LABOR LAW—BETWEEN THE OBVIOUS AND THE FOOLISH: AN APPLICATION OF UCC PRINCIPLES TO THE COMMON LAW OF COLLECTIVE BARGAINING AGREEMENTS

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INTRODUCTION

An employer and a labor union representing several hundred employees enter into an agreement purportedly governing the working relationship between the company and the employees. As a matter of day-to-day practice, however, things are done a little differently than the written agreement seems to prescribe. After a period of several years, the Company notifies the Union and the employees that it desires to return to a strict observance of the terms of the contract. The Union protests that current practices were in place before the formation of the latest written agreement and have become part of the most recent contract. The Union goes on to argue that the Company may not unilaterally alter those practices without negotiating. This situation is further complicated by the fact that the most recent writing contains both a no-oral-modifications (NOM) clause and a merger clause.

The federal courts, in mitigating disputes between the parties to a collective bargaining agreement, are bound to create and amend the federal common law of collective bargaining agreements.

1. Clyde W. Summers, Collective Agreements and the Law of Contracts, 78 Yale L.J. 525 (1969). In this article, Professor Summers presented what he believed to be an unpopular suggestion: that the law of collective bargaining agreements could broaden our understanding of contract law. To his detractors, he issued the following warning:

One who views contract law from the perspective of labor law, and whose last working contact with contract law was twenty years ago, should perhaps be cautious in venturing broad pronouncements on the subject. The risk is great that what may be said here will fall between the two stools of the obvious and the foolish. But collective agreements are contracts, though long treated as disowned offspring; and the law of collective agreements should have something to add to our understanding of the law of contracts.

Id. at 562.

2. The combination of a NOM clause and a merger clause within a written contract will be referred to throughout this Note as a “zipper clause.” See infra notes 55-57 and accompanying text.

in accordance with the policies of national labor law. The Labor Management Relations Act of 1947 indicates that the utmost priority of national labor law is to "promote the full flow of commerce." Correspondingly, national labor law seeks to facilitate smooth and productive relationships between employers, unions, and the represented employees.

The function of a collective bargaining agreement is to govern the working relationship between an employer, a union, and the represented employees. Proper interpretation of such agreements must be rooted in an understanding of the unique nature of collective bargaining and the policies that national labor law supports. One might argue that the goals of national labor policy may be achieved only through a strict reading of the terms that the parties themselves have chosen. Such an interpretation provides parties with certainty and confidence that the terms of their contract will be upheld. However, courts might recognize the impossibility of forecasting every possible contingency that might occur within the employer/employee relationship and allow a reasonable amount of flexibility in the face of the unknown. This interpretation leaves the collective bargaining agreement as a realistic framework that guides the decisions of the parties as they work together.

Part I of this Note outlines the statutory background of collective bargaining agreements under the National Labor Relations Act as amended by the Labor Management Relations Act of 1947. Part I goes on to delineate the facts of *Martinsville Nylon Employees Council v. NLRB*, trace the procedural history of the case, and summarize the majority and dissenting opinions of the United States Court of Appeals for the District of Columbia. Part II begins

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6. *Id.* The purpose of the Act is as follows:
   It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.
with an analysis of the problems that are created by enforcing a zipper clause\textsuperscript{10} within a collective bargaining agreement. It then goes on to stress the similarities between a long-term contract for the sale of goods and a collective bargaining agreement and recommends an application of the principles of Article 2 of the Uniform Commercial Code ("UCC") to the unique context of collective bargaining.

I. Background

A. Statutory Background

A collective bargaining agreement (CBA) is an enforceable contract under section 301 of the Management Labor Relations Act of 1947 (the "Act").\textsuperscript{11} The Act further provides that district courts of the United States possess jurisdiction to hear controversies arising between the parties to a CBA regardless of the citizenship of the parties or the amount in controversy.\textsuperscript{12} The policies giving rise to this legislation are outlined in section 1 of the Act, and indicate that the Act was an attempt by Congress to minimize disputes between management and labor that tended to interfere with the flow of interstate commerce.\textsuperscript{13} To this end, Congress stressed that it was in the best interest of management, unions, and labor to observe their respective rights and duties as to each other and as to the health and safety of the general public.\textsuperscript{14} Thus, through the Labor Management Relations Act of 1947, Congress has sought to protect and support the free flow of commerce by encouraging mutual cooperation among employers, employees, and labor organizations.\textsuperscript{15}

In interpreting section 301 of the Labor Management Relations Act of 1947,\textsuperscript{16} the United States Supreme Court held that the federal courts were to create a substantive common law that would govern the interpretation and enforcement of collective bargaining agreements.\textsuperscript{17} As the Court explained, "[w]e conclude that the sub-

\textsuperscript{10} See \textit{supra} note 2, and \textit{infra} notes 55-57 and accompanying text.
\textsuperscript{12} \textit{Id}.
\textsuperscript{13} § 141.
\textsuperscript{14} \textit{Id}.
\textsuperscript{15} The following Senate report indicates a clear legislative intent to this end: "Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace." \textit{S. REP. NO. 105, 80th Cong., 1st Sess. 17 (1947).}
\textsuperscript{16} § 185.
\textsuperscript{17} Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).
stantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. It is against this backdrop that the federal courts of the United States must interpret and enforce the terms of collective bargaining agreements.

B. Facts of Martinsville Nylon Employees Council v. NLRB

E. I. du Pont de Nemours & Co., Inc. ("the Company") operates a plant in Martinsville, Virginia, which is engaged in the manufacture of nylon yarns. The Martinsville Nylon Employees Council Corporation ("the Union") has represented the employees at the Martinsville facility for over forty years and has been successful in negotiating a continuous line of collective bargaining agreements with the Company. The instant case arose from a collective bargaining agreement that was to encompass the period from April 7, 1986 to August 31, 1987.

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18. Id. at 456.
21. Id.
22. Id. The agreement states in pertinent part:

ARTICLE II
RECOGNITION AND SCOPE
Section 1. The UNION is recognized as the exclusive bargaining agency for the employees at the Plant as set forth in Article I of this Agreement for the purpose of collective bargaining with respect to rates of pay, wages, hours of work, and other conditions of employment.

Section 2. There shall be no discrimination, coercion, interference, or restraint by the COMPANY or the UNION or any of their agents against any employee because of membership or non-membership in the UNION, and the UNION agrees that there shall be no solicitation or promotional UNION activity on COMPANY time.

Section 3. The Agreement constitutes the entire Agreement between the parties hereto as of the execution date hereof. However, any supplement which may hereafter be mutually agreed upon between the parties when executed in the same manner as this Agreement shall become and be a part of this Agreement.

ARTICLE XII
ADJUSTMENT OF GRIEVANCES
Section 1. The UNION agrees to select an employee Committee of no more than five (5) officials and/or accredited Representatives, including a Chairperson, who shall constitute the Grievance Committee. The UNION will keep the Plant Management advised of any changes in the personnel of this Committee.

Section 2. In the event that a dispute or grievance shall arise between the COMPANY and the UNION or any employee, an earnest effort shall be made to settle such dispute or grievance in the following sequence:

FIRST, the aggrieved employee normally will attempt to obtain a settle-
During the effective period of this CBA, the Company notified the Union that there was a need for heightened efficiency at the Martinsville facility. On February 2, 1987, the Company presented the Union with a memorandum entitled "Union Officials and Council Representatives Productivity Proposal" ("the Production through the members of supervision directly in charge. However, the aggrieved employee may elect to take the matter up directly with his UNION Representative who will attempt settlement of the grievance with supervision directly in charge. The aggrieved employee may be present.

