The Grievance Procedure and the Supreme Court: A Theory of Collective Bargaining

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LABOR ARBITRATION as the final step of a grievance procedure has been defined by the United States Supreme Court and distinguished from commercial arbitration in regard to nature and purpose:

In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by the courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.¹

This view of labor arbitration has not, however, received unanimous endorsement by the Court. In a dissenting opinion Mr. Justice Whittaker stated:

This is an entirely new and strange doctrine to me. I suggest, with deference, that it departs both from the contract of the parties and the controlling decisions of this Court. I find nothing in the contract that purports to confer upon arbitrators any such general breadth of private judicial power. The Court cites no legislation or judicial authority that creates for or gives to arbitrators such broad general powers.²

A full investigation of this disagreement concerning labor arbitration and the grievance procedure appears to be in order. Lawyers and industrial relations people have differed substantially over this matter for a number of years. The existence of several views regarding the fundamental nature, purpose, and function of collective bargaining itself carries the seed of this dispute. It is thus proposed that the major theories of collective bargaining be identified and defined; that

² Id. at 589.
the general nature of the grievance procedure be presented; that critical issues in the grievance procedure be noted and discussed; and, that a complete framework of reference for the grievance procedure and grievance arbitration be ascertained for each theory by analyzing all of the positions on the various critical issues. This will reflect the full nature of the controversy and will also serve to identify the theory of collective bargaining adopted by the United States Supreme Court.

THEORIES OF COLLECTIVE BARGAINING

The intrinsic nature of collective bargaining is not a matter of universal agreement. The retained rights doctrine holds that before the advent of collective bargaining, the nature of the employee-employer relationship vested all rights regarding the composition and direction of the work force exclusively in management; that the negotiation and execution of a written labor-management agreement results in a loss of some of the traditional and inherent rights of management; and that all matters not taken away by collective bargaining and set forth in the agreement are retained by management to be unilaterally exercised. Thus the retained rights doctrine is fundamentally an approach that views the historical exercise of authority by management to be inherent in the nature of our economic system, and concludes that collective bargaining does not and cannot destroy this basic vestiture of authority, but is rather a circumstance within this framework. 3

Another approach stresses two types of property rights. These include the property rights of a worker in the ownership of his personal services, and the property rights of an employer in the ownership of the physical and other assets of the business. Collective bargaining is conceived as a process in which inherent property rights of workers regarding the use of their personal services, and inherent property rights of employers regarding the operation of the firm and composition of the force, are mutually recognized and voluntarily restricted through the codetermination of terms and conditions of employment. Major areas of codetermination are set forth in the written labor-management agreement. Matters not submitted to codetermination are retained by each respective property owner. 4

Within the context of these two philosophical bases, there are a number of theories of collective bargaining. These have been classified.


as the marketing theory, which stresses collective bargaining as a means of contracting for the purchase and sale of labor; the government theory, which stresses the industrial self-government aspects of collective bargaining; and the management theory, which stresses a method of efficient management within the context of collective bargaining.\(^5\)

**The Marketing Theory**

The marketing theory represents the general approach of many firms to collective bargaining. Under this theory the union is regarded as an institution with separate and distinct interests from the member-workers. The interests of the workers and the firm are not considered to be in discord, but the basic interests of the union and management are in conflict. The retained rights doctrine is followed with management seeking to restrict the subject matter of collective bargaining and preserve traditional managerial rights from the conflicting union interests. Further, collective bargaining is conceived as essentially a commercial relationship, a means of contracting for the sale of labor with the final terms and conditions of employment specifically set forth in a labor contract.

The marketing theory is thus based primarily on the retained rights doctrine and the commercial nature of collective bargaining. Accordingly, it concludes that collective bargaining introduces certain specific restrictions on managerial unilateral authority and discretion, and management retains all powers, rights, and privileges not specifically given away or restricted by the labor contract. It is further held that since the labor contract is basically a commercial contract, the same objective rules which apply to the interpretation of commercial contracts are applicable, and the solution of all disputes within the relationship must be derived from the terms and nature of the agreement. This theory also maintains that management has an obligation to restrict the subject matter of collective bargaining and preserve the essential rights of management, and that collective contracts are treaties of peace in the economic struggle, rather than instruments for effectuating mutually beneficial union-management relations.

Thus this theory in practice results in a power struggle over union security and management rights. In its highest form this theory affirms belief in collective bargaining and advocates meeting all legal requirements in regard to procedures and subject matter. Support of collective bargaining is based on its assurance of a position of equality of bargaining power on the part of workers in the sale of their services.

Gradations of this theory are reflected in differences over the specific rights of management to be preserved.  

THE GOVERNMENT THEORY

The government theory reflects the concept of collective bargaining followed by many unions. This theory stresses the recognition, agreement, and enforcement of respective rights and duties of the parties through collective bargaining as a system of self-government in industry.

Under this theory the governmental process is conducted through management representing the owners of the firm and the union representing the employees. It is a tripartite system of industrial self-government. The legislative process is intermingled in the negotiation of a collective bargaining agreement, and the supplementing agreements are reached through shop and grievance committees; the executive function is performed by management in the day-to-day administration of the collective bargaining agreement supported by the management rights clause and the right of administrative initiative; and, the judicial process is performed through the grievance procedure with arbitration as the final step. Thus there are both legislative and judicial aspects in a grievance procedure.

Collective bargaining is also stressed as an institution which by its nature is the exclusion of all other systems of employee-employer relations. The union is exclusive bargaining agent for all employees within an appropriate unit of bargaining. Accordingly, all workers within the bargaining unit are sought to be made citizens of this governmental system through the adoption of a union security clause. This is then a guarantee to the union of permanent acceptance of the system, and a prerequisite to the responsible and fruitful development of the relationship.

The retained rights doctrine is rejected as the basis of the bargaining relationship. The collective bargaining agreement is treated as a contract by legal authorities, but the parties regard it as basically a document to be administered in accordance with the needs of both parties.

Thus in practice this theory results in a dual loyalty on the part of workers, with management recognizing the need for full acceptance of collective bargaining before responsible harmonious relations can develop. Management seeks to assure this by agreeing to union security, and working through the union on employee problems. The union in sharing with management the power to determine employment terms

assumes the responsibility of exercising this role in a manner that is genuinely representative of the interests of the employees and not fundamentally detrimental to the employer.\(^7\)

### The Management Theory

The management theory emphasizes the multiple obligations of management. It stresses that management has a primary responsibility to stockholders to make a profit, a responsibility to employees to insure sound industrial relations, and a responsibility to customers to sell a satisfactory product at a just price. The retention of maximum unilateral authority in management and adherence to the retained rights doctrine are rejected as necessary for the fulfillment of these multiple obligations. Collective bargaining is recognized as an instrumentality or method of management which can contribute toward higher productivity and thus enable a firm to meet its primary responsibility to the shareholders while keeping its employee and customer responsibilities in a functional relationship.

