CHAPTER 10

INTERVENTION: RIGHTS AND POLICIES

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It was about as routine a grievance arbitration as one can be. There were three bidders for a promotion, Able, with seven years' seniority; Baker, with four years' seniority, and Charlie, with three years' seniority. The contract provided that promotion would go to the senior employee "provided the abilities of the applicants are relatively equal."

The union in its opening statement asserted that Baker should have the job. Able was not of the requisite ability, but since Baker and Charlie were of equal ability, Baker as the senior employee should get the promotion. The company in its opening statement agreed that Able did not have the requisite ability. It asserted that Charlie should get the promotion because Baker did not match him in ability.

The arbitrator was rather new to the business. He glanced down at the union appearance sheet which he had methodically required to be filled out and noticed that Baker's name appeared there as the grievant. He glanced down at the company appearance sheet and noticed that Charlie's name appeared there as a witness. Where was Able? To this day that question remains unanswered.

The neophyte arbitrator did not articulate this question; but it was there in his mind. He considered asking the parties if he could have a look at Mr. Able and question him a little. Or even as a lesser intrusion he considered the possibility of simply asking the union representatives why they had decided that Able was not of the requisite ability to be in the running. The neophyte arbi-

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trator did nothing. The case was tried wholly on the issue of whether Baker or Charlie should have the promotion. There is valor in discretion, especially when you are new at the game.

The only blow for liberty that the arbitrator felt he could strike was to alter from that time forward one of the preliminary statements he always makes in his awards, and it was no more than a nod to accuracy. Before that case the arbitrator had always stated: "All interested persons were notified of the hearing and given an opportunity to present their respective positions." In that arbitration opinion and in all others written since by that arbitrator the statement reads: "The parties were given notice of the hearing and an opportunity to present their respective positions."

About the only thing that those who have considered the problem of the absentee at the arbitration proceeding can agree upon is that this neophyte arbitrator acted correctly. There agreement ends. While all are concerned about the absentee, and many remedies are proposed for him to pursue, it is generally agreed that the arbitrator should not on his own initiative inject into a case the issue of the absentee.

It would be a happy circumstance to go on and say that virtue does have its reward and that this arbitrator has now arbitrated many times for these parties. But to make this story fact rather than fiction the actual result must be reported. Although he had arbitrated twice for them before, that arbitrator has not been called back again to arbitrate for these parties for what is now going on to ten years. He made one of the parties so mad in his choice between Baker and Charlie that he has never been called back. Of course you had suspected all along the truth: I was that arbitrator. And it still haunts me, and I certainly would not have been worse off with these particular parties if I had asked that simple question: "Where is Able?".

The subject which is here considered could be viewed as quite narrow in scope. Its wording assumes that a grievance is being arbitrated. Some employees who for one reason or another feel that they have an interest which will not be adequately represented by the union or the company wish to participate in the arbitration proceeding. But an effective consideration of the issues

posed by this set of assumed facts fails without broader evaluation of the issues posed by the rights of individuals in grievances. Intervention must be considered in a background of the other possibilities which are available to persons in such circumstances. These possibilities, as they concern the employee in the situation of Mr. Able, can be outlined in brief as follows:

First. The employee may be permitted to intervene and become a party to the arbitration proceeding, or perhaps he may have the power to force the arbitration tribunal to allow him to intervene.

Second. Under the provisions of Section 9a of the National Labor Relations Act, he may attempt to deal with the employer directly to get a satisfactory settlement of his claim for the promotion. Failing such a satisfactory settlement he may attempt to get, and in some cases be able to force, the employer to go to arbitration.

Third. He may sue the company and the union to enjoin them from proceeding with the arbitration, unless he is made a party.

Fourth. He may bring suit against the employer for breach of the collective contract.

Fifth. He may sue the union for a breach of trust in not adequately representing him as a member of the bargaining unit.

Sixth. If union procedures are available, such as the Public Review Board of the United Automobile Workers, he may seek a remedy within the union procedures themselves claiming failure of the union properly to represent him.

Seventh. He may file a complaint with the National Labor Relations Board that the union is not properly representing him as a member of the bargaining unit.

Only by considering various alternatives to intervention by interested employees in grievance arbitrations is it possible to evaluate the role that intervention has or should play. Fortunately, it is not necessary to take up in turn each possibility for detailed consideration. The theories underlying the various alternatives enable more generalized consideration, as does the fact that the literature evaluating the various possibilities has grown very rapidly in the last few years.

A general consensus can now be stated that there are two fundamental approaches to the problem here considered.[1] The consensus can also be stated that the opposing theories are well enough known to be identified by carrying the names of their principal proponents. The theory espoused most thoroughly and effectively by Professor Clyde W. Summers of the Yale Law School is that most of the above possibilities are now by law available to individual employees and all of them should be available over the opposition of union and employer.[2] The opposing theory is that of the Solicitor General of the United States, erstwhile Professor of Law at Harvard, Archibald Cox. His position is that the individual employee should have no recourse in the grievance or arbitration procedure as such if the company and union wish to bar him from it. Also, he should have no right not subject to being bargained away by agreement between employer and union, to enforce the contract against the employer either directly under Section 9a of the National Labor Relations Act or through law suit or enforced arbitration. Under the Cox theory the only remedy which the individual employee can demand over the opposition of employer and union should be one against the union for breach of trust in properly representing all employees who are members of the bargaining unit.[3]

An evaluation of these two widely differing approaches to the protection of individual rights under collective agreements is needed in putting the problem of intervention into its proper perspective. There will be no attempt here to cover the many details of each position or extensively to catalog the case law. This has been effectively done in other places. Rather the attempt here admittedly will be to generalize in description and also in evaluation to achieve some common ground in the consideration of intervention in grievance arbitration.

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1 Silver, Rights of Individual Employees in the Arbitral Process, N. Y. U. 12th Annual Conf. on Labor 53 (1959); Report of Comm. on Improvement of Admin. of Union-Management Agreements, 1954, 50. Nw. U. L. Rev. 143 (1955); Smythe, Individual and Group Interests in Collective Labor Relations, 13 Lab. L. J. 439 (1962); 13 Stan. L. Rev. 161 (1960).

2 Summers, Individual Rights in Collective Agreements and Arbitration, 37 N.Y.U.L. Rev. 362 (1962). Professor Summers was chairman of the A.B.A. committee whose report takes a similar position. See n. 1, *supra*. See also Sherman. The Individual and His Grievance—Whose Grievance Is It?, 11 U. Pitt. L. Rev. 35 (1949).

3 Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956). See also Hanslowe, Individual Rights in Collective Labor Relations, 45 Corn. L. Q. 25 (1959).

