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INDIVIDUAL VS. COLLECTIVE AGREEMENTS: A STUDY IN CONFLICT AND UNION LEVERAGE

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I. INTRODUCTION

OUR national labor policy, as evidenced by the National Labor Relations Act[1] (NLRA), was carefully molded to protect the working man from potential exploitation by his employer. To give the individual worker the power to deal with his industrialist employer from a position of strength, our labor policy accords such laborers the right to pool their strength through union organization.[2] There is no sign in the legislative history of this act that Congress envisioned a strong union growth among a class of employees who, sometimes in less than one year, can earn more than the average worker does in a lifetime.

These people, notably in the entertainment and mass media fields, wield the bargaining power of their names and expertise. As individuals, they often have as substantial a bargaining position as an entire union in another area. Yet these big-time union members are grouped with their perhaps less fortunate compatriots. In the name of concerted activity, they are required to suspend the fruits of their labors, and the employer is faced with this extraordinary additional pressure. Perhaps this is justified, at least where gain is anticipated for the immediate union to which these entertainers and media personalities belong. However, as the gain to the immediate union becomes less direct, as in the case of honoring another union's picket line, the policies underlying such activities should be re-examined.

This article is directed to a generic examination of the rights a person might have under an individual agreement, when the agreement is in conflict with a collective bargaining agreement applicable to that individual. Specifically, this article will deal with problems faced in two recent New York lower court decisions[3] dealing with television network newsmen-announcers, members of the American Federation of Television and Radio Artists (AFTRA), who were ordered by their union to honor the picket lines of another union on strike against the networks. The issues

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1. 29 U.S.C. §§ 151-66 (1970).

2. See, e.g., id. § 157.

3. American Broadcasting Co. v. Brandt, 56 Misc. 2d 198, 287 N.Y.S.2d 719 (Sup. Ct.), aff'd, 30 App. Div. 2d 935, 293 N.Y.S.2d 988 (1st Dep't 1968); Columbia Broadcasting System, Inc. v. Baldwin, 70 CCH Lab. Cas. ¶ 13,275 (N.Y. Sup. Ct. 1972).

range from whether such activities are covered by a no-strike clause to whether they are enjoinable as an interference with individual contract rights sanctioned by the union, and to whether such disputes are subject to arbitration.

In order to deal effectively with this contemporary problem, it is necessary first to examine the historical context of the various doctrines involved; the basic status of individual contracts when in conflict with collective agreements; the right of a union to insist that its membership honor the picket lines of another union; and the effect of an agreement to arbitrate, contained in an expired collective agreement, on the union's insistence that its members honor the picket lines of another union. The issues are drawn narrowly in order to limit an expansive area of the law, in the hope of presenting a thorough analysis within a reasonable space.

II. Historical Precedents: Individual vs. Collective Agreement

A. *The Supreme Court*

When the Supreme Court sustained the constitutionality of the National Labor Relations Act,[4] there was the suggestion that employers might be able to circumvent the directives of the national labor policy by means of individual contracts with their employees.[5] However, within two years, indications were that such attempts to avoid the congressional policy would meet with failure.[6] In 1944, those indications became law in *J.I. Case Co. v. NLRB*.[7]

In *Case*,the employer had requested that his employees voluntarily accept individual contracts. There was no evidence of coercion or of any unfair labor practices.[8] The employer argued that while these good faith individual agreements were in effect, any attempt to force him to the collective bargaining table regarding these employees would be an unconsti-

4. 29 U.S.C. §§ 151-66 (1970).

5. "The [NLRA] does not compel agreements between employers and employees. . . . It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.'" NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) (footnote omitted).

6. In National Licorice Co. v. NLRB, 309 U.S. 350 (1940), the Supreme Court upheld an NLRB ban on the employer's giving effect to individual contracts coerced from his employees during an attempt to unionize. The Court agreed that these contracts "imposed illegal restraints upon the employees' rights to organize and bargain collectively guaranteed by §§ 7 and 8 of the [NLRA]." Id. at 360. However, this case dealt exclusively with the employer who insists on such individual contracts solely for the purpose of frustrating the national labor policy. Id.

7. 321 U.S. 332 (1944).

8. Unlike National Licorice, this employer did not enter into these individual contracts to frustrate the national labor policy. Id. at 333.

tutional impairment of the right of contract. The Court analyzed the purpose and intent of the NLRA and concluded that these individual agreements were superseded by the terms of a collective bargaining agreement negotiated with the properly certified union representative.[9] After voicing its suspicion of individual advantages, the Court did indicate, however, that it would leave open the question of whether an individual employee could avail himself of the more advantageous terms of his individual agreement.[10] This issue was not reached because the collec-

9. The Court reasoned: "[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. 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 . . . ." Id. at 336.

And later: "[But i]ndividual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act . . . to forestall bargaining or to limit or condition the terms of the collective agreement. . . . Wherever private contracts conflict with [the NLRB's] functions, they obviously must yield or the Act would be reduced to a futility.

"It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract 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 the terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment." Id. at 337-38.

See also Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) (companion to Case decision). There the Court refused to allow individual contracts even though voluntary, to supersede the terms of an earlier collective bargaining agreement. Id. at 347.

10. "But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, but we find . . . no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment . . . it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages [and the benefit of one may hurt the group as a whole]. Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the laws of contracts applicable, and to the Labor Board if they constitute unfair labor practices.

tive bargaining agreement at bar was considered far more beneficial than the individual agreements deemed to be superseded.

It is interesting to note that the Court apparently sanctioned union approval of certain areas of contract which might be left up to the independent negotiation between the individual and his employer, notwithstanding the collective agreement.[11] However, there is a strong negative implication that this is perhaps the only way an individual can obtain better terms than his co-workers without forcing his employer to commit an unfair labor practice.[12] The Court seems to have sustained this implication in a later case which banned negotiations between employees and employer without the inclusion of the certified union.[13] There is little doubt that this approach has survived intact, if not enhanced, to the present day.[14]

". . . [where areas are not covered by the collective contract, employees may voluntarily contract with the employer so long as the latter does not] incidentally exact or obtain any diminution of his own obligation or any increase [in benefits] of those employees in the matters covered by collective agreement." 321 U.S. at 338-39.

This same position is stated in Railroad Telegraphers:

"It may be agreed that particular situations are reserved for individual contracting, either completely or within prescribed limits." 321 U.S. at 347.

The National Labor Relations Board addressed the problem of exactly what a "less favorable" individual contract term might be. In Midland Broadcasting Co., 93 N.L.R.B. 455 (1951), the Board dealt with a collective agreement between the employer radio station and the American Federation of Radio Artists (the predecessor of the American Federation of Television and Radio Artists) which allowed the employer to negotiate with its on-the-air personalities for individual talent contracts as long as there were no terms and conditions less favorable than those in the collective agreement. The employer did so negotiate by adding some benefits (e.g., pay guarantees) while withdrawing others (e.g., the right to accept other employment). Noting that the net effect of the individual contracts appeared to be more favorable, the Board refused to remove any negative term:

"It is not sufficient, in our opinion, to show that a particular provision of the talent contracts, taken by itself, is less favorable than a particular term of the union contract." 93 N.L.R.B. at 456. However, the Board also expressed a feeling that this dispute would have been resolved more effectively through the established grievance procedure. The decision is quite logical although the language is not so sweeping as the language of Case would lead one to suspect in terms of response by the Board.

11. See note 10 supra.

12. Id.

13. Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-84 (1944). Even where a majority of the employees in a given bargaining unit no longer wants the union to represent its interests, until certification is revoked it is an unfair labor practice (refusal to bargain in good faith under 29 U.S.C. § 158(a)(5)) for the employer to engage in individual negotiations with his employees while negotiations with the union are pending. See also NLRB v. Katz, 369 U.S. 736, 748 n.16 (1962).

14. "The [labor] policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to

B. *The Response of the Lower Courts*

The issue of conflict between a collective and an individual contract has been raised in both state and federal courts.[15] The response has been less than uniform. The obvious result—invalidation of the individual agreement—certainly has occurred with the greatest frequency in situations where employers have used the individual contract as an obvious means of avoiding a collective agreement.

This pure conflict situation, which is a clear attempt to evade the national labor policy, is reflected in cases like *NLRB v. Port Gibson Veneer & Box Co.*,[16] *NLRB v. Valley Broadcasting Co.*,[17] and *Westinghouse Salaried Employees v. Westinghouse Electric Corp.*[18] Each of these federal decisions seems to emphasize the governmental interest in sacrificing any individual agreements to the collective betterment. This seems in accord with *Case*.

However, more interesting approaches seem to have been raised in

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act in the interest of all employees. . . . Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them." NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) (footnotes omitted). These strong words, expressed by Justice Brennan in a narrow 5-4 decision, suggest that the Case doctrine has survived into the present day with perhaps a stronger judicial sentiment, at least in the Warren Court, against individual advantages through individual agreement.

15. See notes 16-44 infra and accompanying text.

16. 167 F.2d 144 (5th Cir.), cert. denied, 335 U.S. 819 (1948). The court found that the attempts of a crate manufacturer to get his employees to sign individual contracts, while not directly opposing unionism and organization, had the effect of deterring union organization and was thereby an unfair labor practice. Id. at 146.

