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Union Arbitration, the Civil Practice Act and the Remedy of the Individual

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NOTES

UNION ARBITRATION, THE CIVIL PRACTICE ACT AND THE REMEDY OF THE INDIVIDUAL

This note will treat generally of individual enforcement of collective bargaining agreements as formulated between an employer and a union representing his employees. Its scope is narrowed to an investigation and critique of the position taken by the courts of the state of New York.[1] Two distinct aspects are involved, *viz.*, the general power of an individual to bring suit on employment agreements which bind him even though he is not a signatory thereof, and, the more particular power of individuals to sue under the arbitration clauses of collective agreements which are enforced pursuant to the New York Civil Practice Act.[2]

Judicial enforcement of arbitration clauses in collective bargaining agreements is available only by virtue of the Arbitration Law. Its various sections validate such clauses,[3] authorize motions to compel arbitration,[4] to confirm,[5] vacate [6] and modify [7] awards made thereunder, and contain other similar regulatory provisions.

The remedies created by the Arbitration Law are available, either expressly or by necessary implication, only to "parties" to the controversy being arbitrated.[8] The rights of an individual under a collective bargaining agreement, therefore, rest upon the meaning given to "parties"—whether the term refers only to signatories of the agreement, or whether, more broadly, it includes all persons having an interest in the outcome of the controversy. Since only the union and the employer are actual signatories, the first-mentioned interpretation of "parties" would preclude individual employees from utilizing the Arbitration Law's provisions.

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[1] Reference is made to federal legislation and decisions and the decisions of the courts of sister states only insofar as they may, through comparison and contrast, aid in reaching a fair understanding and evaluation of the New York view.

[2] Article 84, encompassing Civil Practice Act §§ 1448-69, is devoted entirely to provisions bearing on arbitration agreements, and will be referred to in this article as the Arbitration Law.

[3] N.Y. CIV. PRAC. ACT § 1448.

[4] N.Y. CIV. PRAC. ACT § 1450.

[5] N.Y. CIV. PRAC. ACT § 1461.

[6] N.Y. CIV. PRAC. ACT § 1462.

[7] N.Y. CIV. PRAC. ACT § 1462-a.

[8] See, *e.g.*, N.Y. CIV. PRAC. ACT § 1462, set out in full, note 14 *infra*.

Under the second view, the individual might be said to have a judicially cognizable beneficial interest in the determination of a controversy. The courts in New York have, at various times and for various reasons, adhered to both views.

In 1936, the year in which *Barth v. Addie Co.*[9] was argued, there seems to have been no doubt but that an individual union member was entitled to sue upon a contract between his union and the employer. There, the plaintiff, an employee and union member, sought relief against his employer who, in violation of the collective agreement, caused plaintiff's pay to be reduced. Promptly after commencing his suit on the contract, plaintiff was notified that his employment was to be terminated altogether. The New York Court of Appeals, while modifying the amount of the award, unanimously affirmed the judgment in favor of the employee. The decision is significant in that the court sustained the action without questioning the plaintiff's right to sue.[10] It is interesting to note that, as early as 1914, an employee's right to enforce such an agreement was expressly granted on the theory that he was a third party beneficiary to the collective agreement.[11]

While not involving a collective agreement, *Busch Jewelry Co. v. United Retail Employees' Union*[12] does construe the meaning of "parties" as used in the Arbitration Law. There the union and employer agreed by stipulation to submit their differences to an arbitration board. A group of nonunion employees, alleging that they and not the union represented a majority of the employees, moved under Sections 1462 and 1462-a of the Civil Practice Act to set aside, or in the alternative, modify, the arbitration award. The motions were opposed by the union on the ground that nonunion employees were not such parties to the arbitration proceedings as were envisioned by the Civil Practice Act, and consequently had no standing before the court.

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[9] 271 N.Y. 31, 2 N.E.2d 34 (1936).