It is recognized that a firm cannot consider this approach until it is convinced of the efficacy of collective bargaining, and also, that a union cannot adopt a cooperative attitude toward management problems until it is convinced that collective bargaining has been permanently accepted. Thus both an understanding and faith in collective bargaining on the part of management, and union security for the union, are prerequisites to the adoption of this theory. This theory does not include the surrender of all management decision-making power to codetermination. There is not an automatic acceptance of an expanding scope of collective bargaining as a contribution to constructive relations. Instead, the relative merits of each situation are controlling, with the exercise of relative economic power accepted as the device for settling disputes in this area. Moreover, it is held that management must always have the right to manage if operational efficiency is to be maintained; but the vital area for the exclusive exercise of managerial authority is the day-to-day administration of affairs, not policy making.

This theory amounts to the adaption of the codetermination aspects of the government theory within a framework of management decision-making. The collective bargaining agreement is viewed as a policy statement and a set of operating procedures developed to meet mutual objectives. It is a tool and guide in areas of management decision-making. The terms of the agreement are followed and applied primarily

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\(^7\) 12 Am. Econ. Rev. 56-79 (1922); Also, Chamberlain, Collective Bargaining, supra note 5, at 125-130.
in the light of the mutual objectives of the parties, rather than strictly on the basis of contract law.  

THE GRIEVANCE PROCEDURE

The three identified theories of collective bargaining reflect substantially different views on the nature of the institution and the labor agreement. All recognize, however, the contractual nature of a collective bargaining agreement, and they endeavor to alleviate disputes in the employment relationship through collective bargaining. Moreover, after a union and an employer have agreed upon the general terms which shall cover their relationship (by negotiating and signing a labor management agreement), there remain areas of potential differences. The parties can disagree over matters which were not covered in the basic agreement, and which call for either a general or an individual solution. These disputes over subject matter not included in the agreement, but of concern to either or both parties, are known as disputes over interests. The parties can also disagree over the proper application of the general terms to particular situations, and the interpretation of the terms set forth in the agreement. These are known as disputes over rights, and are generally called grievances. Labor arbitration is used as a process for settling disputes over both interests and rights. Disputes over interests are submitted to arbitration by either an ad hoc or standing arrangement of the parties. Arbitration of disputes over rights is generally provided in a grievance procedure.

The grievance procedure as specifically set forth in the agreement usually takes the form of several levels of negotiation commonly known as steps, beginning with activity between union stewards and foremen, and ending with meetings between top management and union officials. Throughout the steps of a grievance procedure each side seeks to es-


13. The origin of this term is not definite. It appears to have gained use through the establishment of boards of grievances in the clothing industry in the early part of this century.

14. Arbitration is defined as the reference of a dispute to an impartial person for final and binding determination. Voluntary arbitration exists when the parties themselves agree to this procedure for settlement; compulsory arbitration occurs when the law requires it. The arbitration process is thus basically a judicial proceeding and different in nature from mediation and conciliation where the third party does not have authority to render a decision.

tablish its position and compromises are also attempted. When a grievance remains unsettled after full negotiation, ninety per cent of the collective bargaining agreements today provide for impartial arbitration, consisting of a hearing coupled with a subsequent binding decision. At each step of the grievance procedure, designated representatives of the employer and union participate.¹⁶

The final step of a grievance procedure, requiring that unresolved disputes arising out of or relating to the collective bargaining agreement be finally determined by arbitration, is called an arbitration clause. When the parties are subject to an arbitration clause either party may initiate arbitration by serving notice upon the other of his intention, and such notice is called a demand for arbitration. After hearing arguments and taking testimony from both sides, an arbitrator reaches his decision, which is called an award and is usually accompanied by a written opinion in which the arbitrator sets forth the reasons supporting his conclusions.¹⁷

There are two basic methods for selecting arbitrators in labor dispute cases: agreement upon the use of a permanent arbitrator, and the ad hoc method. Under the permanent arbitrator system one person is selected to serve in all disputes which go to arbitration. Under the ad hoc method, a separate arbitrator is appointed for each group or groups of issues to be arbitrated by the parties. A number of collective bargaining agreements provide for a board of arbitration rather than a single arbitrator. Usually these boards consist of one or more members appointed by the union and by management, and an impartial arbitrator appointed by both. Generally a decision by a majority of such a board constitutes a valid award.¹⁸

The grievance procedure reflects an effort on the part of the participants to voluntarily restrict their use of relative economic power. Historically, as the written labor management agreement signed for a given period of time came into use, there developed with it an appreciation that the process of adjustment under the agreement was fundamentally different from the process of agreement making. The use of relative economic power — the strike and the lockout — to bring about a written agreement was acceptable to the parties, but having reached an agreement, they were reluctant to continue this contest of strength to apply the agreement. This situation gave impetus to the development of the grievance procedure and arbitration to handle the disputes concerning the day-to-day application and interpretation of

¹⁸. Id.
the terms of collective bargaining agreements.\textsuperscript{19} It thus arose as a substitute for strikes and lockouts as devices for settling disputes over rights within the terms of an established agreement. In accordance with this, a no-strike-no-lockout pledge is complimentary to the grievance procedure with arbitration as the final step. The parties expressly or implicitly agree not to strike or lockout over any dispute that may be referred to the grievance procedure and arbitration. Without such an understanding the grievance procedure would be ineffective, due to the ability of either party to unilaterally revert to the use of relative economic power, seeking to impose its position on the other.\textsuperscript{20} When grievance arbitration is not provided, or when some grievance matters are specifically excluded from the arbitration clause, relative economic power remains as the arbitrament.

Grievance arbitration is also a substitute for legal action. Instead of submitting disputes to a private proceeding, the parties could seek to adjust differences over their contract in the courts. The use of relative economic power initially, and subsequent development of the grievance procedure, are interpreted as reflecting the unwillingness of labor and management to submit these matters to the courts as contract disputes. The saving of time and expense through private proceedings are not the controlling factors. The courts and the parties themselves have acknowledged that legal proceedings are not well adapted to labor management relations.\textsuperscript{21} The grievance procedure is then a means of making collective bargaining work.\textsuperscript{22} It has also been observed as a social invention of the greatest importance for a democratic society wherein individuals and groups of employees can take up their problems, seeking some means of redress within the work environment by people most familiar with the nature of the problems.\textsuperscript{23} Further, it is different from the negotiation process which is essentially contract making, a legislative or policy-making process establishing enforceable rights. The grievance procedure is basically a judicial or compliance function because it is limited to disputes over these rights.\textsuperscript{24}

Few collective bargaining agreements provide for resort to the grievance procedure by employers. Most are drafted in language that clearly specifies that the union or employees may file grievances and carry them through the procedure, but are silent on the matter of

\begin{thebibliography}{99}
\bibitem{19} Chamberlain, Collective Bargaining, \textit{op. cit. supra} note 5 at 97.
\bibitem{20} Witte, \textit{op. cit. supra} note 15, preface.
\end{thebibliography}
employer grievances. Indeed, many employers oppose contract provi-
sions permitting them to process grievances through the procedure. 
There are two views supporting this position.