Cox and Summers agree that the law which should be applicable to define the rights of individual employees in grievances is federal law.[4] Diversity in the states in defining these rights and deciding these cases on the basis of each state's own law would tend to create monumental confusion and difficulty in an area where the law already is inadequate.

But beyond this agreement the two prime protagonists differ. And both of them used the state law which has developed in grievance arbitration to support their respective positions. Cox relies most heavily upon the results in the leading cases of *Parker* v. *Borock*[5] and *Matter of Soto*[6] which establish the New York law that the individual employee has no right to force an employer to go to arbitration, that he is not a party to the arbitration and cannot attack it, and that he cannot sue the employer for breach of contract. The only remedy is one against the union. On the other side, Summers gains his authority mostly from the development in Wisconsin where the cases of *Pattenge* v. *Wagner Iron Works*[7] and *Clark* v. *Hein-Werner Corp.*[8] produce a right in the individual employee to sue the employer separately for breach of contract even though the arbitration clause purports to limit the culmination of the grievance procedure to arbitration. And also when the individual employee is likely affected by a grievance arbitration he is entitled to notice and an opportunity to be heard in the arbitration proceeding itself.

Professor Summers takes the position that the federal law already carries within it principles of the Wisconsin cases, and the Solicitor General denies this. The dispute between the two theories of the present application of federal law revolves around the proviso to Section 9a of the National Labor Relations Act. Summers argues

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[4] Cox, *supra* n. 3, at 621; Summers, *supra* n. 2, at 374.

[5] 5 N.Y. 2d 156, 156 N.E. 2d 297, 182 N.Y.S. 2d 577 (1959), 43 LRRM 2483.

[6] 7 N.Y. 2d 397, 165 N.E. 2d 855, 198 N.Y.S. 2d 282 (1960), 34 LA 173. This case and the case cited in n. 5, *supra*, must be taken as eliminating the holding in the often quoted New York case of Matter of Arbitration Between Iroquois Beverage Corp. etc., 14 Misc. 2d 290, 159 N.Y.S. 2d 256 (Sup. Ct. 1955) where intervention was ordered over the opposition of union and employer. The case probably still has vitality insofar as an issue might be raised as to whether a collective contract provided for a right to intervene. But this is a question of the same nature as arbitrability.

[7] 275 Wis. 495, 82 N.W. 2d 172 (1957), 39 LRRM 2770.

[8] 8 Wis. 2d 264, 99 N.W. 2d 132 (1959), 45 LRRM 2137, 2659, *cert denied,* 362 U.S. 962 (1960), 46 LRRM 2033.

that 9a gives the individual employee the inalienable right to pursue his grievance with the employer independently of the union, yet using the grievance and arbitration procedure; [9] Cox, on the other hand, is certain that the role of 9a is only to give the employer control over personal grievances, and the employer can bargain away with the union his right to control.[10] Under such a bargain, the individual employee would have no right to pursue his grievance independently of the union, whether within the grievance procedure or separately.

In support of his position, Summers reads the proviso of Section 9a in the light of the *Elgin, Joliet and Eastern Ry.* v. *Burley* [11] and the *Hughes Tool* [12] cases. It will be recalled that those cases established the right of the individual employee to control his grievance and not to have it settled without his consent. Summers also points to the Railway Labor Act which is now accepted as empowering individual employees to take their grievances to the Railroad Adjustment Board [13] as the result of the holding in the *Elgin, Joliet* case. Further, he refers to the experience in a number of European countries where individual employees are entitled to raise and pursue their grievances independently of union representation.[14]

While Summers does not deny the right of the employee to carry his grievance to his employer separately, he does advocate the handling of these individual grievances through the grievance procedure. He finds in the contract procedure the most effective device and the one which will also bring uniformity to disposition. So he argues that the individual employee should have the right to avail himself of the grievance procedure independently of the union, if desired, and to the point of compelling arbitration with the employer. He would also allow the employee to force

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9 Summers, *supra* n. 2, at 378; Report of Comm., *supra* n. 1, at 169.

10 Cox, *supra* n. 3, at 691. The General Counsel of the N.L.R.B. adopted the same position. Case No. 317, 30 LRRM 1103 (1952); Case No. 418, 31 LRRM 1039 (1952).

11 325 U.S. 711 (1945), 16 LRRM 749, *aff'd on rehearing*, 327 U.S. 661 (1946), 17 LRRM 899.

12 147 F.2d 69 (5th Cir. 1945), 15 LRRM 852.

13 *Estes* v. *Union Terminal Co.*, 89 F.2d 768 (5th Cir. 1937); Summers, *supra* n. 2, at 386.

14 Summers, Individual Rights in Collective Agreements, N.Y.U. 12th Annual Conf. on Labor 63, 87 (1959); Report of Comm., *supra* n. 1, at 187.

his own intervention into an arbitration proceeding between the employer and the union.[15]

Cox denies the legal foundation and also the advisability of the Summers approach. The wording of the proviso of Section 9a is seen by him much more narrowly. To Cox, the proviso was meant only to be permissive when the employer wished to cooperate with the individual employee in pursuing his grievance independently. Cox sees in the *Elgin, Joliet* case and the Summers approach a broad interference with the exclusive representation principle of collective bargaining.[16] He points with insistence to the fact that an independent settlement between employer and employee, whether by agreement or by arbitration, inescapably has an effect upon others being represented by the union. He argues that our concern should be as much in this direction as in the reverse direction of the union settlement having an effect upon the individual.[17] In summary, Cox takes the position that preferably the union should serve as the exclusive bargaining representative of all employees in grievances as well as in the bargaining for a new contract. He does not deny the right of the employer to deal directly with the employee under Section 9a, but he insists that the employer and union, by bargaining, can bar the individual employee from any such recourse. A contract provision to this effect would mean that no recourse, whether in the grievance procedure or outside it, whether by arbitration or lawsuit, would be available to the individual employee against the employer. The only recourse would be the claim of failure to represent fairly presented against the union.[18]

On the basis of the law itself, the Cox position has the better of the argument. The greatest fallacy in the Summers view from a

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15 Summers, *supra* n. 2, at 399-402; Report of Comm., *supra* n. 1, at 183. See also Sherman, *supra* n. 2, at 56.

16 Cox, *supra* n. 3, at 618, 625.

17 *Id.* at 626. See also Scheiber, Individual Rights in Arbitration, N.Y.U. 14th Annual Conf. on Labor 199, 211 (1961).

