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DRAFTING OF GRIEVANCE AND ARBITRATION ARTICLES OF COLLECTIVE BARGAINING AGREEMENTS

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When the parties to collective bargaining negotiations formulate the provisions of their contract relating to grievances and arbitration, they are establishing the basic system of private administrative law that will govern the plant community for the period of the agreement. This is obviously a task that involves more than mere words and phrases. The maturity of their relationship, their respective understandings of the place of collective bargaining in our industrial society, the size and nature of the plant, and innumerable other considerations will substantially influence the choice of language and procedures adopted in the framing of these provisions. Because of the interaction of these various considerations—many of them intangible—it is, of course, impossible to prescribe a single procedure or set of procedures which will be ideally suited to fit the needs of all collective bargaining situations. Recognizing, therefore, that it is impossible and even undesirable to suggest stereotyped or "model" contract provisions to cover the situation, it is the writer's purpose to suggest some of the common problems encountered in the course of the drafting of the grievance and arbitration provisions of collective bargaining agreements, to mention some of the factors involved in the consideration of these problems and to indicate and evaluate some of the more common types of provisions currently employed in typical contracts.

For purposes of analysis, and without becoming unduly academic, it may be said that the drafting problems arise in different forms at three stages of the collective bargaining process. In chronological order, these three problems are: (1) the definition to be accorded the term "grievance" which will identify the nature and types of disputes to be dealt with by the procedures established, (2) the grievance procedure itself, which determines and describes the methods by which the parties themselves will handle these disputes in an effort to effect satisfactory settlements without the intervention of outsiders, and (3) the arbitration provision, fixing and describing the method and procedures by which disputes, remaining unsettled after exhaustion of the grievance procedure, will be referred to arbitration for final and binding decision. These three different, but related, problems will be separately discussed in order.

I. The Definition of Grievances.

Although some collective bargaining agreements may still be found which provide that "all grievances" shall be handled through the

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grievance procedures of the contract, it must be recognized that the term thus broadly used is ambiguous. A "grievance," Webster tells us, is "A cause of uneasiness and complaint; a wrong; an injury." It is conceivable, therefore, that under a contract which fails to limit the term, all manner of complaints might be filed and efforts made to have them settled through the grievance procedure. These complaints might range from efforts on the part of the union to secure concessions it had been unable to obtain at the bargaining table to individual employee protests concerning the color used to paint the company's trucks. When complaints of these kinds are filed, the employer opposes the processing of the grievances on the ground that those of the first type were conclusively settled by the contract, and those in the second category fall within the broad realm of management prerogative. From all of this it becomes obvious that the term "grievance" must be more limited or circumscribed, and the problem of definition arises.

In seeking to arrive at a workable definition, the parties are concerned with an issue that involves more than a simple matter of terminology. The latitude accorded the meaning of the term "grievance" will, of course, determine the volume of business that will be transacted under the grievance procedure. More importantly, it will substantially influence the relationship of the parties since it will reflect their attitudes and philosophies concerning the extent to which matters of mutual importance should be openly discussed during the term of their agreement.

Traditionally, it has been the management view that "During the life of the contract the union's concern is to see that management, in its everyday operation of the plant, does not violate the contractual policy. The union's function can properly be considered to be that of 'watch dog,' in contrast to the management's function, which is to carry the responsibility as the 'acting' party for efficient operations. . . . The purpose of the grievance procedure is simply to provide a method whereby the union can obtain compliance with the contract itself."[1] In keeping with this thesis, management representatives have tended to insist that the term "grievance" be limited to complaints involving the interpretation or application of the provisions of the collective bargaining agreement.

Union spokesmen, on the other hand, have consistently opposed this position saying that "All grievances, whether real or fancied, reflect discontent and affect production and should be settled (through the grievance machinery, made applicable to them by broadly defining the term 'grievances'). Grievances which are banned find expression

1. Fairweather and Shaw, *Minimizing Disputes in Labor Contract Negotiations,* 12 LAW & CONTEMP. PROB. 297, 315-16 (1947).

in reduced morale, or have the curious trait of assuming the guise of admissible grievances . . . . The excluded and therefore unsettled grievance has the annoying characteristic of making itself known through a drop in efficiency, absenteeism, shutdown, controlled production, quit or turnover."[2] Pursuant to this thesis, union representatives have consistently sought to have the term "grievance" defined as broadly as possible, and have resisted management efforts to restrict it solely to disputes arising over interpretation of contractual provisions.

