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National Labor Relations Board

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THE NATURE OF A GRIEVANCE IN LABOR RELATIONS

GEORGE ROSE*

In labor relations, the relationship of the employer and employee is so constant and so close that frictions will inevitably arise which may thwart or destroy the beneficial character of this association. In an effort to stabilize these contacts, collective bargaining agreements are entered into, which set forth the rules which will govern this association for an agreed period of time. Under the Labor Management Relations Act,¹ the employer is required to negotiate such an agreement with the representative selected by a majority of his employees in the appropriate unit. This representative has the exclusive right to bargain and to agree on these rules in behalf of the employees. These rules are the common matters of collective bargaining.

Because of the intimacy and day-to-day character of this relationship and the variety of situations which may confront them, it is impossible for the parties to settle all matters or to forestall all disputes. Consequently, questions and differences arise from the interpretation, the application, and the performance of the contract which may constitute grievances, or may be matters of collective bargaining. Since the law permits individuals or groups of individuals to present their own grievances, but limits the negotiation of matters of collective bargaining exclusively to the majority representative, it is important to determine the nature of a grievance in contradistinction to collective bargaining.

Although the National Labor Relations Board has assumed to sponsor and protect the employee phase of this relation, the statute under which it operates gives no clear indication of what the word "grievance" was intended to mean. The word appears only in two sections in the National Labor Relations Act² and the LMRA, and in neither instance is it defined.³ In Section 2 (5), "grievances" are listed first among the six matters for which a labor organization exists to deal with employers.⁴ In Section 9 (a) it is stated:

Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other condi-

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1. 61 STAT. 136 (1947), 29 U.S.C. § 141 (Supp. 1950) (Taft-Hartley Act).

2. 49 STAT. 449 (1935), 29 U.S.C. § 151 (1946).

3. It is interesting to note that although both Acts had rather comprehensive definition sections, the drafters failed to define the word "grievance."

4. "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

GRIEVANCE IN LABOR RELATIONS

tions of employment; *Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect; Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.*⁵

Grievances are mentioned in the first proviso of this section as being matter which "any individual employee or a group of employees shall have the right to present at any time to their employer." They are omitted from the list in the body of Section 9 (a) as to which the designated representative shall be the exclusive representative, and by being separated by a proviso it is indicated that they are something apart from those matters to be handled exclusively by the majority representative. In neither section is there any intimation that grievances are the exclusive affair of the majority representative, but on the contrary, such a conclusion is unmistakably negated.

Congress had in mind the demarcation between collective bargaining and grievances, when drafting the NLRA, which provided for the establishment of the NLRB. Since grievances properly may be handled by the labor organization, Section 2 (5) included them in the list with collective bargaining activities. However, in Section 9 (a) of this same Act, as previously noted, Congress again distinguished the duties of the collective bargaining representative, by setting them forth in the body of the section, and stating that the majority representative shall be the exclusive representative as to these matters. Then apparently for emphasis, Congress separated grievances by a proviso from the rest of the section, making clear the intent that the right of the individual or groups of individuals to present grievances to their employer was not to be absorbed in the rights of the exclusive representative, but was something retained to the individual.

Thus, Section 9 (a), if properly administered, establishes a system of self-government where the representative selected by the majority of the employees in an appropriate bargaining unit "shall be the exclusive representative . . . for the purpose of collective bargaining as to rates of pay, wages, hours of employment or other conditions of employment." This means that all matters as to collective bargaining which arise between the employer and the employees as a unit are to be funnelled through the union or such representative as the majority of the employees have chosen.

The proviso at the end of Section 9 (a) saves a place for the individual in the pattern of uniformity required by the body of Section 9 (a). It might be characterized as a "Bill of Rights," since it preserves to the individual and

5. Italicized portion added by Taft-Hartley Act.

the minority the right to voice his or their protest, not alone as to the conduct of the employer (which view may be different from that of the majority), but also as to the union's conduct. Although the above provisions recognize and save to the individual his right to present his grievance, they do not indicate the nature and the scope of that right.

It was not until well into the twentieth century that the term "grievance" was used to describe a limited class of alleged disagreements or wrongs which an employee had suffered from his employer.⁶ The Esch-Cummings Act of February 28, 1920,⁷ which was enacted for the mediation of disputes between carriers and their employees, was the first major labor legislation which sought to distinguish the two types of disputes. Although failing to define the word, the language there employed reveals that Congress considered "grievances" as something apart from those matters to be handled by collective bargaining. Thus, Section 303 provided for the creation of Adjustment Boards to decide "any dispute involving only grievances, rules or working conditions, not decided as provided in Section 301, between the carrier and its employees." The implication is that "grievances" are distinct from matters of collective bargaining, since in Section 301 the Conference to be held between the parties is to settle "any dispute," (which would appear to apply to collective bargaining), while the matter to be submitted to the Adjustment Board includes "any dispute involving only grievances, rules, or working conditions."

In the amendments of June 21, 1934⁸ of the Railway Labor Act,⁹ it is set forth that the purpose of the Act is:

- (4) To provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions;
- (5) To provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions.

This section seeks to distinguish between disputes concerning rates of pay, rules, or working conditions, which are presumably matters of collective bargaining, and those disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, which at the present time are frequently included under the head of grievances. This differentiation between disputes arising out of grievances

6. The word "controversy" alone was employed previously to indicate both disputes as to collective bargaining and matters which today would be called "grievances." Perhaps this is largely due to the fact that prior to the Wilson Administration, 1913-21, the labor movement and enlightened labor policies were thwarted by the hostile attitude of employers. The condition of labor relations prior to this time rendered unnecessary the distinction between collective bargaining and grievances.

7. 41 STAT. 469 (1920), 49 U.S.C. § 78 (1946).

8. 48 STAT. 1185 (1934), 45 U.S.C. § 151 (1946).

9. 44 STAT. 577 (1926), 45 U.S.C. § 151 (1946).

and those arising out of the interpretation of agreements is confusing, although technically correct. It is only those in the second group which are properly called grievances; the first should not be given that status.