18 Cox, *supra* n. 3, at 619, 624; Hanslowe, *supra* n. 3, at 37. The leading case on the the right of the individual to pursue against the union the claim of failure to represent properly is *Steele* v. *Louisville & Nashville Ry.*, 323 U.S. 192 (1944), 15 LRRM 708. The principle has been carried over to the National Labor Relations Act by *Syres* v. *Oil Workers Int'l Union*, 350 U.S. 892 (1956), 37 LRRM 2068. The N.L.R.B. may revoke a certification for failure to represent fairly. Hughes Tool Co., 104 N.L.R.B. 318 (1953), 32 LRRM 1010; Larus & Bros. Co., 62 N.L.R.B. 1075 (1945), 16 LRRM 242.

strictly legal analysis is that Summers is converting the grievance-arbitration process, which is a contractual, consensual matter, to a compulsory process with quasi-governmental status. It is here that a clear distinction between the Railway Labor Act and the National Labor Relations Act needs stress. The grievance settling tribunal under the Railway Labor Act is a governmental agency born by statute; its availability is provided by the government. No such legally created tribunal exists under the National Labor Relations Act, and grave doubt would arise in many minds, including mine, if such legal intrusion in the grievance-arbitration process were suggested.

The grievance procedure is a creature of contract. Rarely does the procedure as so created provide for its use by individuals, either at the arbitration stage or at the lower stages beyond the first. It would be possible to compel by law the setting up of qualifying grievance procedures, including a culminating arbitration step, in all collective contracts. Then it would be possible to establish various requisites of the process opening it to individual employees not being represented by the union. But this would certainly be a rather startling departure from federal labor policy, except in those businesses covered by the Railway Labor Act. If this were required it would have the effect of making the grievance process and the final step of arbitration a public function with detailed public control. The history of the National Railroad Adjustment Board has not been so overwhelmingly successful that this appears to be the true course of action.

In most European countries individual employees are free to pursue grievances, and indeed usually the entire grievance procedure is handled by labor courts or through workmen's committees substantially independent from the union. But in our collective bargaining system on this side of the Atlantic, we have developed something which simply is not comparable to the labor relations processes in Europe. Ours is a unique development, and in many ways a much more favorable one than has taken place in Europe. In spite of the extent of governmental control of the process which we have, it still falls quite short of that which is

accepted as the norm in Europe.[19] Most people in the United States seem to prefer it this way.

This is not to say that the government does not need continually to step in where problems develop. But the general approach has been to try to keep the process as free as possible, admitting it is far removed from being without any fetters at all. Our philosophy in general has the government step in only when freedom at a particular point must be curtailed for effective operation. Hence it would be a major policy departure, indeed, to convert the privately organized and operated grievance and arbitration procedure into what would come close to amounting to a governmentally organized and established procedure as is found in the Railway Labor Act and in many of the European countries.

Perhaps evaluating the difficulties in giving employees access by legal fiat to the full grievance procedure becomes needless when one additional factor is stated. The settlement of an individual grievance, whether through negotiation with the employer or by arbitration, opens the door to renegotiation of the contract provision at issue to obviate the settlement. And here there is no doubt but what the union is the exclusive bargaining representative. And the remedy against the union if the renegotiation is unfair or discriminatory is the Cox remedy, action against the union for failure to give fair representation. Thus, even though the government is stimulated to take over the grievance-arbitration procedure to insure the individual rights in that process, the full circle can well occur in renegotiation, relegating the individual employee only to his claim against the union. This is not to say that through this remedy unions never would be barred from renegotiating an effective reversal of such a grievance settlement. Sometimes the action of the union would be discriminatory. But in many cases, a perfectly sound and acceptable renegotiation of a contract provision could render arbitration awards or other settlements at the behest of individual employees of little effect.

There is a middle ground between the Cox and Summers positions which might serve to obviate some of the objections of the

[19] Hanslowe, *supra* n. 3, at 48; Sturmthal, Contemporary Collective Bargaining in Seven Countries (1957); Teller, British Versus American Labor Laws and Practice: A Study in Contrasts, Proceedings of A.B.A. Section of Labor Relations Law 30 (1957).

Summers approach and still serve to preserve individual rights from unfair and improper encroachment by the union. Under the principle of the 9a proviso, it could be argued that the individual's right to pursue his remedy against the employer independently of the union is inalienable. Under this theory the employer and union could not agree that the employee had no remedy against the employer through direct negotiation on grievances or suit for breach of contract. Yet, at the same time it could be accepted that the employee had no right to use the contractually-created grievance procedure. His rights would be limited to direct action against the employer, or also against the union for improper representation.

Even this possible compromise position has its disadvantages, although it is accepted as the law in a number of the states. The main reason that Summers argues that the employee should have the grievance procedure available to him is because of the need for uniformity in the settlement of grievances. Certainly the submission of the interpretation of the contract to the arbitration tribunal in the case of grievances prosecuted by the union and to the courts in cases of suit for breach of contract against the employer holds the seeds of confusion.[20] The argument that there has been very little of this confusion in the past, because there has been so little independent employee suit for breach of contract, avoids the handwriting on the wall. Concern for the individual employee is growing, and such remedies will be more used in the future than they have been in the past or other remedies will be created by legislation if the parties themselves fail to do so.

It must be accepted that the same argument of lack of uniformity is also present, although to a significantly lesser degree, in the Cox solution—the claim against the union for improper representation. Whether it is desirable or not, this device also puts the same facts that were in issue in the grievance procedure and arbitration again in issue before a court. But the holding that the union has engaged in improper representation would occur far less often than would the holding that the employer had breached the contract. This is so because the issue in the claim against the union is violation of trust which will be rather difficult to establish. On the other hand, the issue in the suit against the employer

[20] Summers, *supra* n. 2, at 401.

is one which simply places in the hands of the court the interpretation of the contract on its merits.

From this brief legal evaluation of the rights of individual employees in grievances, it is concluded, therefore, that the denial of the availability of grievance procedures and arbitration to individual employees is not only proper under the present law but is the more desirable interpretation under the present law. Further independent rights of individual employees as against employers are of doubtful legal validity. Yet this is in its effect a negative theory and a negative conclusion. It leaves the employee at the mercy of the union, and sometimes the employer. It need hardly be said that there are subtleties in union representation which put employees at the mercy of the union. The law makes the union the exclusive representing agency for all the employees of the unit for bargaining purposes.

But, there are far fewer opportunities for individual discrimination by the union in the bargains that are made while writing a contract than in the settlement of individual grievances concerning discharge and discipline, seniority in lay-off and promotion, job assignment, overtime opportunity, and other such matters dealing with certain employees. By its nature the collective contract must apply to all. The attempt to single out groups for invidious discriminations is rather easily exposed. This is not so in the case of the grievance settlement affecting named persons.