17. 189 F.2d 582 (6th Cir. 1951). Here, the management of a radio station, knowing that the American Federation of Radio Artists was trying to organize the station's announcers, prepared individual contracts with each announcer (even though these announcers had signed cards naming AFRA as their exclusive bargaining agent). Though these agreements were never signed, their terms were put into effect, affording the announcers some needed economic relief. Ultimately, the employees abandoned their plans to unionize the station and, in effect, went along with the employer who had said the union contained undesirable communist elements. The court held that the employer had committed an unfair labor practice by bargaining with his employees without union sanction or control. Id. at 586-87.

18. 210 F.2d 623 (3d Cir. 1954), aff'd, 348 U.S. 437 (1955). Citing Case, the court stated: "The bargaining representative is made the sole agent for the unit and represents not only its members but all employees in that unit whether members of the union or not. The terms of the collective contract thus become part of the individual contract of employment, not because of consensual acts of the employer and employee, but because the law says so no matter how those parties may feel about the matter." 210 F.2d at 627 (citation omitted).

state courts, which often have ignored the dictates, and dicta, of *Case*. In *Metropolitan Life Insurance Co. v. Durkin*,[19] the court held simply that *Case* did not bar the state from imposing restrictions on the commissions which might be charged by insurance salesmen, notwithstanding a contrary provision in the salesmen's collective agreement. Obviously, the potential for employer abuse is lessened substantially in this situation, and perhaps the national labor policy could be subordinated to reasonable control by the state within its police powers. This decision suggests, however, that powerful employers may petition the legislatures for relief in those marginal areas where a state interest of sufficient magnitude might be found. Thus, the most susceptible unions would be those composed primarily of professional people, whose performance of a service in direct contact with the public might justify state imposition of conditions which would have been void had they been negotiated through individual contracts. It is unlikely, however, that such an approach would be economically and politically viable for any but the largest employers.

The potential conflict between company policies and the rights of the employees under the collective agreement was examined in *Smith v. Unemployment Compensation Board of Review*.[20] Although this decision essentially concerned the state's unemployment laws, the superior court held that an express company policy requiring employees to stop working in the fifth month of pregnancy was a condition of employment which did not conflict with the collective bargaining agreement and, hence, was valid.[21] The state supreme court subsequently reversed on the grounds that a collective agreement "could not abrogate any rights which accrue

19. 276 App. Div. 394, 94 N.Y.S.2d 865 (1st Dep't), aff'd, 301 N.Y. 376, 93 N.E.2d 897 (1950).

20. 187 Pa. Super. 560, 146 A.2d 59 (1958), rev'd, 396 Pa. 557, 154 A.2d 492 (1959).

21. The superior court stated:

"A company policy or individual contract expressive of terms and conditions of employment may be invalid insofar as it may conflict or be inconsistent with a collective bargaining agreement. [Citing Case, 321 U.S. at 335.] But the fact that the collective bargaining agreement in this case contains no provision concerning pregnancy does not have the effect of eliminating the company policy in regard thereto from the terms and conditions of employment. A collective bargaining agreement is not necessarily synonymous with the contract of employment . . . the employment may be validly affected by terms and conditions or company policies relating to matters not encompassed by the collective bargaining agreement." 187 Pa. Super. at 564, 146 A.2d at 61 (citation omitted).

If the court had based its decision on an implied incorporation of this company policy into the collective agreement (because the policy was known to the union and its validity was not challenged in negotiation), the court's rationale might be consistent with Case. However, the court's sweeping language concerning the effectiveness of individual contracts in the vacuum left by collective agreement is at best questionable, if not simply incorrect.

to an employee from the legislative mandate expressed in the Unemployment Compensation Law."[22] It is significant, however, that the lower court apparently was unconcerned about the unilateral imposition of this term by the employer. It is certainly clear that as this is a condition of employment, and therefore a mandatory subject of bargaining,[23] its unilateral imposition must be construed as an unfair labor practice.[24]

In many instances, state courts have resorted to ingenious arguments to enforce a particular individual contract, even though a collective bargaining agreement was in effect. *Fava v. Spacarb New York Distributors, Inc.*,[25] provides an illustration of such logic. There, an employee had an individual contract of employment for a stated term of five years, with a provision requiring the arbitration of employer-employee disputes. The employee was discharged, which discharge the employee alleged to be wrongful. After this discharge, but before the five-year term expired, the employer was unionized and a collective bargaining agreement was reached. The employer claimed that this latter agreement superseded the individual contract and that, therefore, he was not required to arbitrate the discharge. The court responded[26] simply that at the time of the collective agreement the ex-employee was not a member of the bargaining unit. Hence, as to him, the collective agreement had no force. This court's position seems consistent with the general policy favoring arbitration,[27] and with the dictum in *Case* which left open instances in which an individual employee could rely on his individual contract with his employer.[28] However, the court circumvented these policy issues by holding merely that the bargaining unit was composed only of present employees—an entirely satisfactory method of reaching an equitable result.

In *Sloan v. Journal Publishing Co.*,[29] a state court faced a situation where individuals, on their own initiative—a very important factor in the court's view—requested that their status as employees be terminated in favor of a new status as independent contractors with individual con-

22. 396 Pa. at 559, 154 A.2d at 493.

23. The mandatory subjects of bargaining are "wages, hours, and other terms and conditions of employment . . . ." 29 U.S.C. § 158(d) (1970).

24. The leading case in this area is NLRB v. Katz, 369 U.S. 736 (1962).

25. 207 Misc. 846, 139 N.Y.S.2d 866 (Sup. Ct. 1955).

26. Id. at 848, 139 N.Y.S.2d at 867-68.

27. This policy seems best illustrated by the Supreme Court in three cases known as the "Steelworkers Trilogy": United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navig. Co., 363 U.S. 574 (1960); and United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). This topic is discussed further at notes 84-93 infra and accompanying text.

28. See note 10 supra.

29. 213 Ore. 324, 324 P.2d 449 (1958).

tracts. Plaintiffs were newspaper employees governed by a collective bargaining agreement negotiated between the employer and the American Newspaper Guild. They approached the employer with an offer that they become wholesale newspaper dealers pursuant to the above-mentioned individual contracts. The paper agreed and accepted their resignations as employees. At first, the Guild also seemed to accept this change in status. But this apparent complacency was short-lived. Convinced that it still retained jurisdiction over the "wholesalers," the union invoked the established grievance procedure and won its case before an arbitration panel. The union then threatened a strike unless the employer denied effect to the individual contracts signed with plaintiffs. At this juncture, the plaintiffs filed suit to stop the union's interference with their contract rights and obtained injunctive relief.

After a careful analysis of the specific factual situation, the court concluded that the plaintiffs, indeed, were independent contractors, over which the Guild had no jurisdiction. In other words, the court believed that there was no conflict with the collective agreement because it was not applicable to these employees.[30]

In some instances, courts have been less than sympathetic to individuals asserting their individual contracts with employers in order to achieve what would be a clearly inequitable result. *Mossberg v. Standard Oil Co.*[31] is a case in point. In 1937, plaintiff signed a contract of employment with defendant, terminable at will upon sixty days' notice, and which guaranteed a reasonable salary for the life of the contract. In 1945, a collective bargaining agreement was negotiated with a newly-certified union having jurisdiction over plaintiff even though he was not a member. In 1964, a strike was called (lasting sixteen weeks) in which plaintiff joined the picket line and received some form of compensation from the union. There was only minimal evidence that he sought any work from his employer during the course of the strike. After the strike ended, plaintiff demanded his wages for the strike period, claiming that the employer had failed to furnish him work and that the only way defendant could discharge or otherwise fail to pay him was by giving the sixty-day notice agreed upon in the 1937 contract.

As might be expected, the court held[32] that the collective agreement superseded the earlier individual contract. In an unusual gesture, however, that same court refused to say whether the 1937 agreement was dead

30. The court cited Case, inter alia, for the proposition that the collective agreement does not affect the rights and status of independent contractors. Id. at 352-53, 324 P.2d at 462.

31. 98 N.J. Super. 393, 237 A.2d 508 (1967).

32. Id. at 408, 237 A.2d at 516.

for all purposes, though the twenty-five-year lapse of time suggested a mutual intention to abandon it.

The most interesting line of cases in this area concerns the question of seniority rights. In the typical situation, plaintiffs are a group of disgruntled employees whose seniority rights, established prior to the certification of a union and the negotiation of a collective agreement, have been bargained away by the union. In this particularly sensitive area, there is a great deal of disagreement among the various state courts. However, in the federal system, courts have followed faithfully the analysis of the *Case* decision.

One such case involved the Railway Labor Act.[33] In *Lewellyn v. Fleming*,[34] an individual contract with plaintiff, a brakeman, predated the collective bargaining agreement. This individual contract entitled plaintiff, by virtue of his seniority, to be first in line for a job as conductor–employment with more status and higher wages. When a union was certified to represent conductors (and not brakemen), the collective agreement reached provided a new method for selecting conductors. This necessarily and detrimentally changed plaintiff's position. Plaintiff sued claiming that a valuable property right was taken from him without compensation or due process.[35]

The court held that even though plaintiff was not a member of the union enjoying the collective bargaining agreement, his individual contract nevertheless was subordinate to that agreement.[36] Further, it held that no constitutional right was abridged because any individual contract involving interstate commerce may be transcended by a subsequent valid congressional exercise of power under the commerce clause.[37] This case, however, dealt with an indirect loss to plaintiff, inasmuch as he was not

33. 45 U.S.C. §§ 151-88 (1970).