This intent of Congress to differentiate the two different types of disputes has been somewhat distorted by the decisions of the administrative bodies who have attempted to cope with these difficult problems. Even the NLRB, in determining who should present grievances, discussed only in passing what grievances are; and its decisions upon this right of presentation, until the passage of the amendments, confused this procedure with collective bargaining. This fact is evident from their language in *North American Aviation, Inc.*,¹⁰ where the Board stated that, "There is no distinct cleavage between collective bargaining and the settlement of grievances, whether individual or group."¹¹

The importance of this distinction between grievances and collective bargaining may not be immediately apparent, but it was most dramatically stated by Mr. Justice Jackson in his dissenting opinion in *Wallace Corporation v. NLRB*:¹²

The struggle of the unions for recognition and rights to bargain, and of workmen for the right to join without interference, seems to be culminating in a victory for labor forces. We appear now to be entering the phase of struggle to reconcile the rights of individuals and minorities with the power of those who control collective bargaining groups.

The interpretation which the NLRB gave to the proviso in Section 9 (a) of the Act does not "reconcile the rights of the individuals and minorities with the power of those who control the collective bargaining group," but instead it negatives the existence of these "rights of individuals and minorities."

While the majority governs through the contract, and by agreement with the employer, sets the rules or laws of the relationship, the individual or minority is entitled to bring his grievances to the employer, to have a hearing upon them, and have them settled, regardless of the position of the union. This is subject to the proviso of the amended Act that "the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect."

This misidentification of the grievance with collective bargaining by the NLRB was settled prior to the amendment of the law by the United States Supreme Court in *Elgin, Joliet & E. Ry. v. Burley*.¹³ There the collective representative had negotiated a settlement of a grievance with the employer with-

10. 44 N.L.R.B. 604 (1942).

11. *Id.* at 611.

12. 323 U.S. 248, 271 (1944), *rehearing denied*, 324 U.S. 885 (1945).

13. 325 U.S. 711 (1945). Although the case arose under the Railway Labor Act, it is nevertheless significant in this connection, since the court relied upon decisions relating to the NLRA.

out the participation or authorization of the individuals involved. The court held that there is a distinction between grievances and collective bargaining, and that the individual employee has the right to control the processing of his own grievances regardless of the existence of a collective bargaining agent among the employees. Mr. Justice Rutledge in distinguishing the two types of labor disputes, stated:

Congress has drawn major lines of difference between the two classes of controversy.

The first relates to disputes over the formation of collective agreements or efforts to secure them. . . . They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

The second class, however, contemplates the existence of a collective agreement already concluded. . . . The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case.¹⁴

The first class of disputes, as the Court pointed out, relate to the *formation* of collective agreements or efforts to secure them. The employer is obligated under the NLRA, as amended, to treat with the exclusive bargaining agent on these matters and with it alone, for to treat with individuals on these matters would be the "individual bargaining" which is prohibited according to the Supreme Court's decisions.¹⁵ Upon this point there can be no disagreement.

The second class was further described by the Supreme Court as follows:

The so-called minor disputes, on the other hand, involving grievances, affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality.¹⁶

These are the grievances which under the proviso in Section 9 (a) the individual employee or any group of employees is permitted to present to the employer, to negotiate¹⁷ and to settle because they are not matters which belong to the field of collective bargaining, and cannot justify any alteration of the collective bargaining agreement.

In contrast, the decisions of the National War Labor Board recognize, to a certain extent, the difference between "grievances" and matters for collective bargaining. Although these decisions have always lacked the status of decisions of the courts,¹⁸ or even that of the NLRB, the parties had little

14. *Id.* at 723.

15. *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Medo Photo Supply Co. v. NLRB*, 321 U.S. 678 (1944).

16. *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 724 (1945).

17. We use the word "negotiate" advisedly, as the court used it in *Wilson & Co. v. NLRB*, 115 F.2d 759 (8th Cir. 1940).

18. The decisions of the NWLB were not final determinations, but only advisory. *Employers Group of Motor Freight Carriers v. NWLB*, 143 F.2d 145 (D.C. Cir. 1944).

prospect of relief from their lack of technical finality. They do represent, however, the consideration of certain problems in industrial relations with recommendations, which at times may have been ill-advised or wrong, but yet which demand some recognition as being a discussion of such matters by a federal agency which was authorized to determine these questions.¹⁹ Although the Board was inconsistent in its attempt to handle the grievance problem, its decisions, nevertheless, throw some light on what is properly includable within the term. In *Sun Shipbuilding & Dry Dock Co.*,²⁰ the Board displayed admirable comprehension of the distinction. There it was ordered that:

In each case the arbitrator shall first determine whether the dispute is a grievance or a matter properly the subject of collective bargaining. If the arbitrator determines that the dispute is a matter properly the subject of collective bargaining, he shall dismiss the case. If the arbitrator determines that the dispute is a grievance, he shall decide how the grievance shall be settled.

On the other hand, in *Hollister Coil Spring Mfg. Co.*,²¹ the Board established an excessively broad policy on grievances by directing that the agreement be amended as follows:

The Company further agrees to negotiate with the accredited representative of said Union for the purpose of settling any disputes which may arise concerning wages, wage rates, working conditions, hours, dismissal, seniority rights, or discriminations and for the settlement of any dispute or grievance which may arise during the operation of this agreement.

This was indeed opening the flood gates, for it not only provided for a very broad consideration of matters which might properly be regarded as grievances but it went still farther by adding, "any dispute or grievance," without limitation.²² Moreover, by requiring the employer to negotiate with the union as to "any dispute or grievance" it might be construed as depriving the individual of his right to individually present his grievance. By such overtaxing of the

19. Under the Defense Production Act of 1950, 64 STAT. 798 (1950), 50 U.S.C. § 2121 (Supp. 1950), it was stated that Congress intended that "there be effective procedures for the settlement of labor disputes affecting national defense." This might be construed as an indication that the Wage Stabilization Board is to assume functions comparable to those exercised by the late NWLB.

