to modify the labor contract if the occasion requires it, without the approval of the individual union member.[22] Beyond

16. 64 F.2d 902 (C.C.A. 5th 1933).
17. 126 Neb. 493, 253 N.W. 694 (1934).
18. The *Rentschler* case was cited as authority for an opposite conclusion in Clark v. Claremont Apartment Hotel Co., 19 Wash. 2d 115, 141 P.2d 403, 407 (1943).
19. Elder v. New York Central Ry. Co., 152 F.2d 361, 364 (C.C.A. 6th 1945).
20. In Shaup v. Grant Inter. Bro. of Loc. Engineers, 223 Ala. 202, 135 So. 327 (1931) the court held that seniority is not a property right and could be modified or changed at any time in the agreement.
See further Division of Labor Law Enforcement, Department of Industrial Relations v. Dennis 183 P.2d 932 (Cal. 1947). Although a statute was indirectly involved in this case, the court based its decision on the common law third party beneficiary theory.
21. Yazoo & M.V. Ry. Co. v. Sideboard, *supra*.
22. Donovan v. Travers, 285 Mass. 167, 188 N.E. 705 (1934). However, even this advantage would not be available in those jurisdictions holding that a right once vested in a third party beneficiary may not be modified without his consent.

these limited advantages, the third party beneficiary approach carried further would permit no suit against the employee by the employer, for a third party beneficiary incurs no obligation under a contract for his benefit. In most union contracts, as a matter of fact, not only does the employee incur obligations, but frequently he is the chief instigator of the entire contract and approves or rejects it by his vote in the union meeting. He is not a "donee beneficiary" in any sense of the word, but is a real party in interest reaping benefits as well as a potential liability for a breach of the agreement.[23]

Many jurisdictions, however, still applying ordinary contract law, have permitted suits by the union and the company against each other utilizing none of the three preceding theories.[24] These courts have proceeded on the apparent assumption that the labor contract is sufficiently analogous to the ordinary bi-parte contract at least to permit the following results. For example, the employer has been permitted to obtain an injunction to prevent a strike threatened by a union in violation of its contract,[25] and to get a declaratory judgment interpreting the agreement.[26] In another situation, the employer has been able to enjoin an employee from working for a competitor in violation of the collective bargaining agreement.[27] On the other hand, the union has been permitted to enjoin the employer from threatening a lockout in violation of his union agreement,[28] and from violating a closed shop agreement.[29] In addition, it may be noted that the union has also been able to obtain a declaratory judgment interpreting the contract.[30]

Still other courts, cognizant of the ramifications involved in the collective bargaining agreement, have occasionally sought other terms of comparison

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23. *See* analysis by Witmer, *Collective Labor Agreements in the Courts*, 48 YALE L. J. 195, 227 (1938).

24. This seems to be the current trend in some state decisions. See for example, Suffridge v. O'Grady, 15 CCH LAB. CAS. § 74,500 (1948).

25. Grassi Contracting Co. v. Bennett, 174 App. Div. 244 (1916). However, after the workmen had once collectively quit their organization and their employer, it was held in Lundoff-Bicknell Co. v. Smith, 24 Ohio App. 294, 156 N.E. 243 (1927) that equity would not issue an order compelling them to go back to work, nor would it indirectly attempt to accomplish this result by issuing a mandatory order that the officers of the union use their power to make the men return to work.

26. Rambusch Decorating Co. v. Brotherhood of Painters, 105 F.2d 134 (C.C.A. 2d 1939), *cert. denied*, 308 U.S. 587 (1939).

27. Whiting Milk Co. v. Grundin, 282 Mass. 41, 184 N.E. 379 (1933).

28. In Goldman v. Cohen, 222 App. Div. 631, 227 N.Y.Supp. 311 (1928) an employer who was threatening to order a lockout of his employees in violation of his contract with the union, was enjoined on the ground that the plaintiff union would have no adequate remedy at law, and that the damages would be irreparable. The court said: "If the union has not the right to invoke the aid of a court of equity to prevent the unlawful violation of a contract such as exists in the case at bar, then such a contract loses most of its force, and the rights of collective bargaining are narrowed, and the economic benefits to the community from collective bargaining to a great extent lost."

29. Harper Small v. Local Union N. 520, I.B.E.Q. (Tex. Civ. App.) 48 S.W.2d 1033 (1932). In this case the company defended on the ground that the contract was for personal services which could not be compelled by injunction and was therefore lacking in mutuality as to that remedy. The court disregarded the plea.