34. 154 F.2d 211 (10th Cir.), cert. denied, 329 U.S. 715 (1946).

35. Id. at 213. Plaintiff maintained that the fifth amendment prohibited any interpretation of the Railway Labor Act which would abrogate his vested contract rights.

36. Id. at 214.

37. Id. Another federal action which seems to follow this line is Goodin v. Clinchfield R.R., 125 F. Supp. 441 (E.D. Tenn. 1954), aff'd, 229 F.2d 578 (6th Cir.), cert. denied, 351 U.S. 953 (1956). The case centered on an established company practice, in effect for over 30 years, whereby trainmen and conductors would not be retired, regardless of age, or discharged without cause as long as they were capable of working. Notwithstanding this policy, the newly certified union negotiated a mandatory retirement age of 70. Plaintiffs, all of whom were in the bargaining unit but only one of whom was in the union, sued claiming interference with implied contract rights (one plaintiff even produced a written agreement to this effect, but there was no proof that it was authorized). The court indicated that even if a contract could be implied, the Case decision would require that the collective agreement supersede. Id. at 449-50. The court also made it clear that accepted practices were clearly

deprived of a job he already had, and his seniority, at least with regard to other brakemen, remained intact. These elements may be very important in distinguishing cases decided by state courts.

A state court decision of particular interest is *Belanger v. Local 1128, Street Employes*[38] [*sic*]. The controversy involved a change in seniority rights which had been resolved in an earlier compromise agreement among all concerned in a seniority dispute. For many years the Superior White Co. operated streetcar lines. A takeover by the Duluth-Superior Bus Co. led to replacement of the trams with buses. The operators of the streetcars, for the most part, became bus drivers. A dispute arose as to whether the former streetcar operators could count their years in that employment toward their seniority in the company as bus drivers. In 1937, after arbitration, a written contract was signed by the company and the feuding factions of employees. The contract resulted in a compromised seniority list.

A few years later, the defendant union was certified as the exclusive bargaining representative. In 1946, during collective bargaining, the union raised the seniority issue and successfully proposed that the 1937 agreement be abolished. The former tram operators effectively lost the right to include any of their pre-bus days in calculating their seniority. They sued, alleging that the union lacked the power to modify the 1937 contract.

The court agreed, not on the narrow ground that special circumstances merited an exception to the general rule,[39] but rather on a notion that somehow seniority rights in general are worthy of special protection. In

negotiable. Id. at 448. See also ILWU v. Kuntz, 334 F.2d 165 (9th Cir. 1964), where the court refused to find against a union which, in good faith, stripped certain employees of preferred seniority rights granted in an earlier collective bargaining agreement.

38. 254 Wis. 344, 36 N.W.2d 414 (1949).

39. The court noted, however, that with respect to the 1937 seniority list, the union acted "arbitrarily, unfairly, and capriciously," 254 Wis. at 355, 36 N.W.2d at 419, in allowing the majority of the membership (the bus drivers who were not former tram operators) to change the contract to their own advantage. If the court had placed a greater emphasis on this element, it might be argued that the court was, in effect, applying the doctrine of fair representation in order to protect the minority from the potential abuses of their union. For an examination of this doctrine see Steele v. Louisiana & Nash. R.R., 323 U.S. 192 (1944). However, the court semed to be more impressed with the nature of these rights and of seniority in general:

"Bargaining for seniority rights is quite different than bargaining for wages, hours, working conditions, etc. The latter conditions affect the union as a whole and are ever changing. A collective-bargaining agreement may be necessary and its results are final and binding under the union's by-laws when the union bargains for benefits for all its members." 254 Wis. at 350, 36 N.W.2d at 417. By its language, the court suggested that seniority rights, at least those long established, are not within the scope of collective bargaining because of their continuing nature. This clearly contravenes a well established rule that seniority rights are

addition, the court found that limiting union freedom to act in this area would not impair its function as exclusive bargaining agent.[40] The court's reasoning, though it reached an equitable result, seems to go against the dictates of *Case*. Nevertheless, the court distinguished the Supreme Court ruling as dealing solely with litigation between union and employer, while the case at bar was "wholly within the union."[41] Further, and with some merit, the court argued that unlike *Case*, the prior contract in this action was not adopted to "forestall bargaining or . . . limit or condition the terms of the collective agreement."[42]

Belanger seems to be a rare attempt by a state court to allow the just argument to prevail by permitting an agreement negotiated before union certification to prevail over the subsequent collective bargaining agreement.[43] However, it might be significant to note that the 1937 seniority contract was negotiated in a manner strongly suggestive of techniques used in the collective sphere. The parties gathered, with proper representation and in an adversary situation, to settle their differences. The result was an arbitrated compromise. The flavor of the court's decision suggests that this elaborate procedure, indicating the importance attached to the list by the various parties, may have swayed the court to distinguish this factual setting from that in *Case*. This decision produced a result different from that expected, given the strong language of *Case*.[44] Assuming the employer had been the one to suggest abolition of the 1937 seniority list, thus creating an employer-employee dispute more analogous to the factual situation in *Case*, it still would be difficult to believe that

mandatory subjects of bargaining. See, e.g., Industrial Union of Marine Workers v. NLRB, 320 F.2d 615, 620 (3d Cir. 1963), cert. denied, 375 U.S. 984 (1964).

40. 254 Wis. at 350, 36 N.W.2d at 417. It is unclear how the court would support this statement, an effort which was not attempted.

41. Id. at 352, 36 N.W.2d at 418.

42. Id. (citing Case, 321 U.S. at 337).

43. Examples of other, more recent attempts of state courts to employ this approach when facing conflicting collective and individual contracts can be seen at notes 94-109 infra and accompanying text.

44. A more typical example is Pietrzykowski v. Safie, 1 Mich. App. 644, 137 N.W.2d 734 (1965). There, certain seasonal employees (plaintiffs) of a pickle and pepper packing plant had individual contracts guaranteeing them that "as long as plant is in operation, there will be work for said Employee." Id. at 645, 137 N.W.2d at 734 (emphasis deleted). A subsequent collective agreement established a new seniority system which affected the hiring policy in the employer's seasonal employment, and plaintiffs wound up unable to get their jobs back for the next season. The court held that the collective agreement completely superseded plaintiffs' contracts, and that as long as the employer complied with the union agreement, plaintiffs were without a cause of action. Id. at 647, 137 N.W.2d at 735. It would seem that a complete loss of one's job is more important than the mere change in the seniority list noted in Belanger. However, the Michigan court was persuaded by law and not by equity.

the court would have reached a different result. Rather, the court seemed convinced that what the various employees lost was an important property right which the union could not change absent some overriding justification.[45]

It is clear that since *Case* was decided, individual contracts have not fared well when in conflict with a collective bargaining agreement. While it is interesting academically to examine those exceptions where courts have found an excuse, often based on an erroneous view of existing law, to allow the individual agreements to prevail, a simple look at the majority of cases illustrates the futility of encouraging a client to fight for his rights as an individual under a separate contract when it will mean a conflict with the union's negotiated agreement.

III. The Individual's Right to Refuse to Honor a Picket Line

In the entertainment industry and the mass media, where individual employees are paid hundreds of thousands of dollars and are worth much more to their employers, the right to force these individuals to honor pickets lines, whether of the individual's union or of some other labor organization, becomes a most significant tool. Economically, the concerted actions of a large group of union members, in the form of strikes, pickets and boycotts, are intended to give the workers a means of countering the economic power of their employer. However, when union members of "star" appeal are utilized in this effort, the actions of these few are often

45. 254 Wis. at 354, 36 N.W.2d at 419. While the Belanger court obviously was sympathetic to the employees' "vested" rights, Simmons v. Union News Co., 341 F.2d 531 (6th Cir.), cert. denied, 382 U.S. 884 (1965), and Hildreth v. Union News Co., 315 F.2d 548 (6th Cir.), cert. denied, 375 U.S. 826 (1963), illustrate the approach of a court which is less sympathetic to such employee rights. Both cases involved different plaintiffs in the same factual situation. After noting general inefficiency in the operation of a company lunch counter, the employer and the union together investigated the cause of the situation without success. As a result of the negotiation between the employer and the union, it was agreed that five employees (including plaintiffs) on the counter would be laid off as an experiment to see if conditions improved. After the five employees were replaced, the counter began to operate efficiently, and the union agreed that the layoff should become permanent. The employees brought suit against the employer for breach of the collective bargaining agreement which protected employees individually from discharges without cause. The court in Simmons responded:

"[W]e held that the collective bargaining power of the union was not exhausted upon the execution of the collective bargaining contract, that considering the statutory authority of the union as the bargaining agent, the language of the collective bargaining agreement and the undisputed . . . good faith bargaining between the union and the [employer], it was within the authority of the union as bargaining agent to agree with [the employer] that there was just cause for the discharge and that it was not a breach of the contract by [the employer]." 341 F.2d at 532.

much more potent than the combined efforts of their union brethren. And the economic detriment to such important individuals participating in such a concerted activity is often significantly beyond that of the ordinary employee, frequently entailing loses greater than the annual earnings of the average employee. Thus, by including in the bargaining unit both major talents and lesser names, the latter, who are much more numerous and thus control the union, are able to wield power over the former to an extent probably not envisoned by Congress. Against this background, it is important to determine the rights of the individual to resist his union's efforts to force him to honor a picket line. However, the discussion of such interests, stirred up in recent litigation, will be postponed until later.[46] First, the right to control the honoring of a picket line will be examined in its historical perspective.