20. N.W.L.B. No. 427, 3 WLR 404, 407, 408 (Oct. 1, 1942). See also *Winchester Repeating Arms*, N.W.L.B. No. 443, 6 WLR 359 (Feb. 5, 1943); *Baltimore Transit Co.*, N.W.L.B. No. 522, 4 WLR 363 (Nov. 18, 1942); *Acme Evans Milling Co.*, N.W.L.B. No. 584, 6 WLR 163 (Jan. 18, 1943).

21. N.W.L.B. No. 111-1771-D, 13 WLR 511, 513 (Jan. 4, 1944).

22. An agreement from the utility industry, *Consolidated Edison Co. of New York and Brotherhood of Consolidated Edison Employees*, providing that "It is the intent of the parties to this Contract that the procedures hereby established shall serve as the means for the prompt disposition and amicable settlement of such disputes, controversies and grievances as may arise between them or between the Company and any of its employees . . ." is also excessively liberal, in that it would allow the most trivial bickering to become a grievance if anyone was so minded.

grievance procedure, its effectiveness is reduced and much of its value is lost.²³ On the other hand, the NWLB, in *Montgomery Ward & Co.*²⁴ made a credible effort to define grievances both inclusively and exclusively. There the Board said:

Grievances within the meaning of the grievance procedure shall consist only of disputes about working conditions, about the interpretation and application of particular clauses of this agreement, and about alleged violations of the agreement, including alleged abuses of discretion by supervisors in the treatment of employees.²⁵

Then to clarify its position the Board set forth those things to be excluded from grievances:

Changes in general business practice, the opening or closing of new units, the choice of personnel (subject, however to the seniority provision), the choice of merchandise to be sold or other business questions of a like nature not having to do directly and primarily with the day-to-day life of the employees and their relations with their supervisors, shall not be the subject of grievances and shall not be arbitrable. If any question arises as to whether a particular dispute is or is not a grievance within the meaning of these provisions, the question may be taken up through the grievance procedure and determined if necessary by arbitration.²⁶

This definition is important because it sought to limit grievances to those matters arising under the contract, with the exception of "working conditions," which it apparently assumed would not be covered by the terms of the agreement. This at least marked the field and would eliminate many minor controversies which should be settled with the lower level of supervision and not be taken up with the higher echelons of management. The principal weakness is that "working conditions" is a rather vague and inclusive term, and should be limited to matters arising out of the contract.

In another case, the NWLB ordered that:

The term "grievance," as used in this agreement shall mean a complaint filed by an employee, a group of employees, or Union, alleging failure of Company to comply with some provision of this agreement, or a complaint filed by an employee or group of employees pertaining to working conditions.²⁷

This definition likewise assumes that working conditions are not covered by the contract. Moreover, it omitted interpretation or application of the agree-

23. In *Southern Aircraft Corp.*, N.W.L.B. No. 111-12882-D(8-D-379), 23 WLR 459, 461 (Mar. 13, 1945), the dissenting members of the Board stated that "[u]nder no circumstances should every employee gripe be elevated to the dignity of a formal grievance which must be carried through all steps of the grievance procedure, including arbitration."

24. N.W.L.B. No. 192, 4 WLR 277 (Nov. 5, 1942).

25. *Id.* at 280.

26. *Ibid.*

27. *Southern Aircraft Corp.*, N.W.L.B. No. 111-12882-D(8-D-379), 23 WLR 459, 460 (Mar. 13, 1945).

ment, speaking only of the failure of the company to comply with the agreement. Although it is usually the alleged violation which provokes the grievance, the question as to interpretation or application of the agreement may likewise give rise to an alleged grievance without a charge of failure on the part of the company. Hence, this omission is likely to mislead and does not achieve the aim of clarity as to what are grievances. Another contract ordered by the N.W.L.B. defined the limits more satisfactorily:

Any and all matters of dispute, difference, disagreement or controversy of any kind or character between the Union and the Employer involving or relating to wages, rates, hours, conditions of work, arising under the terms of this agreement, or any renewal thereof, including but limited to the interpretation, construction, and application of the terms of this agreement, shall be submitted to grievance procedure and arbitration.²⁸

The clause "arising under the terms of this agreement" restricted grievances to matters coming under the agreement. The final clause, "limited to the interpretation . . . of this agreement," made it doubly clear that there was to be no collective bargaining under the guise of a grievance.

It would seem that since neither the statutes nor the decisions have adequately defined "grievance," the parties to the collective bargaining agreement would provide in exact terms what should be embraced within the term. Unfortunately, this has generally not been the case. In their haste to set up the procedure by which the grievance will be processed, most of the agreements scarcely more than use the word. It is not uncommon to find such vague clauses as, "In case a grievance arises, it shall first be taken up. . . ."²⁹ or "When an employee has a grievance he shall first make an effort. . . ."³⁰ The unlimited use of such broad phrases may comprise a vast field of possible friction and misunderstanding. By such lack of restriction the contracting parties raise to the status of grievances, a vast number of petty matters, which neither party would probably have intended had they carefully considered the consequences and the burden it placed upon their relation.

Some companies refuse to permit the grievance machinery to be put into operation on any matter that could not *properly* be called a grievance. Such a

28. Anamosa Poultry & Egg Co., N.W.L.B. No. 111-5543-D, 18 WLR 353 (July 26, 1944).

29. General Electric Co. and United Electrical Workers—CIO.

30. Nazareth Cement Co. and United Cement Workers. Another agreement which is even more vague provided "Should an employee feel that he has been unjustly treated his grievance. . . ." There is absolutely no restriction on how or in what regard he may feel mistreated. See General Chemical Co., N.W.L.B. No. 267, 3 WLR 387 (9-18-42). Likewise, clauses such as "Any differences arising between the Company and the Union or its members. . . ." or "When an employee believes he has a grievance. . . ." show with what simplicity and complete lack of definition or specification the negotiators of many collective bargaining agreements have drawn up and agreed upon in these important instruments, covering such a multiplicity of matters.

rule may seem wise, but it would be extremely difficult to put into effect unless the negotiators more explicitly define a grievance. If the parties recognize that the prompt disposition of grievances, which is important in reducing their heat, becomes less probable with the enlargement of their numbers, they might take care to circumscribe the term in the collective agreement.