One view holds that management-filed grievances are inconsistent 
with the residual concept of management rights reflected in the retained 
rights doctrine. Under this view, management has retained the right 
to take whatever administrative action it deems proper; thus, there 
exists no necessity for it to file grievances. If any management actions 
are considered contrary to the agreement, the union or employees 
affected may seek redress through the grievance procedure.25

Another view results in the same type of relationship, but does not 
follow the retained rights doctrine. Under this view it is held that 
consistent with the nature of the work environment, the collective 
bargaining relationship, and the development of the grievance pro-
cedure, management has the right of administrative initiative which 
may be balanced against the right of employees and the union to 
challenge it through the grievance procedure. This doctrine of admin-
istrative initiative is, therefore, considered as an essential element of 
the relationship and generally precludes the necessity for management 
to file grievances.26

Critical Issues in the Grievance Procedure

The general nature and framework of the grievance procedure 
has been described. Beyond these principles there are a number of 
fundamental areas of disagreement. Specifically, the major issues in-
clude: the definition of a grievance; the retained rights doctrine and 
the grievance procedure; the several approaches to grievance handling; 
the development and use of a separate body of collective bargaining 
law; the matters of arbitrability, jurisdiction and authority of the 
arbiterator; and the nature of grievance arbitration and the role of the 
arbiterator.

Definition of a Grievance.

A grievance has been defined as a dispute over the interpretation 
or application of a collective bargaining agreement, or a dispute over 
rights as opposed to a dispute over interests. This is a general defini-
tion applicable to any collective bargaining agreement embodying a 
grievance procedure. A specific definition of a grievance is contingent

26. George W. Taylor, Effectuating the Labor Contract through Arbitration, 
The Profession of Labor Arbitration, ed. Jean T. McKelvey (Washington: BNA 
Incorporated, 1957), pp. 31-33.
upon the terms of a particular agreement; a grievance in this sense is then whatever disputes the parties agree to have submitted to the grievance procedure.

Many collective bargaining agreements that specifically define a grievance use the following (typical) language. "Any dispute as to the meaning, interpretation or the application of any provision of this agreement shall constitute a grievance."27

This definition is subject to two separate types of interpretation and application itself. One view holds to a rigid definition, contending that the contract is the absolute and complete embodiment of the intent of the parties, and therefore, it becomes the only authoritative source for setting forth the definition of a grievance. Under this view, a grievance must specifically involve the interpretation, meaning, or application of the contract and its performance or non-performance. Thus it is a strict, technical, and narrow approach based fundamentally on a legal concept. The purpose of this approach is to limit the grievance procedure from any possible expansion of the terms of the agreement, and the genesis of this concept is traceable to business contract law. A second view holds that the definition should be applied in a manner which stresses the practicalities and nature of the collective bargaining relationship and grievance arbitration as opposed to a commercial contract and arbitration thereunder. Thus this second view is looser, less technical, and based primarily on the collective bargaining concept that grievances are primarily disputes within a human relationship not purely breaches of contract.

The broad approach to the definition of a grievance is also limited to disputes over rights. However, this includes disputes directly involving the specific provisions of the agreement, disputes indirectly involving specific provisions of the agreement, and disputes involving an implied provision or an implied collateral agreement. Thus, in this approach, past policies and practices within the relationship, as well as a pragmatic, rather than a solely contractual, concept of the nature of a labor agreement are basic considerations in determining whether or not a grievance exists. For example, the removal of a nurse, where there is not a specific contractual requirement to hire a nurse, may be a proper grievance matter under a contractual provision requiring the firm to make reasonable provisions for safety. As another example, a well established practice of payment of wages in cash rather than by

27. CRANE AND HOFFMAN, SUCCESSFUL HANDLING OF LABOR GRIEVANCES 11 (1956). Also see pp. 6-16 for a full discussion of the various types of grievance definitions.
check might possibly be considered as an implied or collateral agreement.28

The Retained Rights Doctrine in Grievance Arbitration.

The issue of the retained rights doctrine is related to the narrow view of the definition of a grievance. In applying this doctrine within the framework of the grievance procedure it is held that any matter not specifically limited in the agreement is unquestionably an exclusive right of management. This is difficult to follow in its strictest sense for it would result in few arbitration decisions against management, and a frustration of the endeavor to settle disputes through the grievance procedure. This point has been illustrated by analyzing the clause in most agreements which provides that any discipline imposed by management must be "for cause." Under a rigid application of the retained rights doctrine to this provision, management has merely agreed not to take capricious disciplinary action. Thus whatever the "cause," no matter how slight, management retains the right to take disciplinary action, however harsh. Only in cases where there is no "cause" at all would an employee have a right of redress.29 It is doubtful whether employees would voluntarily restrict their use of relative economic power in exchange for such a limited method of review.

Since such an adherence to the retained rights doctrine is unworkable in grievance arbitration, it is not followed in this strict manner. There are three possible types of grievance matters which reach an arbitrator:30 (1) those involving conduct specifically denied or permitted by the agreement; (2) those which involve vague or ambiguous language or a conflict between several clauses of the agreement; and (3) those which involve matters on which the agreement is silent. With regard to the first and third types no problem exists. The agreement itself covers number one and number three involves disputes over interests which are not grievances. It is number two then on which the issue of the retained rights doctrine is centered — matters involving vague or ambiguous language or conflicting contract clauses.

Advocates of the retained rights doctrine refuse to consider the merits of these matters, and rely on the usual statement in labor agreements that an arbitrator may not change, modify, or add to the expressed terms of the agreement. They claim that this view is the only one which gives full recognition to the realities of the collective bargaining relationship. Moreover, they also contend that a different admin-

29. Taylor, op. cit. supra note 26 at 158.
istration of the agreement in day-to-day relationships and long range planning would be impossible, that arbitration could not perform its traditional role of developing standards for the parties to follow in contract administration, that it is the parties’ responsibility to draft agreements in clear language, including and excluding whatsoever they desire, and that this is not the function of an arbitrator, who must necessarily do this when the retained rights doctrine is not followed.

Critics contend that the retained rights doctrine is an assertion which workers who seek representation in collective bargaining have never accepted; that the statement or understanding that an arbitrator may not change, modify, or add to the terms of a collective bargaining agreement developed, historically, to limit the authority of an arbitrator to disputes over rights, thus preventing the grievance procedure from being used as a vehicle for settling disputes over interests. It is further stressed that when an arbitrator follows the retained rights doctrine, without full consent of the parties, the arbitrator adds to the agreement by imposing his concept of collective bargaining on the relationship. They conclude that an arbitrator cannot perform his function under either view without adding to an agreement, and stress that adherence to the retained rights doctrine is not the mutual understanding of the parties when they seek arbitration as a means of dispute settlement.  