A. *In General*

The most important recent case in this area is *NLRB v. Allis-Chalmers Manufacturing Co.*[47] The dispute in this case centered about an employee who simply refused to honor his own union's picket line which was established as a part of a general strike against the employer. In a narrow 5-4 decision—a margin of questionable safety today given the recent changes in the Court—the Court refused to find that the union had committed an unfair labor practice against the mentioned employee by disciplining him under the union charter and bylaws. Justice Brennan, speaking for the Court, noted that the proviso in § 8(b)(1)(A) of the NLRA[48] clearly intended that the union's internal affairs, which included disciplining employees who violated union regulations, were beyond the scope of that Act. The majority also felt that §§ 101(a)(2) and (5) of the

46. See notes 94-109 infra and accompanying text.

47. 388 U.S. 175 (1967).

48. 29 U.S.C. § 158(b) (1970) states in pertinent part:

"It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein..." (italics omitted).

Section 7 of the NLRA, 29 U.S.C. § 157 (1970) states:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized...." Upon a plain reading of these sections it is difficult to see how the majority opinion is justified.

Labor-Management Reporting and Disclosure Act (L.M.R.D.A.)[49] gave the union the power to discipline a union member for failing to obey the union's lawful directive to honor a picket line without any interference with his basic rights. The dissent, represented by Justice Black, believed that to allow a union to discipline a member for failing to engage in a concerted activity was a violation of §§ 7 and 8(b)(1)(A) of the NLRA.[50]

The opinion suggests very strongly that there is a right to picket which exists until the union, through the collective process, decides to bargain it away.[51] While this decision deals strictly with a union member who refuses to honor the picket lines of *his own union*, at least one lower court has ruled that absent a specific ban on such activities under the collective agreement, a member has the inherent right to honor the picket lines of other unions.[52] Thus, it would seem that the right to honor picket lines exists even though that right is not specifically granted in the collective

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49. Section 101(a)(2) of the L.M.R.D.A., 29 U.S.C. § 411(a)(2) (1970) states:

"Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations" (italics omitted). The majority seems to have read the proviso in this section as broad enough to swallow the rule, an unwarranted presumption.

Section 101(a)(5) of the L.M.R.D.A., 29 U.S.C. § 411(a)(5) (1970) states:

"No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." The Court drew the negative inference that since there are controls on disciplining members, any disciplinary action taken to protect a legitimate union interest will be upheld substantively. It seems that this is an unfair inference in light of the generic intent of the L.M.R.D.A. to narrow the range of union activities.

50. 388 U.S. at 199 (Black, J., dissenting); see note 48 supra.

51. "Thus only the union may contract the employee's terms and conditions of employment...; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line." 388 U.S. at 180 (footnotes omitted). Note the negative inference that an employee has a right to picket until the union bargains it away.

52. Kellogg Co. v. NLRB, 457 F.2d 519, 523 (6th Cir.), cert. denied, 409 U.S. 850 (1972), dealt with two unions which represented pressmen and millers, respectively. The pressmen's union struck the employer, and two millers (on their own) refused to cross the picket line. The court held that the particular no-strike clause in the millers' collective agreement did not cover the right to cross picket lines, thus allowing the two members to engage in what was seen as a protected concerted action.

agreement. However, it is also clear that the collective agreement can also take away this right.[53]

The tenuousness of *Allis-Chalmers* in the contemporary setting of labor law is best exemplified by a recent decision by the Burger Court, *NLRB v. Local 1029, Textile Workers*,[54] which held that an employee could avoid his union's control, even during a strike, simply by resigning.[55] There is an implication here that even assuming it can survive a direct attack before the new Court, *Allis-Chalmers* may be limited to its facts.[56]

Among the more interesting NLRB decisions in this general area is *American Guild of Variety Artists*.[57] The ruling dealt specifically with the right of the union to order big-name entertainers (and apparently only these few big names) to honor the picket lines of another striking union. The American Federation of Musicians called a strike of several casino-clubs in the Reno-Lake Tahoe area and established the usual picket lines. The American Guild of Variety Artists (AGVA) sent notices to five of its members,[58] requesting that they honor said picket line or face disciplinary action by the union. Two of these featured entertainers were singers, and thus their performances were music-related. However, the other three were comedians whose acts were not strictly dependent on music. Each of these performers had an individual contract, within union-established limits, with the respective employers, but the issue here did not involve a conflict between these contracts and the collective bargaining agreement.

The employers filed with the NLRB seeking a cease and desist order against AGVA on the grounds that the latter was coercing a secondary boycott illegal under § 8(b)(4)(ii)(b) of the NLRA.[59] The board, un-

53. See notes 63-64 infra and accompanying text.

54. 409 U.S. 213 (1972).

55. Basically, the Court ruled that where the union's constitution and bylaws had no restraints on resignations, members were free to resign from the union and return to work during a strike. In this particular case, the Court sustained this position even though the employee at bar had participated in the vote to strike and impose fines on any members aiding the employer. Once he resigned, the union no longer had power over him. Id. at 217-18. See also id. at 218 (Burger, C.J., concurring).

56. Textile Workers reveals a strong inclination of the Burger Court to read Allis-Chalmers narrowly. By its action, the new Court has found a loophole which can be used to defeat the control the Warren Court had granted the union over the individual's right to refuse to honor a picket line.

The question of a union's right to discipline an employee will be considered in greater detail at notes 68-81 infra and accompanying text.

57. 176 N.L.R.B. 580 (1969), rev'd sub nom. Harrah's Club v. NLRB, 446 F.2d 471 (9th Cir.), cert. denied, 404 U.S. 912 (1971).

58. Gaylord and Holiday, Dinah Shore, Tennessee Ernie Ford and Sid Caesar. Id.

59. Section 8(b) of the NLRA, 29 U.S.C. § 158(b) (1970) states in relevant part: "It shall be an unfair labor practice for a labor organization or its agents . . . (4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an

persuaded that there had been a secondary boycott, stated instead that the work of the entertainers in question was so "inextricably involved with and necessary to the normal operations of the casinos" that their honoring of the AFM picket line constituted a protected primary activity.[60] The Court of Appeals for the Ninth Circuit reversed and remanded,[61] finding that since the stars were independent contractors, the AGVA directives violated the NLRA's prohibition of secondary boycotts.

This decision does not deal with the basic question of whether a union can use the extraordinary leverage of its big-name entertainers to assist in the efforts of another union. Except for some nebulous fraternal spirit of unionism, the benefit to AGVA is at best vague and remote. It is quite unlikely, for economic reasons, that AGVA would ever require the sympathetic assistance of the AFM, since by means of its distinguished membership it is quite able to control some powerful economic weapons if necessary. However, even though this issue was not raised, the board's

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object thereof is... (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization... unless such labor organization has been certified as the representative of such employees...: Provided, That nothing contained in this clause (B) shall be construed to make unlawful . . . any primary strike or primary picketing . . ." (italics omitted).

60. 176 N.L.R.B. at 581. The board seized on the words of the above proviso and stated: "In applying... traditional principles to the present case, it is not and cannot be contended that [AGVA's] actions called for anything but the refusal of the entertainers to cross the picket lines of the striking musicians at the clubs in question. The picket lines were established in furtherance of a primary strike of the employees of the picketed casinos, and the [notices] advised the stars that AGVA supported the strike and instructed them to honor the picket line. The conduct of [AGVA] in advising its members to honor the AFM picket lines was not substantially different from that of the AFM itself in conducting the picketing at the situs of the disputes, namely at the clubs themselves. Accordingly, we find that AGVA'S conduct does not fall into the category of illegal secondary activity by virtue of the fact that it assisted another union in that unions's [sic] labor dispute." Id. at 580-81 (footnote omitted). In essence, the NLRB believed that the employment of the stars was so intimately related with the primary operations of the employers involved that it was an inseparable element of the primary activity of the striking union. The board cited United Steelworkers of America v. NLRB, 376 U.S. 492 (1964) to support its contention. That case held, inter alia, that: "The primary strike, which is protected by the proviso [in NLRA § 8(b)(4)(ii)(B)], is aimed at applying economic pressure by halting the day-to-day operations of the struck employer.... In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral deliverymen furnishing day-to-day service essential to the [employer's] regular operations." 376 U.S. at 499 (footnote omitted). In the AGVA case, the board implied that if a striking union may picket the employer in the hope of stopping the day-to-day business of the company, then other union employees should have the basic right to give effect to that intent. 176 N.L.R.B. at 581.

61. 446 F.2d 471, 480, cert. denied, 404 U.S. 912 (1971).

decision does evidence a tolerant attitude toward such sympathetic concerted activity, at least where no secondary boycott is involved.