[10] The union was subsequently permitted to intervene. Note that *both* the union and its member-employee were considered proper parties to the action. Barth v. Addie Co., 271 N.Y. 31, 34, 2 N.E.2d 34, 35 (1936). The Appellate Division also unanimously awarded plaintiff damages, without questioning his right to sue. Barth v. Addie Co., 246 App. Div. 618, 284 N.Y. Supp. 376 (2d Dep't 1935) (memorandum decision).

[11] Gulla v. Barton, 164 App. Div. 293, 295, 149 N.Y. Supp. 952, 953-54 (3d Dep't 1914). "[T]he defendant had agreed to pay a stated union wage to the plaintiff and to the other men working with him as members of the union. The union label had force and value, and the union had strength by reason of the moneys which it received as fees and dues from the plaintiff and other members. The plaintiff was therefore connected with the consideration and was a party intended to be benefited by the agreement." *Ibid.*

[12] 170 Misc. 482, 10 N.Y.S.2d 519 (Sup. Ct. 1939).

Section 1462-a provides:

> In either of the following cases, the court must make an order modifying or correcting the award, upon the application of *any party to the controversy which was arbitrated:*
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> 1. Where there was an evident miscalculation of figures, or an evident mistake . . . .
> 2. Where the arbitrators have awarded upon a matter not submitted to them . . . .
> 3. Where the award is imperfect in a matter of form not affecting the merits . . . .
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> The order may modify and correct the award so as to effect the intent thereof and promote justice between the parties.[13]

Section 1462 uses similar language in providing a means of vacating an arbitration award entirely.[14] The court, rejecting the union's contention, took the following stand as to the rights of individual employees under New York's Arbitration Law:

> [W]hen the Arbitration Law speaks of "any party to the controversy" in sections 1462 and 1462-a of the Civil Practice Act, it is obvious that it refers not only to the parties who have participated in hearings or in the selection of arbitrators, but to all who are actually parties *in interest* so far as the subject matter of arbitration is concerned. If this were not so there would be no reason for the inclusion of section 1458. . . .[15]

Section 1458 provides a remedy for a party who has not participated in arbitration proceedings but who wishes nevertheless to object to an award made.[16] The court in *Busch* found this section without meaning or purpose unless it was taken to refer to persons such as

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[13] N.Y. CIV. PRAC. ACT § 1462-a.

[14] N.Y. CIV. PRAC. ACT § 1462: "In either of the following cases, the court must make an order vacating the award, upon the application of *any party to the controversy which was arbitrated:*

1. Where the award was procured by corruption, fraud or other undue means.
2. Where there was evident partiality or corruption . . . .
3. Where the arbitrators were guilty of . . . any . . . misbehavior by which the rights of any party have been prejudiced.
4. Where the arbitrators . . . exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject-matter submitted was not made.
5. *If there was no valid submission or contract . . . .*"

[15] Busch Jewelry Co. v. United Retail Employees' Union, 170 Misc. 482, 485, 10 N.Y.S.2d 519, 521-22 (Sup. Ct. 1939) (emphasis added).

[16] N.Y. CIV. PRAC. ACT § 1458(2): "A party who has not participated in the selection of the arbitrators or in any of the proceedings had before them and who has not made or been served with an application to compel arbitration . . . may also put in issue the making of the contract or submission or the failure to comply therewith either by a motion for a stay of the arbitration or in opposition to the confirmation of the award . . . ."

the individual employees before it. From this the court concluded that article 84 did not limit its remedies to actual parties, or signatories, to the collective agreement but, on the contrary, included all parties "in interest." A flaw in this reasoning appears, however, upon noting that section 1458(2), has been utilized extensively in controversies involving *only* signatories.[17] Therefore, section 1458 was apparently misconstrued and the validity of the court's conclusion based on that construction consequently becomes questionable.