It has been truly said at an earlier time by the present Secretary of Labor that if remedies are not created by the parties to protect these individual rights, we can be sure they will be created in statutes.[21] So here we find ourselves left with an unsatisfactory remedy. Making the grievance procedure and arbitration available to the individual employee on his own is an unhappy remedy because it destroys the nature of the grievance and arbitration process and pressures parties into making of the process a compulsory clearing house for all the gripes of individual disgruntled employees. This is a rather frightening picture. Yet the remedy of independent relief against the employer or even against the union for the employee who feels he has been "sold down the river" in a union grievance settlement or in an arbitration award,

21 Wirtz, "Due Process of Arbitration," in *The Arbitrators and the Parties* (Washington: BNA Incorporated, 1958), pp. 1, 26.

also proves unsatisfactory. The remedies are at best expensive and stringent from the point of view of the employee. Then, too, they require another tribunal, usually a court, to investigate and make determinations upon the same facts which have already been resolved between the parties either through agreed grievance settlement or arbitration.

The inescapable conclusion to which the author is brought by the weighing of these considerations is that allowing the individual employee to intervene in the arbitration process is the best remedy. There is no legal foundation for this; the Cox theory is legally sound. Arbitration should remain a consensual matter, with union and employer themselves setting up the process. Yet, use of this procedure in individual cases appears to be the only way whereby the government can be kept out of the business of settling these matters, where there can be an expeditious and reasonably inexpensive hearing, and where uniformity can be preserved by submitting the same issue to one tribunal and one tribunal only.

This pragmatic conclusion is buttressed in the Fleming, Aaron and Wirtz report at the Fourteenth Annual Meeting of the Academy.[22] When the facts of the *Hein-Werner* case were submitted to arbitrators hypothetically, the theory universally stated was that there was no legal right to intervene on the part of those whose seniority was not being recognized by the union and the company.[23] Yet as Fleming said: "Over and over, arbitrators would say, after bowing in the direction of their theory, that they 'worked something out' to take care of the issue." [24] Fleming goes on to report that invariably this meant that the arbitrator had persuaded the parties to permit a form of intervention which was acceptable to them. Then a number of examples were detailed.[25]

It would be a shocking thing indeed in the modern development of intervention and joinder of parties in courts [26] if the

[22] Fleming, "Due Process and Fair Procedure in Labor Arbitration," in *Arbitration and Public Policy* (Washington: BNA Incorporated, 1961), p. 69.
[23] *Id.* at 72. *But compare* Arbitrator Volz's Award in Kister Lumber Co., 37 LA 356 (1961), holding a grievance could not be settled by the union and employer without the consent of the aggrieved employee, relying upon the Elgin, Joliet case.
[24] Fleming, *supra* n. 22, at 75.
[25] *Ibid.*
[26] See 2 Barron & Holzoff, Federal Practice and Procedure § § 591-604 (Wright ed. 1961).

flexible arbitration process could not make a like accommodation to the needs of other interested persons. The present Secretary of Labor in his outstanding paper at the Eleventh Annual Meeting of the Academy, in discussing due process in arbitration, pointed out that the procedures in arbitration are, with rare exceptions, not set by the parties at all but are set by the arbitrator.[27] And when arbitrators find a potential intervenor knocking on the door, they seem, under the Fleming report, to be willing to bring pressure upon the parties to allow the intervention to take place.

Various procedural objections could be raised to the intervention of the interested employees in the arbitration proceeding. To the general objection that the procedure would be upset and somewhat confused, the proper answer would appear to be that if the courts can handle multiple party proceedings, the arbitration process can. Indeed, the picture of the serene and uncluttered proceeding is in some measure a chilling one. Although the statement was meant to be a plea against allowing intervention in the arbitration process, the statement by Edward Silver at the Twelfth Annual New York University Conference on Labor is one of the best arguments for allowing intervention of which I know. He said arbitration "has led to the development of a closely-knit fraternity among arbitrators, company and union representatives and lawyers representing both sides. Very few will deny that this has been all to the good." [28] Then he adds that to him, this is not an appropriate setting "for disposition of a grievance presented by a dissident individual or group." [29] I say procedures certainly can and should be worked out in this closely-knit group so that comradery can give way to concern for the dissident who has a genuine interest in being heard.[30]

There can be some claim that with the absence of the subpoena

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[27] Wirtz, *supra* n. 21, at 25, 34.

[28] Silver, Rights of Individual Employees in the Arbitral Process, N.Y.U. 12th Annual Conf. on Labor 53, 60 (1959).

[29] *Ibid.* Compare Feingold, Individual Rights in Labor Arbitration, N.Y.U. 8th Annual Conf. on Labor 259, 265 (1955), stating that courts should not compel intervention lest "such unwarranted interference will disrupt the stability of relations between employer and the representative."

[30] One caveat needs inserting here. A minority union should not be permitted as an intervening party or representative of one. Even Summers agrees; Report of Comm., n. 1, at 184.

power the arbitrator will be unable to obtain the witnesses that the intervening person or group wish to have. That this might occur in some situations is undeniable. Yet the best answer to this argument is the same pragmatic answer which the arbitrators gave to the legal theory denying intervention. Something can usually be worked out.

Perhaps one of the greatest objections to intervention from the point of view of the employer and union is the matter of costs. While this might appear to be a valid objection in theory, as a practical matter it should not bear much weight. The tribunal is already in existence. The arbitrator is going to be paid jointly by the company and the union. To allow someone else to take a little of the time of the hearing would constitute actually a petty financial burden upon the employer and the union.

The intervenor should pay the expenses of his own counsel and representatives, of course. Again, in most instances, it would be a very surprising thing if the arbitrator could not work something out so far as the compensation of the witnesses that the intervenor might wish to call and the other expenses that he might have. Justification for slight additional expense on the part of the company and the union can come from the fact that even with the intervention, this is administration of the contract. The union is under obligation to represent the dissident person or group. As a matter of fact, allowing intervention could be quite the cheapest and easiest way to discharge this obligation of fair representation.

The strongest concern that companies and unions would have concerning intervention must almost certainly be that intervention by persons with little or no chance of success could unduly prolong and confuse settlement of an important contract issue. Willard Wirtz was undoubtedly correct when he stated that for every person who is now being inadequately represented by unions, there are at least ten who are being over-represented by unions.[31] Yet the fact that others are being over-represented is small solace to that one who is not getting his proper representation. Some discomfort, some confusion, some prolonging of hearings seems to be a rather small price to pay for allowing the unrep-

[31] Wirtz, *supra* n. 21, at 33.

resented employee to be heard. Again, the arbitrator must be relied upon to keep the process of intervention under reasonable control so it does not degenerate into days of sound and fury signifying nothing.