30. CIO v. J. I. Case Co., 12 CCH LAB. CAS. § 63,617 (1947).

apart from the three basic theories upon which they have ordinarily proceeded. For example, one New Jersey court compared the collective bargaining agreement to a "group insurance" policy,[31] while the Fifth Circuit of the United States Court of Appeals considered the agreement similar to a treaty.[32] Obviously, these terms as comparisons are indicative of some progress in recognizing the *sui generis* nature of the labor contract, but should be limited to this use. The rights and liabilities of a group insurance policy are primarily concerned with individual contractual rights, whereas the collective labor contract emphasizes status giving rise to rights considerably more complex than insurance liability. Furthermore, to place a collective bargaining agreement in the same unenforceable category as a treaty at international law relegates the parties to "self-help" to effectuate legitimate demands better served on some accepted judicial basis.[33]

Regardless of the theory involved, many jurisdictions applying common law concepts of procedure and substantive contract law have denied recovery on the collective bargaining agreement because of one or several of the following reasons: (1) union not suable as a corporate entity;[34] (2) lack of mutuality;[35] (3) policy against enforcement of personal service contracts;[36] (4) in restraint of trade;[37] (5) promise illusory.[38]

In summation, these common law decisions which have been considered, although sound enough at times as isolated conclusions, are very unsatisfactory as a basis for judicial precedent. In addition to their inherent inconsistency and their limited scope, they reveal generally (1) different results on similar facts under the same theory;[39] (2) the use of different theories applied to similar facts;[40] (3) application of time consuming, costly, common law procedural impediments to a speedy determination of the real issues involved;[41] and (4)

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31. Christiansen v. Local 680, 126 N.J.Eq. 508, 10 A.2d 168 (1940).
32. Yazoo & M.V. Ry. Co. v. Webb, *supra*.
33. See Dickinson, *New Conception of Contract in Labor Relations*, 43 COL. L. REV. 688, 702-703 (1943).
34. Worthington Pump & Machinery Corp. v. Local No. 259, etc., 63 F. Supp. 411, 413 (D. Mass. 1945).
35. Davis v. Davis, 197 Ind. 386, 151 N.E. 134 (1926). An excellent case in point is CIO v. Elastic Stop Nut Corp. of America, 12 CCH LAB. CAS. § 63,567 (1947), where the court by way of dictum emphasized the necessity of finding "mutuality" and "consideration." Said the judge: "In view of the state statute which 'declared that it is lawful regardless of any undertaking made after March 13, 1941, to cause work stoppage,' . . . it will require very careful study to determine the effect of the statute and whether it has made collective bargaining contracts unenforceable."
36. Schwartz et al. v. Cigar Makers' Inter. Union, 219 Mich. 589, 189 N.W. 55 (1922).
37. Connors v. Connolly, 86 Conn. 641, 86 Atl. 600 (1913).
38. Moran v. Lasete, 221 App. Div. 118, 223 N.Y.Supp. 283 (1927).
39. *Compare* the Hudson case, *supra*, with Cross Mt. Coal Co. v. Ault, *supra*, where different results were reached on similar cases from the same usage theory.
40. *Compare* Yazoo & M.V. Ry. Co. v. Sideboard, *supra*, third party beneficiary theory with Yazoo & M.V. Ry. Co. v. Webb, *supra*, usage theory, arising from similar facts. See also note 4 and note 18 *supra*.
41. Note the facts in Ill. Central Ry. Co. v. Moore, 112 F.2d 959 (C.C.A. 5th 1940), where the plaintiff worker brought his original action in the state court in 1932. Four years later, judgment was rendered against him in the State Supreme Court. In 1936 he filed

different, fundamental approaches to the issues based on the personal attitude of the court rather than on an objective underlying legal premise.[42]

The legislative enactment of the National Labor Relations Act in 1935,[43] and the Labor-Management Relations Act, 1947,[44] known as the Taft-Hartley Law, have placed the labor contracts of industries dealing in interstate commerce in an entirely different light, and as a result, require a re-evaluation of applicable contract principles.

The National Labor Relations Act, prior to its 1947 amendments, was not directly concerned with collective bargaining agreements. Its *raison d'etre* was to protect the workers in the process of collective bargaining by citing certain employer interferences as "unfair labor practices."[45] According to the proponents of this legislation, the "equality of bargaining power" was thereby maintained, and the channels of interstate commerce were not disrupted by industrial strife. The over-all purpose of the Taft-Hartley Law is the same, except that it expands the legislative requirements in an attempt to place equal responsibility upon the union in the preservation of industrial peace. Specifically, Section 301 of the Taft-Hartley Law provides that suits may be brought against labor unions as legal entities for a breach of collective agreements. These actions may be brought in any district court of the United States against

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another action concerning the same employment in the state court; after struggling through demurrers, a plea in abatement, and a remanding by the state court, he reached a district court of the United States where the doctrine of *Erie Ry. Co. v. Tompkins* forced him back to his original position. When he finally reached the Circuit Court of Appeals for the 5th Circuit, in 1940, he lost because of the application of the three year state statute of limitations on "contracts."