That a workable definition can be stated in the agreement is evidenced by the following clauses, which stated with considerable definitiveness exactly what should be included within the term:

For all purposes of this Contract, a "grievance" of employees is defined as a dispute or controversy between the Company and one or more of its employees, which (a) affects such employees in their work, pay, or relations with their employer; (b) arises under and by virtue of the provisions of this Contract as to wages, hours, working conditions, or the terms of his or their employment; and (c) involves the interpretation or application of such provisions to such employees, or an alleged violation of such provisions in respect of such employees or an alleged arbitrary action or abuse of discretion by supervisors in their treatment of such employees with respect to matters provided in this Contract.³¹

Grievances are limited to those categories named and provided for in the contract.

A grievance is defined as any difference between the Local Management and the Union or employees as to the interpretation or application of or compliance with this agreement respecting wages, hours or conditions of employment.

An employee who has a request or complaint which is not a grievance as defined above will be given an opportunity to take it up with his union steward . . . and his Foreman.³²

Some contracts provide that matters specifically covered by the agreement are not grievances. This is an understandable attempt to foreclose matters which are specifically provided for in the contract, in the view that such an attempt to have them considered would be to change the contract and to engage in collective bargaining.³³ This would prove ineffective, however, as there might be disagreements as to the application and interpretation of those matters specifically provided for in the agreement, and they would be proper grievances.

31. Consolidated Edison Co. of New York and Brotherhood of Consolidated Edison Employees.

32. Continental Can Co. and United Steel Workers of America. Another clause which is very explicit as to what a grievance does and does not cover, and makes certain that matters of collective bargaining cannot be processed as grievances stipulated that, "Grievances pertain only to the interpretation and application of Company rules and regulations, and the terms of this agreement. The grievance procedure outlined below does not apply to wage rates, modification of this agreement or negotiation of a new agreement." Globe-American Co. and Stone Mounters Union.

33. See Allis Chalmers Mfg. Co. and United Automobile Workers.

It is apparent that "grievance" is an unsatisfactory term to use for all disputes not coming within those matters for collective bargaining, for while some of the disputes bearing this label are substantial injuries or wrongs, many are merely problems, matters of adjustment, or uncertainty as to the meaning of sections of the collective bargaining agreement. Grievances, real or fancied, constitute the common basis for strikes, work stoppages, slow downs, poor morale and general dissatisfaction, and other conditions which cause the slowing up of production. Consequently there is a real and vital necessity of knowing what a "grievance" is.

TYPES OF GRIEVANCES WHICH MAY ARISE UNDER A COLLECTIVE BARGAINING AGREEMENT

When a contract is concluded, it means that the parties have agreed upon this instrument for their manner of living together. Wherein the terms of the agreement are explicit, there will be less uncertainty, but no contract can cover in detail all matters and all emergencies or incidents of as close a relationship as that of employer and employee. Consequently, there are bound to be differences in interpretation and application which, if they cannot be settled at once, become grievances and as such may become the focal point of agitation and unrest.

In a bulletin issued by the United States Department of Labor, entitled "Settling Plant Grievances,"³⁴ there were listed five kinds of employee grievances: (a) Wages, (b) Supervision, (c) Seniority, (d) General Working Conditions, and (e) Collective Bargaining. Although most of the better collective bargaining agreements provide for the first four classifications, the fifth, Collective Bargaining, under the concept of grievance as suggested in this paper, should definitely not be included. To make this more confusing, under (e), Collective Bargaining, are contained the sub-headings, (1) Violation of Contract, (2) Interpretation of Contract, and (3) Settlement of Grievances. These three elements might be involved in any grievance falling within the first four groupings, which would make heading (e) entirely superfluous. Another more serious objection to this latter classification is that these matters are not proper subjects of a grievance and it is doubtful whether the tactics employed by either side in the course of collective bargaining negotiations, could be processed as grievances. If the employer's or Union's conduct were improper, it might be made the subject of a charge to the NLRB, but that is quite different from saying that it could be processed as a grievance. The implication is inescapable that if such grievances were allowed, the terms of the contract might be altered, which is directly contrary to the existing law. The rulings of the NLRB make it clear that changes in

34. Bulletin No. 60, U.S. Dept. of Labor, Division of Labor Standards (1943).

the agreement may not be brought under the guise of grievances, as it would be an attempt at collective bargaining.³⁵

The writer would suggest a slightly different division of grievances from that proposed by the pamphlet noted above. It would include (1) Working Conditions, (2) Discharge, (3) Seniority, (4) Wages, Wage Rates, Classifications and Related Matters, (5) Supervision, and, under certain conditions, matters thought to be within the prerogatives of management.

1. *Working Conditions*

Disputes concerning working conditions are a frequent source of grievance, yet neither the legislatures nor the courts have been definite as to the meaning of this term. Some of the statutes have spoken of "conditions of employment" in one place, and in another place of "working conditions." In the early legislation these terms apparently covered all the conditions under which employees may work, including wages, hours and what is now regarded as working conditions. In Section 1 of "Findings and Policy" of the NLRA, "working conditions" is found twice and "terms and conditions of their employment" once. Throughout the remainder of the Act, variations of these two expressions appear interchangeable without any discernible distinction. The only conclusion to be drawn is that the two phrases mean the same thing. The courts made no attempt to define these terms until the case of *Vonnegut Machinery Co. v. Toledo Machine & Tool Co.*³⁶ There, in holding that a sympathetic strike was not a dispute concerning "terms and conditions of employment" within the meaning of the Clayton Act, the court went on to describe "conditions of employment" as "conditions to maintain health and self-respect," "sanitary and physical conditions controllable by the employer" and "proper environment."³⁷

35. Reynolds Metals Co., N.W.L.B. No. 193, 2 WLR 496 (Aug. 29, 1942).

36. 263 Fed. 192 (N.D. Ohio 1920).