Grievance Handling.

Section 9(a) of the Labor Management Relations Act provides for legal protection of the right of an individual or group of employees to present grievances to their employer and pursue final adjustment without intervention of the union, as long as the union has an opportunity to be present at such adjustment and the manner of adjustment is not inconsistent with the terms of the collective bargaining agreement in effect.

This provision for individual bargaining within the context of collective bargaining is the law of the land and therefore the situation within which the parties must conduct themselves. In developing a grievance procedure, however, the parties can provide that all grievances be presented to the foreman through the union representative, or that all grievances be presented by the aggrieved to the foreman for possible further discussion with the union, or that either approach may be taken by an employee and followed through the procedure in the same manner. There is then an issue as to whether or not all grievances are normally to be presented through the union.

One view is based on the concept of exclusive bargaining agent under which the union bargains for all employees, both members and non-members, and this, it is stressed, includes grievance negotiating. It is also based on the premise that the union as well as individual employees, due to its status, has an interest in grievances. Therefore, all grievances are sought to be presented by the union, and in the strict application of this principle any employee who feels aggrieved would present the grievance through his shop steward or committee-man. This is further advocated as an aid in maintaining efficient operations — on the premise that the steward will tend to eliminate unfounded grievances and present valid ones which, at the same time, will effectively release the foreman to attend to his operational duties.

A substantial number of firms object to having all grievances presented first to the shop steward. They are not concerned primarily with keeping a vestige of individual bargaining within the context of collective bargaining, but conclude that due to the political nature of the union, non-members or dissident members might have difficulty getting grievances beyond the steward to the foreman. They also point out that the shop steward is not a firm appointee and his ability in grievance matters may not be very good, thus hindering the proper administration of the procedure; also, a firm should not deter this valuable line of communication and its proper functioning in the area of grievance handling.33

There is also disagreement regarding the general technique or method that is proper in handling grievances. It is well recognized that employees have many types of individual problems not necessarily related to the terms of the employment relationship, that these matters will be reflected in employee efficiency and productivity, and that many of these dissatisfactions or complaints cannot be brought to union or management attention under the traditional concept of a grievance as a dispute over rights. Overall and individual production and efficiency can be adversely affected due to the fact that not every employee dissatisfaction is expressed by him, that some are incapable of being formally presented as grievances, and that these types of complaints are, therefore, often disguised as grievances. Accordingly, the use of skill in interviewing and situation thinking on the part of first line supervisors has been encouraged, and an attempt has been made to create an atmosphere that will not discourage the expression of dissatisfactions by employees.34  "What is being urged . . . is a clinical

approach to grievances and the grievance machinery — an approach that views complaints through the functioning processes of shop behavior by which men are working together to turn out goods and services.”

In advocating the clinical approach it is argued that the basic status of the agreement continues. It is the first recourse for handling and adjusting grievances and adoption of this approach does not change the structure of the grievance procedure in any fundamental way. In a positive sense the clinical approach places emphasis “upon the problems of treating grievances rather than upon the mechanics of accepting or dismissing grievances. The agreement is utilized not to determine what merit the grievance possesses or its right to consideration, but to facilitate non-discriminatory consideration of all grievances.”

Where a complaint can be settled by application of the agreement, the clinical approach advocates that this should be done and the matter thereby concluded. However, where current disputes threatening relationships and production cannot be negotiated or adjusted in this manner, it is concluded that until the dissatisfaction underlying the complaint is also mitigated or adjusted the problem will remain. Consequently, it is further held by the clinical approach that the investigation of a complaint

should not be considered complete until these highly important bodies of facts have been compiled . . . the evidence by which the foreman or steward can decide whether the grievance submitted to him presents a valid case within the terms of the agreement, and . . . such data as may at least indicate the degree to which factors of personality, feelings, sentiments, and so on, underlie its genesis or threaten to complicate its handling.

Development and Use of a Body of Collective Bargaining Law in Grievance Settlements.

The desire of both of the parties to settle as many grievances as possible at the first step, leaving the upper levels open for the settlement of major issues, is self-evident in view of the time, costs, and possible loss of bargaining power involved. It is noted that the great bulk of dissatisfaction are settled in most shop relationships at the first step which is a highly informal process. These settlements, which involve substantial skill on the part of foremen and stewards, occur in face-to-face contact between workers and/or stewards and foremen who know

35. SELEKMAN, LABOR RELATIONS AND HUMAN RELATIONS 79 (1947).
36. Id. at 75-110.
37. Id. at 89.
38. Id. at 91-92.
each other fairly well, and who must continue to work together long after the grievance at hand is settled. Such matters are often not fully reported or recorded and are adjusted without adherence to legalism and completely consistent interpretation of agreements.39

Despite the mutual desire for expeditious settlement of grievances at the first step, there are a number of varying political factors affecting the accomplishment of this goal. The union may be desirous of building up interest in an issue through the grievance procedure, looking toward the next contract negotiation. A power struggle may exist between the union and firm over union security, the wage level or structure, or other issues, and this may be reflected in the manner grievances are administered. Active union politics, factionalism within the union, or the threat of a rival union can also be a factor. Although there are other factors, it is not the purpose of this work to develop all the aspects concerning union or firm politics which may be reflected in the collective bargaining relationship and particularly the handling of grievances; rather, suffice it to note the existence of these influences.40 It is also recognized that the type of union-management relationship that exists will be reflected in the grievance procedure. For example, a cooperative relationship will tend to be reflected in less grievances and a higher number of settlements at the first level, while an armed-truce relationship will result in a greater number (and a higher proportion) of grievances proceeding beyond the first step.

In an endeavor to settle grievances at the first step on an individual basis, some stress adherence to established principles at all levels of the grievance procedure and the use of prior decisions under an agreement as precedents. Another view holds that

a considerable body of substantive law relating to industrial relations has been built up by decisions of arbitrators, War Labor Board, National Labor Relations Board, and other governmental agencies. . . . [However] this statement is not literally true in the same sense that court decisions make up the common law. There is no doctrine of stare decisis. . . . But obviously, previous well-considered decisions, if presented, will be persuasive though not binding. Some labor contracts specifically provide that no arbitration decision shall be binding as a precedent in future disputes.41

Thus, although a body of generalizations has emerged, "these generalizations have flexible application,"42 and "an arbitrator is not

40. Id. at 282-283.
41. Udgareff and McCoy, Arbitration of Labor Disputes 129 (1946).
bound to follow precedents in determining the merits of the matter submitted to him, but follows his own judgment."

The observation that grievance settlement is not a "single, standard process, but a range of processes that may vary with the enterprise and from case to case within the same enterprise . . ." is consistent with this approach.