42. *Compare* Consolidated Vultee Aircraft Corp. v. United Auto. Workers of America, 160 P.2d 113, 117 (1945), *aff'd*, 167 P.2d. 725, where the counsel for the union, in the course of the trial argued that a particular interpretation would better maintain "employer-employee relationship." The court answered this argument by saying that "it is not for us to decide whether it would be desirable to add the amendment, but only whether the contract admits of the amendment. Being a court and vested with no administrative powers, but only judicial powers, and those well defined by the Constitution, statutes, and sound precedent, we must approach our problems and solve them from the standpoint of law and not of economic expediency . . .", *with* McNeil v. Peoples Life Ins. Co., 43 A.2d 293, 294 (D.C. 1945), where the court said: "A collective bargaining agreement represents an accord between the employer and the bargaining representative as to terms which will govern hiring and work and pay, and such an agreement 'ought to be construed not narrowly, and technically but broadly and so as to accomplish its evident aims.'" Query: In the *Consolidated Vultee case, supra*, is not the court in fact basing its decision on its own conception of "economic expediency" when in reversing both the permanent referee and the Los Angeles County Superior Court, it was held that a labor contract which provided: (1) that the employer reserved the exclusive right to employ and discharge employees and (2) that in the event of dispute of "desirability" of amendment, the matter would be referred to the grievance procedure, the award of the arbitrator in imposing a maintenance of membership clause was a denial of "substantial right" of the employer. The justice cites no authority, either statutory or constitutional, or any precedent, "sound" or otherwise, to support his conclusion, that the employer's right could not be modified under these particular circumstances.

43. 49 STAT. 450, 29 U.S.C. § 152 (1935).

44. *See* note 1 *supra*.

45. "The right asserted by the Board is not one arising upon or derived from the contracts between petitioner and its employers. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. . . ." National Licorice Co. v. N.L.R.B., 309 U.S. 350, 364 (1940).

a union which represents employees in any industry affecting commerce, without regard to the amount in controversy or the citizenship of the parties.

It is apparent that this last provision has a direct bearing on the nature of any collective bargaining agreements entered into by employees covered by the Act.

Apart from Section 301, and the decisions under it, the courts and the National Labor Relations Board, as the administrative agency charged with the responsibility of carrying out the provisions of the Act, and effectuating the broad Congressional policy, have occasionally expressed theories of the nature of the collective bargaining agreement either openly, or by analogy and description, as incident to the prosecution of unfair labor practice charges or in certification proceedings. These theories and the administrative rulings of the National Labor Relations Board together with the decisions of the courts under the Act, have to a certain extent, placed limitations and requirements on the collective bargaining agreement. It is believed that these limitations and requirements, placed on the agreement either by implication or direct ruling, prevent the possible application of the three common law theories previously discussed, and simultaneously, they give birth to the formation of a new theory of the nature of the agreement.

The manner in which the common law theories of the enforcement of the agreement have become inapplicable can best be seen by an individual examination of the cases involved. For example, the following case clearly indicates the inconsistency of the usage theory with a Supreme Court interpretation of the National Labor Relations Act.

In the *J. I. Case Company v. National Labor Relations Board* case,[46] the company offered each employee an individual contract of employment. About 75% of the employees accepted and worked under these agreements. It was not found or contended that the contracts were coercive, obtained by unfair labor practices, or that they were not valid under the circumstances in which they were made. The company (1) refused to bargain with the union on matters covered by the individual agreements, and (2) offered to bargain on all matters after the expiration of the contracts.

The Board held that the refusal to bargain was a violation of Section 8(5) of the Act, and the company was ordered to cease and desist from giving effect to the contracts. The Circuit Court of Appeals granted an order of

46. 321 U.S. 332 (1944). For further analysis of the effect of the Act on individual contracts, see Rice, *The Legal Significance of Labor Contracts under the National Labor Relations Act*, 37 MICH. L. REV. 696, 703 (1939) and Notes, 57 HARV. L. REV. 110 (1943), 9 Mo. L. REV. 256 (1944). After this decision by the Supreme Court, the J. I. Case Company was still insistent that the individual employees had bargaining rights. As a consequence, the company entered into a contract with the union limiting its authority to represent all employees within the appropriate bargaining unit, and permitting individual bargaining by the remaining employees. The Court held that the contract was invalid. CIO v. J. I. Case Co., 12 CCH LAB. CAS. ¶ 63,617 (1947).

enforcement. On appeal to the Supreme Court, the individual contracts were held to be no bar to the bargaining requested by the Board. Mr. Justice Jackson in delivering the opinion of the Court discussed the nature of the collective bargaining agreement:

> Contract in labor law is a term the implications of which must be determined from the connection in which it appears. . . . Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, or 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. . . . But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of established rates. . . . Whenever private contracts conflict with its functions (of the Board) they obviously must yield or the Act would be reduced to futility. . . .