In the two cases preceding, plaintiffs Barth and Busch enjoyed, as interested third parties, judicial sympathy for their actions, based in one instance on an employment contract, and in the other, on the Arbitration Law. This sympathy is nowhere to be found, however, just six months after *Busch,* in *Petition of Minasian.*[18] There, an employee petitioned under the Arbitration Law to compel arbitration of a dispute with his employer.[19]

The court denied petitioner's motion on two grounds. The first was that he was barred by laches and the second that, even were he not so barred, his petition would fail since he had no right, as a stranger to the contract, to bring any action thereon.[20] No mention was made of section 1450 or of the persons to whom it is available, but rather the court reasoned in the following manner:

"[A] valid objection to this arbitration is the defective manner in which it is sought. The contract was between the union and the employer and a perusal of Schlesinger v. Quinto [21] . . . would indicate that the union and not the petitioner should have made the application." [22]

It will be noted that the court apparently placed itself in fundamental opposition to *Busch Jewelry Co. v. United Retail Employees'*

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[17] See Matter of Hesslein & Co. v. Greenfield, 281 N.Y. 26, 22 N.E.2d 149 (1939), where the alleged purchaser moved under § 1458(2) to stay arbitration of the controversy between himself and the alleged seller on the ground that no contract of sale was formed. See also Matter of Amtorg Trading Corp., 304 N.Y. 519, 109 N.E.2d 606 (1952); Raven Elec. Co. v. Linzer, 302 N.Y. 188, 97 N.E.2d 746 (1951); Pierce v. Brown Buick, Inc., 258 App. Div. 679, 17 N.Y.S.2d 889 (2d Dep't), *aff'd,* 283 N.Y. 669, 28 N.E.2d 40 (1940).

[18] 14 N.Y.S.2d 818 (Sup. Ct. 1939).

[19] Motions to compel arbitration are authorized by N.Y. CIV. PRAC. ACT § 1450: "A *party* aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration . . . may petition the supreme court, or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in such contract or submission." (Emphasis added.)

[20] Petition of Minasian, 14 N.Y.S.2d 818, 819 (Sup. Ct. 1939). The court does not indicate how a plaintiff who was never entitled to sue can be guilty of laches.

[21] 201 App. Div. 487, 194 N.Y. Supp. 401 (1st Dep't 1922).

[22] Petition of Minasian, *supra* note 20, at 819.

Union.[23] It should be noted further that neither case underwent appellate review.

The question still had not been finally settled in 1949 when *Matter of I. Miller & Sons*[24] expressly discarded *Busch* and decided that the Arbitration Law provided relief only for signatories of a collective agreement. In denying the motion of nonunion employees to stay arbitration the court made clear its view:

> I . . . find myself unable to concur in the construction given to these provisions [Civil Practice Act, Sections 1462 and 1462-a] in the *Busch* case . . . as to the right of persons, situated as are the petitioners, to interfere.
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> Parties to an arbitration are those who have become so by virtue of contract and the submission of a controversy to decision is perforce the agreement of the parties thereto to arbitrate . . . .
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> The phrase "any *party* to the *controversy*" . . . refers to one who is a *party to the arbitration agreement* and the "controversy" referred to . . . means the submission of differences that may arise under specified acts or relations of the *parties to the contract* . . . .[25]

A notable aspect of *Miller* is that the court, while denying third parties' power to intervene in matters of arbitration, suggested that the result would be different had the petitioners stood in the shoes of third party beneficiaries. "Of course, an exception may attend where the third party claims to be the beneficiary of a contract to which he is not a party . . . ." [26] But if the Arbitration Law is, as the court holds, available only to "parties," and by "parties" is meant "signatories," of what significance is it that a movant is a beneficiary? Moreover, are not nonunion employees, in large measure, similarly benefited? Certainly the contract provisions pertaining to wage scales, working hours, and fringe benefits inure as much to nonunion employees as to union members.

The holding in *Matter of Julius Wile Sons & Co.*,[27] introduced, in 1951, a different approach altogether. There, a union refused to

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[23] Simply stated, the point of opposition is this: two similarly situated plaintiffs, moving under the same statute (article 84), obtained opposite results. The employees of Busch were held to be proper parties plaintiff; Minasian was declared powerless as a stranger to the arbitration.