37. In considering the scope of the language "terms and conditions of employment" the court said: "[we] should not attempt an inelastic definition. One should be given which would keep step with the advance in sentiment, as conditions change, to make good the very proper demand that the laboring man should receive consideration from his employer which will maintain his health and self-respect, and secure to him the full measure of the fruits of his toil, while preserving to him all those opportunities for social intercourse, and self-improvement which should be his to enjoy that he may realize his aspirations. But even a most liberal definition in this direction has its limitations. The mind, in considering the words 'terms and conditions of employment,' unconsciously, but directly, goes to a contemplation of such things as hours of labor, wages, classification of employees, sanitary and physical conditions controllable by the employer, opportunities for reasonable redress of grievances, and for bargaining respecting the conditions of employment, whether collectively, as enlightened public sentiment as well as convenience approves, or individually. . . . A certain line must be drawn somewhere. It surely is at the place where a man whose asset is his daily toil has guaranteed to him sufficient recompense and proper environment. Therefore no conceits or whims, or mere prejudices, of the employee, may be by him elevated to the dignity of terms and conditions of employment, to be protected in any degree by the statute in question, and thereby to become the basis for a demand under it of a discriminatory nature." *Id.* at 200, 201.

In *Underwood Elliott Fisher Co.*,³⁸ the N.W.L.B. construed "working conditions" to relate to the installation of safety appliances required or desired for particular operations, and to compliance with federal and state laws respecting safety and health regulations.

The phrase is usually disposed of in the collective bargaining agreements by such clauses as "the company will make fair and reasonable provision for the safety and health of its employees. . . ." ³⁹ Although such broad terms may be provocative of grievances, unless the particular industry involves exceptional hazards, any other course would involve great detail. Hence, this appears the easier way out as long as an excessive number of grievances do not arise.

The line between "working conditions" and other matters of grievance is not clearly drawn as the subjects merge and consequently are, at times, hard to distinguish. However, by examination of the decisions and the agreements themselves, one can obtain a detailed understanding as to what conditions the parties have come to regard as working conditions subject to the grievance procedure. They are usually matters of interpretation and application of the contract. Briefly summarizing, they require the provision of such protective equipment and clothing as is necessary;⁴⁰ of safety equipment;⁴¹ of shelter from the elements,⁴² as well as from dangerous or hazardous conditions in the plant or place of work;⁴³ of inspection of machinery by a competent mechanic to keep it in safe condition;⁴⁴ of sanitary conditions, including toilet facilities, light, air, heat, and eating facilities;⁴⁵ and of a ratio of one group of employees to another.⁴⁶ It may also restrict some of the duties. Of course, requirements of federal, state, and municipal health and safety regulations are automatically a part of these working conditions, for violation of which there is provided a stronger sanction than proceeding through the grievance procedure. In conclusion, it might be said that working conditions are the conditions obtaining in each industry necessary for efficient production and for safe labor by the employees.

2. Discharge

Discharges are customarily within the sole prerogative of the employer. Mr. Justice Roberts in *Associated Press v. NLRB*,⁴⁷ stated that the NLRB

38. N.W.L.B. No. 178, 3 WLR 476 (Oct. 2, 1942).

39. Link Belt Co. and United Steel Workers of America.

40. Calumet Steel Casings Corp. and United Steel Workers of America.

41. General Electric Co. and United Electrical Workers—CIO.

42. Consolidated Edison Co. of New York and Brotherhood of Consolidated Edison Employees.

43. Long Lake Lumber Co., N.W.L.B. No. WCLC 6, 12 WLR 352 (Aug. 13, 1943).

44. Coleman Stamp and Stove Co. and Coleman Employees Federation.

45. Pacific Coast Shipbuilding Corp. and Metal Trades Dept.—AFL.

46. Armour & Co. N.W.L.B. No. 111-6832-D, 20 WLR 440 (Nov. 15, 1944).

47. 301 U.S. 103, 132 (1937).

"does not compel the petitioner to employ anyone. . . . The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees." Mr. Chief Justice Hughes, in a companion case,⁴⁸ concluded that "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them."

These decisions do not protect the employee from a discharge, reasonable or arbitrary, if there is no union question involved. However, an employee during the years of working for an employer, acquires certain moral rights or claims, such as seniority, which are lost if he is fired. These seniority rights are recognized in collective bargaining agreements and tend to restrict this absolute right of the employer to discharge.⁴⁹ The right to file a grievance upon a discharge, therefore, becomes extremely important, not alone to the employee, but also to the good name of the employer. Whether or not such a right is specifically given by the contract, any employer who cares for his reputation for fairness, will be willing, in most cases, to recognize the possibility of a mistake or hasty judgment, and the desirability of permitting a grievance to be filed.

Immediate attention to such grievance is assured in a recent agreement in the automotive industry. Its urgency increases in a large plant with thousands of employees.

Any employee who has been disciplined by a lay off or a discharge may request the presence of the committeeman for his district to discuss the case with him in an office designated by the local Management, before he is required to leave the plant.

It is important that complaints regarding unjust or disciplinary lay offs or discharges be handled promptly according to the Grievance Procedure. Grievances must be filed within three working days of the lay off or discharge and the local Management will review and render a decision on the case within five working days of its receipt.⁵⁰

Whether such safeguards are necessary or are practical in the case of smaller companies is doubtful, but it is apparent that in corporations employing thousands of employees, new devices and new formalities are required to assure employees that their rights and claims receive adequate consideration with reasonable promptness, and are not pigeonholed down the line by officials who are delegated insufficient authority.

48. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

49. In *Arcade Malleable Iron Co.*, N.W.L.B. No. NDMB-84, 1 WLR 153, 162 (May 1, 1942), the Board ordered that "If a disciplined or discharged employee believes himself to have been unjustly dealt with, such case shall be adjusted under the procedure hereinafter provided for grievances." A typical agreement provides that "Upon discharge, all further rights or benefits of a discharged employee under this agreement shall cease and terminate, subject to reinstatement of such discharged employee pursuant to the provisions of the grievance procedure." By such a clause the aggrieved employee need only to file a grievance as in any other alleged violation of the contract.