As previously discussed, the usage theory permits the worker to waive the provisions of the collective bargaining agreement in his individual employment contract. As indicated by this decision, however, the relegation of the collective bargaining agreement to a secondary position is invalid under the Act. A further elaboration of this point is to be found in the case of *Gatliff Coal Company v. Cox*.[47] In the words of the court:

> . . . the National Labor Relations Act, in the public interest, has given such collective agreements a more secure and stable position in our national economy than that of ordinary common law contracts which may be altered at pleasure by rendering ineffectual and unavailable any collateral agreements between individual members of the collective bargaining group designed to obtain a diminution of the obligations of a particular employer or abridgment of the benefits accruing to particular employees under the collective agreement, regardless of the circumstances which may be relied upon to justify them or the terms thereof. To hold otherwise . . . would reduce the National Labor Relations Act to a mere futility and leave collective agreements no stronger than the weakest members of the union.

It is evident from these cases that the usage theory is completely abrogated. To proceed to the decisions involving employee representation under the Act, it can be seen that the agency theory has likewise been rejected.

The selection of the representative for the purposes of collective bargaining under Section 9 of the National Labor Relations Act involves at times as a condition precedent to the entertainment of the representative proceedings, a determination of the effect to be given to an existing collective bargaining

47. 59 Fed. Supp. 882 (1945), *aff'd*, 142 F.2d 880 (C.C.A. 6th 1945).

agreement after a shift in membership from the contracting union to a new union. Should the old contract be disregarded *in toto*, as a matter of law, because the new petitioning union represents in fact a majority of the unit, or should the contract, valid when made, carry over in some way as binding on the new union? This presents a difficult problem for the Board as Section 9 provides no articulate standard by which a conclusion can be reached.

It might be suggested that the agency theory of enforcement and interpretation of the labor contract would provide a solution. Under this theory, the principal employees, entering into a collective bargaining agreement through their agents, would be bound by the resulting agreement until its expiration date, and, in the absence of any unfair labor practices surrounding the signing of the contract, could not retroactively void legitimate actions of unquestioned agents. This problem was squarely presented to the Board in the case of *Matter of Container Corporation* [48] where the majority opinion held the existing contract not a bar to an immediate election. Mr. Gerald D. Reilly, applying the agency theory suggested, dissented. A detailed examination of the case defines, it is believed, the approach of the Board toward the collective bargaining agreement.

In this case, pursuant to a consent election in April, 1943, the Anderson Corrugated Box Workers Union, Local 456, was certified as the collective bargaining representative of the company's production and maintenance employees. In July, 1943, this local signed a contract to be in effect for one year. Upon its expiration in July, 1944, a new one year contract was negotiated and signed by the local.

On August 22nd, the Paper Workers Organizing Committee wrote to the company stating that its local organization represented a majority of the production and maintenance employees, and requested recognition, which the company refused because of its contract with Local 456.

The hearing before the Board revealed the following: (1) Since the execution of the contract, only three meetings of the local were called; (2) the membership never ratified the agreement; (3) the union shop provision of the agreement was not complied with; (4) although all stewards refused to collect dues by the end of August, the president of Local 456 made no attempt to remove any steward or to appoint others. These, and other facts presented, indicated that Local 456 had for some time ceased to function as a representative of the employees of the company.

The issue was whether the purposes and policies of the Act were best effectuated by directing an immediate election, or by requiring the company's employees to forego the selection of a bargaining representative until the terminal date of the contract.

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48. 61 N.L.R.B. 823 (1945).

The majority opinion of the Board held that the contract was not a bar to an immediate election. The conclusion was reached, based not on technical contract or agency principles, but "by weighing two basic interests of employees and society which the Act was designed to foster and protect, namely, the interest in stability of industrial relations" . . . preserved in most cases by recognition of a collective bargaining agreement and "the somewhat conflicting interest in employees full freedom to choose their bargaining representatives." Said the Board:

> But where it appears that the contract either in its form or provisions, or in its operation, does not serve to stabilize industrial relations in the manner contemplated by the statute, the Board holds that it presents no obstacle to the employees' present exercise of their right to choose a bargaining representative.[49]

The Board was careful to restrict itself within the confines of the particular case, and attempted to make it clear that it was establishing no new principles of general applicability to the law of contracts by setting forth the following proposition in the footnote:

> We also assume, to the extent material, the validity of such contracts under general legal principles, although it is not our province to define or enforce the legal rights and obligations of the parties under contract.

Mr. Reilly dissented on the ground that since there "is nothing either in this record or in the findings of the majority which negate the contention that the collective agreement now in effect between this Company and the Pressmen's Union . . . is a valid contract," he could find no legal basis for permitting an election prior to the expiration date of the contract. He continued:

> Granted that, in the absence of these local union officers, it would be difficult, if not impossible, to administer the grievance provisions of the contract, I still cannot find any legal theory for setting aside the contract, since it is obvious that the principals to the contract, viz:—the employees, —are the ones responsible for liquidating their bargaining agent.
>
> I do not question that they have a right to revoke the authority of their agent, but such revocation can apply only perspectively and cannot be used to invalidate any lawful obligations undertaken by such agent during the period in which representative capacity was not questioned.