[24] 195 Misc. 20, 88 N.Y.S.2d 573 (Sup. Ct. 1949).

[25] *Id.* at 24, 88 N.Y.S.2d at 576. The court rejected petitioners' motion on the further ground that §§ 1462 and 1462-a provide for an attack on an arbitration *award* and are inapplicable in petitioners' case because no award has been made. *Id.* at 23, 8 N.Y.S.2d at 576. This does not affect this discussion, however, since § 1450 enables a party to compel arbitration, and § 1451 authorizes a stay in proceedings violating an arbitration agreement. Thus, had petitioners moved under either of these sections, the court's argument regarding the absence of an award against which to move, would not apply. There can be no doubt, nevertheless, that because of their disability as nonparties, *no* motion by petitioners would have been granted.

[26] *Id.* at 23, 88 N.Y.S.2d at 575; *cf.* Barth v. Addie Co., 271 N.Y. 31, 2 N.E.2d 34 (1936) (see text accompanying note 9 *supra*).

[27] 199 Misc. 654, 102 N.Y.S.2d 862 (Sup. Ct. 1951).

arbitrate a nonunion employee's dispute with his employer. The employee then brought an action against the employer alleging breach of contract. That action was stayed, on motion by the employer, pending arbitration pursuant to a collective bargaining agreement with the union. No such arbitration was forthcoming. In answer to the employee's motion to vacate the stay, the court directed that the employee and employer seek to arbitrate the controversy without enlisting the union's participation. The court further directed that if such plan proved unworkable, then the employee would be permitted to proceed with his action at law. In view of the discussion to this point, the *Wile* case stands alone. No question was there raised as to the individual's authority to merely *affect* the arbitration; on the contrary, he was directed to depose and displace the union wholly, and to proceed in total disregard of the *union's* rights under the contract.

The court's sympathy was clearly with the slighted employee:

> I do not think that the . . . [employee] must be made the unwilling victim of this impasse [*viz.*, the union's refusal to arbitrate, and the stay in the employee's action at law pending arbitration]. It is clear that he is entitled to have his claim against petitioner . . . heard and determined. . . .[28]

It was thus "clear" to the court that an individual is entitled to seek enforcement of a collective bargaining agreement. This same point was "obvious" to the court in *Busch,* but was flatly denied in *Miller,* as was a similar contention in *Petition of Minasian.*

In the decade following the *Wile* case the courts of New York continued to render inconsistent opinions concerning the rights of employees. The cases discussed thus far are representative of a large number of decisions which in some instances upheld [29] and in others denied [30] the individual's claimed right to a personal remedy.

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[28] *Id.* at 655, 102 N.Y.S.2d at 863.

[29] See, *e.g.*, Donato v. American Locomotive Co., 306 N.Y. 966, 120 N.E.2d 227 (1954) (memorandum decision) (Individual employee may attack arbitration award by motion to vacate pursuant to §§ 1462 and 1463 of the Civil Practice Act.); Hudak v. Hornell Indus., Inc., 304 N.Y. 207, 106 N.E.2d 609 (1952) (employees permitted to assert rights under collective bargaining agreement since they were third party beneficiaries); Iroquois Beverage Corp. v. International Union, 14 Misc. 2d 290, 159 N.Y.S.2d 256 (Sup. Ct. 1955) (Where it appears that individual employees will not be fairly represented by the union during arbitration proceedings, such employees may intervene.).

[30] See, *e.g.*, Wright v. Ruppert, 14 Misc. 2d 290, 182 N.Y.S.2d 102 (Sup. Ct. 1953) (Individual acting in bad faith has no right to compel arbitration where representative union denies that he has a valid complaint. Agreement is between union and employer and the power to enforce it rests solely in those parties.); Bianculli v. Brooklyn Union Gas Co., 115 N.Y.S.2d 715 (Sup. Ct. 1952) (Individual under collective bargaining agreement had no right to compel arbitration by union or to require employer to submit to arbitration not participated in by union. Union alone has right to arbitrate employee's grievance.); Sholgen v. Lipsett, Inc., 116 N.Y.S.2d 165 (Sup. Ct. 1952) (Individual, not