Within this general framework of thought on the limited usefulness of substantive principles and prior decisions there is, however, a recognized tendency to rely on prior settled disputes as part of a standard operating procedure.

A sequence of decisions on basic substantive issues of contract interpretation and application will result over a period of time in the development of a body of principles that can be concretely and meaningfully applied by the parties. Such private case law within a particular relationship can serve to prevent grievances, settle grievances informally, eliminate duplicatory arbitrations, and head off flanking operations designed to escape the consequences of an unpalatable earlier award.

Thus, though rejected as a complete method of deciding disputes, the use of prior decisions is viewed here as contributing to better contract administration.

**Arbitrability and the Jurisdiction and Authority of the Arbitrator.**

The question of the arbitrability of a specific issue is basically whether or not the parties have agreed to make the arbitration process available for disputes over the matter involved. Parties frequently exclude disputes over production rate changes, work schedule changes, job method changes, and many other topics. These matters are then not arbitrable. The question of the jurisdiction of an arbitrator is basically whether or not the arbitrator is empowered to hear a specific dispute. Thus with regard to the aforementioned oft-excluded matters the arbitrator is without jurisdiction to hear such disputes. The question of the authority of an arbitrator refers to the extent that he may decide a dispute on its merits. An arbitrator may have jurisdiction to hear a dispute, but limited authority with regard to making a settlement of the matter.

43. Id. at 148.
45. Davey, op. cit. supra note 8 at 150.
46. A full discussion of the principles which have become more or less settled by means of substantive decisions is not within the scope of this work. The reader is referred to the arbitration reporting services.
In another context, where an employer refuses to accept arbitration of a dispute over whether or not the firm may properly contract out maintenance work — relying on the position that the agreement is silent on this matter and excludes from arbitration matters "strictly a function of management" — the issue of whether or not such dispute is excluded from the grievance procedure involves a question of arbitrability. Further, where an employer refuses to arbitrate a dispute over an injured employee's right to return to his old job after he had received workmen's compensation benefits, claiming that this type of dispute is not arbirtable under the labor agreement, the issue of whether or not the arbitrator may properly decide the dispute over arbitrability involves a question of jurisdiction of the arbitrator. Finally, where an employer refuses to comply with the arbitrator's award (ordering the reinstatement of several employees) on the grounds that the arbitrator had not properly interpreted the contract, the issue of whether or not the arbitrator could decide the merits of the dispute as he did involves a question concerning the authority of the arbitrator.

These questions of arbitrability, jurisdiction, and authority become interrelated in cases where a party is seeking to enforce the arbitration clause of an agreement, to stay arbitration proceedings, or to set aside an arbitrator's award. Court decisions are sometimes rendered on the merits of the disputes for which arbitration is being sought or has taken place, rather than on the specific issues of arbitrability, jurisdiction, or authority. In a leading case a state court denied a union's suit to enforce arbitration on the grounds that the dispute was not arbitrable because the meaning of the agreement was beyond dispute. When an arbitrator goes beyond the jurisdiction, authority, or limits upon arbitrable matters reposed in him by the parties, the courts will grant redress. A controversy has existed, however, concerning whether or not the court should review the merits of a grievance to decide a case involving one or more of these matters.

Law suits involving issues of arbitrability, jurisdiction and/or authority, have often been treated as concerning questions of jurisdiction over subject matter. This approach has its foundation in equating grievance arbitration to commercial contract arbitration. Under commercial contract arbitration principles, where the arbitrator applies general principles of contract interpretation, it is both acceptable and desir-

able for a court to decide the merits of a dispute which is also being contested on the grounds of nonarbitrability or lack of jurisdiction or authority in the arbitrator. All these matters are part of a judge's role in commercial contract cases, and thus in doing this in arbitration disputes the court is merely performing the function of its substitute — the arbitrator. Where arbitration is viewed as a substitute for legal action, there exists no purpose in making distinctions among arbitrability, jurisdiction, or authority. 52

Where this commercial contract approach is not followed, and emphasis is on the concept of the process as a substitute for the use of relative economic power, these matters become important. Under this view the parties have established a private judicial process with their own procedures and principles of application. The extent to which a court may intervene to determine questions of arbitrability, jurisdiction, or authority rests on the agreement of the parties to permit this, and the substitution of a court decision on the merits of a dispute for that of an arbitrator is completely inconsistent with the nature and design of the process. Thus, it is held to be within the nature of grievance arbitration that an arbitrator initially determine issues of the extent of his own jurisdiction, the arbitrability of a specific dispute, and the extent of his own authority. After an arbitrator has acted, unless the parties expressly agreed otherwise, the aggrieved party may then challenge the award in proceedings to vacate. It is stressed, however, that the court should decide the issue of arbitrability jurisdiction or authority, without going into the merits of the dispute itself. 53

Nature of Arbitration and Role of the Arbitrator.

Within the concept of grievance machinery as basically a judicial or compliance function, grievance arbitration can be viewed primarily as a legal process for interpreting and applying the agreement in a purely contractual framework, as the judicial process within the industrial self-government created and perpetuated by the parties in bargaining, or as a continuation of the bargaining process beyond the conclusion of negotiations and the signing of an agreement. The latter two are easily distinguished from the legalistic approach, but the line of demarcation between these two views is not exactly precise. Under both, the use of mediation techniques within the process of arbitration is likely, but the legalistic approach rejects this entirely.

In the legalistic approach to grievance arbitration, the commercial contract nature of the process is stressed and the role of the arbitrator is conceived as that of a judge. This view is succinctly and concisely reflected in the following statements:

There is one point that I wish to emphasize above all others and that is that arbitration is a judicial process. The arbitrator sits as a private judge, called upon to determine the legal rights and economic interests of the parties as these rights and interests are proved by the record made by the parties themselves. It is my view of arbitration that an arbitrator is bound entirely by the record presented to him in the form of evidence and agreement at the arbitration hearing. His job is the same as that performed by a state or federal judge, called upon to decide a case between party litigants.54

An arbitrator is bound by the language of a contract, and he has no right to reform or amend it. . . . The arbitrator should always be bound by the legal meaning of the contract, and by the rules of contract law. The legal rules of construction must be applied by him as an aid in determining what the contract means.55

My chief criticism of labor arbitration as it functions in many cases is that too few arbitrators have grasped the full significance of arbitration as a judicial process. Too many arbitrators still take judicial notice of interests and facts not established in the record of the hearing. Too many arbitrators still apply the principle of compromise in their decisions. I think I understand their good intentions and motives, and their desire to please both sides, at least a little bit. But when they yield to the principle of compromise they wrong not only both parties to the dispute, but they impair the effectiveness of arbitration as a judicial method of settling labor disputes. . . .56

In the industrial self government approach to grievance arbitration the private and voluntary nature of the process in which the parties themselves determine the extent of the type of arbitration they desire is stressed as the central theme. It is significant to note that under the industrial self government approach the role of the arbitrator is flexible with the desires of the parties. An agreement with a provision for grievance arbitration is considered to be the fulfillment of the goal of the parties to self-regulate their entire employment relationship and to assure a continuity of the relationship implicit in the collective bargaining agreement. The parties themselves, it is indicated, voluntarily and mutually agree on the power and function of the arbitrator; they fix

55. Id. at 490.
56. Id. at 489-490.
the rules and determine the kind of arbitration they will get in this private judicial process, not the arbitrators (nor any other source).  