With reference to the majority's remark that they were not passing on the "validity of such contracts," Mr. Reilly replied:

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49. The Board went on to cite the following as examples of contracts "considered not a bar to an election: oral contracts; a situation where the contract if given effect as a bar would foreclose for an unreasonable time the employees' opportunity to change representatives"; contracts which lacked substantive provisions fixing terms and conditions of employment, contracts where recognition and closed shop clauses consistently disregarded in practice; "complement of employees greatly expanded since execution of contract"; "contracts otherwise repugnant to statutory policy"; and a contract involved in a "dispute as to which of two labor organizations was the legal successor to the union which negotiated the contract." (citations omitted)

> The view has occasionally been advanced that, in holding a contract not to be a bar to a redetermination of representatives, the Board is not passing upon the validity of the contract, and hence, the contracting union is still free to enforce its contract in a state court. Such a theory cannot be supported. The effect of a new certification imposes upon an employer a legal obligation to bargain exclusively with the certified union, and, hence, by the same token to refrain from any further relationship with the contracting union. Hence whenever our order is valid, the "supreme law clause" of the Federal constitution would prevent an employer from being placed in the dilemma of being subject to a conflicting decree by a state court. . . .

Mr. Reilly has thus made it clear that the majority of the Board, in holding the existing contract not a bar to an election, has rejected the second of the common law theories of interpretation, namely, that of a true agency relationship. Another issue in this case, secondary to the representative proceedings but important to an analysis of the nature of the labor contract is presented by this question: When the court holds a contract not a bar to representative proceedings, what would be the position of the employer in a suit on the contract by the employees in a common law court? If the premise of the majority be correct, namely, that they were not passing upon "the validity of such contracts under general legal principles" it would follow that such a suit could be maintained. It is submitted, however, in accordance with the thesis of the dissent, that the effect of the majority ruling by the Board is to void the existing agreement which is outweighed by the superior public interest represented by the policies of the Act. In support of this conclusion, consider, for example, the following Massachusetts decision on the point.

In *Sanford et al. v. Boston Edison Co.*,[50] certain officers of the union brought a bill in equity for specific performance of a trade agreement, particularly with reference to a provision for the check off of dues. The contract in question, entered into on May 24, 1940, included "working foreman," and provided for the check off. On January 15, 1943, a rival union petitioned the National Labor Relations Board for certification, as did the plaintiff, after unsuccessfully arguing that the contract was a bar to the proceeding. Three units were certified by the Board, and in the subsequent election the plaintiff won in all three units. Certain supervisory employees covered by the contract of 1940 were excluded from the units and election by the Board. The question was whether the company was excused from checking off wages of those employees who were, by the decision of the Board, excluded from the bargaining units and from being represented by the union in bargaining with the company. The court dismissed the bill, and held that the Board, in its certification proceedings, acted independently of the agreement. It was urged, as pointed out in the *Container* case, *supra*, that the "essential validity of the agreement" was not passed upon in the Board's proceedings, and thus the state court had

50. 64 N.E. 2d 631, 632-634 (Mass. 1946).

jurisdiction to entertain this action on the contract. The court answered this argument:

> We think it would be inconsistent with the (certificates of) certification, which excluded the union from representing these supervisory employees as their collective bargaining agency with the Company, to compel the Company to recognize the union as such agency for its enforcement of the collective bargaining agreement of May 24, 1940, in so far as it applied to these supervisory employees.
>
> The result of the certification was that the scope of the authority of the Union as bargaining agent under the agreement was restricted to those employees who the Board ruled were represented by the union. . . .

In other words, the effect of this decision by the state court was to consider that the old contract becomes inoperative as a matter of law upon certification of the statutory representative.[51]

It is likewise believed that the third party beneficiary concept is no more applicable as a basic theory of interpretation under the Act than the other common law fictions. Although Mr. Justice Douglas, in the *Case Company* decision, stated that "an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement. . ." the qualifying word "somewhat" makes it clear that the justice is speaking by analogy only, referring to the fact that the employee receives benefits from the National Labor Relations Act particularized through the medium of the collective bargaining agreement entered into by a properly certified union. Beyond this, the same technical objections, previously discussed in reference to the common law decisions, apply.