An end to the controversy came in 1959 when the Court of Appeals in *Parker v. Borock* [31] expressly limited the employee's remedy to an action against his union. There, the employee, having been discharged, first employed the grievance procedure outlined in the collective agreement. Representatives of both the company and the union discussed the discharge, but it was agreed that no wrong [32] had been done. The plaintiff, consequently, was not reinstated. The union specifically refused a request by the plaintiff that the matter be pressed to arbitration. He then brought an action against his employer for breach of the collective bargaining agreement.

In dismissing plaintiff's cause, the court rested upon its interpretation of the collective agreement which declared the agreement to be binding on the employer, the union, its officers, representatives, *and* members. Provisions to this effect are standard in such agreements.[33] Under it, concludes the court, the provisions of the collective agreement inure to the union members.[34] They are expressly bound by it, in all of its provisions, including the fundamental clause empowering the union to process all grievances. The plaintiff, therefore, can obtain relief only insofar as the union is willing to act in his behalf. "[T]he only conclusion which logically follows is that the employee is without any remedy, except as against his own union, if he claims that the union mishandled [his grievance]. . . ." [35]

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being a party to a collective bargaining agreement, may not demand arbitration thereunder.); DeRienzo v. Farrand Optical Co., 148 N.Y.S.2d 587 (N.Y. Munic. Ct. 1956).

[31] 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959).

[32] The agreement provided that no regular employee could be discharged or disciplined without good and sufficient cause. It was upon an alleged breach of this clause that plaintiff based his action.

[33] See, *e.g.*, U.S. Steel Corp., 1 C.C.H. LAB. L. REP. (Union Contracts Arbitration) ¶ 59,908, p. 85,204 (1960); Brooklyn Union Gas Co., 1 C.C.H. LAB. L. REP. (Union Contracts Arbitration) ¶ 59,911, p. 85,352; Consolidated Edison of N.Y., 1 C.C.H. LAB. L. REP. (Union Contracts Arbitration) ¶ 59,920, p. 85,852-53; Ford Motor Co., 1 C.C.H. LAB. L. REP. (Union Contracts Arbitration) ¶ 59,923, p. 86,005; Massey-Ferguson, Inc., 1 C.C.H. LAB. L. REP. (Union Contracts Arbitration) ¶ 59,927, p. 86,252. It should be observed that the collective agreement provisions naming the union as sole and exclusive bargaining agent (the essential clause), in effect declare the employees bound to submit all disputes and grievances under the agreement to the union for processing. In this sense, all employees are bound by collective agreements, whether the contract so recites or not.

[34] Parker v. Borock, 5 N.Y.2d 156, 161, 156 N.E.2d 297, 299, 182 N.Y.S.2d 577, 581 (1959).

[35] *Id.* at 161, 156 N.E.2d at 300, 182 N.Y.S.2d at 581. In a dictum statement, the court declared: "In this jurisdiction, it is clear that wage provisions in the collective bargaining agreement inure to the direct benefit of employees and may be the subject of a cause of action." *Id.* at 159, 156 N.E.2d at 298, 182 N.Y.S.2d at 577. In light of the court's final holding, this statement appears to be without real meaning. The court agrees that the union is the sole bargaining agent in disputes arising under the collective agreement. Wage disputes therefore would necessarily be a *union* responsibility.

While in *Parker v. Borock,* denial of the employee's cause of action was based upon an interpretation of the collective agreement itself, *Matter of Soto* [36] accomplished the same result, in 1960, under its interpretation of Arbitration Law provisions.[37] In *Soto,* the plaintiff moved to vacate an arbitration award,[38] which permitted his discharge, on the ground that he was denied representation by his own attorney in the arbitration proceeding and that the attorney assigned by the union to act in his behalf was in fact an attorney who in related matters acted also as counsel for the employer.