By allowing intervention in the arbitration hearing, what might become an intensely complicated and difficult process is eased to a manageable one. It is the only way by which the prospect of hearing the same issue twice in two different tribunals is avoided. In almost all instances it would even cut off the Cox remedy, a later claim against the union of failure to represent fairly and effectively. Whether the other tribunal be a court, an arbitrator, or some tribunal set up by the union, that tribunal would still have to re-hear the same facts. Only by allowing intervention is this ineffective and confusing pattern avoided.

In summary, then, it may be stated that the law today is that there is no right for the unrepresented employee to intervene in the grievance-arbitration proceeding. It is the creature of the contract between the employer and the union. But it should be the policy of employers, unions, and arbitrators to encourage this intervention. If intervention is not accepted as a routine aspect of the arbitration process, a firm prediction can be ventured that legislation will be passed compelling it as a minimum. Actually it is more likely that more stringent and confusing measures would result from governmental intervention. The courts would almost certainly be enlisted. But even if legislation limited itself to compelling intervention, it would mean that the arbitration process had been moved far in the direction of governmental prescription, with the attendant lessening of flexibility and the freedom of the parties to use it as they wish.

While this constitutes the summary of rights and policies in intervention in its immediacy, it does not face up to what is actually a more difficult problem to solve in a closely related situation. One cannot talk of the success that allowing intervention may bring without confronting the plight of the employee where intervention is not possible because the union and the company have not gone to arbitration. This is the typical case where the union has refused to represent the employee and no other employees are directly concerned, or the employee's grievance has been settled at a stage short

of arbitration. The most typical cases of this kind probably are a discipline case where the union feels that the company properly disciplined the employee or a seniority/ability case. Here there often can be no intervention in the arbitration hearing because there is no arbitration hearing.

As has been mentioned before, Summers would say that here the employee is entitled to force the employer to go to arbitration under the terms of the arbitration agreement in the contract. While some contracts do specifically provide for this,[32] most do not. And it is perversion of the consensual theory of arbitration under the overwhelming majority of contract provisions to say that the employee feeling unrepresented can force arbitration. Cox, on the other hand, says that the only recourse for the employee here is the claim against the union for failure to represent fairly. As I have attempted to establish above, as far as the law today is concerned, I would conclude that Cox is correct in the legal analysis.

The result of this conclusion is that the employee finding himself in this situation is relegated to his remedies at law, which might be a suit against the employer for breach of contract, although Cox would deny this, but in any case which would be the pursuit of a remedy against the union. Without going into the details because it is not directly in point of my subject, I would claim that unless reasonably effective and inexpensive remedies are worked out in this situation as well, we must expect statutes which will set up remedies.

It has been proposed, for example, that the suit at law against the union for fair representation include the award of attorney's fees in the event the dissident employee succeeds.[33] While this may encourage too many employees to make claims which are not sufficiently justified, the more serious objection to it is the submission of these issues, in many instances involving the entire picture of labor relations at the plant, to a court for determination. Perhaps some such device, however, would fulfill the function of encouraging unions to take more such cases to arbitration.

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[32] *Gilden* v. *Singer Mfg. Co.*, 145 Conn. 117, 139 A.2d 611 (1958), 30 LA 113; *Fagliarone* v. *Consolidated Film Indus.*, 20 N.J. Misc. 193, 26 A.2d 425 (1942), 10 LRRM 666.

[33] Smyth, *supra* n. 1, at 448.

While this has a disadvantage of sometimes bringing matters to arbitration when the parties themselves could settle short of arbitration, nevertheless it would constitute an additional protection of the rights of the individual.

If a relatively recent innovation could be developed and its use stimulated, perhaps the best remedy for such a case is found in an expansion of the concept of the Public Review Board of the United Automobile Workers and some other unions.[34] The use of such an impartial tribunal within the union structure would fall precisely in the pattern of the Cox theory that the remedy should be against the union for fair representation. The present structure of such union agencies is not adequate because its availability is limited to the union membership.[35] If the union is to be the exclusive bargaining representative of all the employees of the bargaining unit, including those who are not union members, it ought to sense the obligation to provide such a remedy for non-union employees as well as union members.

Yet at best this is only the dream of a remedy since it is highly unlikely that many unions will set up such effective impartial review boards without governmental requirement. If the government made the requirement, then the structure and procedures of such a board would be under government control and the ultimate remedy would again be one of government prescription of what the board did.

It probably is best to conclude that increasingly effective remedies against union and employer will be developed in this area as well. It probably also is necessary to conclude that they will likely take the form of suits in court if other remedies are not provided rapidly. This will mean, again, that more than one tribunal will be making its interpretation of the same contract provision. Certainly it would be preferable if unions could be stimulated more effectively to protect the rights of the individual employees through the grievance procedure and the arbitration

[34] Oberer, "Voluntary Impartial Review of Labor: Some Reflections," 58 Mich. L. Rev. 55, 56 (1959).

[35] It should also be added that the challenge by a union member of failure to represent properly, under the P.R.B., requires a showing of fraud, discrimination, or collusion with the employer. These constitute a rather stiff limitation on the availability of the P.R.B. remedy in such cases. See Cases 18, 21 and 22 as described in First Annual Report of the P.R.B., p. 7 (1957-58).

process. This may increase the number of grievances and the number of arbitrations, but this increase is better than an increase in the number of court cases raising the same issue. At a minimum, settlement of a personal grievance short of arbitration should not take place unless the parties are certain that independent suit or claim against the union properly would fail.

Contrary to the unhappy reactions of many employer representatives to the trilogy of arbitration cases in the United States Supreme Court, I have been of the view that those decisions are a restraining influence in making labor arbitration comply more strictly with law. In most jurisdictions, there was no law of labor arbitration before those three decisions were reached. I agree with Professor Fleming that those decisions should make the arbitrators feel that the house should be tidied up for visitors.[36] I venture that most arbitrators can think back to cases in jurisdictions with no developed law of labor arbitration where they gave awards which might well now not stand up in a federal court under the trilogy rules.[37] Did they actually go beyond their jurisdiction even though successfully and with the best of motives?

The searchlight will now inescapably be probing more and more into the grievance and arbitration process as it plays its increasingly accepted role in labor-management relations. Unfair treatment of individual employees will be brought to the attention of the public and of legislators. Even for selfish reasons, then, arbitrators must use the arbitration process in a way to avoid the sacrifice of the rights of individual employees. And in doing so, they will perform a tremendous service to the cause of keeping labor-management relations as free from the strictures and compulsions of governmental control as is possible. Freedom from control is effective and justified only so long as the job is done. History teaches us that in any democracy as freedom from controls fails to fulfill the social need, the electorate will be stimulated to pass legislation to make the process work effectively.