It should be noted that entirely independently of the contractual definition of the term "grievances," the duty to meet and negotiate disputes arising under the terms of a collective bargaining agreement is imposed by the language of section 8(d) of the Labor Management Relations Act[3] which reads in part as follows:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement, *or any question arising thereunder* . . . . (Emphasis supplied.)

In addition, the National Labor Relations Board has held that an employer, when so requested, has the duty, during the term of a collective bargaining agreement, to meet and bargain with representatives of his union on matters appropriate for collective bargaining despite the fact that the contract contains no provisions respecting the subject.[4]

Perhaps as a consequence of these legal developments, but more likely as a result of experience gained in the course of living with their grievance procedures, which has engendered a growing feeling of mutual trust and confidence, the parties have tended to compromise their extreme views as illustrated by the quotations set forth above from articles which appeared as recently as ten years ago. In the course of the writer's experience as an ad hoc arbitrator of labor-management grievances, he has observed a growing tendency in the course of collective bargaining for the parties' representatives to broaden the definition of "grievances," in the direction of embracing *all* disputes which arise during the period covered by the contract. This is not to say that management has subscribed completely to the union thesis previously quoted, but it does seem to bespeak an endorsement of the view therein advanced that some outlet for disgruntlement should be afforded in the fulfillment of the employer's

2. Katz, *Minimizing Disputes Through the Adjustment of Grievances,* 12 LAW & CONTEMP. PROB., 249, 259 (1947).
3. 61 STAT. 142 (1947), 29 U.S.C.A. 158(d) (1956).
4. Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951), *enforcement granted,* 196 F.2d 680 (2d Cir. 1952).

own enlightened self-interest. Management is still concerned over the prospect that complaints involving matters which it regards to be plainly within that vaguely defined, but nonetheless real, area of management prerogative, if allowed to be aired in the grievance procedures, may ultimately be referred to an arbitrator for final and binding decision. Employer representatives are understandably perturbed over the prospect that some third party stranger, unfamiliar with their problems, will, unless restrained, impose conditions upon the management which are not only unacceptable, but which, by hypothesis, were not even the subject matter of collective bargaining at the time the contract was adopted.

To protect against this hazard, and at the same time to open the gates of the grievance machinery to all complaints, employer representatives have insisted that the contractual definition of the term "grievances" be drawn to provide for two types or classes of "grievances." The one type, which may be designated the "first-class grievance," is, by definition, somewhat more narrow than the other. It may be restricted solely to disputes which arise over the interpretation or application of the terms of the agreement, or it may be expanded to cover other, specific cases. In any event, it is limited in scope, but the contract clearly provides that it shall receive the "red carpet" treatment; that is to say, it may be processed through the regular grievance machinery, and, if it remains unsettled at that point, referred to arbitration for final and binding decision. The other type or the "second-class" grievance embraces all other complaints that arise during the period covered by the contract. As to these, the contract provides that while the grievance procedure shall be available and used in attempts to solve them, if they remain unsettled at the conclusion of grievance negotiations, arbitration shall not be invoked in an effort at final settlement.

This compromise impresses the writer as a most encouraging development. That it is only a compromise is clearly demonstrated by the fact that neither of the traditional aims of the parties has been achieved. Management has obviously yielded and withdrawn from the position that the grievance machinery be restricted solely to those disputes involving interpretation or application of the provisions of the agreement. At the same time, the unions have yielded in their insistence that the contract make provision for the final settlement of all disputes which arise between the parties during the life of the agreement. This represents but a development in the process of collective bargaining. It has resulted from practical experience which has instilled mutual faith and confidence in the minds of representatives of both parties. It is but one facet of the total picture of labor-management relations which illustrates the growing maturity of the

institution of collective bargaining. There are few, if any, areas of the field of collective bargaining that are more important in the development of good labor-management relations than this one. The grievance definition compromise indicates acceptance of the fact that their mutual self interest requires a realistic treatment of the problem. To the extent that each accepts its responsibilities under the compromise and conducts negotiations in good faith, it may be expected that further developments will be forthcoming.