SECOND, between the employee's Union Representative and the Area supervision of the area in which the grievance occurs. If the UNION Representative so desires, he [or she] may have the Grievance Committee Chairman present at this step.

At the FIRST and SECOND Steps, of the grievance procedure an answer normally will be given to the UNION by supervision not later than ten (10) calendar days after the date the grievance was presented at each step. In the event an answer is not given by supervision at a Step, unless an extension of time is agreed upon by both parties, the grievance may be presented at the next Step.

THIRD, failing a satisfactory adjustment as above provided, the UNION Grievance Committee may present the grievance to the Plant Manager and/or his/her designated representatives who will render an answer to the UNION within ten (10) calendar days of the date the grievance is presented at this Step, unless an extension of time is agreed upon by the parties.

Any Grievance not presented at the SECOND and THIRD Steps with [sic] ten (10) calendar days following supervision's answer to the grievance in the preceding Step shall be considered terminated by the parties unless an extension of the time is agreed upon by the parties.

Section 3. In the event that more than one (1) employee is involved in a grievance or dispute in the FIRST Step, the number of employees, exclusive of the UNION Representative, to confer with supervision shall be agreed upon between supervision and the UNION.

Section 4. Meetings between elected officials and/or accredited Representatives of the UNION and the Plant Management will be permitted on COMPANY time and COMPANY property in cases where such meetings are for the purpose of conferring with the Plant Management. No elected officials or Representatives shall be paid for the time consumed in a meeting with the Plant Management outside of his/her regular working hours. No change in the working hours of an elected official or Representative will be made for the purpose of conducting business of the UNION except in cases where a Representative or elected official may make his/her own arrangements with another qualified employee, subject to the approval of his/her supervision and provided no overtime pay is incurred.

Section 5. An accredited Representative of the UNION, on being presented with a grievance shall be allowed a reasonable amount of time during working hours without loss of pay to receive, investigate and handle such grievance in accordance with the grievance procedure after obtaining permission from his/her immediate supervision. It is understood that in contacting an employee concerning the settlement of handling of a grievance, prior advice of the desire to make the contact will be given to the employee's supervision.

Id. at 567 n.6 (emphasis added).

23. Id. at 565.
tivity Proposal” or “the Proposal”).24 The Company noted in this memorandum that for the past several years union representatives had enjoyed great freedom to pursue union business on company time and with pay.25

Day-to-day practices had developed at the Martinsville facility that permitted union officials and representatives to spend 60% to 100% of their on-the-job time engaged in various union activities.26 Common practice had come to allow Union officials and representatives to leave their production posts, at their own discretion, to pursue active employee grievances.27 Union officials and representatives were also free to spend time in the Union office, located on the company premises, researching employee grievances; to confer with other Union representatives and the represented employees regarding existing or potential infractions of the CBA; and to walk freely about the plant facility to “police” the terms of the CBA.28 These Union activities all took place during the representatives’ scheduled shifts, and the representatives were fully compensated by the Company for time spent on Union business.29

Prior to the issuance of the Proposal, the Company made no complaint concerning the amount of time the Union representatives were spending away from their formal production duties.30 In fact, there were several instances where the Company accommodated shift changes for Union representatives to facilitate the pursuit of Union business.31

At the time that the Company presented the Union with the Proposal, it informed the Union that it was opening negotiations on the substantive contents of the Proposal.32 In essence, the Productu-
tivity Proposal stated that the Company would require Union officials and representatives, with the exception of the Union president, to work their scheduled shifts and to seek the permission of their immediate supervisors before leaving their posts in the pursuit of an employee grievance.\(33\) The Proposal made it clear that the Company would once again require production work from the Union officials and representatives.\(34\) The Company estimated that requiring Union officials and representatives to perform production work would lead to a savings of $400,000 per year.\(35\)

The Union objected to the implementation of the Proposal in its entirety and maintained that such a proposal could not be discussed until contract negotiation time.\(36\) The Company repeatedly offered opportunities for negotiation, but to no avail. On March 8, 1987, the Company enacted the Proposal and issued a memorandum to its supervisors which detailed its implementation.\(37\)

From that date forward, Union officials and representatives would be required to follow the strict language of the collective bargaining agreement.\(38\) In order to obtain permission to pursue a grievance, the Union representative and her or his immediate supervisor were to engage in a prescribed colloquy consisting of five questions.\(39\) The memo also established that the supervisor had discretion to permit the pursuit of a grievance as the employee’s work load allowed.\(40\) Finally, the supervisor of that Union representative was to contact the supervisor of the grievant to set up a mutually

\begin{footnotesize}
\begin{enumerate}
\item See supra note 22 at Art. XII, § 5.
\item E. I. du Pont de Nemours & Co., 294 N.L.R.B. at 566. The five questions were as follows:
\begin{enumerate}
\item Who is the grievant or employee with whom you want to meet?
\item What area of the plant does he/she work?
\item Who is the employee’s supervisor or contact supervisor?
\item What is the nature of the grievance?
\item How much time do you think you will need?
\end{enumerate}
\item Id.
\item Id.
\item Id. at 566.
\item Id. at 566.
\item Id.
\item Id.
\item Id.
\item Id. at 566.
\item Id. at 566.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. at 566.
\end{enumerate}
\end{footnotesize}
convenient meeting between the representative and the employee.  

C. *Case History of Martinsville Nylon Employees Council v. NLRB*  

The complaints filed by the Union alleged that the Company had violated sections 8(a)(1), (3), (5), and 8(d) of the National Labor Relations Act ("NLRA").  

Essentially, the Union claimed that the Company had unilaterally altered the working conditions at the Martinsville facility without providing an opportunity to bargain or negotiate and that such behavior constituted an unfair labor practice for the purposes of the NLRA.  

The Administrative Law Judge ("ALJ") held that the Company did not attempt to modify the CBA, but simply returned to a strict interpretation of its terms:  

[T]he deviation from contractual provisions or the relaxation of rules contained therein did not amount to a waiver of Respondent's rights under the contract or to the establishment of a past practice; and that when, on 8 March, the Respondent, for purely economic reasons, returned to a literal interpretation of the contract and strict enforcement of its rights thereunder, it did not thereby refuse to bargain in good faith, in violation of the Act.  

On May 17, 1988, the ALJ dismissed the Union's complaint in its entirety.  

Following the decision of the ALJ, the Union filed exceptions and supporting briefs with the National Labor Relations Board ("NLRB" or "the Board"). The Board agreed with the ALJ that the Company had not violated sections of the NLRA "when it offered to bargain over changes in the practices and when its own bargaining position was essentially to return to the written terms of the agreement."  

The Board, however, drew a distinction between returning to the express terms of the CBA on the one hand and implementing a restriction that was (1) not contained in the CBA and (2) which was
contrary to past practice on the other. The NLRB held that the CBA contained no language that gave rise to question four of the Company’s prescribed colloquy, which asked, “What is the nature of the grievance?” The Board reasoned that requiring a Union representative to answer this question before allowing that representative to pursue an employee grievance was a unilateral mid-term modification of the CBA and as such, amounted to a violation of section 8(d) of the National Labor Relations Act. The NLRB required the Company to remove question four from its Productivity Proposal and then dismissed the remainder of the Union’s complaint. The Union alone sought appeal in the United States Court of Appeals for the District of Columbia.