This is why it appears to me that it is of the utmost impor-

[36] Fleming, *supra* n. 22, at 69.

[37] One such example which is obvious is the arbitrator's award which was at issue in *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960). How many arbitrators have become much more careful in ascertaining amounts of back pay awarded or making sure the parties understand how the amounts will be calculated since they read that case?

tance that arbitrators recognize the value of allowing intervention by anyone who has any justifiable interest in an arbitration proceeding, even at the risk that the arbitrator will find himself expendable in the eyes of the parties. Arbitrators must feel that they individually are more expendable than is the efficacy of the free voluntary arbitration process.

More generally, arbitrators are deeply involved in the entire process of grievance settlement. They must use their influence more broadly in attempting to get the parties to recognize the rights of individual employees in non-frivolous cases where settlements are now being made short of arbitration. Insofar as arbitrators have general influence in the labor-management area, and they are bound to have some, this influence should be pointed in this direction.

There is no simple panacea that will solve all the problems of the protecting of the rights of individual employees in the grievance and arbitration process. The protection of these rights will have to be a step-by-step development in which all persons concerned take an active and creative part. But arbitrators dare not rest easily until they know that the rights of the absent Ables have been so protected by union and employer that they need not be at the hearing. Nor may they rest easily until the Ables who ask to be heard and have claims worthy of consideration are heard as a matter of course and of contract right, without a precise code of statutory procedures to be followed.

Discussion—

LEO KOTIN*

By a singular coincidence, I recently heard a promotion by-pass grievance factually identical to the one described by Professor Williams. Involved were three employees who, in order of their seniority, were Ben, Gabe, and Pete. Pete had the job, Gabe, who filed the grievance, wanted it. How Ben felt about it, I never did find out. His absence from the hearing gave me no concern. It never occurred to me that he ought to be there and that possibly

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I might do something to get him there. On later reflection, stimulated by Professor Williams' paper, I assessed my reaction at the time of the hearing as follows: If the Union and the Company agreed that Ben was not entitled to the job, that was good enough for me. I was content to leave well enough alone.

What did concern me in this case, as in many others with identical situations, was the absence of Pete. Essentially, the arbitration proceeding to which he was not a party had the potential of depriving him of a job whose greater benefits he now enjoyed and to which, under the Labor Agreement, he might have a right. The potential defect in the proceeding created by Pete's failure to participate was not, in my own mind, however, identified with the possible denial of due process. There was rather a sense of frustration, bordering on resentment, over being deprived of a body of information which seemed essential for the equitable determination of the issue. In studying the record preparatory to writing my opinion and award, I found the same situation that had repeated itself so often as to become a stereotype. Gabe's qualifications for the job were set forth in microscopic detail. He testified at length about his superior accomplishments during the five years that he had worked, the foreman's prejudice toward him during this period which allegedly was the basis for denying him the promotion, and the incident two years ago when it was only through his superior knowledge and inventiveness that the Company was able to eliminate a "squawk" which had defied the ingenuity of the foreman and the department head. Seven other witnesses called by the Union, employees working in the same department as Gabe, corroborated everything that Gabe had said.

All I knew about Pete was from the testimony of his foreman, and from a meticulous review of the documents in his personnel file, analyzed by a representative of Industrial Relations. It should be noted that the Union, in characteristic fashion, made little or no reference to Pete's qualifications. What reference was made was in the nature of agreeing that he was a good employee, but that he was no better than Gabe, who had the greater seniority.

The problem for the Arbitrator is pointed in the contrasting emphasis that Professor Williams and I place on the identical factual situation. Implicit in the two divergent approaches are

two separate tests that should govern the Arbitrator's actions when a problem of intervention is present. In one instance, the Arbitrator is motivated by his determination of how the participation or lack of participation of the intervenor will aid him or impede him, in the determination of the issue. In the other instance, the Arbitrator's motivation is the protection of the interests of individuals who are not parties to the arbitration, and the degree to which participation in the arbitration hearing would provide such protection. The dualism suggested here, however, has only limited validity. The arbitration hearing, itself, regardless of the limitations under which it is conducted, provides a degree of due process. Nor is the Arbitrator without authority to afford due process in some areas which the parties have ignored. He has a high degree of control as to the completeness of the evidence that ultimately makes up the entire record. On his own initiative, he may probe into areas which may have been ignored by the parties but which, in his opinion, are necessary for the determination of the issue. The problem confronting us, then, is essentially the determination of how far beyond the limitations imposed by the parties an Arbitrator may go in order to protect legitimate interests of individuals who are not present at the hearing or who, uninvited, appear at the hearing as intervenors.

I would say at the outset that I do not believe that any set rules can be established which would be effective. The decision of the Arbitrator to permit or to bar intervention will ultimately be based on his personal conception of the significance that attaches to the arbitration process in the collective bargaining relationship. The differences in conception will reflect themselves in conflicting and divergent approaches to the specific problem of intervention.

Who participates in the arbitration hearing is initially the determination of the parties. The participation, then, of an intervenor, if permitted by the Arbitrator, becomes a factor not introduced by the parties but imposed by the Arbitrator. Such imposition may in one instance be motivated by the Arbitrator's sense of responsibility for seeing that the interests of the intervenor, which may have been ignored by the parties, are protected. The same decision to permit the intervention may, with another Arbitrator, be motivated by his assessment of the intervenor's partici-

pation as an aid to resolving the issue posed by the parties. The contrasting motivations in the instances cited reflect the contrasting and widely divergent approaches to the place of arbitration in the entire collective bargaining process.

The typical case described at the beginning of this paper, can be used to illustrate. Let us posit a situation where Ben, the senior of the three employees appears, uninvited, at the hearing and asks to be heard. He alleges that he has a greater entitlement to the job in question than the two junior employees, Gabe and Pete. If the Arbitrator depicts himself primarily as the guardian of due process, then he would permit the intervention. (We may speculate on the complications created by a decision that Ben did have a right to the job in question.) Another Arbitrator would probably reason that whether Ben had the seniority and the ability to fill the job in question or not, the determination of this would in no way help him in deciding the relative rights of Gabe and Pete to the job. His role would be limited to the determination of whether Gabe or Pete should have the job. Under these circumstances, that Arbitrator would bar the intervention. I would concur with this action. Using the same case situation, let us now posit another possibility. Pete, uninvited, appears at the hearing. He asks leave to participate because he asserts an entitlement to the job in question which he then holds, and is unwilling to leave the protection of his interests to the Company. In that instance, I would be inclined to permit the intervention, recognizing as I do, that there might be compelling circumstances in specific situations which might warrant a contrary decision.