50. *General Motors Corp. and United Automobile Workers.*

A number of contracts do not contain a special provision for discharge grievances, but it is the practice that they may be processed in accordance with the usual grievance procedure. Although there is no presumption that there has been a violation of the terms of the contract, the employer, as a matter of sound labor relations and in an attempt to remove any question that the discharge was unfair, is willing to make this concession. However, the union usually insists on such a section, setting forth the employees rights in such cases of discharge, for as previously noted, very valuable employee rights are at stake, and the union is ever fearful that discharges may be used to undermine its position. Moreover, since the employer's right to discharge is unlimited, except as to discriminatory discharges, the union seeks to put a restraint on this power by the right to process a grievance, based on the discharge.

In many agreements the grievance procedure is expedited for the handling of the grievance based on a discharge,⁵¹ or a definite time limit is prescribed for its disposal. This is an advantage to both the employee and the employer, for if the matter is settled while the recollection of the facts is fresh, a fairer decision may be arrived at, and if the decision is adverse to the employer, there will be less back-pay due.

3. *Seniority*

Being one of the aims for which workers have formed a union, the recognition of seniority is one of the most important subjects of collective bargaining. It represents rights to a job which a worker feels he has acquired through years of faithful service. Many employers have long recognized this right, without a union to present the claim. Most other employers, except possibly in industries employing unskilled labor, have used an informal seniority system for lay offs and rehires.

Seniority has been interpreted by the unions to mean primarily longevity of service, contending that it should only amount to the length of time that an employee has been in the employer's employment. The employer has always opposed such a construction since the oldest man in service may not be the "all-round" or the "key" individual needed when lay offs are necessary. Employers have insisted that something other than the length of service comprise seniority, such as ability, efficiency, and physical qualifications. This, likewise, has been fought by the unions, their argument being that it affords the opportunity to favor certain employees and disregard seniority with resulting injury to the union. The union may similarly make this objection to every provision which concedes the exercise of discretion by the employer, but the

51. The N.W.L.B. on May 17, 1945, issued a statement on disciplinary discharges to the effect that they should be processed as grievances, and if necessary, the grievance procedure should be shortened. 24 WLR XXIX (1945).

grievance procedure is available, if the employer is violating the contract.

Since management has the responsibility of operating the plant, it must have the discretion and authority to determine who are the most able.⁵² And since it is conceded that seniority is a valuable right, it is not surprising that it should be set forth in the collective bargaining agreement in considerable detail to insure its preservation.⁵³ An excellent provision is the following:

Seniority shall consist of length of unbroken service with the Employer. In order to exercise his Seniority, a regular Employee must first have (a) immediate ability to perform the job efficiently; and (b) physical and mental fitness in so far as it relates to capacity to do the job.⁵⁴

4. *Wages, Wage Rates, Classifications and Related Matters*

In the mind of the average worker, wages are the crux of the collective bargaining process. Therefore, the sections setting forth wage rates and ranges, and other matters related to wages are the part upon which the collective bargaining hinges and are frequently reserved until the end of the collective bargaining. If the negotiations on wages are not successful the tentative collective bargaining agreement generally falls and the union will endeavor to exercise its economic power to obtain satisfactory rates. The rights the worker has gained in the agreement, that is, the right to his job based on seniority, the safeguards he must have in proper working conditions, the protection from unjust discharge and the right to file grievances under certain conditions, too often seem comparatively insignificant beside the answer to the question as to how much of a raise he will receive. It is in this excessive emphasis upon the wage increasing power of the union, wherein lies one of the greatest weaknesses of unionism and collective bargaining. Until this is corrected the unions will not have the stability which they desire, and which the community demands.

These wage provisions are, of course, either embodied in the main part of the contract, or are attached as an annex, which may set forth the wage rates, the rate ranges, the labor grades, and the establishment of job classifications. Being a part of the contract, no grievance can be processed which seeks to

52. This discretion is granted in a clause providing that "On special skilled jobs qualifications of employee shall be given consideration in quality and ability as well as seniority."

53. The usual method of establishing seniority is for the employer to draw up and post a list of the employees, either by plant, or by department or by classification, whichever has been agreed upon as the paramount type of seniority. The employees names appear upon the list in order of the date of commencement of service with the employer. When this list is first prepared the persons appearing thereon are granted a certain period of time in which to examine the list and determine whether their names appear in proper order of service. If there is a question, or a mistake, the employee must file a grievance within the allotted time, or else the mistake will remain uncorrected, and the employee will lose his right to that position on the list.

54. Pierson Hollowell Co. and Upholsters International Union.

change these wage rates and classifications specifically established by the agreement, as this would be an attempt at collective bargaining.⁵⁵ However, disputes relating to the interpretation and application of these rates and classifications, and many related matters such as the qualification and eligibility of employees, may properly be taken up as grievances.

Although the establishment of job classifications and rate ranges were formerly considered to be the exclusive prerogative of management, with the increase in collective bargaining and under many of the decisions of the NWLB, these matters have commonly been subject to negotiation between the two parties. In fact, failure of the employer to bargain as to wage rates or related matters would be held by the NLRB to be a refusal to bargain,⁵⁶ which is an unfair labor practice. This grants to the union a veto power over rates and classifications and consequently a definite part in their final determination. If the parties reach an impasse after bona fide collective bargaining, then the employer may be in a position to put rates into effect temporarily, but always subject to the resuming of collective bargaining.

The NWLB directed that a multitude of matters relating to wages be processed through the grievance procedure. Questions of individual wage and classification adjustments,⁵⁷ inequities in wage or bonus payments⁵⁸ or within the wage rate structure,⁵⁹ alleged intra-plant inequities not involving changes in method or production standards,⁶⁰ automatic wage increases after designated beginning periods,⁶¹ merit increases,⁶² inequities under job evaluation plans,⁶³ classification of individual employees,⁶⁴ establishment of piece rates,⁶⁵ work assignments of employees which overlap employee classifications,⁶⁶ and quality, quantity or comparability of work,⁶⁷ should all be settled via the grievance procedure. Likewise, the procedure should be utilized to settle disputes as to new wage rates or classifications which appear to be unfair after a reasonable trial period,⁶⁸ establishment of pay rates as related to