A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obligated to respect. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties.

Basically, the arbitration process is a part of a system of industrial self-government created and developed by labor and management. That basic and fundamental concept has been adapted to substantial segments of our economic life by companies and unions. For such a system to work and achieve its potentialities, arbitration is an indispensable instrument. Attempting to develop a system of industrial self-government without an arbitration facility is roughly similar to political self-government trying to operate without a judicial system whereby resolved differences are determined only by conflict or surrender.

A system of arbitration as the terminal point in the grievance procedure is essential for the functioning of industrial self-government. It not only provides for a final solution of such disputes, which is very important, but it is also a system within the control of the parties. The judge who determines the dispute is selected by them and they may agree and stipulate to the powers which he will wield. Thus they have fashioned their own legislation and have created their own scheme of administration.

Under the view of the grievance procedure as a judicial part of the continuous process of collective bargaining, the meeting of minds aspect of collective bargaining is stressed and the role of the arbitrator is presented as one who seeks to get the parties to agree on a solution to the dispute presented. The basic tenets of this concept of grievance arbitration are reflected in the following statement:

The fundamental nature of grievance arbitration derives from three fundamental characteristics — (1) it is complementary to the no-strike no-lockout; (2) it is an agreement to arbitrate future, unknown disputes; and (3) it invariably involves agreement-making as well as agreement administration.

60. Id. at 12.
61. Taylor et al., supra note 26 at 21.
... [T]hat a sharp line of distinction can be drawn between agreement-making and agreement administration ... is an erroneous notion. The labor contract is, in most particulars, no more than a skeleton understanding. The agreements there embodied frequently have to be given substance — they have to be amplified in grievance settlement — before a complete meeting of minds is achieved.\(^2\)

Within this view of arbitration as part of the continuous process of collective bargaining, the "central problem of grievance arbitration is whether, at the final step in grievance settlement, a meeting of minds or mutual acceptance should be a vital criterion."\(^3\) The arbitrator holds a highly professional position under this view.

An arbitrator will not perform his function properly unless he is alert to the possible use of mediation methods under certain conditions. An arbitrator is given a great power and a grave responsibility by parties who voluntarily agree to accept his judgment as binding upon them. If either disputant specifically requests the arbitrator to exercise his own judgment without any attempt at mediation, he has an unmistakable obligation and authority to do so. In the absence of a specific authorization of this kind, the arbitrator may well conduct himself in conformance with the principle that a reasonable restraint in the use of power is expected of him.

Unless the parties specifically indicate a preference for a decision instead of an agreement to settle their differences, it is fair to assume that a meeting of minds is the best possible solution of the case which an arbitrator can bring about. If both parties show an interest in arriving at an agreement, the arbitrator is duty bound to assist in that endeavor. Under these conditions, an arbitrator's power to order a settlement is best used when it is directed toward mediating an agreement between the parties. In conformance with these principles, an arbitrator may be looked upon as a mediator with an unusual status. He is in an extremely good position to assist in a meeting of the minds because of his reserve power to issue a decision. A decision must issue, of course, if no agreement is forthcoming.\(^4\)

Proponents of this view further state that disputants frequently prefer this technique, and that parties do not desire arbitration until every effort to secure a meeting of the minds has first been made.\(^5\) It is also held that two essential defects of the legalistic view on arbitration are that it embodies some part of the fatalistic idea that labor

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62. Id. at 26.
63. Id. at 39.
64. TAYLOR, GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS 136-138 (1948).
65. Id. at 137, n.5.
and management differences are irreconcilable, and that the parties know more about their affairs than any outsider.\textsuperscript{66}

In the adoption of the use of mediation within the context of arbitration the conclusion is that the parties have more to gain by removing the issue from the limitations of the contract and widening the scope of the arbitration.\textsuperscript{67} Use of mediation is also based on the notion that the settlement of grievances relates to disputes over the terms of a skeletal, incomplete and/or inconsistent agreement, and therefore “involves not merely the application of clear and unmistakable agreement terms to individual cases, but, particularly in the early stages of a relationship or as it depicts new terms added to an old contract, is also related to a completion of the agreement of the parties.”\textsuperscript{68}

Where an arbitrator functions as a mediator with reserve power to render a decision he is sometimes called or designated impartial chairman rather than arbitrator, umpire, or referee, as these terms connote the primary legalistic rather than mediative role.\textsuperscript{69} It is also generally accepted that \textit{ad hoc} arbitration is inadequate when using mediation techniques within arbitration except for cases “which do not lie at the heart of the parties relationship, which are not symptomatic of any deeper trouble or pregnant with serious implications for the parties' future, whichever way the decision goes.”\textsuperscript{70}

A deterrent to greater use of mediation within the process of grievance arbitration is that no matter how compelling the logic of mediation, the arbitrator inevitably runs a risk of failure in attempting it. Within the processes of mediation, the mediator must necessarily express opinions and judgments on the relative merits of the respective shifting positions of the parties. Thus unsuccessful mediation complicates his effectiveness as an arbitrator on the same issue, for he may have to render a decision on the merits of the case under the agreement in a manner inconsistent with the position he took as a mediator.\textsuperscript{71} A further deterrent to the use of mediation within arbitration is the possible tendency of the parties to take more cases to arbitration — seeking mediation and a better result — instead of settling the disputes themselves at the lower levels of the grievance procedure.

When the legalistic approach to grievance arbitration, together with a rejection of mediation techniques within the arbitration process

\textsuperscript{66} Id. at 137, n.6.  
\textsuperscript{67} Bernstein, \textit{op. cit. supra} note 30 at 311-312.  
\textsuperscript{68} Taylor, \textit{op. cit. supra} note 26 at 39-40.  
\textsuperscript{70} Shulman, \textit{op. cit. supra} note 44 at 249-250.  
\textsuperscript{71} Bernstein, \textit{op. cit. supra} note 30 at 312.
is adopted, the conclusion is that this will force the parties to: attempt to reach agreement themselves before resort to arbitration; write more complete agreements; and, reduce the number of disputes that would otherwise be referred to an arbitrator.