The impact on the collective bargaining agreement by the National Labor Relations Act and the decisions under it with reference to representative proceedings and unfair labor practices may be summed up as follows:

The common law theories of usage, agency, and third party beneficiary have been proved inapplicable to the collective bargaining agreement. Affirmatively, it is evident that the authority of the union to negotiate the agreement,[52] the extent of the unit,[53] and the duration of the agreement,[54] all originate in Congress and in the determination of the Board. Furthermore, an agreement, if reached, must be in writing,[55] and the content of the agreement may be examined [56] to see whether the parties have bargained "in good faith." [57]

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51. To the same effect is the opinion expressed by Chairman Madden in Matter of Pacific Greyhound Lines, 22 N.L.R.B. at 141 (1940).
52. Matter of Container Corporation, *supra*.
53. Sanford at al. v. Boston Edison Co., *supra*.
54. Reed Roller Bit Company, 72 N.L.R.B. 157 (1947).
55. H. J. Heinz Co. v. N.L.R.B., 311 U.S. 514 (1941). *See also* Ward, *The Mechanics of Collective Bargaining*, 53 HARV. L. REV. 753 (1940).
56. Matter of Timken Roller Bearing Corp., 70 N.L.R.B. 39 (1946).
57. The courts have held that the employer must bargain "in good faith" to satisfy the requirements of the Act. General Electric Co. v. Gojack, 68 Fed. Supp. 686 (U.S. Dist.

It is submitted that such an agreement so conditioned by legislative and judicial fiat is clearly not a "contract" in the accepted bi-parte sense. Rather, it seems that Congress has in effect delegated to the properly certified representative and the employer, within the framework of the law, the authority to draw up rules and regulations to govern the relationship between management and the employees in the unit involved.[58] This inference has found support in a decision of the Circuit Court of Appeals for the Fourth Circuit which characterizes the agreement as the "industrial constitution of the enterprise." [59]

In other words, the effect of the national legislation is to restrict "liberty of contract" of employers and of unions to the right of merely drafting local industrial regulations providing substantive standards for the conduct of the group enterprise, thus taking the collective bargaining agreement out of the realm of the common law contract and placing it on a different status.

The question may well be asked at this point whether Section 301 of the Taft Hartley Law, as written,[60] in subjecting the collective bargaining agreement to common law enforcement in the federal district court, represents a workable approach that is consistent with the *sui generis* nature of the instru-

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Ct. 1946). Under the Taft-Hartley Law the union must also "bargain in good faith." Times Publisihing Co., 72 N.L.R.B. 767 (1947).

58. "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 . . ." Steele v. Louisville & N.R. Co., 323 U.S. 192, 202 (1944).

59. National Labor Relations Board v. Highland Park Mfg. Company, 110 F.2d 632, 638 (C.C.A. 4th 1940).

The conclusion that the labor contract has broader implications than an ordinary bi-parte contract has found support in texts and law reviews for years. In 1918, Professor Duguit aroused considerable comment by the following analysis:

> "The collective labor contract is an agreement or law regulating the relations of two social classes. It is by no means a contract giving rise to special, concrete, and temporary obligations between two juristic subjects. It is a law establishing permanent relationships between two social groups, the legal rule according to which the individual contracts between members of these two groups are to be concluded. Just as the articles of association are the law for a group, in the same way the clauses of a collective contract are the law which governs the relations between the two social groups."

Although Duguit denied any legal obligations to the collective agreement, he was one of the first to recognize the deeper implications in the status relationship which inevitably arises upon the execution of such a contract. More recent writers have characterized the agreement as a source of "industrial common law," GOLDEN AND RUTTENBERG, THE DYNAMICS OF INDUSTRIAL DEMOCRACY 121 (1942); "a super-contract or norm," Rice, *The Legal Significance of Labor Contracts under the National Labor Relations Act*, 37 MICH. L. REV. 696, 722 (1939); "a statutory collective contract" Lenhoff, *The Present Status of Collective Contracts in the American Legal System*, 39 MICH. L. REV. 1109, 1138 (1941); and as an element in "representative government as applied to labor relations." *See* note, 38 MICH. L. REV. 516, 521 (1940).

60. There is good evidence to believe that § 301, in some form, will survive the present 81st Congress. Consider President Truman's recent remarks to Congress on January 5, 1949:

> "The Wagner Act should be reenacted . . . certain improvements are needed. . . . The use of economic force to determine issues arising out of the interpretation of existing contracts should be prohibited. . . ." N.Y. Times, Jan. 6, 1949, § 1, p. 4, col. 3.

ment, implicit in the document itself and the decisions under the remainder of the National Labor Relations Act.

The reasoning underlying the passage of Section 301 is not difficult to follow. When the 80th Congress was considering enactment of remedial labor legislation, it was faced with the fact that effective collective bargaining requires an employment contract that is binding on all parties. The Congressional attitude was that "breaches of collective agreements have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur. . . ." It was felt ". . . that the aggrieved party should also have a right of action in the Federal Courts." [61]

The legislators remarked:

> If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic welfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal Courts. . . .