As I have previously stated, I do not believe that a set of rules can be established. The decision to permit or to bar intervention should be, and inevitably will be, subjected to tests deriving from the Arbitrator's conception of the arbitration function. I suggest here several of the tests that may be applied:

1. Will the participation of the intervenor aid the Arbitrator to determine the issue as submitted by the parties? Referring to the hypothetical situation described heretofore, if Pete's testimony would help in determining his relative ability as compared to Gabe's, then he should be heard.

2. Will the participation of the intervenor contribute to the finality of the award? This, to me, is a most important consideration, too often ignored. If, as has been stated on frequent occasions, arbitration is the creature of the parties, then it is a creature created for the principal purpose of providing a final resolution of disputes between parties who have relinquished the use of power to achieve such resolutions. The phrase "final and binding arbitration," redundant as it is, reflects in its frequent appearance in labor agreements, the objectives of the parties in accepting this form of dispute resolution. Admittedly, there is no absolute finality in any arbitration award. However flawlessly the arbitration proceedings have been conducted, the rights of individuals to attempt to set aside the awards are ever present. This does not negate, however, the potential of the Arbitrator to insure a maximum degree of finality.

The decision, then, as to whether the intervention will be permitted, should be based, in part, on whether such intervention will provide a basis for one of the parties to seek to set aside the award. One way of determining this is to ask the parties. This is what I did in a recent case. The intervenor agreed that he would be bound by the award and would waive whatever rights he might have to seek to set aside an adverse decision. One of the parties blurted out, "I will not be bound." In that case, I did not permit the intervention. In the absence of prior commitments from all the parties concerned, the Arbitrator may still make a calculated guess as to whether any of them will move to vacate the award. Some risk attaches to permitting intervention in the face of the objection of one of the parties. The Arbitrator, I believe, is well advised to take this risk if he anticipates that, despite the objection at the hearing, no party will move to set the decision aside. The risk assumed here is no greater than that incurred by the Arbitrator in any of the rulings that he may be called on to make over the objection of one of the parties. In any event, the Arbitrator should adhere to a course of action which, in his opinion, will make the decision stick.

3. The third test is the most obvious one. It is the test of whether the parties themselves have given due consideration to the rights of all interested individuals, before the issue was brought

to arbitration. If the motion to intervene is made at the beginning of the hearing, then the Arbitrator may be well advised to reserve judgment until a substantial part of the evidence has been introduced. The evidence will often shed light on whether the rights of the intervenor have been considered. In the case of a promotion by-pass, the Company and the Union will frequently go into meticulous detail on all of the procedures leading to the designation of the incumbent for the higher rated job. It is often patently clear that considerable attention was devoted to the interests of individuals not parties to the arbitration.

Some speculation may be warranted on the motivation of the Union in determining which grievance shall go to arbitration. However much the Union may be persuaded that Ben, the senior employee, is entitled to the promotion, it would be reluctant to carry his case to arbitration if it believed that it could not win. Sophisticated parties, experienced in arbitration, will avoid a losing contest however substantial the merits of the grievant may be. It is not necessary to recount the many factors considered in assessing the possibilities of victory or defeat. A chance of winning the case is significant, if not dominant among them,

Professor Williams' paper goes far beyond the immediate impact of an intervention in an arbitration proceeding. I share his concern with the broad problem of increasing government restriction on the area of collective bargaining. The extent to which the Arbitrator's ruling on an intervention question can affect the course of legislation is, I believe, minimal in nature. The incidence of intervention in the total of cases arbitrated is small indeed. Where such intervention is attempted, one may assume that the intervenor is concerned enough to pursue his objective beyond the arbitration hearing if the Arbitrator rules against him. Similarly, the party opposing the intervention, may also seek further recourse in the event the Arbitrator's award goes against him. There is, then, comparatively little the Arbitrator can do to keep the issue from surviving his "final and binding award."

Discussion and persuasion by Arbitrators may have some effect on the ultimate course of legislation as it applies to collective bargaining. The individual ruling in a specific case will, in my opinion, have little or no effect. The so-called landmark cases will

arise from time to time regardless of what course of action the Arbitrator may take in a specific hearing. In the face of these imponderables, the Arbitrator can make his greatest contribution to collective bargaining by deciding the issue as posed by the parties. His guide in his rulings on intervention will be which courses of action will help him most in reaching a decision which carries the maximum potential for finality.

As to the larger problem of restrictive legislation, the Unions themselves are displaying considerable anxiety. This is evidenced in their increased resort to arbitration. The number of cases referred to arbitration is greater today than ever before. Admittedly, the displacement of personnel because of automation, and the erratic manpower demands made by the defense program with their erosion of job security, are partially responsible. Anxiety on the part of Union officials lest they be subject to penalty under the Landrum-Griffin Act if they fail to afford the maximum degree of due process cannot be ignored as a major contributing factor. The Landrum-Griffin Act makes no specific reference to the possible abridgment of members' rights in the processing of grievances. Despite this, many Union leaders have told me that there is a hazard to them in refusing to take a case to arbitration regardless of how little merit it may appear to have. A dissatisfied employee now has an agency sympathetic to his rights, whose assistance he may invoke. The consequences of an appeal to the Bureau of Labor-Management Reports are something which the Unions cannot assess. Consequently, they are playing it safe. It would seem to me that this behavior on the part of the Union, however unsound it may be from the standpoint of proper use of the arbitration procedure, will have a greater bearing on legislation aimed to protect due process than any ruling an Arbitrator may make in an individual case.

The impact of the Arbitrator on the collective bargaining patterns of the disputants cannot be legislated. It can make itself felt where the Arbitrator, over a substantial period of time, has established an identification with the parties on a level other than as an Arbitrator. Where he has successfully done this, as in the case of David Cole at International Harvester, he can make a significant contribution and effect necessary changes in long existing patterns.

In closing, I refer to Robben Fleming's reference to the process of "working out" problems which Arbitrators have successfully done on many occasions. I see nothing wrong with this. Reduced to its basic elements, the arbitration process itself is the device that Employers and Unions have voluntarily adopted for the specific purpose of "working out" disputes in preference to resolving them by economic conflict or court adjudication.

Discussion—

ABRAM H. STOCKMAN*

According to the usual uninformative definition provided by most dictionaries, intervention is defined as the "act or fact of intervening." In its literal sense, it means "to come or be between."

As the last discussant on this workshop, and among the last of the speakers on the program at this Annual Meeting of the Academy, I feel—in a sense—as an intervener between the stimulating and thoughtful discussions you have already heard during the past two days and the rewarding prospect of listening, within the next few hours, to an address by the Hon. W. Willard Wirtz, Secretary of Labor.