Reversing a unanimous decision of the Appellate Division,[39] the court found that the petitioner was not a proper party plaintiff:

> The award . . . could be vacated only at the initiation of a party to the arbitration . . . . The misconduct of an arbitrator, contemplated by the statute, and warranting the setting aside of an award, is that "by which the rights of any *party have been prejudiced*" . . . . The petitioners, not being parties to the agreement may not avail themselves of rights which under the Civil Practice Act are limited to parties; an exception to such limitation may not be created by judicial application of equitable principles, nor may a basis for vacatur be supplied by implication.[40]

Taken together, *Parker v. Borock* and *Matter of Soto* preclude the assertion by an individual employee in New York of any claim arising under a collective bargaining agreement.[41] *Parker,* in effect, denies employees any right of action on the contract; [42] *Soto* denies the privilege of invoking, or in any way affecting, the arbitration procedure.[43]

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[36] 7 N.Y.2d 397, 165 N.E.2d 855, 198 N.Y.S.2d 282 (1960).

[37] N.Y. CIV. PRAC. ACT § 1462(3): "[T]he court must make an order vacating the award upon the application of *any party to the controversy which was arbitrated:* . . . . 3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced."

[38] N.Y. CIV. PRAC. ACT § 1462(3).

[39] Matter of Soto, 7 App. Div.2d 1, 180 N.Y.S.2d 388 (1st Dep't 1959).

[40] Matter of Soto, 7 N.Y.2d 397, 399, 165 N.E.2d 855, 856, 198 N.Y.S.2d 282, 283 (1960).

[41] With the indirect exception, of course, of an action in tort against a union for breach of a fiduciary duty owing to the employee.

[42] This does not necessarily prevent an employee from *joining* in proceedings instituted either by the union or the employer. Sections 193-a and 193-b of the Civil Practice Act, relating to third party practice, provide for participation in any action by interested persons, either as plaintiffs or defendants. These sections have been held applicable to arbitration proceedings, although no specific reference is made to individual union members. See Publisher's Ass'n v. Typographical Union, 168 Misc. 267, 5 N.Y.S.2d 847 (Sup. Ct. 1938). However, since the Court of Appeals in *Matter of Soto* denied relief to an individual under the Arbitration Law, it is not likely that it will reverse itself in the face of Civil Practice Act provisions only remotely concerned with arbitration procedures.

[43] While *Matter of Soto* specifically interpreted only §§ 1462 and 1462-a

The United States Supreme Court, through implication and dicta in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*,[44] strongly implied that the federal courts are similarly unavailable to individuals. There, it was held that not even a *union* acting in behalf of its members may bring an action under Section 301(a) of the Taft-Hartley Act[45] for an alleged breach of wage provisions in a collective agreement. The Court disallowed the suit, stating that if unions were to avail themselves of section 301(a) in the enforcement of every personal wrong committed against each of its members, a tide of litigation would result that could not have been intended by Congress.[46] In view of this, it is not likely that the Supreme Court would allow *individuals* to pursue suits of the very same character on their own behalf.

In *Dimeco v. Fischer*,[47] plaintiff-workman brought suit under section 301(a) against his employer for wrongful discharge, and against his union for failure to properly represent him under the arbitration clause of a collective agreement. The District Court held this provision unavailable to individuals, first, because a remedy is available to them, even at common law, in the courts of various states,[48] and further, because allowance of actions by disgruntled individuals would seriously overburden the courts.[49] This position is reflective of the very wide majority of federal decisions in point.[50]

The Court in *Westinghouse* also lent strength to the *Dimeco* view that individuals ought confine themselves to remedies already

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of the Civil Practice Act, it is most likely that the meaning of "parties" will be construed uniformly throughout article 84, so closely meshed and interdependent are the sections therein. It is hardly probable, for example, that an individual's motion to compel arbitration under § 1450 would be granted, and his subsequent motion to confirm the award under § 1461 denied.

[44] 348 U.S. 437 (1954).

[45] "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Labor Management Relations Act (Taft-Hartley Act) § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

[46] Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 459-61 (1954).