Collectively, these decisions suggest that, absent an express ban imposed by the union, each employee has the inherent right to honor any picket line without fear of discharge by his employer, and may be required so to honor if directed by his union. As will be illustrated, this right to picket takes on greater significance when the conflict is between an individual and a collective agreement.[62]

B. *The Effect of a No-Strike Clause*

There has always been a dispute whether a generic contractual "no-strike or other stoppage of work" clause can be used to prevent a union's ordering or an individual employee's honoring of a picket line. The early Supreme Court reaction seemed to suggest this general language could be construed to limit such picket-related activities.[63] Such construction would seem to be even more favored when there is an alternative method of communication with the employer, namely, arbitration.[64] Indeed, it has been almost a rule that such general no-strike provisions be interpreted to include a proscription against the honoring of picket lines.[65]

However, like most general rules, there is little room for complacency.

62. See notes 94-109 infra and accompanying text.

63. NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953), involved a collective agreement containing a clause barring strikes, lockouts or work stoppages. The Court concurred with an arbitration decision finding such language sufficient to discharge an employee who, completely on his own, refused to cross the picket line of another union which blocked the entrance of a plant where he was scheduled to make a pick-up. See also Portland Web Pressmen's Local 17 v. Oregonian Publishing Co., 188 F. Supp. 859 (D. Ore.), aff'd, 286 F.2d 4 (9th Cir. 1960), cert. denied, 366 U.S. 912 (1961).

64. The most recent example of such a decision is Boys Mkts., Inc. v. Retail Clerks, Local 770, 398 U.S. 235 (1970). However, it is not at all clear what purpose the grievance procedure might serve where the employee is honoring the picket line of another union, since the employee does not have a grievance against the employer and is merely in sympathy with the dispute of another union.

65. See, e.g., Montana-Dakota Utilities Co. v. NLRB, 455 F.2d 1038, 1093 (8th Cir. 1972); News Union v. NLRB, 393 F.2d 673, 677 (D.C. Cir. 1968); Honeywell, Inc. v. Instrument Workers, Local 116, 66 L.R.R.M. 2027 (Pa. Ct. C.P. 1966). Honeywell is particularly representative of this line of cases. There, one union represented both clerical workers (whose contract had expired and who were on strike) and maintenance and production employees (whose existing contract contained a general no-strike clause which included a general proscription of concerted activities). The court interpreted the contract as barring production workers from honoring the picket lines of the clerical workers and applied injunctive relief as per state law.

The Montana-Dakota Utilities case provides a good example of how far a court will go to interpret a no-strike clause to cover an employee's refusal to cross a picket line. The contract provided that the employer waived any rights he might have to discharge an employee who insisted on honoring a picket line. The court insisted that the no-strike clause did apply to

In *Kellogg Co. v. NLRB*,[66] the Sixth Circuit narrowly construed a ban on sympathy and other forms of strikes contained in the collective agreement, holding that it did not cover the right to honor picket lines. This case might be analyzed as a quirk, inasmuch as it dealt with contract terms similar to those used in other cases and construed to have the opposite effect.[67] What is particularly disturbing is that this case, decided as recently as 1972, seems to cast doubt on what was otherwise a fairly well-accepted view. Certainly, if this decision is generally applied, it will mean that reliance on other judicial interpretations of such clauses will cause many employers to be defenseless when faced with employees who refuse to cross the picket lines of other unions. Previously, it was fairly safe to assume that a generic ban on work stoppages included such employee actions, no more specific language being necessary.

C. *The Union's Right to Discipline Members Who Violate the Lawful Picket Lines of Another Union in Defiance of Their Union's Orders*

It is well established that a union may discipline its members for infractions of reasonable union regulations (and reasonably well established that the union retains such powers with respect to its members who violate picket lines in contravention of a legitimate union mandate).[68] It is becoming equally clear that the union's right to discipline is definitely circumscribed.[69] A union may not impose unreasonable regulations which contravene public policies,[70] nor may it, except in the simple case of fail-

the employee at bar (who honored a picket line) and that the employer could discipline the employee in any reasonable manner except via discharge.

66. 457 F.2d 519, 526 (6th Cir.), cert. denied, 409 U.S. 850 (1972). For a brief description of the facts of this case see note 52 supra and accompanying text.

67. See note 65 supra.

68. For a general discussion of the union's generic right to discipline a member see notes 47-56 supra and accompanying text. In particular, notes 48-49 supra provide quotations from the relevant statutory materials.

69. See notes 70-71 infra and note 44 supra.

70. In International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), the Court stated that "the protection of union members... from arbitrary conduct by unions and union officers has not been undertaken by federal law [in a pre-L.M.R.D.A. context], and indeed the assertion of any such power has been expressly denied [the federal courts under the proviso to § 8(b)(1)(A) of the N.L.R.A.].... Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights." Id. at 620. The Supreme Court also approved of the California Supreme Court's treatment of the union's charter and bylaws as a binding contract between the members and the union. Id. at 618-19. There was also a suggestion that the wrongful discipline of a member might well be a subject for the state's tort laws. Id. at 621.

A post-L.M.R.D.A. (1959) Supreme Court opinion, Scofield v. NLRB, 394 U.S. 423 (1969),

ure to pay reasonable dues or other such fees, discipline the member without certain guarantees of due process.[71]

However, in practice, state courts, particularly in California, have allowed unions a great deal of leeway when dealing with the matter of discipline of their own members,[72] suggesting that perhaps discipline might be in order even for the member's exercise of free speech if this speech is inimical to the legitimate economic interests of the union.[73] Further, courts

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held that if a union rule "invades or frustrates an overriding policy of the labor laws the rule [allowing discipline as articulated in Allis-Chalmers] may not be enforced, even by fine or expulsion, without violating § 8(b)(1) [of the NLRA]." Id. at 429. In order to determine whether a union rule frustrates the labor policy, the Court suggested that one examine the "legitimate union interest [which] impairs no policy Congress has embedded in the labor laws, and [which] is reasonably enforced...." Id. at 430. The latter vague standard would seem to be a convenient rubric for a lower court to invalidate a union regulation which that court felt inequitable.

71. Section 101(a)(5) of the L.M.R.D.A., 29 U.S.C. § 411(a)(5) (1970) which is reproduced in full at note 49 supra.

72. This trend is exemplified by DeMille v. American Fed'n of Radio Artists, 31 Cal. 2d 139, 187 P.2d 769 (1947), cert. denied, 333 U.S. 876 (1948). Pursuant to powers granted in the union constitution, the AFRA governing board required the payment of one dollar, from each member, into a fund which was used to defeat a ballot proposition which would have enacted a right to work law. Plaintiff, a well-known radio personality and motion picture producer-director, filed suit seeking an injunction against the union assessment, claiming an abridgement of his right to free speech and the right to vote. He was unable to show any coercion other than the facts presented above. The court reasoned that the assessment did not impinge on plaintiff's rights as an individual: "Dues and assessments paid by members to an association become the property of the association and any severable or individual interest therein ceases upon such payment." Id. at 149, 187 P.2d at 776. The court expanded on this logic: "Majority rule necessarily prevails in all constitutional government including our federal, state, county and municipal bodies, else payment of a tax levied for a duly authorized and proper objective could be avoided by the mere assertion of beliefs and sentiments opposed to the accomplishment thereof....A member of a voluntary association should not be permitted successfully to seek a similar avoidance." Id. at 150, 187 P.2d at 776. The court went on to treat the failure to pay the assessment as a voluntary suspension from the union. Id. at 154, 187 P.2d at 779. It viewed the union constitution and bylaws as a contract between the members and the organization, a position later sanctioned by the Supreme Court in International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

73. A case which is disturbing more for what it suggested than for the result is Mitchell v. International Ass'n of Machinists, 196 Cal. App. 2d 796, 16 Cal. Rptr. 813 (1961), a decision rendered after the 1959 passage of the L.M.R.D.A., 29 U.S.C. §§ 401-531 (1970). Plaintiff (a union member) backed the enactment of a right to work amendment to the state constitution and openly and verbally manifested his support. The union expelled him (but he was allowed to retain his job) for violating the union charter by engaging in behavior unbecoming to a union member. After weighing the union's economic interest in avoiding voluntary unionism (and favoring the retention of union shops) against the plaintiff's individual right to speak freely on political matters, the court favored the latter, in part because the economic interests of the former were insufficient. The negative inference is clear: had the union had sufficient economic interest, it might have been allowed to abridge the free

have been inclined to accept whatever interpretation the governing board of a union places on the union charter and bylaws, notwithstanding vague language (suggesting a potential for abuse).[74] There is evidence, however, that this pro-union trend may be ending. Courts which previously have been quick to support the ouster of a union member in the name of union discipline now are finding that membership in the union is a property right which merits greater protection.[75]

Of particular consequence is a recent decision in a federal district court in New York holding that persons have the right, under certain circumstances, to refuse to join a union where there might be a direct and substantial chilling effect on that individual's constitutional rights, notably free speech. That case, *Evans v. American Federation of Television and Radio Artists*,[76] addressed the claims of conservative news commentators William F. Buckley, Jr. and M. Stanton Evans. These plaintiffs maintained that a union rule barring any act or statement "prejudicial to the welfare" of the labor organization (under threat of fine, censure, suspension or expulsion) exerted a chilling effect on their first amendment rights. After dwelling on the particular nature of plaintiffs' employment as *news commentators*, the court concluded that it would be unconstitutional to read section 8(a)(3) of the NLRA[77] as allowing a union to enforce a union shop where such substantial first amendment rights might be impaired.[78] Thus, plaintiffs were held to have a constitutional right not to join the defendant union. Among other pressures which the court found distasteful was the union right to require plaintiffs to honor picket lines designated by the union.[79] The court ventured into the area of constitutional law which for some reason is rarely applied to labor situations.