My last experience as a discussant at an Academy meeting occurred some four years ago in St. Louis. The then Professor Wirtz presented a paper on the subject "Due Process of Arbitration." It received general acclaim as a significant contribution to the field—as indeed it was. The measure of my contribution on that occasion is perhaps best illustrated by the fact that writers who have since referred to the published paper and discussion in the BNA publication have been content to conclude their comment with the citation: "Wirtz, *Due Process of Arbitration.*"

Professor Williams' discussion of the subject of intervention recognizes that, as such, it is part and parcel of a broader issue. That issue has been expressed in a variety of ways by an increasing number of writers and speakers who have been concerned with the subject. Professor Kurt L. Hanslowe has achieved what I be-

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lieve to be a particularly perceptive formulation of the issue in an article entitled "Individual Rights in Collective Labor Relations," 45 Cornell Law Quarterly 25 (1959-1960). He states it thus: "To what extent do the institutional needs of the employer, union and the collective bargaining relationship place limitations on the scope of protection that can and should be accorded to individual rights immersed in this complex of collectivities?" And he noted that the accommodation of those needs and the competing values involved pose some of the most difficult problems to be encountered within the labor relations field. I do not wish to presume that I can, or am in a position to, make a contribution to such a complicated problem. But in the short time allotted I have a few comments from the point of view of an arbitrator which perhaps deserve mention.

Let me say at the outset that I concur with Professor Williams in the view that it is undesirable to confer upon the individual employee an independent and unfettered right to resort to the arbitration machinery where the collective agreement does not so provide. Whether by statutory amendment or by the fashioning of federal substantive law, any such development would, I think, result in significant loss from the substantial gains which have occurred in the field of labor relations during these past twenty-five years. It is important to bear in mind that in the absence of a collective agreement, there is no enforceable right to grieve. Hence, it has been public policy that an individual employee can best achieve adequate protection of his individual interests through enforced recognition of the entity representing the collective group, and the collective bargaining agreement which may result therefrom. The solution to such inadequacies as may exist—and I do not deny that they do exist—does not require us to throw out the baby with the bath. Or more appropriately here in the Middle West: "Do not burn the barn to roast the pig."

There are less drastic means for encouraging the bargaining agent to be more sensitive to individual rights than by measures which would tend to undermine the very nature of industrial self government, imperfect though it may be.

If we seek to develop a standard of ethical conduct and an

awareness of fiduciary responsibilities, I think this can be achieved in no better fashion than directly by a plenary action in equity for breach of fiduciary obligations. The significant question is not whether the aggrieved employee possesses a colorable claim of contract violation affecting his individual interests, but whether in the disposition of that claim he has failed to receive the equal protection to which he is entitled as a member of the bargaining unit. There are signs—encouraging, I believe—that the right of an individual to bring suit to vindicate personal rights may be emerging under the federal law of labor relations.[1] And I am content to await further development of the case law in that regard.

Professor Williams and I part company, however, in the advantages claimed for a policy of intervention.

It is unclear from his discussion whether intervention is to be permitted only when the intervener has filed a grievance which has not been processed to arbitration, or whether it may be invoked on the arbitrator's own motion though no grievance has been filed. A situation in which Able, the senior bidder in the example cited, has not filed a grievance is clearly in a different posture from a situation in which he has grieved but the union has preferred to process the grievance of Baker, the junior employee, because it believes only he has the required qualifications for the job opening. To invite Able to participate in the proceedings when he has not grieved seems to me to indulge in what in another context would be characterized as stirring up litigation. Labor-management relations are usually much too sensitive to permit any such freedom of action by an arbitrator. If an arbitrator insists on playing the role of an arbitrator-physician—a characterization about which we heard so much last year from Professor Lon Fuller[2]—he must, of course, be willing to assume the consequences.

But even were intervention to be restricted to an employee who

1 Although *Smith* v. *Evening News Ass'n,* 51 LRRM 2646, United States Supreme Court, decided Dec. 10, 1962, involved an action by an individual employee against his employer for breach of the collective agreement, I find such signs in the horoscope of the majority opinion, and one need not be an astrologer to observe them in the minority opinion of Mr. Justice Black.

2 Lon L. Fuller, "Collective Bargaining and the Arbitrator," *Collective Bargaining and the Arbitrator's Role* (Washington: BNA Incorporated, 1962), p. 11.

had filed a grievance at some indeterminate time prior to the arbitration stage, it appears to me that Professor Williams, and others who espouse a policy of intervention, have glossed over as insignificant, problems which I find to be compelling. What are the limitations, if any, with respect to the problem of who is a proper party? Who should be included within the ambit of the proceeding? Able, who has not filed a grievance? Able who has filed a grievance which has been heard only at the first step or the second step or any step prior to invoking a demand for arbitration? These questions suggest not only problems of procedure but problems of substantive law as well.

Modern procedural rules which allow liberal intervention and joinder of parties presuppose a code of procedure that is the constant subject of judicial interpretation. The same is true in the case of administrative proceedings such as those conducted by the NLRB. The absence of any comparable rules governing an arbitration proceeding under the usual collective bargaining agreement is a significant distinguishing factor. It necessarily means that some standards will have to be developed on an *ad hoc* basis. The parties, accordingly, will have to be given the opportunity to present argument, and facts, if necessary, addressed to the issue of intervention and joinder. Can it be suggested with any assurance that this can be handled with any less degree of complication than now occurs at the threshold of so many arbitration proceedings concerning the question of arbitrability?

The fact that arbitrators have been able "to work something out" in a number of instances implies no more to me than that arbitrators have been able to obtain implied, if not express, consent from the parties to permit a third party to intervene. But if intervention were to become a fact of life, applicable in any and all disputes, the likelihood of any such consent being obtained would not appear promising.

Some writers have regarded the facility with which courts are able to handle multi-party complications in the administration of decedents' estates and trusts as indicative of the possibilities in an arbitration proceeding. But unlike judges, arbitrators do not function within the framework of jurisdiction well defined by

statute or constitution, a code of procedural rules, and a body of substantive law.

One final word regarding such matters as subpoenas, costs, expenses and compensation: Professor Williams has an inherent faith and optimism—for which I frankly envy him—that all of this can be worked out. Last week I had the experience of having a hearing end in bitter recriminations because the union did not want a copy of the transcript and was willing to pay only half the cost of the carbon copy rather than half the cost of the original for the transcript to be furnished to the arbitrator. This is merely illustrative of the problems which are very apt to be exacerbated if we must deal with an intervener as well as the collective parties. Of course, I need not dwell on a problem which is dear to our hearts as arbitrators, except to note that it will be an unusual experience to submit a bill for services rendered in a situation where each of the collective parties ends up as a loser.