D. The Majority Opinion in Martinsville Nylon Employees Council v. NLRB

The United States Court of Appeals for the District of Columbia framed its analysis of the issues in three parts. In Part A, the court discussed the ramifications of the no-oral-modification (NOM) clause contained within the collective bargaining agreement. In Part B, the court reasoned that the NOM clause could be combined with the merger clause of the CBA to form a “zipper” clause. The court then held that the zipper clause proscribed
the inclusion of any past practice within the terms of the collective bargaining agreement.58 Finally, in Part C, the Martinsville court reasoned that “past practice may still inform the Board’s understanding of what the written agreement means.”59

1. Part A - Treatment of NOM Clauses Under the Uniform Commercial Code

The majority, in an opinion written by Judge Ginsburg, began its analysis with the Union’s argument that, under existing common law, a no-oral-modification clause is essentially unenforceable.60 While agreeing with this contention, the court then explained that this traditional common law rule has been discarded in many areas of the law.61 Specifically, the court pointed to Article 2 of the UCC, which has been adopted in every state to govern the creation and enforcement of contracts for the sale of goods.62 Section 2-209(2) of the UCC provides that “[a] signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded.”63 Thus, a NOM clause is enforceable under Article 2 of the UCC.64

After outlining these two strong positions in contract law, the majority explicitly stated its preference for the UCC treatment of NOM clauses.65 Judge Ginsburg likened the parties to a CBA to “‘merchants’ within the meaning of UCC 2-104” in that they possess knowledge of the terms under negotiation and are represented by counsel when the negotiations take place.66 The court further reasoned that a strong profit motive on both sides of the table ensured that no one would miss “the fine print” or include a “meaningless provision against oral modifications.”67

Judge Ginsburg found that the UCC view enabled sophisticated parties to consciously include or exclude an enforceable no-oral-modification provision and, in essence, control their own

58. Id. at 1268.
59. Id. at 1269.
60. Id. at 1267.
61. Id.
62. Id.
63. Id. (quoting U.C.C. § 2-209(2) (1990)).
65. Martinsville, 969 F.2d at 1267.
66. Id. (citing U.C.C. § 2-104 (1990)).
67. Id.
The common law view, on the other hand, simply renders such a provision unenforceable. The court reasoned that the traditional common law view robbed parties of the ability to restrict the manner in which future modifications to the CBA were to be made.

The majority then addressed the question of whether national labor policy prohibited the enforcement of NOM clauses. The court noted that in *Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996*, the Court of Appeals for the Ninth Circuit adopted the common law stance against NOM clauses, explaining that such a prohibition would encourage parties to a CBA to resolve a dispute through further negotiations rather than coercion or strike. The *Martinsville* court disagreed with the Ninth Circuit’s conclusion that “overriding a no-oral-modification clause in a CBA ‘effectuates the federal policy of maintaining ‘industrial peace.’”

Judge Ginsburg concluded that the position taken in *Certified Corp.* would actually lead to “industrial strife.” The court reasoned that the clear intent of the parties when they included a NOM clause could not be ignored. To do so would cause uncertainty as to which terms of the CBA would be enforced, as well as bickering among the parties over “who said what to whom.”

The majority embraced the concepts of self-determination and certainty in contract formation as embodied in the UCC view of NOM clauses. As Judge Ginsburg stated, “we are confident that the UCC rule will better serve the purposes of collective bargaining and of industrial peace.” It should be noted, however, that the court refused to base its holding upon this reasoning. Indeed, the court began part B of its opinion by explicitly stating that it had not made a final determination between the traditional common law view and the UCC view of the NOM clause.

68. *Id.*
69. *Id.*
70. *Id.* at 1267-68.
71. 597 F.2d 1269 (9th Cir. 1979).
72. *Martinsville*, 969 F.2d at 1268.
73. *Id.* at 1268 (quoting *Certified Corp.*, 597 F.2d at 1271).
74. *Id.*
75. *Id.* at 1267.
76. *Id.* at 1268.
77. *Id.*
78. *Id.* at 1268.
79. *Id.*
2. Part B - Combination of a NOM Clause and a Merger Clause Forms an Impenetrable Zipper Clause

The zipper clause contained in Article II of the collective bargaining agreement proved determinative. Judge Ginsburg concluded that the additional inclusion of the "entire agreement" or merger clause in the CBA left no doubt as to the intentions of the parties. The court held that the combination of the NOM clause and the merger clause formed an impenetrable zipper clause that did not permit the incorporation of any past practice into the terms of the collective bargaining agreement. The court made clear that no past practice, either consistent or inconsistent with the explicit terms of the CBA, was to be incorporated.

In reaching this conclusion, the majority took issue with the distinction made by the NLRB between past practices that were consistent with the terms of the CBA and those that were not. The Board held that the entire agreement clause served to bar the incorporation of any past practice that was inconsistent with the express terms of the CBA. Judge Ginsburg took the NLRB's explanation to imply that the merger clause did not serve to bar the incorporation of any past practices that were "not inconsistent" with the express terms of the CBA. The majority emphatically rejected this implicit proposition, holding it to be "flatly inconsistent with the entire agreement clause."

It appears that holding a practice to be consistent with the written terms of a contract and holding a practice to be not inconsistent with the written terms of a contract carry different meanings for the purpose of the court's analysis.

80. See supra note 22 for the pertinent text of the collective bargaining agreement.
81. Martinsville, 969 F.2d at 1268. Judge Ginsburg emphasized that the written CBA was closed to any alteration that did not come in written form:
[B]y including the entire agreement clause the parties here made clear beyond doubt their intention not to be bound to any informal arrangement to which they might voluntarily adhere during the term of their CBA. In effect, each told the other: "If you want anything else, you'll have to get it in writing," and to this they both agreed.
Id.
82. Id.
83. Id.
85. Martinsville, 969 F.2d at 1268. The court explained its use of a double negative by stating that "[the NLRB's] clear implication is that a practice not inconsistent with the CBA (i.e., it adds to rather than alters it) is incorporated into the CBA." Id.
86. Id.
87. Id.
the parties is embodied in the written terms of the CBA. The majority found that the entire agreement clause in conjunction with the NOM clause revealed the clear intent of the parties. No addition or alteration of this CBA was to be made in the absence of a further writing.

3. Part C - Course of Performance Plays a Limited Role in the Face of a Zipper Clause

Finally, the majority explained that, while the past practices of the parties were not to be incorporated within the express terms of the CBA, the past practices of the parties could be used to inform the court as to what the terms of the CBA actually meant. In interpreting the language of the CBA, the court reasoned that "the parties' course of performance may be the best evidence of their intent in using a particular term." The court found support for this premise in both case law and section 2-208 of the UCC.