55. See cases cited note 15 *supra*.

56. J. H. Allison & Co., 70 N.L.R.B. 377 (1946).

57. Worcester Pressed Steel Co., N.W.L.B. No. 142, 3 WLR 504 (Sept. 30, 1942).

58. Winchester Repeating Arms, N.W.L.B. No. 443, 6 WLR 359 (Feb. 5, 1943).

59. Four Meat Packing Companies, N.W.L.B. Nos. 186, 181, 189, 188, 245, and 187, 6 WLR 395 (Feb. 8, 1943).

60. Republic Steel Corp., N.W.L.B. No. 111-10937-D, 21 WLR 480 (Jan. 30, 1945).

61. Electric Storage Battery, N.W.L.B. No. 207, 5 WLR 227 (Dec. 10, 1942).

62. Watson-Flagg Mfg. Co., N.W.L.B. No. 111-1929-D, 18 WLR 1 (July 27, 1944).

63. United Aircraft Corp., N.W.L.B. No. 111-4933-D, 18 WLR 9 (Aug. 1, 1944).

64. Allis-Chalmers Mfg. Co., N.W.L.B. No. 111-8458-D, 21 WLR 390 (Jan. 2, 1945).

65. *Ibid.*

66. Bell Aircraft Corp., N.W.L.B. No. 111-10667-D, 26 WLR 412 (July 10, 1945).

67. U.S. Cartridge Co., N.W.L.B. No. 75, 4 WLR 1 (Oct. 5, 1942).

68. American Can Co., N.W.L.B. Nos. 111-813-D, 111-764-D, 111-102-R, 3948-D, 3947-D(380), 13 WLR 644 (Jan. 14, 1944).

new jobs,⁶⁹ contentions that the incentive rates adopted do not comply to the agreed-upon criteria,⁷⁰ and variations in materials, machinery, or tools.⁷¹

As has been pointed out above, the refusal of the employer to bargain with the union on rates would be considered an unfair labor practice by the NLRB. However, it is obvious that within contract years, it may not always be possible to bargain as to all rates and classifications. In such cases as these, the NLRB took a realistic point of view and permitted the employer to set new rates subject to the grievance procedure.⁷² The NLRB, on the other hand, would probably rule that if the rates were not discussed at the last bargaining session, the employer could be forced to bargain on it.⁷³

It is apparent from the cases cited above that the NLRB frequently took the position that where new rates were set and new classifications established, the employer generally had the right to initially set them up. This is in accordance with management's prerogatives. However, if these rates appear unfair or unrelated to the job content, or do not bear a reasonable comparison to the previous job or other jobs in the plant, the employee or the union has the right to file a grievance. When these rates or matters of methods and performance are complicated, it is obviously unreasonable to require the company to turn them over to men who are unfamiliar with those technical requirements, to be dependent upon their approval. In some cases the Board ordered that the company train one of the union representatives in order that he may understand them and may pass on them as a representative of the union and explain them to the union committees.⁷⁴ In other cases the Board directed that the rates be put into effect for a period of time, two weeks, or six weeks, or whatever period is necessary to afford a fair trial, after which the employees may file grievances as to their dissatisfaction with the new rates.⁷⁵

Some of the modern contracts demonstrate that this trend is being accepted in collective bargaining. Thus, in the automotive industry a recent agreement provides that:

When a dispute arises regarding standards established or changed by the Management, the complaint should be taken up with the foreman. If the dispute is not settled by the foreman, the committeeman for that district may, upon reporting to the foreman of the department involved, examine the job and the foreman or the time study man will furnish him with all of the facts of the case. If there is still a dispute after the committeeman has completed his examination, the fore-

69. G. F. Richter Mfg. Co., N.W.L.B. No. 111-3692-D, 26 WLR 362 (Apr. 11, 1945).

70. Union Biscuit Co., N.W.L.B. No. 111-7685-D (r-D-1059), 23 WLR 136 (Mar. 9, 1945).

71. Fairbanks Co., N.W.L.B. No. 111-10504, 22 WLR 595 (Jan. 26, 1945).

72. Anstice Co. Inc., N.W.L.B. No. 111-12880-D, 28 WLR 74 (Oct. 11, 1945).

73. See Jacobs Mfg. Co., 28 L.R.R.M. 1162 (1951).

74. Pettibone Mulliken Corp., N.W.L.B. No. 326, 4 WLR 140 (Oct. 20, 1942).

75. Anstice Co. Inc., N.W.L.B. No. 111-12880-D, 28 WLR 74 (Oct. 11, 1945). See also Celanese Corp. of America, N.W.L.B. No. 539, 7 WLR 290 (Mar. 24, 1943).

man or the time study man will then reexamine the operations in detail with the committeeman on the job. If the matter is not adjusted at this stage it may be further appealed as provided in the Grievance Procedure.⁷⁶

It is clear that an employee who understands the basis upon which he is being paid, so long as it is reasonable, will probably be a more satisfied employee. It is likewise obvious that many employees will not comprehend these technical features; however, if a representative of the union understands them and believes that they are fair to the employees, or at least can explain them, the actual production employees may feel better satisfied. The union should not be permitted to interfere in these methods and similar matters without sufficient reason, but under present conditions the employer cannot, and should not arbitrarily say, "These are the rates, take 'em and like 'em," and expect its employees to be contented, without any further explanation.

5. *Supervision*

Arbitrary acts or abuse of discretion by supervisors in their treatment of employees, which acts are alleged to be in violation of the contract, are included in many grievance clauses, although in general the complaint relates to the disregard of some section of the contract, rather than being a grievance against supervision. Frequently, a grievance against a supervisor is an attempt to interfere with management or to have a disliked supervisor removed. If the act of the supervisor is improper, it is probably because the agreement has been violated and the grievance should be founded upon that violation. These acts of supervision are discussed under a separate grouping, nevertheless, because this type of complaint is considered in many contracts as a separate class of grievance.

Management is burdened with a great responsibility in the selection of its supervisors. The supervisor is the principal point of contact and, in some cases, practically the only point of contact between the employees and the employer. If this point is abrasive or inept, and the supervisor disregards the contract, the relations between the employees and the employer will be unsatisfactory. In a small plant the problems of supervision are comparatively simple, but the hierarchy of industrial management tends to become more rigid in larger organizations, and those persons with real authority recede away from the rank and file; hence, the employee-employer relation, as centered upon the foreman have become more important, while his authority has diminished.