II. The Grievance Procedure.

Once the parties have decided the type of disputes which will be referred to the grievance procedure, it becomes necessary to spell out the method by which they will seek to adjust these complaints by negotiations between themselves without the intervention of outsiders. Traditionally, this has been done by creating a multi-step procedure pursuant to which successively higher echelons of management and union representatives participate in the discussions looking toward settlement. The number of steps or discussion-levels will vary, depending upon the size and nature of the plant or plants involved and the geographic situation presented. In a typical three-step grievance procedure the contract will provide for a first step meeting between the aggrieved employee (usually accompanied by his steward) and the foreman, and, in the event of an unsatisfactory settlement, a second step meeting between the union's grievance committee and the plant or divisional superintendent with a third step meeting between top union representatives and top management personnel. The representation on either side may vary with individual contracts, and it is frequently provided that grievances must be filed within a designated time after they occur. Similar time periods are prescribed for management to furnish answers to the union's complaints with a further limitation of time upon the union to seek to have the grievance processed at the next step. These variations upon representation, the time limits imposed, and other incidents of the typical grievance procedure are well known to persons familiar with the problem and because of the wide variations in individual cases calling for specialized handling of the issue, no attempt will be made here to treat all of the manifestations of the problem. They are adequately dealt with elsewhere.[5]

There is one aspect of the grievance procedure which, in the judgment of the writer, merits special mention here. Many observers

5. See Elkouri, How Arbitration Works 62-88 (1952); Lapp, Labor Arbitration 33-40 (1942); Updegraff and McCoy, Arbitration of Labor Disputes 52-54 (1946); Weiss and Hussey, *Grievance Procedure Under Collective Bargaining*, 63 Monthly Lab. Rev. 175 (1946).

have heretofore pointed out that sound, stable labor relations will be most effectively promoted if the representatives of each of the parties approach grievance negotiations with the attitude that they have a problem of mutual concern that must be solved, rather than a case to win. It has come to the writer's attention that there is an increasing tendency to utilize a device in the formulation of the grievance procedure which significantly encourages such an approach. This device is found in the use of informality at the first step of the procedure. Informality is injected by omitting any requirement that the grievance be reduced to writing. A formal written grievance is, of course, desirable, and even necessary where the complaint proceeds beyond the first step. Some permanent statement of the dispute must be made for the sake of the record to inform those representatives who will participate in the negotiations at the higher levels. Furthermore, there is always the possibility that in the course of complying with a requirement that the grievance be in writing, and seeking to state it in its simplest terms, the parties will discover that they have far less to quarrel about than they at first anticipated—or possibly nothing at all.

At the same time, however, there is an element of finality or irretrievability about a formal written grievance. The institution of saving face is not restricted to the orientals; it has its American counterpart in the industrial scene. If a worker or his foreman is required to "go on record" from the very first incident in the course of the grievance procedure, less opportunity is afforded for him to "back down" when subsequent investigation or disclosures by the other side show that he may have acted upon the basis of faulty information or a mistaken understanding of contractual obligation, than is the case where the contract calls for an informal meeting to discuss the matter. There is a natural, human tendency to stand behind that which one has documented and signed. Conversely, where the contract stipulates that the first step of the grievance procedure shall consist of an informal meeting of the parties without requiring them to commit themselves to documentation, there is a far greater likelihood that when erroneous assumptions of fact or contract interpretation are disclosed in the give and take of such discussions, the errant party will more readily concede his error and recant from his position.