Evans is at the same time too broad and too narrow. Its narrowness

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speech of its membership, a highly suspect position, to describe it in a most favorable light.

An emerging trend seems to counter the above presumptuous opinion. See notes 76-80 infra and accompanying text.

74. Quoting DeMille v. American Fed'n of Radio Artists, 31 Cal. 2d at 147, 187 P.2d at 775, the court in Musicians' Local 274 v. American Fed'n of Musicians, 329 F. Supp. 1226, 1236 (E.D. Pa. 1971), stated: " 'The practical and reasonable construction of the Constitution and by-laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts [and will be denied enforcement only if arbitrary or unreasonable].' "

75. See, e.g., Berkeley Teachers Ass'n v. Berkeley Fed'n of Teachers, 62 Cal. App. 2d 660, 62 Cal. Rptr. 515 (1967): "Once acquired, membership in a labor organization is a property right [secured by contract] that courts will protect." Id. at 669, 62 Cal. Rptr. at 521.

76. 354 F. Supp. 823 (S.D.N.Y. 1973).

77. 29 U.S.C. § 158(a)(3) (1970), which accepts closed or union shops.

78. 354 F. Supp. at 847.

79. Id. at 843-44.

stems from excessive emphasis on the particular nature of plaintiffs' occupations as commentators and official opinion-givers. If anything, this suggests a possible denial of equal protection to other employees who do not have such broad media appeal or to workers who are simply restrained from exercising their free speech in general. But *Evans* is too broad in that it could have avoided an examination of the constitutionality of the statute or its application altogether. Rather, it would seem more logical for the court to have struck down the union regulation under the rationale established by the Supreme Court in *Scofield v. NLRB*.[80] If the *Evans* court had decided that the union regulation, which the union admitted it would use if plaintiffs ever spoke against unions, was simply an impairment of a constitutional policy and must therefore be denied enforcement, perhaps a more satisfactory result might have been reached. It is possible that this particular issue will someday be resolved by the Supreme Court itself.

It is submitted that this growing judicial disenchantment with union attempts to control individual actions may well result in a more generalized acceptance of a balancing test wherein the union's interests (including alternative means of furthering those interests) will be weighed against the imposition on the individual member's interests. Thus, it would be acceptable for a court to hold that a union may not require employees with a great economic stake in their employment, such as entertainers and network newsmen, to honor the picket lines of other labor organizations where the interests of the original union are at best remote or speculative.[81] In this way, the special cases involving highly paid workers with union-sanctioned, personal services agreements, for which Congress probably never envisioned labor organizations, can be handled in an equitable fashion.

IV. The Collective Duty to Arbitrate: Does It Extend Beyond the Contract Term?

The period of an employer's greatest vulnerability follows the expiration of the collective agreement. Even assuming the existence of a no-strike, no-work stoppage term (coupled with the duty to arbitrate) which includes not honoring picket lines, once the collective contract has expired it is arguable that the right to honor picket lines[82] is revived. In some instances, the individual employees may still hold continuing per-

80. 394 U.S. 423 (1969), discussed at note 70 supra.

81. This notion has been adopted to some extent in New York. See generally notes 94-109 infra and accompanying text.

82. This of course assumes that one accepts the notion that absent an express agreement to the contrary, the right to honor a picket line is inherent and absolute. See generally the discussion at notes 47-52 supra and accompanying text.

sonal services contracts, affirmed by the union in the earlier collective period. This practice is common in the entertainment-mass media area.

The problem, then, centers around a union directive that its members honor the picket lines of other unions during this limbo period.[83] While this clearly would be impermissible during the time in which the collective contract is in effect, does this impermissibility carry forward until either a new collective agreement takes effect or a strike is called? Does the fact that a union may go on strike without violating a contract suggest that it may engage in *any* concerted activity with equal safety?

At the outset, one must note the extremely strong public policy favoring the arbitration of labor disputes.[84] The desire to insure labor peace and stability[85] certainly does not cease merely because of the lapse of a collective agreement. Thus where a trade agreement provides for arbitration as an alternative to concerted actions, perhaps the benefit of the doubt should be given in favor of arbitration even if that trade contract might have expired.

Several decisions have enforced arbitration provisions even though the contract had expired. The clearest example is where the grievance arose prior to the expiration of the agreement but was submitted for arbitration after the contract term ended. In such circumstances, it is fairly well accepted that the dispute is still arbitrable.[86]

The more interesting opinions deal with post-collective agreement grievances. Where certain contract terms clearly were intended to outlive the collective agreement, it has been held that even though the arbitration (and anti-work stoppage) clauses technically may have terminated, in fact they are applicable to such special terms.[87] In another instance,

83. Recent litigation in New York dealt with this specific issue and is discussed in full at notes 94-109 infra and accompanying text.

84. E.g., the "Steelworkers Trilogy": United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navig. Co., 363 U.S. 574 (1960); and United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). See also text accompanying note 27 supra.

85. See, e.g., Boy's Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235, 249 (1970).

86. Procter & Gamble Ind. Union v. Procter & Gamble Mfg. Co., 312 F.2d 181 (2d Cir. 1962), cert. denied, 374 U.S. 830 (1963) stated: "Grievances which are based upon conditions arising during the term of the agreement... are arbitrable after that term has ended." Id. at 186 (emphasis omitted).

87. In United Rubber Workers Local 102 v. Lee Rubber & Tire Corp., 394 F.2d 362 (3d Cir.), cert. denied, 393 U.S. 835 (1968), the parties (union and employer) agreed in an instrument separate from the collective contract that certain health and welfare benefits should survive the trade agreement. Even though the arbitration clause was contained in the expired collective document, the court held that it was applicable to a health and welfare dispute which arose after the lapse of the collective contract.

In Monroe Sander Corp. v. Livingston, 377 F.2d 6 (2d Cir.), cert. denied, 389 U.S. 831 (1967), the court noted: "[I]nsofar as the union demands arbitration of rights not limited to the duration of the collective agreement, whether or not the dispute and the demand for

a court held that a generic agreement to submit all negotiation impasses to arbitration, though contained in the expired collective contract, still governed the parties.[88] Other cases have held that where custom suggests that certain rights are continuing ones, and accrue notwithstanding the end of the collective agreement term, then an expired arbitration clause is still applicable.[89]

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arbitration occurred after the expiration of the agreement is irrelevant." Id. at 10. And later: "Also, it is clear that parties to a collective agreement may provide for the survival of obligations beyond the term of the agreement." Id. at 11. The court went on to say that whether circumstances exist such that rights under an expired contract could presently be arbitrated should be left to the arbitrator. Thus, where there is doubt, a court is best advised to enjoin a non-strike or non-lockout concerted activity, even if the collective agreement has expired, pending a decision of the arbitrator.

A non-arbitration case which involved a possible construction extending the life of the collective agreement is Richardson v. Communications Workers of America, 443 F.2d 974 (8th Cir. 1971), cert. denied, 414 U.S. 818 (1973). A former employee sued his union and former employer for breach of the collective agreement resulting in his wrongful discharge. The court reversed the trial court for limiting damages merely to the period of the collective agreement. It was held that damages were recoverable beyond that period since "[t]o measure this loss only to the expiration of an existing bargaining agreement fails to take into consideration the realities existing"—that is, the expectancy of continued employment is not merely contingent on the collective agreement. Id. at 979. Perhaps this perception of existing "realities" may well be used by courts in other contexts to find that certain collective terms extend beyond the face of the trade agreement period. This logic permits a court substantial leeway to limit the activities of either negotiating party during the period of collective bargaining.

88. See Winston-Salem Printing Pressmen Local 318 v. Piedmont Publishing Co., 393 F.2d 221 (4th Cir. 1968).

89. The following cases provide examples involving either pension rights or vacation pay, where the court held it to be customary to accrue these and give them effect even after expiration of the trade agreement: Local 595, Int'l Ass'n of Machinists v. Howe Sound Co., 350 F.2d 508 (3d Cir. 1965) (holiday and vacation pay); Vallejo v. American R.R., 188 F.2d 513 (1st Cir. 1951) (pension rights); In re Public Ledger, Inc., 161 F.2d 762 (3d Cir. 1947) (vacation pay); Local 459, UAW v. Defiance Indus., Inc., 251 F. Supp. 650 (N.D. Ohio 1966) (pension rights).

In general, where courts have found that a particular term extends beyond the collective agreement, there has also been a suggestion that this was the parties' intent. In other words, there are no flat rules for determining where such a result might be anticipated, though common sense dictates that certain rights which workers have throughout their lives, and instances where the equities mandate such a result, are likely candidates.