The majority opinion explained that the decisions of the Administrative Law Judge and the National Labor Relations Board were based upon the belief that the entire substance of the agreement between the Company and the Union could be gleaned from the terms of the CBA alone. In the words of the court, "[b]oth [the ALJ and the Board] seem to have assumed that the meaning of the contract is to be discerned entirely from within its four corners." Judge Ginsburg opined that this was "particularly unfortunate . . . where the past practice predated the current contract." In essence, the court proposed that the current contract may have been an attempt by the parties to memorialize what had come to be the day-to-day practices at the plant. As the court illustrated:

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88. Id. at 1268-69.
89. Id. at 1268.
90. Id. at 1269.
91. Id.
92. Id. (citing Carey Canada, Inc. v. Columbia Casualty Co., 940 F.2d 1548 (D.C. Cir. 1991)).
93. Id. (citing U.C.C. § 2-208). Section 2-208(1) provides that "any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement." U.C.C. § 2-208(1) (1990).
Section 2-208(2) provides further that "[i]n the express terms of the agreement and any such course of performance . . . shall be construed whenever reasonable as consistent with each other." U.C.C. § 2-208(2) (1990).
94. Martinsville, 969 F.2d at 1269.
95. Id.
96. Id.
97. Id. at 1270.
For example, Article XII, § 5, provides that a union representa-
tive may process a grievance during working hours "after ob-
taining permission from his immediate supervision." Since the
Employer had not since 1980 required a union representative to
get permission each time before handling a grievance, could not
§ 5 refer to the apparently blanket permission that union repre-
sentatives had been given in practice?98

The majority found error in the prior proceedings because no
attempt was made to compare the terms of the CBA with the ongo-
ing practices of the parties to determine if such a memorialization
was intended.99 The court remanded the case to the National La-
bor Relations Board "to consider the relevance of past practice to
the meaning of the contract as written."100

E. The Dissent in Martinsville Nylon Employees Council v.
NLRB101

In her dissenting opinion, Judge Wald registered two major
complaints with the opinion of the majority. The greater portion of
Judge Wald's dissent chastised the majority for its "dicta" in Part A
of its opinion.102 The dissent reasoned that strict enforcement of
NOM clauses within collective bargaining agreements was both ill-
conceived and unsupported.103 Judge Wald argued that, while it is
the place of the federal judiciary to create the federal common law
of collective bargaining agreements, such development must take
place in accordance with the policies of national labor law.104 The
dissent opined that a federal court may not rely upon the principles
of commercial law as embodied in the UCC while fashioning a set
of rules to govern the interpretation and enforcement of collective
bargaining agreements.105

The dissent then questioned the majority's treatment of the
holding in Certified Corp. v. Hawaii Teamsters & Allied Workers,
Local 996.106 Judge Wald explained that the flexibility sought to be

98. Id.
99. Id. at 1269-70.
100. Id. at 1270.
101. Id. at 1270 (Weld, J., dissenting.
102. Id.
103. Id. at 1270-72.
104. Id. at 1270 (citing Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-
57 (1957)).
105. Id.
106. 597 F.2d 1269 (9th Cir. 1979).
Judge Wald stated, "I believe Certified Corp. may have more to offer than my
achieved in *Certified Corp.* appears to promote a smooth and cooperative relationship between management and labor. The judge reasoned that such a relationship was obviously "an incontrovertible goal of federal labor policies." The dissent stressed the unique nature of the collective bargaining relationship and the fundamental role of federal labor policy in forming the federal common law of collective bargaining agreements. It explained that the "unforeseeable contingencies" that occur every day within the management/labor relationship must be met with flexibility in order to achieve the goals of national labor policy. Rigid structure and certainty would prove to be costly and disruptive in the arena of labor negotiations.

Judge Wald's second major disagreement with the majority concerned the distinction which the majority drew between the use of course of performance to create new contract terms and its use as a tool in contract interpretation. Judge Wald reasoned that "the line between interpreting contract language in light of past practices and saying that established practices, when consistent with contract language, will be deemed covered by the contract is a theoretical one at best. I can only wonder how distinctly it can be applied in practice."

II. ANALYSIS

The majority in *Martinsville* held that the combination of the merger clause and the NOM clause within the CBA proved dispositive. First, the court reasoned that the merger clause barred the incorporation of any implicit arrangement within the agreement: on the date of execution the written CBA stood as the totality of the agreement between the parties. Second, the NOM clause pro-
vided that any alteration must come in the form of a writing. \footnote{116} In the face of a zipper clause, any practice that was not embodied in the CBA or in a subsequent written modification had no legal effect. \footnote{117}

The Union argued that the parties' course of performance over the past several years affected a modification of their agreement and had come to allow enhanced freedoms for Union representatives. \footnote{118} The \textit{Martinsville} court rejected the Union's argument and held that the CBA was limited to its explicit written terms. On April 7, 1986, the CBA in question became the entire agreement between the parties. Any practice that was not contained in that writing was not a part of the agreement. \footnote{119} After April 7, no practice could be said to modify the CBA unless memorialized by a writing. As the majority explained:

\begin{quote}
[T]he parties here made clear beyond doubt their intention not to be bound to any informal arrangement to which they might voluntarily adhere during the term of their CBA. In effect, each told the other: "If you want anything else, you'll have to get it in writing," and to this both agreed. \footnote{120}
\end{quote}

In essence, the court reasoned that industrial turmoil would result if parties were unsure which portions of their CBA would be enforced. \footnote{121}

The \textit{Martinsville} court explained that although past practices could not be incorporated into the CBA, such practices might inform the court as to the parties' intended meaning of the written terms. \footnote{122} The \textit{Martinsville} court then remanded the case to the NLRB to determine if the contested practice was simply an implementation of the written terms of the CBA. Notwithstanding the court's instructions on remand, it appears that the behavior of Union representatives may have actually contradicted the explicit

\begin{footnotes}
116. \textit{Id.} at 1269.
117. \textit{Id.}
118. \textit{Id.} at 1265.
120. \textit{Martinsville}, 969 F.2d at 1268.
121. \textit{Id.} The court was strenuous in its advocacy on this point:
\begin{quote}
We think it more likely that judicial disregard for the parties' expressed intent that any modification be in writing is more likely to promote industrial strife by encouraging prevarication about who said what to whom, and to create uncertainty about what a court will determine are the actual obligations of the parties.
\end{quote}
\textit{Id.}
122. \textit{Id.} at 1269.
\end{footnotes}
terms of the CBA. Union representatives moved about the plant and engaged in Union business at their own discretion. This practice was not explicitly authorized by either the primary CBA or any subsequent memorandum of modification. In fact, one could argue that such behavior actually contradicted the CBA requirement of supervisory permission.123

The Martinsville court reached the correct result in affirming the NLRB’s dismissal of the Union’s complaint. However, the reasoning supporting this conclusion seems strained, primarily because of the court’s reliance on the zipper clause. Enforcement of a zipper clause within a CBA presents at least two major problems. First, it appears that such a clause could prove overly-restrictive in the context of industrial labor relations. It is difficult to imagine a collective bargaining agreement that could even begin to set out the procedures, rights, and duties involved in every possible contingency.124 Second, the court’s reliance on the zipper clause includes an implicit reliance upon the widely criticized NOM clause.

As stressed in the Martinsville dissent, the need for flexibility within the collective bargaining relationship cannot be overstated. Judge Wald argued that “[t]here are too many unforeseeable contingencies in a collective bargaining relationship to justify making the words of the contract the exclusive source of rights and duties.”125

123. The seemingly applicable section of the written CBA states as follows:

Section 5. An accredited Representative of the UNION, on being presented with a grievance shall be allowed a reasonable amount of time during working hours without loss of pay to receive, investigate and handle such grievance in accordance with the grievance procedure after obtaining permission from his immediate supervision. It is understood that in contacting an employee concerning the settlement of handling of a grievance, prior advice of the desire to make the contact will be given to the employee’s supervision.