[47] 185 F. Supp. 213 (D.N.J. 1960).

[48] *Id.* at 215.

[50] See, *e.g.*, United Protective Workers v. Ford Motor Co., 194 F.2d 997 (7th Cir. 1952); Evening Star Newspaper Co. v. Columbia Typographical Union, 124 F. Supp. 322 (D.D.C. 1954); Square D Corp. v. United Elec. Workers, 123 F. Supp. 776 (E.D. Mich. 1954); Disanti v. Local 53, Federation of Glass Workers, 126 F. Supp. 747 (W.D. Pa. 1954); Ketcher v. Sheet Metal Workers, 115 F. Supp. 802 (E.D. Ark. 1953); Schatte v. International Alliance of Theatrical Stage Employees, 84 F. Supp. 669 (S.D. Cal. 1949), *aff'd*, 182 F.2d 158 (9th Cir.), *cert. denied*, 340 U.S. 827 (1950). *But cf.* Massanzano v. Riggs Nat'l Bank, 184 F.2d 349 (D.C. Cir. 1950).

available in state forums: "The employees have always been able to enforce their individual rights in the state courts." [51] Thus, the Court reasoned that at a time when Congress was concerned with congestion in the federal courts, it could not have contemplated a broadening of federal jurisdiction to include remedies already available in state courts.

The availability of a remedy in state courts as a consideration warranting a narrow interpretation of section 301(a) is, in light of *Parker v. Borock,* small comfort to workers in New York. Whatever may be the remedies allowed in other states,[52] the narrow view of section 301(a) probably forecloses New York employees from bringing suit in the one remaining forum available to them.

It will be noted that section 301 has been thus interpreted ostensibly on the basis of congressional intent. The following excerpt is taken from the debate concerning section 301 prior to passage in the House of Representatives:

> Mr. Barden. Mr. Chairman, I take this time for the purpose of asking the Chairman a question, and in asking the question I want it to be understood that it is intended to make a part of the record that may hereafter be referred to as history of the legislation.
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> It is my understanding that section [301] . . . contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; in other words, proceedings could, for example, be brought by the employers, the labor organizations, or *interested individual employees* under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract.
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> Mr. Hartley.[53] The interpretation the gentleman has just given of that section is absolutely correct.[54]

So clear an expression of congressional intent is not frequently available. It is difficult to understand how, in the face of it, the courts are able to attribute to Congress an intent directly opposed to that which it has specifically declared.

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[51] Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., *supra* note 46, at 460.

[52] Most other states apparently *do* allow suits by individual employees. See, *e.g.,* Mastell v. Salo, 140 Ark. 408, 215 S.W. 583 (1919); O'Jay Spread Co. v. Hicks, 185 Ga. 507, 195 S.E. 564 (1938); McGregor v. Louisville & N.R.R., 244 Ky. 696, 51 S.W.2d 953 (1932); Yazoo & M.V.R.R. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931); Hall v. St. Louis-San Francisco Ry., 224 Mo. App. 431, 28 S.W.2d 687 (1930); Rentscehler v. Missouri Pac. R.R., 126 Neb. 493, 253 N.W. 694 (1934); H. Blum & Co. v. Landau, 23 Ohio App. 426, 155 N.E. 154 (1926); Volquardsin v. Southern Amusement Co., 156 So. 678 (La. App. 1934); Cross Mountain Coal Co. v. Ault, 157 Tenn. 461, 9 S.W.2d 692 (1928).

[53] Mr. Hartley was the sponsor of the act in the House of Representatives.

[54] 93 CONG. REC. 3656-57 (1947) (emphasis added).

Unions are formed essentially to equalize the imbalance of power between employers and individuals, and to serve as instruments in a continuing effort to isolate and more accurately define the prerogatives of labor and to increase their number. The union organization is a child of human need, and as such, serves well only while that need is being effectively met. Thus, while unions are properly recognized as entities separate and distinct from the individuals within them for most purposes, the separation must not be permitted to become so broad that sight is lost of individual rights.