A loose construction permits modification by interpretation . . . when the contract is realgislated once a year, . . . loose construction is not necessary to keep it in line with changing circumstances. A strict interpretation also leads to certainty and consistency. If a loose approach is used, then the question becomes how loose and in what direction. This approach would lead to a greater use of arbitration than desirable, as each party might seek to gain an advantage not obtained through the collective bargaining process itself.72

Thus the rationale of the legalistic approach is that it will make arbitration (the substitute for the strike) equally as frightening as the strike and thereby force the parties to take fewer disputes to arbitration, to negotiate more complete contracts, and to settle disputes at the lower steps in the grievance procedure.

THE GRIEVANCE PROCEDURE AND THE UNITED STATES SUPREME COURT

The Grievance Procedure Under the Marketing, Governmental, and Management Theories.

The marketing theory views collective bargaining as the purchase and sale of labor, essentially a contractual relationship: the collective bargaining agreement permanently fixes the terms and conditions of employment for its duration; and, the grievance procedure is a vehicle for bringing questions of interpretation and application of the contract to the attention of management for settlement within the established terms.

This theory adopts a narrow contractual definition of a grievance and the retained rights doctrine. In the area of grievance handling, the filing of grievances by individual employees at the first step, rather than through the shop steward, is strongly supported. And, while recognizing that the grievance machinery can operate as a safety valve for the expression of employee dissatisfactions and as a line of communication to management, technical aspects, rather than the techniques to be used by shop stewards and foremen, are stressed. The exercise of unilateral decision making by management and restriction of the use of the grievance procedure are sought to be established and main-

72 Chamberlain, op. cit. supra note 24 at 85.
tained through contractual devices. Thus the application of general contract interpretation principles is implicit, and the development of a separate body of collective bargaining agreement law is inconsistent with the basic tenets of this theory. The issues of arbitrability, jurisdiction, and authority of the arbitrator are all generally considered and treated as questions of jurisdiction over the subject matter of the contract, and the courts are viewed as the final arbiter of the meaning of the contract regarding these and all other issues. Finally, grievance arbitration is considered as essentially a legal process of contract interpretation, and the role of the arbitrator is basically the same as that of a judge, who applies contract law principles without regard to the mutual acceptability of his decisions.73

The governmental theory views collective bargaining as a system of industrial self-government: legislative province is vested primarily in the negotiation process wherein the parties regulate the employment relationship and embody the terms and conditions in a labor agreement; the executive function is performed by management in enforcing and adhering to the agreement and in exercising its right of administrative initiative; the judicial function is performed through the grievance procedure wherein respective rights and duties are enforced; and the grievance procedure also has legislative aspects as the settlements established therein add to the terms and conditions of the employment relationship beyond the labor agreement.

This theory in stressing the private self-government aspect of the grievance procedure generally describes a grievance as whatever the parties themselves desire; however, the traditional use of the grievance procedure for disputes over rights dominates. The theory adheres to the broad definition of a grievance which includes disputes over implied rights flowing from the total employment relationship, as well as disputes involving matters set forth in the agreement. The retained rights doctrine is rejected. The presentation and pursuance of grievance settlement by individual employees directly with management, rather than through the union, is considered to be inconsistent with the basic status of the union as an institution and representative for all the employees. Further views on the matter of grievance handling include a recognition of the need for qualified union representatives, foremen with the skill and authority to settle grievances, and a grievance machinery geared to expeditions and final settlement of all disputes. Under this theory the judicial nature of the grievance procedure requires that prior settlements within a particular relationship constitute a body of

73. Hill and Hook, Management at the Bargaining Table (1945), chiefly used as the basis of these conclusions.
collective bargaining law supplementing the legislative enactments of the negotiations. However, due to the legislative aspect of the grievance procedure, these prior decisions are subject to adjustment, and serve often as guides toward agreement rather than principles to be automatically applied. In a system of self-government with its own private judicial process as it exists under this theory, the issues of arbitrability, jurisdiction, and authority of an arbitrator are properly submitted to the private arbitrator; the determination of these issues by a court without first using the private judicial process is contrary to the basic tenets of the theory. The role of an arbitrator is basically to interpret and apply the labor agreement in the light of the total relationship and thus, rigid contract principles are inapplicable. Due to the understanding of the parties regarding the nature of the relationship, the loose manner of framing labor agreements, and the agreement-making aspects of the grievance procedure, the use of mediation techniques within arbitration are acceptable where the parties understand and desire this result.  

The management theory regards collective bargaining as a method of business management in the area of employee relations. It is basically a functional relationship wherein the union joins with management in reaching decisions on matters of mutual interest. The agreement is regarded as a set of administrative standards providing guidance in areas of managerial decision making, and the grievance procedure constitutes the judicial and compliance machinery within a collective bargaining relationship.

There are not any basic differences regarding the nature and operation of the grievance procedure under the governmental and management theories, both reject adherence to legalistic and commercial arbitration principles on all the critical issues identified. This is a reflection of the fact that the two theories do not present wide areas of basic disagreement, but rather differences of emphasis by each of the two representative parties in collective bargaining. The management theory has been previously described herein as the adaption of the governmental theory to a method of management decision-making and administration. The three theories of collective bargaining thus reflect two concepts regarding the nature of a grievance procedure, and the inquiry regarding which theory of collective bargaining has been followed by the United States Supreme Court.

74. GOLDEN AND RUTTENBERG, THE DYNAMICS OF INDUSTRIAL DEMOCRACY (1942), chiefly used as the basis of these conclusions.

75. CHAMBERLAIN, THE UNION CHALLENGE TO MANAGEMENT CONTROL (1948), chiefly used as the basis for these conclusions.
can be expressed in terms of whether or not the marketing theory or government theory prevailed.

The Law and the Grievance Procedure.

The circumstances under which these theories became significant to the work of the United States Supreme Court lies in the historical and contemporary role of state and federal courts with respect to labor arbitration agreements and labor arbitration.

The judicial review of labor arbitration agreements occurs in several types of cases. A party may seek an order: (1) to stay the arbitration proceedings; (2) to have an award vacated or modified; (3) to enforce an arbitration award; or (4) to compel arbitration.

Under the common law either party may repudiate or withdraw from arbitration at anytime prior to the issuance of an award. This is based on the theory that consent must persist throughout the process, coupled with the fact that an executory agreement to arbitrate future contract disputes constitutes a threat to the traditional jurisdiction of the courts over such contractual matters. This position has continued and the common law still applies where there exists no statute expressing the contrary. However, many states have enacted legislation to enforce contracts involving agreements to arbitrate both present and future disputes, with some states limiting the relief to present disputes. Moreover, at common law and under the several state statutes, courts will accept jurisdiction to enforce or vacate an arbitration award.

The United States Arbitration Act, which is applied in the federal courts, also modifies the common law regarding agreements to arbitrate, and provides for enforcement and modification or vacating of arbitration awards. This statute has been held inapplicable to labor agreements and labor arbitration. However, in the case of Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), the United States Supreme Court ruled that agreements to arbitrate future labor disputes are enforceable under Section 301 (a) of the Labor-Management Relations Act of 1947 which provides that "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . , may be brought in any district court of the United States having jurisdiction of the party, without respect to the amount in controversy or without regard to the citizenship of the parties."