Complaints against supervision arise on the ground that supervision is improperly interpreting and applying the agreement or has violated the agreement. From such broad terminology it is apparent that so called grievances against supervision might embrace all types, since so many stem from faults

76. General Motors Corp. and United Automobile Workers.

or errors of supervision. However, they primarily fall under the heading of "working conditions," because it is the foreman who is chiefly concerned in the interpretation and application of the agreement to working conditions. This reveals the inadequacy of classifying grievances under such a heading as "supervision."

The whole question of the supervision grievance is basically a question of how supervision is interpreting and applying the contract. If it is done in a fair and reasonable manner, there can be no real grievance. If management is doing an inadequate job of running the business, and has poor personnel relations, that is not a matter of grievance but is improper management, and cannot be corrected by taking complaints through the grievance procedure.⁷⁷

Under the heading of management prerogatives is found the area which supposedly is not subject to grievances; the domain admittedly reserved to management—the control of the plant. Even here, if the conduct of management is such that it violates the contract rights of the employee, it is subject to a grievance.⁷⁸

The NWLB has sustained management's right to determine new production methods,⁷⁹ the products to be manufactured, the location of plants, the schedules of production,⁸⁰ and the number of persons to be employed.⁸¹

77. In an unreported case involving the Association of Street Railway, Bus, and Coach Operators, the union sought to force the dismissal of the superintendent. The dispute was certified to the National War Labor Board, but the Board refused to accept the certification, on the basis that "said issue is prerogative of management."

78. The following section from a contract covers the area of management prerogatives very fully:

The management of the plant and direction of the employees, including the right to hire, assign, or re-assign to departments, train, promote, transfer, to discharge, to promote to supervisory positions, to demote, lay off, or in any other manner effectuate a change in the status of an employee, to direct or to change the type of products to be manufactured, the location of the plant, to set standards, to establish schedules of working hours and the work week, to change or discontinue departments, or to establish new departments, to institute technological changes, to introduce new production methods or facilities, or to change existing facilities, to re-define existing or to establish new job classifications, to establish rules and regulations for the conduct of employees, and the enforcement thereof, and the supervision of the work, is vested exclusively in the Employer, subject nevertheless to observance of all terms and provisions of this agreement; provided that claims of wilful or unjust abuse of these responsibilities shall be subject to the grievance procedure. Pierson Hollowell Co. and Upholsters International Union.

79. Revere Copper & Brass Co., N.W.L.B. No. 111-3597-D, 21 WLR 4 (Nov. 14, 1944).

80. North American Aviation, N.W.L.B. No. 111-7431-D, 25 WLR 583 (June 12, 1945).

81. Shell Oil Co., N.W.L.B. No. 111-15046-D (8-D-436), 25 WLR 469 (June 12, 1945); American Smelting & Refining Co., N.W.L.B. No. 111-4366-D, 21 WLR 163 (Nov. 29, 1944).

CONCLUSION

It is, of course, to be recognized that some phases of the employee and employer relationship are covered in certain collective bargaining agreements, while the same matters are omitted from other agreements. Consequently, some of the points which have been discussed as coming under the interpretation and application of the collective agreement, since they are not included in other agreements, are sometimes matters outside the application and interpretation of the contract. This perhaps presents a confused picture because "now they're in and now they're out."

To the writer it appears advantageous for both parties to have their rights and duties defined and made explicit so that each may know its obligations and to what they are entitled, as a means of assuring stabilized relations. Where relations are unstabilized, either party or both may consider it profitable, in a game of wits or in maneuvering for power, to have the rights and obligations undefined or at least vague, in the hope that conditions may develop whereby the party can take advantage of the other's circumstances to force the situation to its benefit. If there are contract terms covering, in a specific manner, these rights and obligations, such maneuvering and shifting will be more difficult. These unsettled conditions, however, are disturbing and creative of disorder and unrest, and hinder efficient operations. A carefully drawn agreement presents decided advantages and serves the best needs of industry and production. In addition, the employer must have a reasonably cooperative working force which does not feel that it is "on the march" or is fearful of what the employer may try to squeeze out of it, but finds stability, security, and favorable working conditions in their jobs.

This review of various types of grievances reveals that the question as to what are grievances and what complaints will be recognized, depends primarily upon the terms of the contract, in the absence of such a board as the late NWLB with wide powers and the emergency of war to implement its orders. Moreover, there are grievances arising outside the contract which will at times necessarily be recognized. A strong union may obtain concessions as to what kinds of differences or complaints may be processed as grievances, while a stable industrial organization with good public relations may successfully resist such demands. The trend however, is to permit substantial disputes to be made the subject of grievances. This does not include, of course, the settlement of very minor disagreements with the foreman. They should be handled at the foreman level and not be permitted to burden the grievance machinery.

During the period of the existence of the NWLB when these questions were submitted to it, while it relied on past practices to a limited degree, it increasingly extended to these other matters the availability of the grievance machinery, and thus broadened the scope of grievances. There are, however,

two types of situations where the Board indicated its belief that the company's decision is to be unquestioned, in the absence of other improper conduct or discrimination; first, in matters of executive and supervisory personnel; and second, in determination of production methods, new and old. The influence of these decisions is very marked in current contracts, and rightly or wrongly have opened the door to the consideration of many matters which were long considered clearly within the sole determination of management. This trend parallels the decisions of the NLRB in extending the subject of collective bargaining to bring in nearly all matters of industrial life.

In seeking a better understanding of grievances, the aim is their reduction in number and their limitation to proper disputes. If the employer and the union are to obtain relief from many of these vexations, they must first seek a well-drawn contract, without loose phraseology. Then they must train their representatives, giving them a better understanding of the contract, so that it may be applied correctly. Thirdly, they must seek good relations, with fair-mindedness and fair dealing toward one another. Moreover, the employees must be educated as to the importance of the business, and kept informed as to its progress. These are all conducive to that sovereign good, high morale, which is essential to stabilized labor relations. However, even with good morale, it is important that the aims and intentions of the parties be clear.