E.I. du Pont de Nemours & Co., 294 N.L.R.B. at 567 n.6 (emphasis added).

124. See infra note 133 and accompanying text.

125. Martinsville, 969 F.2d at 1271 (Wald, J., dissenting) (quoting Humphrey v. Moore, 375 U.S. 335, 353-54 (1964) (Goldberg, J., concurring)). See also HARRY SHUMAN & NEIL W. CHAMBERLAIN, CASES ON LABOR RELATIONS 3 (1949).

[C]ollective bargaining involves first, the negotiation of a general agreement as to terms and conditions of employment, and second, the maintenance of the parties’ relations for the period of the agreement. The first process is the dramatic one which catches the public eye and which is sometimes mistaken to be the entire function of collective bargaining. But in fact, it is to labor relations approximately what the wedding is to domestic relations. It launches the parties on their joint enterprise with good wishes and good intentions. The life of the enterprise then depends on continuous, daily cooperation and adjustment.

Id.
Due to the inherent dynamics of the collective bargaining relationship, the potential for necessary alterations and modifications is infinite.126 Within this context, the operation of an industrial production facility under an enforceable zipper clause would prove both time consuming and expensive.

Further, in relying upon the zipper clause, the court based at least a portion of its holding upon the enforceability of NOM clauses, notwithstanding the fact that courts have universally held that such clauses are not enforceable at common law.127 As Judge Cardozo stated in 1919, "[t]hose who make a contract may unmake it. The clause which forbids a change may be changed like any other."128

In the face of opposition to the enforceability of NOM clauses, the Martinsville majority drew an analogy to contracts for the sale of goods.129 Article 2 of the UCC provides that NOM clauses in contracts for the sale of goods are enforceable under certain circumstances.130 The court reasoned that the unique context of collective bargaining would be well-served by a similar rule.131

The common law and the UCC are in direct opposition132 and such conflict of authorities indicates that the enforceability of a NOM clause must be questioned. Close scrutiny, however, reveals

126. Martinsville, 969 F.2d at 1271 (Wald, J., dissenting).

Unanticipated amendments may, for example, be necessary in the context of a bid with a time deadline, or in other constraining situations where flexible procedures will make the difference between failure and success for both labor and management. Requiring that all such impromptu modifications be memorialized in writing (with attendant costs in time, effort, and money), may be counterproductive to the best interests of both sides.

Id.


See also Restatement (Second) of Contracts §§ 283 cmt. b and 148 cmt. b. (1979).


129. Martinsville, 969 F.2d at 1267-68.


131. Martinsville, 969 F.2d at 1268.

132. Alysse Kaplan, Note, Partial Satisfaction Under the UCC, 61 Fordham L. Rev. 221, 237-38 (1992). "Under common-law principles for modification of an agreement, both parties must offer consideration. Under the UCC, however, this has changed to reflect the Code's emphasis on flexibility and the facilitation of commercial transactions. UCC § 2-209(1) specifies that no consideration is necessary to modify a contract." Id. (footnote omitted).
that the similarities between contracts for the sale of goods and collective bargaining agreements warrant the application of UCC principles to the federal common law of collective bargaining. Regrettably, the Martinsville majority failed to fully evaluate the application of commercial law within the unique context of collective bargaining.

A. Zipper Clauses in Collective Bargaining Agreements Should Not Be Strictly Enforced

Courts and commentators alike have suggested that no writing could ever embody the "entire agreement" between a company, a union, and the individual employees. At best, the boilerplate language of a merger clause within a CBA provides the parties with an unrealistic and misleading sense of completion. At worst, a merger clause provides courts with the temptation to indulge in a legal fiction. The addition of a NOM clause further binds the hands of the parties to a CBA and unduly burdens the daily operation of an industrial production facility.

The Martinsville court based its holding upon the zipper clause found in the parties' CBA. The court held that the written terms

133. Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 154-55 (1969) ("It would be virtually impossible to include all working conditions in a collective-bargaining agreement."); Humphrey v. Moore, 375 U.S. 335, 353-54 (1964) (Goldberg, J., concurring) ("There are too many unforeseeable contingencies in a collective bargaining relationship to justify making the words of the contract the exclusive source of rights and duties."); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) (A CBA "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."); Railway Labor Executives Ass'n v. Norfolk & Western Ry., 833 F.2d 700, 705 (7th Cir. 1987) ("A written agreement, however, does not necessarily contain all relevant working conditions. . . . The parties' collective agreement, therefore, includes both the specific terms set forth in the written agreement and any well established practices that constitute a 'course of dealing' between the [employer] and employees.") (citations omitted).

ARCHIBALD COX, LAW AND THE NATIONAL LABOR POLICY 79 (Greenwood Press 1983) (1960) ("A collective agreement rarely expresses all the rights and duties falling within its scope. One cannot spell out every detail of life in an industrial establishment, or even that portion which both management and labor regard as matters of mutual concern."); see also Summers, supra note 1, at 529 ("Because of the diverse congeries of matters covered by a collective agreement and the practical need for a readable and reasonably concise document, a written agreement cannot possibly provide for the myriad of variant situations which might arise, even if they could be foreseen.").

134. Merk v. Jewel Food Stores, 945 F.2d 889, 902 (7th Cir. 1991) (Easterbrook, J., dissenting), cert. denied, 504 U.S. 914 (1992). "Manville said that 'national labor policy' forbids labor and management to have a fully integrated contract no matter how strongly they prefer the benefits of certainty." Id. (citing Manville Forest Prod., Inc. v. Paperworkers Union, 831 F.2d 72, 75-76 (5th Cir. 1987)).

135. Martinsville, 969 F.2d at 1268.
of the CBA embodied the totality of the agreement between the Company, the Union, and the employees. However, this conclusion appears unrealistic in that the day-to-day operations of a production facility present new and unique situations almost constantly.\footnote{The Court of Appeals for the Fifth Circuit explained the vital importance of flexibility under a CBA as follows:} A collective bargaining contract operates prospectively over a substantial period of time and the parties cannot be expected to foresee all the problems that will develop in an industrial establishment within the period of the contract and more scope must be left for decisions made in the course of performing the agreement. The parties to the collective bargaining agreement share a degree of mutual interdependence for the cost of disagreement is great and the pressure to reach agreement is so intense that the parties are willing to contract with the thought in mind of working out the problems of interpreting and amending when the inevitable problems arise.\footnote{Watson v. International Bhd. of Teamsters, 399 F.2d 875, 879 (5th Cir. 1968) (emphasis added) (footnote omitted).} Following the majority's reasoning, an enforceable zipper clause will lead to costly and time consuming results, for each new situation will be met with calls to the parties' respective attorneys. Negotiations and deliberations will be followed by memorialization of the new terms of the agreement, and then everyone may go back to work.

The costs and delays involved in following such a procedure do not comport with the efficient operation of a business. Economic reality dictates that business-people allow themselves the freedom to act quickly in a dynamic market.\footnote{See supra note 126.} It seems counterintuitive that players in the industrial production realm would bind themselves to a written agreement, only to engage in the delusion that they had provided for all future events.