It is equally clear that in some instances, a specific agreement between union and employer to extend a particular term beyond the time of the agreement will not be given effect. In Kenin v. Warner Bros. Pictures, Inc., 188 F. Supp. 690 (S.D.N.Y. 1960), the American Federation of Musicians sued to enforce an earlier collective bargaining agreement with Warner Bros., in which the latter was barred from releasing the soundtracks of films made up to 1958 for use on television without approval from the AFM. The clause in dispute held this provision applicable during the contract term and thereafter. However, the AFM lost an election against the Musicians Guild of America and was replaced by that organization as the exclusive bargaining representative. The suit was filed for employer violations which occurred after the new union assumed its position. Notwithstanding the express language of

Perhaps the most interesting situations are those in which the parties to the collective process intend that until a strike is called or negotiations are completed, the status quo (as evidenced by the prior collective contract) will be maintained. In *Potoker v. Brooklyn Eagle, Inc.*,[90] the status quo provision was actually written into the contract. The court had little trouble deciding that any disputes which involved the "expired" contract terms were necessarily arbitrable.[91] In industries where custom maintains the status quo, perhaps this tradition may be implied into the expired agreement. This construction would be most consistent with the national policies favoring arbitration in particular[92] and labor peace in general.[93]

In the mass media-entertainment industry, the above construction would also prevent a union's demand that stars and other big name talents honor the picket lines of a second union while the original union still enjoyed the de facto maintenance of the status quo in all other areas. Perhaps this is the only equitable result. On the other hand, if the union is ready to strike—and thereby violate the status quo entirely—perhaps the equities would reach a different balance and allow the union to demand of its own members that they honor its *own* picket line.

V. NETWORKS, NEWSMEN AND NO-STRIKE CLAUSES: *Brandt*[94] AND *Baldwin*[95]

The precedents and historical trends discussed so far in the article came to a head in two recent New York state court decisions, each involving the order of a union, after the collective agreement expired, that its members honor the picket lines of another union.[96] In both cases, the union was the American Federation of Television and Radio Artists (AFTRA) and the employer was a leading television network.

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the AFM collective agreement, the court held that once the Guild assumed the role of exclusive bargaining agent, the AFM necessarily lost all of its rights under any collective bargaining agreement. Id. at 699.

90. 2 N.Y.2d 553, 141 N.E.2d 841, 161 N.Y.S.2d 609 (1957).

91. After the collective bargaining agreement expired, and a strike resulting from an impasse in negotiations compelled the employer to close down the plant forever, the union demanded arbitration regarding severance, vacation, etc., pay. The union argued that the "status quo" provision continued the effect of the expired agreement, and the court agreed. Id. at 560, 141 N.E.2d at 844, 161 N.Y.S.2d at 613-14.

92. See notes 27 & 84 supra and accompanying text.

93. See note 85 supra and accompanying text.

94. American Broadcasting Co. v. Brandt, 56 Misc. 2d 198, 287 N.Y.S.2d 719 (Sup. Ct.), aff'd, 30 App. Div. 2d 935, 293 N.Y.S.2d 988 (1st Dep't 1968).

95. Columbia Broadcasting System, Inc. v. Baldwin, 70 CCH Lab. Cas. ¶ 13,275 (N.Y. Sup. Ct. 1972).

96. See notes 94 & 95 supra.

Performers and newsmen who appear live or on video-tape (or on film which is presented as a part of a live or video-taped program) are within the jurisdiction of AFTRA. In essence, the lesser performers and newsmen accept the minimum terms of the AFTRA agreement with the respective employer; however, the collective agreement with each network provides that individual contracts, which are bound to the minima prescribed by the union, may be signed with any member of the AFTRA. Thus, prominent personalities such as Walter Cronkite, John Chancellor or Harry Reasoner, all members of AFTRA, basically are bound by their union-sanctioned personal services contracts which provide for benefits far in excess of the union scale.

In both *Brandt* and *Baldwin*, the collective agreement with the network had expired (along with a contract term barring work stoppage and requiring arbitration) though the individual contracts with the respective big-name personalities were in force. In both cases the union directed that the picket lines of another union[97] be honored.

In *Brandt*, an oral agreement, allegedly reached[98] with the union during contract negotiations following the expiration of the prior trade agreement, sanctioned the inclusion of anti-work stoppage and arbitration terms in both the collective agreement to be negotiated and the individual contracts with the star performers and newsmen. Pursuant to the alleged oral agreement, the network, the American Broadcasting Company, inserted this provision in several such individual contracts. At this point, and prior to the execution of a new collective agreement, AFTRA directed that its members honor the picket lines of an engineering union striking ABC. ABC claimed that members who disobeyed the AFTRA directive were being subjected to union discipline and were also receiving threats of physical violence. It sued the union, seeking an injunction against the AFTRA directive based in particular on the union's tortious interference with the contract rights ABC had with the star performers and newsmen under the respective personal services contracts negotiated with union sanction.[99]

The first and most important issue addressed by the New York Supreme Court was that of primary jurisdiction. AFTRA argued that the activities at bar were protected under sections 7 and 8 of the NLRA[100] and, hence,

97. In Brandt, the National Association of Broadcast Employees and Technicians, the union which controls the broadcast engineers, was striking ABC. In Baldwin, the International Brotherhood of Electrical Workers, a union also controlling broadcast engineers, was striking CBS.

98. 56 Misc. 2d at 202, 287 N.Y.S.2d at 724. The case was decided on a motion to dismiss and thus the merits had not been addressed.

99. Id. at 200, 287 N.Y.S.2d at 721.

100. 29 U.S.C. §§ 157-58 (1970), quoted in part at note 48 supra.

were within the exclusive ambit of the National Labor Relations Board[101] which had refused to take action on an unfair labor practice charge filed by ABC in connection with the above allegations. ABC argued that there was a compelling state interest in preventing such tortious conduct, and that this fell within the exception to the doctrine of primary jurisdiction.

The state court agreed with the network's contention. Analogizing the case at bar to factual situations where the United States Supreme Court had found exceptions to this doctrine,[102] the lower court reasoned that the state had a compelling interest in preventing tortious interference with contract rights, and issued a preliminary injunction pending precise determination of the facts.[103]

There is a suggestion of a vicious circularity in the court's reasoning. If the individual contracts are indeed a part of the collective bargaining agreement (which may not yet be fully negotiated) then it is difficult to conceptualize how a union may be found liable for the tortious interference with its own contract. On the other hand, if the individual contracts are seen as separate and distinct from the collective agreement, then the doctrine of *Case* and related decisions would seem to compel that the individual agreements yield to the collective one. Nevertheless, the result in *Brandt* is appealing. Apparently, AFTRA members were still receiving the benefits of the pre-existing collective contract which had proscribed such concerted actions, and, if their allegations proved correct, the union in fact agreed orally not to cause its members to honor the picket lines of another union. But the decision does not seem well-based in tort theory. The same result could have been achieved with a narrower approach in which the union would simply have been enjoined from breaching its own contract, thus avoiding an exploration into the tenuous doctrine of primary jurisdiction.[104]

Where *Brandt* had left off, *Baldwin* began. No longer confronted with

101. This is essentially the primary jurisdiction doctrine as described in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

102. See, e.g., Linn v. United Plant Guard Workers Local 114, 383 U.S. 53 (1966) (upholding the application of the state's libel laws to publications made during a labor dispute); International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958) (holding the wrongful ouster of a union member was only of peripheral concern of the NLRA, thus allowing state court to assume jurisdiction); UAW v. Russell, 356 U.S. 634 (1958) (upholding a state court tort judgment against union because of threats of force preventing an employee from working during a strike); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956) (upholding the application of traditional state criminal laws to a matter which arguably was an unfair labor practice); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (upholding state court tort judgment against a union for threats of violence to company officials).

103. 56 Misc. 2d at 202, 287 N.Y.S.2d at 724.

104. As it is difficult to determine exactly what is sufficient before a state has an overrid-

deciding the primary jurisdiction issue, the *Baldwin* court suggested an entirely new approach to deciding whether or not a union should be allowed to engage in a stated concerted activity, a test which involves the balancing of the respective interests involved.

The facts parallel those in *Brandt*. In *Baldwin*, the collective agreement had expired, but the previously negotiated personal services contracts which had been negotiated with the network performers and newsmen remained intact. The old agreement had contained a ban on concerted activities in favor of arbitration; but the union claimed that once the basic agreement expired, this clause was no longer effective. Because of this belief, AFTRA ordered its members to respect the picket lines of another engineering union which was then striking the Columbia Broadcasting System. CBS sued for an injunction alleging first that the arbitration clause should be construed as extending beyond the expiration date in order to preserve the status quo, and second that AFTRA was tortiously interfering with contract rights under the personnel services agreements.

The court completely dispensed with the arbitration issue, choosing instead a far more innovative approach.[105] Although here, unlike the situation in *Brandt*, there were no threats of violence, the court still managed to find an overriding state interest which would permit judicial control over this situation.[106] The trial judge reasoned that the support of the striking engineers (by the directive to honor the engineers' picket line) was not in furtherance of any labor dispute between AFTRA and CBS. Therefore, it held that the union had interfered with legitimate

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ing interest in a situation, perhaps the court should have found another, more solid ground upon which to base its result.

105. The court stated: "Nonetheless, one factor remains clear and that is that AFTRA by its actions has directed its employees not to honor their contracts. Moreover, AFTRA has done so not in furtherance of any labor dispute between it and CBS or between any of its members and CBS but, rather, to aid another union." 70 CCH Lab. Cas. at 25,936. Obviously, the court is balancing the respective interests of the union, its members and the employer, a refreshing approach in an area of the law where too often a simple black-and-white rule is applied to extremely delicate questions.