Based upon a recognition of this human characteristic (or perhaps upon the basis of experience), parties to collective bargaining agreements are increasingly providing that the first step of their grievance machinery shall consist of an informal meeting between the parties' representatives. Only if and when this first step results in an unsatisfactory settlement, with the result that the grievance will be carried further, is the requirement imposed that the complaint be reduced to writing. It is impossible, of course, to estimate the extent to which

the informality of the procedure at this point results in the satisfactory settlement of disputes (a very substantial portion of all grievances are settled at the first step, whether they are required to be in writing or not). However, it is the writer's view, based upon discussions with both management and labor representatives using the informal technique, that it is a factor which contributes substantially to the improvement of the grievance procedure and does, in fact, result in the solution of a greater number of disputes.

III. The Arbitration Article.

Just as the grievance procedure affords an orderly method for negotiating the settlement of grievances which arise during the period covered by the agreement, the arbitration provision is inserted for the purpose of securing final and binding adjustment of those disputes which remain unsettled after the grievance procedure has been exhausted. Since arbitration is to be invoked only if the parties themselves have been unable to reach agreement, and their failure to do so might reasonably be expected to have strained amicable relations, it would appear logical to expect that they would spell out the procedure for the selection of the arbitrator and the handling of the case in considerable detail. Unfortunately, however, this has not always been the case. Numerous contracts were to be found a few short years ago which simply declared that unresolved grievances should be "referred to arbitration."

More recently, however, and perhaps as a result of unsatisfactory experience with such vaguely worded clauses, the parties have tended to be far more particular in their contractual explication of the arbitration process. In the course of a study of more than fourteen hundred contracts in effect in 1952 the Bureau of Labor Statistics discovered that eighty-nine percent of these agreements contained provisions relating to the arbitration of grievances.[6] Apparently all of these contracts spelled out the method by which the arbitrator would be selected, although thirty percent of them "failed to provide a predetermined means of breaking a deadlock over the selection of an arbitrator."[7] Eighty-two percent of the contracts studied fixed the scope of the arbitrator's jurisdiction, and three-fourths of them dealt with the compensation of the arbitrator and made provision for allocating the cost of the proceeding between the parties.

Various methods are commonly used for selecting the arbitrator. In a growing number of cases involving larger industries, it has become the practice to provide for a permanent arbitrator who is either

6. Moore and Nix, *Arbitration Provisions in Collective Agreements, 1952*, 76 Monthly Lab. Rev. 261 (1953).

7. *Id.* at 263.

named in the instrument itself or pursuant to a method of selection provided for in the agreement. More frequently, it is provided that arbitration will be on an ad hoc basis, pursuant to which the parties will request the American Arbitration Association, the Federal Mediation and Conciliation Service or some other governmental agency to appoint the arbitrator or to submit a list of the names of qualified arbitrators from which the parties will make their own selection. In the latter case, the contract usually provides for a panel of odd numbered names with the right of each party to alternately strike names until the name of a single person remains on the list who then is selected to serve.

One of the most significant facts disclosed by the Bureau of Labor Statistics study and confirmed by the writer's experience as an arbitrator is the persistence of the tripartite board in ad hoc labor arbitration. Forty-six percent of the contracts examined by the Bureau provided for ad hoc arbitration by tripartite boards consisting of representatives of management and the union appointed by the respective parties, together with a third or impartial member selected pursuant to one of the methods mentioned above. These agreements, while constituting forty-six percent of the contracts studied, represented only twenty-six percent of the employees covered by all of the agreements. Seventeen percent of the agreements, representing thirty-seven percent of the employees covered, provided for permanent arbitration machinery. Thirty percent of the contracts, applying to thirty-two percent of the employees covered, provided for ad hoc arbitration before sole arbitrators. The remaining seven percent of the agreements studied were either optional or not specific as to the form of arbitration machinery.

