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Book Review

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Book Review

DRAFTING A UNION CONTRACT. By LeRoy Marceau. Boston & Toronto: Little, Brown & Company, 1965. Pp. 321. \$12.50.

This book is intended to instruct not only lawyers, but also union representatives, company industrial relations men, trade association staff members and lay consultants, in the secrets of drafting an ideal collective bargaining agreement ("union contract"). The book is concerned only with form, regardless of contractual undertakings. The ideal union contract envisioned would accurately state the agreement of the parties in simple, understandable language, would be subject to only one possible interpretation, and would be adaptable to changing conditions. It would give rise to few disputes.

The sorry fact is that many union contracts are, in Mr. Marceau's words, "trackless jungles." This is the first guide to remedying this lamentable condition. A "how to do it" book such as this, however, must be judged not by its novelty, but by its utility.

Chapters dealing with style, choice of words, simplification, statement of rules, and clarification of meaning provide numerous worthwhile suggestions. The need for internal consistency is stressed, and common errors in usage, such as the redundant "force and effect," "null and void," and "terms and conditions," are briefly demonstrated. Some frequently overlooked refinements in the use of "shall" or "will" and "may" or "can" and in the ambiguous phrase "no employee shall . . ." are explained. The illustrations are pertinent to union contracts, but none of the rules covered seems unique to such contracts. More exhaustive treatment can be found in less specialized works on legal drafting or English usage.

Mr. Marceau's discussion of procedural and mechanical details will interest only the novice. These include steps such as presentation of questions to the policymaker and circulation of the draft for comment, techniques such as double or triple spacing and retyping of revised sheets which are becoming illegible, and reading aids such as topical headings, tabs, table of contents and index.

Mr. Marceau's major contribution might be expected to be in his suggestions on specific contract clauses. Slightly more than half the book is devoted to the drafting of typical provisions, such as coverage, term, right to manage, union recognition, check-off of dues, seniority, schedules, promotion, layoff, transfer, termination, rates of pay, grievance procedure, arbitration, and strikes. These sections enumerate items to be covered in such provisions, explain their operation, and suggest alternative ways of treating them. The section on grievance procedures, for example, explains what a grievance is and sets forth a checklist of questions for the draftsman: who can file a grievance, with whom, how, what are the time limits, what is the penalty for failure to file, etc.

A distracting academic odor, however, pervades these chapters. Since Mr.

Marceau is not concerned with substance, he tries to deal abstractly with highly controversial provisions. To do so, he introduces a number of strange general concepts. Frequently, he combines several of these concepts, such as "dimension of employment," "place of employment," and "incumbency," in erudite discourse that must be read (and reread) to be appreciated:

The parties will often want an employee working in one place to stop working there and start working in a different place in the same dimension of employment. In order to start working in the different place, the employee must become an incumbent of the different place, and, since both places are in the same dimension of employment, the new incumbency will be 'comparable' to the old one. But what will happen to the old incumbency when the new incumbency begins? It would be possible to say in the contract that the old incumbency will end—that is, to set forth a general rule saying that an incumbency ends whenever a new comparable incumbency begins. Some contracts say that. But most parties prefer not to say that. They foresee that the new incumbency will end, and that they will then want the employee to be working once again in the old incumbency. They could, of course, create a new third incumbency, exactly like the first incumbency, when the second incumbency ends; but they find it simpler to say that the first incumbency continues to exist—even after the second incumbency begins—so that the first incumbency will be standing when the second incumbency ends.¹

If Mr. Marceau is saying that an employee transferred to a new classification, department, or shift may retain certain rights in his former location, he certainly has done it the hard way.

Draftsmen looking for alternatives to boilerplate might find some ideas in this book. It does not provide model clauses, but the illustrations and suggestions adopt a mode of expression foreign to that normally used in collective bargaining with the major industrial unions. A section headed "Separate Drives to Resolve a Single Dispute" suggests a typically esoteric passage: "A party becomes 'debarred' from initiating any new drive to resolve a particular dispute when . . ."² While a fresh approach to union contract language may be desirable, a fledgling draftsman who resorts to phrasing such as this in the seclusion of the drafting room may be in for a shock at the bargaining table.

Union representatives are extremely wary of aberrant wording. They are generally even less receptive to clauses intended to spell out duties of employees or the union, such as the following:

1. Each covered employee shall do his duty.
2. 'Do his duty' means make a reasonable effort to perform his employee functions, except that while the Union is striking and the employee is not on Company property . . .
3. 'Perform his employee functions' presumptively means
 - At his starting time, be ready to start at his starting place,
 - While he is on duty, perform whichever proper task the proper supervisor imposes,

1. MARCEAU, DRAFTING A UNION CONTRACT 136 (1965).

2. *Id.* at 233.

- While he is released from duty, engage in the activity for which he is released, and
- At all times refrain from committing any prohibited act.³

An equally questionable clause is suggested to clarify certain rights of the employer: "The Employer can decide in good faith what sound practice requires in any situation."⁴

In most bargaining situations, clauses of this type would prove to be a futile, if not dangerous, drafting exercise. They illustrate a serious flaw in the book—the failure to recognize the importance of phraseology in obtaining acceptance of the draft by the adverse party. This is one of the underlying causes of many of the drafting defects in existing union contracts. Unfortunately, ambiguity and imperfection are frequently the price of agreement.

To avoid getting too far out of touch with reality, the draftsman might also consult a volume of sample clauses and a few union contracts actually agreed to by the adverse party and others in the industry or area. While this time-honored approach to drafting involves some danger of perpetuating error and adoption of inappropriate clauses, suggestions could have been made for minimizing these risks. Mr. Marceau apparently feels that his book will make the use of such models obsolete. In the opinion of this reviewer, it will not.

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3. *Id.* at 188-89.

4. *Id.* at 258.

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