77. Freidin, op. cit. supra note 21 at 31-46.
78. 61 Stat. 669 (1947).
State courts generally consider labor arbitration as undistinguishable from commercial arbitration. In the review of an arbitration agreement or award under this concept (as previously noted), a court may properly interpret the provisions of the contract which the parties agreed to arbitrate. The application of this view to labor arbitration is known as the Cutler-Hammer doctrine. In the federal courts the Lincoln Mills decision held "that the substantive law to apply in suits under § 301 (a) is federal law, which the courts must fashion from the policy of our national labor law," and the general policy is one of promoting industrial stabilization through the collective bargaining agreement and the grievance procedure. Subsequently, in three simultaneous decisions involving section 301 (a) and grievance arbitration the Court moved toward this goal. These same cases were used as illustrations in the discussions on the matters of arbitrability, jurisdiction, and the authority of an arbitrator. The case of United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960) involved a dispute over the arbitrability of a grievance. The case of United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960) involved the central issue of whether an arbitrator or a court has jurisdiction to decide the issue of arbitrability initially. The case of United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) involved a question concerning the basic nature of the authority of an arbitrator in making his award. The United States Supreme Court rejected the Cutler-Hammer doctrine in these decisions, and substantially clarified the federal law concerning grievance arbitration. In order to accomplish this result the Court had to consider the nature of the grievance procedure in its entirety and to adopt a framework of reference consistent with one of the theories of collective bargaining.

The United States Supreme Court and A Theory of Collective Bargaining.

The governmental theory was expressed by the Court in describing the fundamental nature of collective bargaining. The Court stated:

A collective bargaining agreement is an effort to erect a system of industrial self government. When most parties enter into a contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor

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83. Id. at 453-454.
agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having the relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.  

A review and analysis of the many critical aspects of the grievance procedure and labor arbitration followed; these decisions reflect a rather comprehensive discussion of this entire topic.

The broad definition of a grievance was adopted. In arriving at this result the Court noted that "The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time." However, due to the necessity of having to reach agreement, the extent of the subject matter involved, and the need for a concise and lucid written document, most labor agreements do not meet this standard.

Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. . . . But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. . . . The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Thus the Court concluded that "[a]part from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement," and specifically ruled that "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad."

The retained rights doctrine is implicitly rejected in this broad definition of a grievance. The matter of inherent reserve rights in

85. Id. at 580.
86. Id. at 580-581.
87. Id. at 581.
88. Id. at 584-585.
management was also specifically rejected. "A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages." Further, management rights or matters "strictly a function of management" must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion.

The matter of handling grievances was not specifically discussed. The right of an individual employee to pursue the settlement of his grievance has been noted. The role of the participants at the various steps in the procedure and the policy to be implemented was not reviewed. However, the rejection of a completely legalistic approach in the handling of grievance is a natural conclusion flowing from the Court's position on the other issues previously and subsequently discussed. Also, the observation that "even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware . . .," is without quarter in the legalistic approach to grievance handling.

The existence of a separate body of collective bargaining agreement law was recognized. This is consistent with the acceptance of the broad definition of a grievance and rejection of the retained rights doctrine. In taking this position the Court stated that "[t]he collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a . . . particular plant." Further, the inefficacy of a labor agreement to serve as the sole basis of the relationship was expressed by reference to an authoritative observation that, "[o]ne cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the restrictional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement" (Archibald Cox, "Reflections Upon Labor Arbitration, 72 Harvard Law Review 1482, 1419 1959"). These factors coupled with the acceptance of the grievance procedure as part of the continuous process of collective bargaining wherein a particular agreement derives meaning and content, compels the development of a separate body of law with aspects of both uniform and flexible applicability.

89. Id. at 583.
90. Id. at 584.
93. Ibid.
The matters of arbitrability, jurisdiction, and authority of an arbitrator, as noted, were the principal issues of the cases. In the case of the *United Steelworkers v. Warrior & Gulf Navigation Co.* it was held that traditional hostility of the courts toward arbitration is not applicable to labor arbitration. The Court concluded that matters not specifically excluded from the scope of an agreement are arbitrable. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 94 In the case of *United Steelworkers v. American Manufacturing Co.*, the Court took a broad view of the jurisdiction of an arbitrator. It was held that "[t]he function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." 95 The case further held that "[t]he courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." 96 In the case of *United Steelworkers v. Enterprise Wheel and Car Corp.* the Court, in considering the question of the authority of an arbitrator, ruled that an arbitrator's award is enforceable where it draws its essence from the collective bargaining agreement, and is not reversible on the grounds the court disagrees with the award. "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract the courts have no business overruling him because their interpretation of the contract is different from his." 97

The nature of grievance arbitration and the role of the arbitrator was reviewed in detail:

The grievance procedure is . . . a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.

The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.

94. *Id.* at 582-583.
96. *Id.* at 568.
“A proper concept of the arbitrator’s function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general character to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties.” [Schulman, Reason, Contract and Law in Labor Relations, 68 Harv. L. Rev. 999, 1016 (1955)].

The labor arbitrator’s source of law is not confined to the express provisions of the contract, as the industrial common law — the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgments whether tensions will be heightened or diminished. For the parties’ objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.88

The governmental theory of collective bargaining thus completely prevailed. The nature and purpose of collective bargaining was described as the establishment of a system of industrial self-government. The grievance procedure with arbitration as the final step was identified as the judicial arm of the continuous bargaining process. Consistent positions were expressed on each of the critical aspects of the grievance procedure. The theoretical framework then served as the basis upon which the United States Supreme Court distinguished commercial arbitration from labor arbitration. This federal policy and substantive principles of federal law are also applicable in suits under section 301 filed in state courts.89

The full import of this reliance on a theory to decide a specific legal issue has, perhaps, not yet been experienced. The cases at hand were contract matters brought under section 301. The impact of the decisions on the total process of collective bargaining is an open ques-

The Labor Management Relations Act of 1947 provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the certified representative of his employees, and an unfair labor practice for a certified labor organization to refuse to bargain with an employer. For purposes of enforcing these mandates, collective bargaining is defined as

the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

It is significant that all three theories of collective bargaining are applicable under this definition.

There will be many matters arising under this definition that can be resolved only by applying a theory of collective bargaining — questions concerning the basic nature of a process, the proper role of a union as exclusive bargaining agent, or the rights of an employer in dealing with employees in the process. Thus the acceptance of the governmental theory with regard to the grievance procedure raises a question concerning the extent to which this theory will be followed by the United States Supreme Court in dealing with new and previously settled issues over the duty to bargain.