Returning to tripartitism, it is the writer's view that the policy, as presently administered, is of extreme dubiety. This opinion has been expressed by others.[8] Tripartitism in labor arbitration in its early nineteenth century origins was something far different from grievance arbitration under contemporary collective bargaining agreements. It was frequently invoked under statutes; the parties to the dispute did not themselves select the partisan representatives; it involved a considerable degree of mediation; and in most cases where it was truly arbitration, it consisted of the establishment of contract terms, not the adjudication of disputes under existing contracts.[9]

The persistence of tripartitism in present day grievance arbitration

8. COPELOF, MANAGEMENT-UNION ARBITRATION, 28-29 (1948); UPDEGRAFF AND McCOY, *op. cit. supra* note 5, at 27; Lesser, *Tripartite Boards or Single Arbitrators in Voluntary Labor Arbitration?*, 5 ARB. J. (n.s.) 276 (1950); Note, *The Use of Tripartite Boards in Labor, Commercial, and International Arbitration*, 68 HARV. L. REV. 293 (1954).

9. See WITTE, HISTORICAL SURVEY OF LABOR ARBITRATION 3-12 (Labor Relations Series, U. Pa. Press 1952); Note, *supra* note 8, at 294-96.

is probably due, in substantial measure, to the influence of the National War Labor Board of World War II, itself a tripartite body. It is generally acknowledged that the Board's policy of recommending the incorporation of grievance and arbitration procedures in contracts between parties appearing before it in dispute cases was largely instrumental in the widespread use of this process during the years which have ensued. Since modern grievance arbitration thus had its origins in the recommendations of a governmental agency which was itself tripartite in character, it was not unnatural for the parties, when drafting contracts incorporating these recommendations, to tend to emulate the form of the agency itself and to provide for tripartitism in their arbitration procedures.

However, the functions, powers and duties of the National War Labor Board which made tripartitism a desirable feature of that agency are substantially different from the role played by grievance arbitration of labor disputes arising under collective bargaining agreements. Furthermore, the method of selecting the representatives of the parties is materially different. War Labor Board members were selected and appointed by governmental officials, not by the parties to the very disputes pending before it. Thus, while the representatives were partisan in the sense that they represented labor or management, they were not the direct agents of the parties to the controversies to be decided. Tripartitism as it has developed in grievance arbitration contemplates the appointment of partisans who are usually direct representatives of the parties to the dispute.

In such a setting it is fairly obvious that the parties' representatives do not, and usually cannot, bring any substantial attitude of objectivity to the arbitration proceedings. In fact, in many cases they are not even expected to exercise any office other than that of a partisan advocate, dedicated to the task of seeing to it that their principal wins the case. Some contracts provide that prior to the selection of the third or so-called neutral member of the arbitration panel, the two arbitrators appointed by the parties shall meet and discuss the case for the purpose of seeking a settlement without the necessity of calling in the third party outsider. In many instances, the arbitrators appointed by the parties actually serve as the parties' advocates in the course of the arbitration hearing, presenting the case for the side they represent. In such a setting it is, of course, futile to pretend that there is any element of objectivity injected into the arbitration proceedings by the presence of representatives of the parties. It is frequently the practice in such cases for the parties to waive any contractual requirements relating to executive sessions of the arbitration panel and to stipuate that the decision and award of the impartial member shall constitute the decision and award of the panel and be

final and binding upon the parties. This may be done even where the contract expressly provides that a decision of a majority of the arbitrators is required. To the extent that contractual provisions relating to tripartitism are regularly and consistently waived, it would appear that the parties have long since abandoned the concept and have simply failed to get around to the business of reforming their contractual procedure. This is unquestionably true in many cases and is to be explained by the fact that other matters preoccupy their attention at contract negotiation time.