Yet *Matter of Soto*[55] declares that the individual employee is a total stranger to the collective agreement and that when the Arbitration Law gives remedy to aggrieved "parties to the controversy" it does not include thereby, the very person for whom the union acts; the person who, in most cases, is the only party directly affected, and who, in all cases of personal grievance, is the party with the greatest interest. Such a position reflects a widespread tendency to give to unions an existence too far removed from the individuals they purport to serve.

The proper extent of union power is not easily delimited, however. Allowance of individual action in all controversies obviously would result in complete breakdown of the arbitration concept as an efficient, inexpensive and consistent method of settling labor disputes. The union is peculiarly competent to act both for individual employees and for all employees as a group, whether the action taken is the processing of single grievances, invoking arbitration or prosecuting actions at law on the contract.[56] For example, many settlements in individual cases are made with a view toward the effect they will have as precedents bearing on future controversies. Thus, a union may decline to press a valid grievance because a present settlement in the individual's favor will result in unfavorable settlements of a large number of grievances at later dates. A union, therefore, must weigh comparative advantages so that the interests of a majority of the employees will be served.[57]

Manifestly, such decisions involve considerable discretion.

> [I]f the entire nexus of the individual's right is subject to determination by the Union or a Union committee, there is the danger that his individual rights may . . . be used for trading purposes in bargaining with management, or that their vindication may depend on his position in the Union or his personal relations with the committee members.[58]

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[55] 7 N.Y.2d 397, 165 N.E.2d 855, 198 N.Y.S.2d 282 (1960).

[56] See Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 625-27 (1956).

[57] *Id.* at 614-15.

[58] *In re* Norwalk Tire & Rubber Co., 100 F. Supp. 706, 711 (D. Conn. 1951); *cf.* Donato v. American Locomotive Co., 283 App. Div. 410, 127 N.Y.S.2d 709 (3d Dep't 1954).

The law in New York seems to place individual workers entirely at the mercy of union management, denying them remedy under the collective agreement however flagrant such abuses of discretion might be. As has been indicated, the aggrieved party is relegated to an action at law against the union for damages.

The individual is thus forced to bear the expense of litigation and the burden of proving fraud or breach of fiduciary duty in dealings admittedly of a discretionary nature, and in which, in the usual instance, he has taken little active part. Further, should he overcome these obstacles, he is entitled only to money damages—a remedy not wholly satisfactory in instances of, for example, wrongful discharge.

The door of abuse would seem therefore to be cast ajar in an area that has already had occasion to feel the sting of power misused.[59]

The need seems clear then for precise regulation of enforcement procedures under collective agreements that would preserve the basic rights of individuals to remedy injustices done them and at the same time retain the overall advantages of the collective bargaining system. Such regulation, properly, is the task of the legislature.

An amendment to the Civil Practice Act permitting the individual to compel and otherwise affect arbitration proceedings between the parties, upon a showing that there is reasonable cause to believe that the employee's rights have been violated by the union's mismanagement of his grievance, would seem to be the most likely solution. Such an amendment (if possible in the now-existing statutory scheme) would tend to limit direct participation in arbitration proceedings to those individuals whose rights are clearly endangered. Neither a flood of litigation nor the consequent collapse of the arbitration system, so feared by the courts, seems likely under such a provision.

FEDERAL INCOME AND NEW YORK REAL PROPERTY CHARITABLE TAX EXEMPTIONS: APPLICATION OF THE "EXCLUSIVE" TEST

The problem herein discussed is one of comparative statutory construction, centering around the meaning of "exclusive," as used in Section 501(c)(3) of the Internal Revenue Code, and Section 420

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[59] See, *e.g.*, Gregory, *Fiduciary Standards and the Bargaining and Grievance Process*, 8 LAB. L.J. 843 (1947); Kennedy, *Union Refusal to Bargain*, 73 HARV. L. REV. 502 (1958); Tureen, *Judicial Intervention in Intra-Union Affairs to Protect the Rights of Members*, 1954 WASH. L.Q. 440 (1954).