Because of the dynamic character of the collective bargaining relationship, the parties to a CBA should be dissuaded from burdening themselves with a zipper clause. Although parties do retain the ability to alter their agreement, such alterations must come in written form.\footnote{Martinsville, 969 F.2d at 1269.} Under the circumstances, even this restriction appears to present an unbearable hindrance. The better-reasoned approach would be to put all parties involved in collective bargaining on notice that there is no such thing as a fully integrated CBA.\footnote{See supra note 134 and accompanying text. \textit{See also} Anthony Carabba, Comment, Merk v. Jewel Food Stores: The Parol Evidence Rule Applied to Collective Bargaining Agreements - A Trend Toward More Formality in the Name of National Labor Policy?, 10 Hofstra Lab. L.J. 719 (1993).} In essence, the parties to a CBA should be counseled to expect the
unexpected and to build a degree of flexibility into their written agreements.

In the absence of an ironclad zipper clause, alternative mechanisms must be established to protect the parties' freedom to contract, while at the same time allowing for the flexibility required by economic reality. The federal common law of collective bargaining agreements should be developed to give fuller effect to parties' course of performance. Concurrently, barriers to fraud, extortion, and false allegations must be constructed to ensure that no course of performance is enforced as a modification unless it was genuinely intended as such.

The interworkings of Article 2 of the UCC provide just such a compromise. Section 2-209 of the UCC fosters flexibility in the modification of contracts for the sale of goods. At the same time, however, section 2-209 erects barriers to overreaching and misrepresentation. The compromise embodied in section 2-209 is an attempt to embrace commercial reality and formulate a set of workable rules within that context. An application of this very compromise could prove quite successful within the context of collective bargaining.

B. A Comparison of Contracts for the Sale of Goods and Collective Bargaining Agreements

1. A Useful Analogy May Be Drawn

At first glance, the differences between contracts for the sale of goods and CBAs seem glaringly apparent. A typical contract for the sale of goods involves a defined quantity, a specified price, and a designated date of completion. Section 2-209 has three main objectives. First, in accordance with the Code's policy of preserving flexibility of commercial contracts, it validates modifications of sales contracts that are made in good faith, even though those modifications are not supported by consideration. Second, it invalidates modifications that are made in bad faith, even though such modifications are supported by consideration. Finally, the section offers protection against the possibility that one party to the contract will fraudulently or mistakenly assert that an oral modification has been made, when, in fact, it has not.


It is perverse to say that the contracting process in labor must be more formal than the contracting process in shipping or construction or natural resources. You can define how much coal to sell and where to deliver it...
lective bargaining agreement provide for the future conduct and interaction of many people, and "[m]any provisions do little but establish the framework for further bargaining." \cite{142} Under these definitions, it appears that no productive analogy may be drawn between contracts for the sale of goods and collective bargaining agreements.

The difficulty here, however, lies in our conception of a typical contract for the sale of goods. As commercial dealings evolve, the parties to a sale of goods become more sophisticated and the terms of the bargain become more complex. The expansion and specialization of industry have given rise to sales contracts which extend far into the future and anticipate a variety of circumstances. The law of sales has evolved to correspond with commercial reality, growing beyond a limited application to the "one shot" contract for the sale of goods.\cite{143} Article 2 of the UCC "applies to transactions in goods,"\footnote{144} and draws no distinction between our typical image of

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Labor agreements govern the ongoing relations among thousands of persons and affect matters not so easy to specify. Rigidity backfires. Competitive conditions and technology change. Labor relations must change too.

\textit{Id.} (second emphasis added).

\textit{See also Cox, supra} note 133, at 78 (1960) ("Not all commercial contracts, but surely those which are most familiar, relate to a single transaction.").


\textit{See Shulman & Chamberlain, supra} note 125, at 3.

\textit{The heart of the collective agreement—indeed, of collective bargaining—is the process for continuous joint consideration and adjustment of plant problems. And it is this feature which indicates the great difference between the collective labor agreement and commercial contracts generally. The latter are concerned primarily with "end results"; [sic] the former, with continuous process.}

\textit{Id.}


In nineteenth-century commerce, the prototypical sales transaction was the face-to-face sale in which the buyer paid cash and took her goods home. Llewellyn sought, instead, a model that reflected the reality of a twentieth-century "nationwide indirect marketing structure." In the modern world of sales, Llewellyn’s and ours, most commercial sellers and buyers of goods do not deal face-to-face and do not immediately take the goods home. Rather, they contract for a sale in the future; their agreement is usually on the buyer’s or the seller’s printed form; their sale is on credit; and their relationship has just begun.

\textit{Id.} at 475-76.

\cite{144}. \textit{U.C.C.} § 2-102 (1990).
one shot contracts for the sale of goods on the one hand and long term contracts for the sale of goods on the other.

Like collective bargaining agreements, long-term contracts for the sale of goods are made in an attempt to secure a commercial relationship of extended duration. One prevalent example of a long-term contract for the sale of goods occurs in the natural gas industry. Typically, a local natural gas distributor agrees to buy all of its requirements from a single supplier for a period of several years. In this situation, the local distributor will forego the opportunity to buy gas at the lowest price available at any given time. However, in return, the distributor will be guaranteed an adequate supply of gas in the coming years.

A similar situation exists in the realm of collective bargaining. The employer enters into an exclusive relationship with a labor union and foregoes the opportunity to hire non-union labor at reduced compensation. In return, the employer receives certainty of an adequate supply of qualified and productive labor. In both long-term contracts for the sale of goods and collective bargaining agreements there exists an attempt to foster an on-going contractual relationship. Notwithstanding the typical one-shot contract for the sale of goods, a genuine analogy may be drawn between long-term contracts for the sale of goods under the UCC and collective bargaining agreements.

2. Flexibility of Contracts for the Sale of Goods and Collective Bargaining Agreements

A comparison of long-term contracts for the sale of goods and
Collective bargaining agreements reveal a common theme of flexibility. The parties to a CBA seek to maintain a productive and cooperative relationship with indefinite breadth. Likewise, Article 2 offers a flexible framework to buyers and sellers of goods based in the reality of modern commercial transactions.

Modification of a contract for the sale of goods provides an excellent example of the Code’s implicit flexibility. In view of the realities of commercial transactions, section 2-209(1) of the UCC removed the requirement of consideration in modifying a contract for the sale of goods. The framers of Article 2 recognized that a degree of flexibility was essential, and that the day-to-day realities of transactions in goods required a departure from the traditional common law view of consideration. The following section 2-209 explains that “[t]his section seeks to protect


150. Of course, one of the fundamental precepts of contract law is that consideration is required for the formation of an enforceable contract as well as any subsequent modification or agreement. John D. Calamari & Joseph M. Perillo, Contracts 185-87 (3d ed. 1987). See also United States v. Stump Home Specialties Mfg., Inc., 905 F.2d 1117, 1121 (7th Cir. 1990); Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280, 1285 (7th Cir. 1986).

151. U.C.C. § 2-209, cmt. 1 (1990) (“This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments.”). See also, 1 Thomas M. Quinn, Quinn’s Uniform Commercial Code Commentary and Law Digest ¶ 2-209 [A][1] (2d ed. 1991).

Modification of a sales contract is a common event. Indeed, multiple modifications of the same contract are not uncommon. Change is a fact of life. Less common but no less important is rescission of the contract. That, too, is often a fact of commercial life. Section 2-209 assumes the validity of both such events and seeks to facilitate the process.

Id.

152. 2 Hawkland, supra note 140, § 2-209:02 at 203 (1992). As Professor Hawkland explained, “[s]ection 2-209 has three main objectives. First, in accordance with the Code’s policy of preserving flexibility of commercial contracts, it validates modifications of sales contracts that are made in good faith, even though those modifications are not supported by consideration.” Id.