In other words, faced with the problem of harmonizing the economic and social interests of the unions as representatives of workers, and management, Congress felt (1) that unions were not observing their labor agreements, thus promoting industrial strife, (2) labor contracts were not generally enforceable in the state courts because of the inability to sue unions as entities, (3) the prosecution of unfair labor practices did not provide a sufficient sanction against such undesirable conduct. Therefore, in the words of Section 301 (a):

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

Viewing this provision critically, it appears to be entirely procedural in its nature; its proponents advanced as the legal necessity for its enactment the inability of employers to sue because of procedural impediments in the state

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61. REPORT OF THE SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE ON THE PROPOSED FEDERAL LABOR RELATIONS ACT OF 1947, Sen. Rep. No. 105, 80th Cong., 1st Sess. 15 (1947).

courts. Yet the one court in which its constitutionality has been tested held that 301(a) provides for the enforcement of "substantive rights" created by the Act,[62] although no standards are provided by which the interpretation and enforcement of the agreement can be determined.

In spite of the noteworthy purpose underlying the enactment of this statute, the failure of Congress to provide the necessary guiding principles to assist the judges in the determination of the critical issues inherent in any labor contract leaves the court in the position where the common law decisions discredited in theory and in fact, pertaining to labor contracts, establish the only criteria available for precedent. Furthermore, the decisions analyzed prove that most judges are not equipped by training or experience to decide without some assistance the emotional and economic issues arising from the employment relationship.

Just how to retain the essence of the common law contract dignified by public respect and enforced in the courts, within the *sui generis* concept of the collective bargaining agreement, and then to fit these elements effectively into the completed structure of collective bargaining to achieve industrial peace is the main problem.

A suggested answer lies (1) in frankly recognizing that the labor contract is a focal point in a social and economic relationship fully as complex as the regulation of transportation, public utilities, or the issuance and sale of securities, and (2) in utilizing a court structure expert enough to sense the intangible implications involved and flexible enough to effectuate the demand for whatever special remedies are needed.

Today we are in the early stages of point (1) of the suggested answer to the problem. It is believed that complete fruition of point (1) can be realized only by certain adjustments in our existing legislative machinery, and in our general national thinking with reference to the labor contract. In the first place, it may well be argued that the jurisdiction of the National Labor Relations Board should be extended to give it primary jurisdiction in all matters affecting labor disputes.[63] The Board should have the power not only to interpret the collective bargaining agreement but also should have the power of enforcement.[64] For example, cease and desist orders should be utilized in the place of the present equity injunction.

62. Colonial Hardwood Flooring Co., Inc. v. International Union United Furniture Workers of America, 76 Fed. Supp. 493 (D.C.Md. 1948).

63. For a general discussion of special labor courts see BRAUN, THE SETTLEMENT OF INDUSTRIAL DISPUTES 261 *et seq.* (1944).

64. This suggestion to delegate the right to interpret and enforce a labor contract to an administrative agency may raise a constitutional question under U.S. CONST. ART. III, § 1; "The Judicial Power of the United States shall be vested in One Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." For example, it may be argued that the interpretation and enforcement of the contract is a "judicial function" traditionally handled by an established court of law and the attempt to place this responsibility in the hands of an administrative agency would be an unconstitutional delegation of "judicial power" under Art. III, *supra*.

From a practical standpoint, the highly integrated industrial development of this country with its emphasis on centralized personnel policies radiating from a central source and arising in part, in many cases, from a master union agreement covering all plants wherever located, presents problems to the employer, the employee, and the union of a basic similar nature regardless of the jurisdiction in which they arise. To channelize litigation arising from a collective bargaining agreement into a federal agency composed of experts who will realize (1) that the complex instrument they are interpreting is the industrial constitution of that particular industry and (2) will rely on precedents sound in fact as well as law in the enforcement of that instrument, will increase confidence in the courts by industry, labor, and the general public, and will lend stability to a growing body of industrial law.[65]

It may be argued, on the other hand, that the extension of the jurisdiction of the National Labor Relations Board is not attainable. If this be true, it is believed that the general aims just outlined can be achieved by providing in Section 301, that all federal district judges be provided with the services of a special master or commissioner. These judicial assistants, experts in the field of industrial relations, would take the evidence informally, but according to practical judicial standards, and make recommendations to be passed on by the judge. They would be assigned to each circuit, and be available to any district faced with a labor law problem. By this device, the quality of "expertness" will be satisfied without disturbing the basic framework of the law now in existence.