In some instances, however, even where the party-appointed arbitrators serve as advocates presenting the case at the hearing, there is insistence upon the contractual stipulation that the award must be made by a majority of the panel. This means that before the decision and award of the neutral arbitrator shall be binding upon the parties, he must secure the concurrence of at least one other member of the panel. Ordinarily this will impose no serious problem, for the neutral arbitrator will usually sustain the position of one side or the other and in such cases readily obtains the concurrence of that party's representative. In the relatively rare case, however, the neutral member of the panel finds that the true solution to the problem lies somewhere in between the two positions taken by the parties. If he is required to obtain the concurrence of at least one other member of the panel before his decision and award becomes effective, he must, in such a case, circulate his "tentative" award to the other two parties, seeking such concurrence. If it develops that neither of the parties' arbitrators will concur in the tentative award, the neutral member is confronted with a dilemma. If he persists in the view that his tentative award is the only position he can conscientiously take in the matter, no award can be made and the arbitration process will thus be frustrated by failing to accomplish the end for which it was designed. If, on the other hand, the neutral member feels that an award must be issued at any cost, in order that the arbitration process shall fulfill its function, he must obviously compromise the position he originally took and side with the views of the partisan arbitrator which, in his judgment, most closely reflect his own. Most arbitrators feel that they should not be required to face this dilemma. In a poll conducted among a selected group of outstanding arbitrators by the American Arbitration Association in 1946 it was found that only seventeen percent of them preferred tripartite boards whereas seventy-five percent favored the single arbitrator device.[10]

Defenders of tripartitism advance two principal arguments in support of its continued use. One of these arguments proceeds upon the thesis that the presence of the parties' representatives on the panel will

10. See Lesser, *supra* note 8, at 277.

assist the neutral member in arriving at an informed decision. It is said that in the course of their discussions, the partisan members may, by various ways, cast light upon the issues which the neutral member is unable to obtain in the course of the hearing. There are several answers to this argument. In the first place, as already indicated, the parties rarely meet in executive session and consequently this opportunity for broader enlightenment is not presented. But even in those cases where such sessions are held (or the views of the partisans are secured through correspondence), it is the experience of most neutral arbitrators that they do not benefit from the meetings or correspondence as indicated by the poll cited, above.

However, even if it be conceded that the parties' representatives may occasionally persuade the neutral member that the position he has taken in his tentative award is erroneous, the third member is, by this development, spared the necessity of facing the dilemma mentioned, because he is thus convinced that his tentative decision was incorrect and he does not have to compromise a position conscientiously taken.

The second argument of the proponents of tripartitism is that it prevents the neutral member from forcing a decision upon the parties which neither of them regards as acceptable. There is admittedly more force to this contention, and concededly the device of tripartitism does just this. But, the parties should realize that if they are unwilling to empower an arbitrator to force an unacceptable award upon them, they must also expect that on occasion the arbitration process will prove abortive and fail to produce settlement of cases. They must assume the risk of no settlement in those instances in which neither of the parties' arbitrators is willing to concur with the neutral member and the latter is unwilling to recede from a position which he conscientiously believes to be best suited to the case.

The writer is not prepared to say that the parties should abolish tripartitism. As an arbitrator he would prefer not to be confronted with the occasional dilemma which the system produces. Any arbitrator is reluctant to participate in a proceeding which fails to produce its intended result, but no arbitrator should feel compelled to abandon a position which he has conscientiously taken after careful study of all the relevant evidence and argument in a case. The determination to retain or abandon tripartitism should be made in the light of the problem it poses as herein discussed, but it should also be made in view of the parties' basic conception of the role that arbitration is to play in their total relationship. If they contemplate arbitration as a basically judicial process for settling their disputes, tripartitism seems to interfere with that objective. If, on the other hand, arbitra-

tion is regarded as an extension of the collective bargaining process, then the retention and use of tripartitism would seem to be eminently justified.

CONCLUSION

In this brief review of the problems encountered in the course of the drafting of the grievance and arbitration provisions of collective bargaining agreements we have seen that the parties are dealing with a dynamic subject. Underlying the formalism of language employed in the drafting of these provisions numerous forces are at work, reflecting the experience and philosophies of the parties themselves. To the extent that experience inspires mutual trust and confidence, the parties have been willing to make alterations in the form and substance of their contractual procedures. This has been reflected in the growing tendency to broaden the definition of the term "grievances," in the employment of informality in the grievance procedure itself, and finally in the gradual tendency to abandon tripartitism in the arbitration procedure which results in a relinquishment of party control over the process. Other observers might be expected to comment upon other aspects of the problem, for it must be conceded that growth and development in this area has not been restricted to the matters herein mentioned. The significant fact is that the process is constantly undergoing change, and may be expected to continue to change in the future just as it has changed in the recent past.