See also, Robert A. Hillman, Standards for Revising Article 2 of the U.C.C.: The NOM Clause Model, 35 WM. & MARY L. REV. 1509 (1994). Professor Hillman opined:

Through the use of standards such as commercial reasonableness, unconscionability, and good faith, Article 2 in large measure appears to have accomplished Karl Llewellyn’s goal of drafting sales law that reflects societal customs and traditions and adjusts to evolving commercial practices, but still provides a framework of rules to govern commercial relationships.

Id. at 1515 (citations omitted).
and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments."

In both collective bargaining and the sale of goods, agreements are continuously altered without a quid pro quo exchange of consideration on every point. Pursuant to section 2-209, parties to a sale of goods may adjust the terms of their agreement for their own mutual benefit, without considering whether they have satisfied the formalistic requirement of consideration. Analogously, consideration plays a unique and reduced role in the common law of collective bargaining agreements. At least two United States Courts of Appeals have held that consideration is not required to render a CBA enforceable. In both contexts, the law has sought to support economic reality instead of forcing rigid contract doctrine upon an incompatible situation.

Consider the following example. A and B are parties to an agreement. B asks A for a modification that will bring no additional costs or inconvenience to A. A agrees to the modification, but B offers no additional consideration to support her side of the bargain. The law seeks to support the everyday realities of business by enforcing such modifications even in the absence of fresh consideration. This example could apply to a sale of goods where the buyer asks the seller to deliver the specified goods three days earlier than agreed, or to a situation where the union requests that an employee's daily coffee break be moved from 9:00 a.m. to 9:30 a.m.

In view of the similarities that exist between contracts for the sale of goods and collective bargaining agreements, the Martinsville court was justified in relying upon the provisions of Article 2. The problem with the majority opinion is that it did not go far enough. The Martinsville court advocated the enforcement of NOM clauses within CBAs by arguing that the UCC holds such clauses enforceable. However, the provision for the enforceability of NOM clauses is not a per se rule under the UCC. A better reasoned result could have been obtained if the Martinsville majority had embraced the subtleties of section 2-209 and applied them to the special challenges presented by collective bargaining.

154. Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996, 597 F.2d 1269, 1271 (9th Cir. 1979); Darnel v. East, 573 F.2d 534, 537 (8th Cir. 1978).
C. The Limited Role of No-Oral-Modification Clauses Within the Uniform Commercial Code

An exchange of consideration between two parties often operates as evidence of an agreement between those parties. When the UCC dispensed with the requirement of consideration in modifying a contract for the sale of goods, an effective safeguard against fabrication was lost. Freed from the requirement of consideration, parties could accuse each other of breach of some alleged modification, and the court would then be faced with little more than a swearing match. To avoid this difficult problem, section 2-209 of the UCC provides for the enforceability of NOM clauses within contracts for the sale of goods. The parties to a contract for the sale of goods, by inserting a NOM clause into their agreement, may prevent the enforcement of a completely fabricated modification.

The Martinsville court, in arguing in favor of the enforceability of NOM clauses, ignored the true function of section 2-209(2) within the UCC. As comment three to section 2-209 explains, "[s]ubsections (2) and (3) are intended to protect against false allegations, whereas the no-modification-unless-in-writing term makes good sense, because the parties ought to have some means of providing a substitute for the cautionary and evidentiary function that the requirement of consideration provides; and the means chosen was to allow them to exclude oral modifications [under 2-209(2)]."
gations of oral modifications."160 In other words, section 2-209(2) permits parties to erect their own Statute of Frauds. However, when courts are presented with alternative assurances that a modification was actually made by the parties, then there is very little to recommend the enforceability of a NOM clause.161 Indeed, within section 2-209, there is evidence that the enforceability of a NOM clause is not as hard and fast a rule as the Martinsville majority would have us believe.162

It appears that the Martinsville majority distorted the letter and spirit of Article 2 of the UCC by ignoring the delicate balance between section 2-209(2) and section 2-209(4). The majority reasoned that section 2-209(2) provides for the strict enforcement of NOM clauses.163 However, section 2-209(4) provides that attempts at modification or rescission, which do not satisfy the requirements of the NOM clause, may operate as a waiver.164 The Official Comment states: "[s]ubsection (4) is intended, despite the provisions of subsections (2) and (3), to prevent contractual provisions excluding modification except by a signed writing from limiting in other respects the legal effect of the parties' actual later conduct."165 The Martinsville majority did not discuss the clear tension between sections 2-209(2) and 2-209(4) of the UCC, but based its endorsement of the UCC approach entirely upon the strong language of section 2-209(2).166 In selectively quoting the language of section 2-209(2), the majority distorted the operation of section 2-209 specifically and the spirit of the UCC in general.167

Assuming for a moment that the principles of section 2-209 of the UCC were applied to collective bargaining agreements, the reasoning of the Court of Appeals for the District of Columbia would play out as follows. In the Martinsville case, the Company argued that the written terms of the CBA did not provide Union representatives with the freedom to pursue Union business without permis-

160. U.C.C. § 2-209 cmt. 3.
161. Rothermel, supra note 157, at 1243.
162. U.C.C. § 2-209(4) and cmt. 4.
164. U.C.C. § 2-209(4).
165. U.C.C. § 2-209 cmt. 4.
166. Martinsville, 969 F.2d at 1267.
167. See Rothermel, supra note 157, at 1240 n.3 ("[A]lthough the Code's drafters effected a complete reversal of the common law rule by recognizing the validity of NOM clauses, they softened the reversal by adding the waiver provision of § 2-209(4).") (citing E. FARNSWORTH, CONTRACTS § 7.6 at 476 (1982)).
sion from management. Under the principles of section 2-209(2) and in the face of the CBA's zipper clause, the practices that had developed at the plant could not be viewed as an enforceable modification.\textsuperscript{168} A strong argument could be made, however, that the Company, in failing to object to the practices of the Union representatives, acquiesced to those practices. Thus, under UCC theory, it could be argued that such Company acquiescence operated as a waiver under section 2-209(4).

There are similarities that exist between the \textit{Martinsville} case and the facts surrounding a typical transaction in goods. The parties in \textit{Martinsville} did not argue that there was a modification of their written agreement supported by fresh consideration. Practices had developed at the plant where Union representatives received greater latitude in pursuing Union business on Company time. There is no evidence, however, that the Union or the employees offered any consideration in return for the representatives' newfound freedoms. If the Union had been able to show some evidence of consideration, then the court would have received some assurance that the CBA had actually been modified.

Additionally, the alleged modification of the CBA was not evidenced by a writing. Indeed, this was the main issue in the case. Within the UCC, the NOM clause plays an evidentiary role that replaces the assurances typically provided by an exchange of consideration. If some other evidence of a bona fide modification is provided, however, the function of the NOM clause is discharged. When a NOM clause ceases to serve a function, there is no rational reason for courts to enforce it.\textsuperscript{169} The difficulty with the \textit{Martinsville} opinion is that it appears to require that there be a writing for the sake of having a writing. This reasoning, however, is not derived from the principles of the UCC.

\textsuperscript{168} U.C.C. § 2-209(2).