In the second place, the United States Arbitration Act which provides for a stay of proceedings in a suit upon an issue referable to arbitration under an arbitration agreement until such arbitration is had, should be amended to include "employment contracts" currently excepted from the provisions of the Act.[66] This statute has been involved in litigation several times during the past year in suits for enforcement under Section 301, and the courts, in taking jurisdiction, decided the issues in spite of arbitration provisions provided in

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It is further suggested, however, that this objection may be answered by (1) providing adequate substantive and procedural standards in the statute extending this jurisdiction, such as (a) a right to a "full hearing" before the agency and (b) the right of a reviewing court of law to have exclusive jurisdiction to affirm, modify, or set aside an order, in whole or in part, with findings of fact of the Board, to be conclusive if supported by the evidence. It is believed that the excellent draftsmanship of § 24(a) "Court Review of Orders" of the "Public Utility Holding Company Act of 1935" would provide an adequate model to withstand any attacks on the constitutionality of this proposal.

65. Brown, *The Judicial Regulation of Industrial Conditions*, 27 YALE L. J. 427 (1918). This article presents an interesting study of what Australia and New Zealand have done in the extension of the "sphere of the State" in relation to the control of industrial relations. The author emphasizes the "separate development of a body of industrial law, coherent and composed of judicial principles, analogous to but not necessarily the same as ordinary 'civil law.'"

66. Act of February 12, 1925, c. 213 (as reenacted by the Act of July 30, 1947, c. 392, 9 U.S.C.A. 1).

the grievance procedure of the contract.[67] The effect of including employment contracts in the Arbitration Act will be to force the parties to utilize and exhaust all administrative remedies at the local level before resorting to court action. It is believed that this type of settlement will in most cases be more productive of future harmonious relations than that effectuated by the superimposed rigid court of law.

Regardless of necessary changes in existing legislation, a solemn obligation rests on all law teachers, lawyers, and the industrial relations experts of both management and the union, to realize that within the boundaries of every industrial organization there exists a community of individuals with mutual interests in the promotion of the success of that industrial organization, and individual interests in their own security and advancement. These interests, mutual and conflicting, are as local to that industry in many respects as those of the citizens of New York and Florida with respect to their state sovereign interests. It should be recognized that when the "citizens" of this industrial community arrive at a working agreement which may be both a settlement of existing problems and a projection of future working conditions, such an agreement can be interpreted only in the light of disputes previous to and arising out of the agreement and the course of their arbitration and settlement. The difficulties giving rise to each particular provision and the history of collective bargaining in that plant must be understood.[68] The roots of a dispute thus frequently reach much deeper than the printed words on the paper of the collective bargaining agreement, and a legal judgment for the payment of money from one side or the other because of the apparent "breach of contract" frequently no more settles the problem than if a wife or husband sued the other in a court of law for breach of the marriage contract and continued to live together in hopeful harmony.

Many such local disputes arise from years of resentment against poor personnel policy and continued misunderstanding between management and labor. Obviously, in such cases, mutual trust and understanding are not fostered by formal legal proceedings where the parties must continue to work side by side in the future. Of course, a farsighted and wise personnel policy would prevent and anticipate many difficulties which could flare into actual disputes.

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67. Colonial Hardwood Flooring Co., Inc., v. International Union United Furniture Workers of America, *supra;* Matson Navigation Co. v. National Union of Marine Cooks and Stewards, 14 CCH LAB. CAS. ¶ 64,521 (1948).

68. "The industrial aspect carries us into another sphere, not that of legal contract theory or technique, but that of the social and political effects of contract, and especially of contract as an instrument of unofficial government . . . in the self-government of sub-groups contract provides an original framework, a constitution, a source of ultimate sanction in dispute or breakdown . . . but for the running of affairs they say but little. The play of personality, the unrecorded adjustment from day to day, further factual agreement from time to time, informed by usage, and by initiative and acquiescence which do not even call for conscious agreeing . . . these are what fill the contract framework with a living content. . . ." Llewellyn, *What Price Contract?*, 40 COL. L. REV. 704, 728 (1931).

The administration of a collective bargaining contract is essentially a human problem, since it deals with the ways and habits of human beings, their relations to one another in responsibilities and authorities, and their common welfare. A strike or lockout is less a violation of a legal document than it is the breakdown of union-management relations.[69]

Recognizing all of these facts, the law teacher in teaching labor law, the practicing attorney, and the industrial relations expert, should not be quick to seize upon traditional confining legal "contract" concepts in this application, but should emphasize the prevention of disputes at the local level, and if they occur, should completely exhaust all grievance procedures provided by the agreement. The importance of fair and thorough arbitration, and a reluctance to take such a case to court in the absence of extraordinary circumstances such as unwarranted economic force amounting to a breach of the agreement, cannot be overemphasized. If preventive measures and all methods of arbitration are exhausted first, actual litigation will be rare. When it does occur, attempting to put square pegs in round holes by forcing the labor problem into traditional legal molds is only a superficial solution which may result in even more bitter resentment and increased industrial instability. The process of collective bargaining is the cornerstone of our industrial and social peace, and it cannot be successful until the importance and true nature of the collective bargaining agreement is understood.

69. GOLDEN AND RUTTENBERG, *supra* at 91.