106. "[T]he situation here presented is like that before the court in . . . Brandt . . . , although in the instant case there is no allegation of threats and violence. There, as here, the court found merit to the claim that in like circumstances a direction by one union that its employees breach their contracts, constituted a legal wrong. In the instant case, it seems clear that the possible irreparable injury that would flow to CBS from withholding the injunction is far greater than any injury that [the union] might sustain if the injunction is granted." Id. (italics omitted). It should be noted that in this case and Brandt, there was substantial opposition to the union directive from the highly-paid newsmen involved, and this variable may explain much of the sympathy these courts have shown for the employers at bar.

contractual relations without any substantial benefit to the immediate labor dispute.[107]

At first glance, this reasoning is both tenuous and disturbing. It suffers from the same fallacies found in *Brandt* in that the individual contracts must either be a part of the collective agreement or subservient to it. It follows that the union conduct was possibly breach of contract, but certainly not tortious. However, the same basic appeal in the result is also present. Presumably, the court could have reached the same conclusion by finding the arbitration provision applicable beyond the expiration of the collective agreement, and this might have been a more satisfactory approach.

Yet the route selected by the *Baldwin* court offers some important insights into the complexities surrounding the individual-contract-versus-collective-agreement problem. In the first instance, it recognizes that the union does not have the same interests in engaging in concerted activities in all situations. It notes that there is a basic, perhaps unresolvable, dichotomy between the interests of the union as a participating element in the national spectrum of organized labor and the interests of its members as individual workers. Where the potential benefit to the particular workers in a given bargaining unit is small, there seems to be little reason to give the union the same leeway it might enjoy when the benefits anticipated are more proximate. This would seem to be the situation in almost all disputes surrounding the honoring of a picket line of *another* union.[108] Possible justifications would be that such fraternal sympathies (1) support a better economic world for all working men and (2) might result in reciprocal support when the circumstances are reversed. The fact that the right to honor picket lines may be bargained away[109] suggests that our courts have found the former argument irrelevant since the labor laws generically offer this comfort to labor. The second argument evokes the realm of the extremely speculative, especially if the right to honor picket lines is sacrificed at the bargaining table.

107. If Brandt could be held to be an exception from the primary jurisdiction doctrine because there were threats of violence (although Brandt seems to place greater emphasis simply on preserving the state's interest in preventing tortious interference with contract rights), then Baldwin would seem to be opening up a new area where the state interest does not have to be as compelling if the union's interest is minimal. Here, though no threats of violence were made, the court still found the state's interest sufficient to allow relief.

108. It should be noted that the only Supreme Court statement in this area, NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175 (1967), involved a union's right to discipline a union member who refused to obey a union directive that he honor his own union's picket line. Since this was a very narrow decision and because the new Court seems to have evidenced an antagonism to this case, see notes 54-56 supra and accompanying text, it is quite probable that Allis-Chalmers will be limited to its facts.

109. See notes 63-67 supra and accompanying text.

Baldwin will not be resolved at a higher level. Like most such disputes, which are necessarily short-lived because of the economic variables at stake, an injunction decided the case. By the time litigation is completed in such cases, the strike is over and a collective bargaining agreement has been reached. In *Baldwin*, AFTRA simply reacted by withdrawing its original directive in anticipation of a quick settlement of the engineers' strike (which then occurred). The issues are important but never seem to get too far beyond the trial court level.

VI. Conclusion

The Supreme Court has never decided the issue of a union's right to order its members to honor the picket lines of another labor organization.[110] It has never dealt with individual contracts such as those found in the mass media-entertainment industry—union-sanctioned personal services contracts offering benefits very much in excess of the union minima. The Court has never been faced with the types of conflicting economic interests which are commonly faced in broadcast and entertainment industry labor relations.

Perhaps the answer lies in a basic recognition that labor policies, as evidenced by existing laws, simply do not function well in this context. When Congress enacted the various labor laws,[111] it simply did not envision the exceptional circumstances presented in this strangest of all possible worlds for labor relations.

But what is the answer to this dilema? Is it the exclusion of such highly paid personalities from the scope of the labor laws because the labor laws were designed to protect only those common workers capable of equal bargaining power with their employers only through collectivism; whereas here the employees in question are more akin to supervisors?[112] Maybe

110. See note 108 supra.

111. See, e.g., National Labor Relations Act, 29 U.S.C. §§ 151-66 (1970).

112. The rights granted under the National Labor Relations Act adhere to employees and not to supervisors who are defined thus: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Id. § 152(11) (1970).

Perhaps, instead of paralleling the notion of "supervisors," many of these star personalities are in fact supervisors. For example, in many of the network news facilities, a correspondent may also exercise a supervisor's role over those in his production unit (including his cameraman, soundman and perhaps even a writer or associate producer). Similar problems have arisen in the area of newspaper publishing. In NLRB v. Fullerton Publishing Co., 283 F.2d 545 (9th Cir. 1960), the court was faced with deciding whether the county editor was a supervisor within the above-quoted portion of the NLRA on the basis of the follow-

the solution should rest with a judicial balancing of the particular interests involved in each factual situation as was done in *Baldwin*.[113]

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ing facts: "[The county editor] had complete discretion to determine what county news to use to fill up his section. He assigned the [two full-time and three part-time] reporters under him to cover county stories, and he was expected to criticize and advise the reporters in their work. He spent about half of his working hours editing the copy of the reporters under him, and the other half he acted as a reporter himself.

. . . .

"Whenever a county news story appeared to merit a front page spread, [the county editor] notified [the managing editor] and let him make that decision. But with this exception, the news that was placed in the county news section was solely [the county editor's] decision." Id. at 547.

There, the court found that the county editor was indeed a supervisor and could therefore be fired for assisting a union which was organizing his employer.

The power and control exerted by many network newsmen, notably the correspondents, parallels the power and control exerted in this instance. Further, the fact that such network newsmen also appear on the air would seem to be immaterial, as the editor in this case also doubled as a reporter without any impairment of his supervisorial status. There may be questions of estoppel if the network or the individual correspondents decide now to challenge the respective unions' jurisdiction; however, as the entire area of the law is rife with complexities, and as the transition from mere reporter to one with supervisorial control is subtle and gradual, a court's acceptance of such an argument would simply be an avoidance of the real issues at stake.

For other examples see The Daily Review, Inc., 111 N.L.R.B. 763 (1955) (where a city editor, in charge of three reporters and having discretion to assign regular and special news stories, was held to be a supervisor notwithstanding his part-time work as a reporter); A.S. Abelle Co., 81 N.L.R.B. 82 (1949) (holding assistant city and sports editors to be supervisors because they had considerable authority to run their respective departments). But cf. Greensboro News Co., 85 N.L.R.B. 54 (1949) (sports editor was held not to be a supervisor because there was no showing that he could responsibly control or discipline his only assistant).

A recent decision at the NLRB regional level suggests a further willingness to afford employees the right to organize collectively even though they are apparently of a supervisorial character. In Westinghouse Broadcasting Co., NLRB No. 4-RC-10351 (July 23, 1973), the regional director determined that the Directors Guild of America (DGA), was a labor organization within the meaning of the NLRA and that the producer-directors were not managerial employees. Such directors, with independent professional artistic judgment and artistic control of a production crew, would seem to be fairly typical of the type of management employee intended to be exempted from the protection of the NLRA.

However, as the above decision, and perhaps even the very existence of the DGA itself, reflect, such employees can still find shelter in the right to organize. The regional director in the Westinghouse case found that the producer-directors exercised authority over other employees only in artistic matters, not in questions of hiring, firing, wages, grievances or other supervisorial jobs. This case casts suspicion as to the true meaning of the term "supervisor," and certainly augurs badly for network correspondents who might seek to be excluded from a bargaining unit because of supervisorial status.

113. An example of this may be found in the reasoning of the Evans court (discussed in the text accompanying notes 76-80 supra). The court found in this particular instance that, because of the threat to free speech, a union simply could not have jurisdiction over a nonmember, television political commentator.

Whatever approach is selected, it is clear that legislative inaction can result only in courts' reaching the desired results by means of convoluted and often erroneous reasoning—efforts which in the process of deciding one case defile concepts which might have validity in another context. This article has examined what courts have done in the past, and thus are likely to do in the future. It has illustrated the shortcomings of most approaches in this nebulous area of conflicts between individual and collective contracts. In the narrow area of the union's right to demand that its members honor the picket lines of *another* union, a blanket ban on such power should be enforced because of the remoteness of any possible benefit to the union so demanding.[114]

In the broader area of individual versus collective contracts, exceptions to the general rules should be made where the purposes of the labor legislation are no longer substantial. In other words, *Case* should be read so as to apply only to those workers whose bargaining power depends upon collectivism. This would not mean that if an individual employee himself could get somewhat better terms than the group, he must be allowed to prevail; but, it does mean that if there is an identifiable group of persons, each of whom has sufficient bargaining power as an individual, then it should be deemed improper to include these in the same bargaining unit with those who have such power only collectively.

114. Naturally, this would compel a narrow reading of NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967), and produce a result contrary to the holding in Kellogg Co. v. NLRB, 457 F.2d 519 (6th Cir. 1972), cert. denied, 409 U.S. 850 (1972), and the spirit of the board's decision in American Guild of Variety Artists, 176 N.L.R.B. 580 (1969), rev'd sub nom. Harrah's Club v. NLRB, 446 F.2d 471 (9th Cir.), cert. denied, 404 U.S. 912 (1971).