\textsuperscript{169} Karl N. Llewellyn, speaking as an advocate of legal realism, stated the following:

And those involved are folk of modest ideals. They want law to deal, they themselves want to deal, with things, with people, with tangibles, with \textit{definite} tangibles, and \textit{observable} relations between definite tangibles — not with words alone; when law deals with words, they want the words to represent tangibles which can be got at beneath the words, and observable relations between those tangibles. They want to check ideas, and rules, and formulas by facts, to keep them close to facts. They view rules, they view law, as means to ends; as only means to ends; as having meaning only insofar as they are means to ends.

D. A More Complete Application of Section 2-209 Yields a Pragmatic Solution

The Court of Appeals for the District of Columbia remanded the case to the NLRB to determine if the contested practice was actually an implementation of the written terms of the CBA.170 The court then offered one possible interpretation of the facts that would permit the CBA and the parties' course of performance to be viewed as consistent.171 The strength of this position, however, is questionable, especially because both the Administrative Law Judge and the NLRB found the behavior of Union officials to be clearly inconsistent with the written terms of the CBA.172

In holding the zipper clause of the CBA enforceable, the court left no function for the parties' course of performance beyond that of defining the written terms.173 A better-reasoned conclusion would have allowed the parties' course of performance to play a more substantial role. In the dynamic realm of collective bargaining, interpretation of relationships and agreements cannot be driven by the formality of a NOM clause. Indeed, it is possible that a practice developed at the facility, which was contrary to the written terms of the CBA but nevertheless was met with acquiescence. The day-to-day reality of the parties' activities should not be ignored simply because their CBA contains a zipper clause.174 Nor should the courts manipulate facts in an attempt to find harmony with the explicit terms of a contract.

Following the principles of Article 2,175 the Martinsville major-

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170. Martinsville, 969 F.2d at 1270.
171. See supra notes 97-98 and accompanying text.
172. Martinsville, 969 F.2d at 1269.
173. Id.
174. Id. at 1271.

[Union and management may informally agree over an extended period of time to allow seemingly innocuous practices that are not covered in the contract to become part of the settled expectations of the parties, without going through the formality of amending the contract. It may then be downright disruptive to the parties' bargaining relations to prevent these firmly established expectations from being enforced as part of the agreement.

Id. (Wald, J., dissenting).

175. Karl N. Llewellyn rejected the mechanical application of black-letter rules. As the driving force behind Article 2, Professor Llewellyn sought rules which embraced the facts and realities of individual situations. Professor Wiseman described Llewellyn's view as follows:

Faced with rules that no longer fit the facts of sales transactions, the courts in some cases "construed" the facts in ways that bore no relation to reality but instead fit the rule. In so doing, courts preserved the rule without addressing what Llewellyn called the "felt needs" of the case. Alternatively, courts en-
ity should have examined the parties' course of performance to determine if certain provisions of the CBA had been waived. Such an analysis would have allowed the parties' course of performance to play a more genuine and realistic role in interpreting what had actually transpired between the Union and the Company. If the parties' actions could be viewed as an attempt at modification or rescission of the written CBA, then the court should have held that the NOM clause had been waived.

It is here that the tension between sections 2-209(2) and 2-209(4) comes into full play. The former holds that NOM clauses are to be enforced, while the latter provides that conduct which does not meet the requirements of section 2-209(2) may, nonetheless, operate as a waiver. As one commentator has noted, "[s]ome courts and commentators have hurriedly concluded that this waiver provision emasculates the no oral modification provision because a party could always claim a waiver of the NOM clause."

176. Of course, common sense dictates that such a conclusion is without merit. One cannot reasonably argue that the effect of one provision of the UCC is abrogated by another provision two sentences later.177

A more thorough analysis of Article 2 reveals that these two sections can operate consistently and effectively. It may be forcefully argued that section 2-209(2), when read in conjunction with section 2-209(4), only bars "mere oral assertions of an oral modification."178 In the face of a contract containing a NOM clause, no

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176. Rothermel, supra note 157, at 1241.
177. Id. at 1248. See also, Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280, 1286 (7th Cir. 1986).
178. Rothermel, supra note 157, at 1243. See also, Wisconsin Knife Works, 781 F.2d at 1286 ("Whether called modification or waiver, what National Metal Crafters is seeking to do is to nullify a key term other than by a signed writing. If it can get away with this merely by testimony about an oral modification, section 2-209(2) becomes
party may allege that the contract has been modified without offering some supporting evidence. If a party is able to offer some evidence that provides a safeguard against fraud or fabrication, then the court should consider whether some portion of the written agreement has been waived. In this way, courts may guard against frivolous litigation based solely upon fabricated claims. At the same time, the flexibility required by the realities of industrial-labor relations will be retained.

Section 2-208 of the UCC, which governs the role of parties’ course of performance in contracts for the sale of goods, lends support to this interpretation. The comment under section 2-208 provides that:

Where it is difficult to determine whether a particular act merely sheds light on the meaning of the agreement or represents a waiver of a term of the agreement, the preference is in favor of “waiver” whenever such construction . . . is needed to preserve the flexible character of commercial contracts and to prevent surprise or other hardship.179

The UCC seeks to support the realities of commercial transactions as evidenced by the behavior of the parties. If an act by one party is met with acquiescence by another party on ten separate occasions, this course of performance should not be ignored simply because the parties’ contract contains a NOM clause. On the other hand, inadvertence should not be mistaken for acquiescence.

Instead of relying upon the boilerplate language of the CBA’s zipper clause, the Martinsville court should have completed its UCC analysis by employing the provisions of section 2-209(5). Section 2-209(5) provides that:

A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.180

In Martinsville, the CBA explicitly required that Union representatives obtain permission before leaving their production posts to

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pursue Union business. For a period of several years, however, the Company did not enforce this requirement. Under the principles of section 2-209, such acquiescence on the part of the Company should be viewed as a waiver of the permission requirement. However, section 2-209(5) allows a party to retract its waiver in the absence of detrimental reliance. The language of section 2-209(5) appears particularly applicable in this situation, in that the NLRB found that the Company merely attempted "to return to the written terms of the agreement."^{181}

In the instant case, the Court of Appeals for the District of Columbia should not have remanded the case to the NLRB to determine if the parties' course of performance was simply an implementation of the terms of the written agreement. Instead, the parties' actions should have been examined to determine if the permission requirement of the CBA had been waived. Further, if a waiver was found, the court should have reviewed the actions of the Union to determine if it detrimentally relied on the waiver. Did the Union representatives fail to make demands for increased freedoms, believing that they had already obtained them? Did the Union pursue compensation increases less vigorously in the belief that it had won a victory in another area? Did the Union fail to designate an adequate number of Union representatives in the belief that the existing number were free to pursue Union business up to forty hours per week? In the absence of such reliance, the Company should be permitted to retract its waiver and return to the written terms of the agreement.

**CONCLUSION**

Flexibility is the hallmark of collective bargaining agreements. In view of this, the *Martinsville* majority's formalistic dependence upon a zipper clause is unsatisfying. Further, a selective reliance upon section 2-209(2) of the Uniform Commercial Code, holding NOM clauses to be enforceable, is not the proper solution to the issue presented.

The *Martinsville* court should have developed its Code analysis more fully. Section 2-209(2) is not simply a black-letter rule which holds NOM clauses enforceable. Instead, it is one fragment of a statutory construct. To remove section 2-209(2) from the context of its surrounding provisions distorts both the part and the whole.

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Properly understood, Article 2 provides a set of flexible rules which embrace the realities of commercial transactions. When the Code is viewed in this manner, the application of UCC principles to a collective bargaining dispute seems more obvious than foolish.

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