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Grievances

In preparing this discussion on grievances I have made two assumptions. First, I assume that an established collective bargaining relationship exists. I am not suggesting that this relationship is necessarily desirable, but the assumption is important. When grievances arise in an unorganized situation, their disposition is different than handled under collective bargaining. In addition, statutorily or organizationally established grievance procedures may be different from those established through collective bargaining.

My second assumption is that the subject is not limited to the substantive matter of which types of issues and problems constitute grievances in a collective bargaining relationship. I am assuming for the purpose of this discussion that the subject concerns not only those issues but also the problem of institutional procedure for dealing with grievances. In fact, the procedural aspect of the subject may be the most important part of the entire problem.

Before turning to the specific subject of grievances, I want to direct attention to the background against which I believe our discussion must be carried on. All organizations of substantial size have procedures for establishing employment conditions and for administering them on a continuing basis. In some instances these are poorly conceived and haphazardly administered. In others they are thoughtfully constructed and carefully executed. These procedures exist in organized as well as unorganized situations—in any large organization there are some arrangements for dealing with employment conditions. In contrast to the procedure generally followed in unorganized situations, in which employment conditions are established and administered at the discretion of managers alone, under collective bargaining these

This article is an edited transcription of Mr. Wagner's presentation at the Institute.

employment conditions are established and administered bilaterally through negotiations and structured consultations with representatives of the employees to which they are applicable. Collective bargaining, therefore, is a particular procedure for establishing those employment practices and policies and the procedures for administering and executing them. Out of this collective bargaining procedure a kind of governmental process develops for dealing with these employment concerns on a continuing and structured basis. The analogy with a governmental process may be overdrawn, but it does indicate something about the nature of this activity, particularly in relation to the administration of the process. It is the nature and the quality of this governmental process that is real for most of those involved in it and affected by it, and it is central to our concern.

Like those who study other complex institutions and relationships, those who examine the entire collective bargaining situation find it useful and meaningful to examine systematically different functional aspects of the process relationship in order to get a better understanding of the whole. At times we tend to examine separately—or abstract from the whole—one interesting and fascinating part of this procedure, the negotiation process. This is the dramatic process of changing or redefining the substantive terms, the basic practices and conditions of the relationship. We look at the negotiating process in which existing employment conditions are reshaped and redefined, and we become interested in and preoccupied with the strategies and tactics used by the negotiators to yield an acceptable result. At times those of us who look at the process break that negotiating aspect of the relationship into even smaller units, and examine the different stages at which these negotiating processes or procedures take place. Then we examine the involvement and the influence of additional parties such as negotiators, factfinders, or arbitrators, or some outside governmental forces, factors or persons who step into these procedures. We also look at the use of alternative pressure mechanisms and the contributions and effects that these have on the outcome of the negotiations. The breaking down of this large chain into smaller and smaller units to try to comprehend what is going on is an important analytical device and a good intellectual approach.

Similarly, we occasionally set a different task for ourselves and examine separately the procedures whereby the same negotiated conditions that were the product of one of these negotiation sessions are put into effect at the work place and how differences, controversies and disputes about their application and interpretation are resolved. Here we are examining another facet of this continuing relationship, looking at it in great and greater detail and asking: How does it work? How do we resolve the inevitable differences and controversies that may arise under an agreement or previously established set of ground rules? What procedures are useful in trying to handle this kind of

dispute? As with negotiations, we divide the relationship into smaller units and examine the mechanisms that are used to resolve those differences and those matters which the negotiating parties were unable to resolve.

The program for this institute illustrates my point. We are dealing with a whole series of topics, including the scope of negotiations, the establishment of bargaining means, grievances, the negotiating process, and the negotiation of substantive terms of a new relationship. Each of these topics is abstracted from a continuing relationship in an attempt to gain some insight or some sense of what is occurring. As useful or significant as this approach is, we need to remind ourselves regularly that each of these functions, each of these categorized aspects of the relationship, is an integral part of the total relationship. Whether deliberate or not, a change in any one of these functions has some effect or influence on the total relationship. The segments are abstractions, and it is the totality which is real and significant. It is that totality with which we should be concerned.

What happens in the day-to-day administration of the previously agreed-upon conditions, the day-to-day application of those agreed-upon practices, has a tremendous impact on their negotiation the next time. Similarly, not only the agreements reached, but also the manner in which the agreements are reached in negotiation—including the style, the respect or lack of respect, and the attitudes of the parties involved—has a tremendous effect on the daily applications of the relationship that follows. To state it simply, attitudes and sentiments are shaped in each of these segmented procedures, but they are not confined to those particular procedures or to that setting; they spill over into the others. In general, neither the substantive issues nor the procedures adopted for dealing with grievances are as visible or as dramatic as those dealt with in the negotiation for changes in conditions, as is true in many other parts of the collective bargaining process. The headlines today discuss pending negotiations, and negotiations in progress, but little is said about what has been happening at the coal face in the last two years in the daily administration of safety provisions and the contractual provisions of the previous agreement. The drama is in the negotiations, and yet the absence of drama in the handling of grievances does not mean that they cannot and do not have a significant effect on those negotiations. What takes place in the day-to-day administration of a collective bargaining relationship may lend more flavor than the actual negotiations do. It is against this background that I wish to discuss the specific problem of grievances and the grievance procedure.

What is this business of grievances about? A first major characteristic is that the establishment of a grievance procedure or the existence of a grievance is premised on recognition. It is in the application of the bargaining agreement that the meaning of the grievance procedure is realized. You can sit down in a

room and negotiate a collective bargaining agreement, and include guidelines and substantive terms, but until that agreement becomes a viable, active instrument at a work place it is only a piece of paper. It is in the application of the agreement that it becomes alive and obtains its significance.

A second important point is that in any complex, dynamic organization in which collective bargaining agreements exist, differences over the application and interpretation of those agreements will inevitably arise. Because of this, it makes eminent good sense to make arrangements for dealing with those differences when the specific issues of an individual situation are not before us, to deal with the potential difference before it occurs. Once a difference arises, the feelings aroused by the difference itself are imposed on the question and we cannot resolve it. Therefore, when we recognize that differences will arise, there are two approaches we can take. One is to say that we will deal with them on an *ad hoc* basis as they arise. There are dangers in that procedure. Alternatively we can say that we anticipate them, that we expect that the resolution of those differences will be important in terms of our continuing relationship, and that we ought to devise an instrument for solving them.

It is also important that the actual parties to the relationship negotiate the grievance procedure. It is on the basis of their experience, knowledge and understanding of their situation that they decide to develop an instrument or mechanism for dealing with future differences. No one from the outside imposes these mechanisms. No one says, "This is the model, and it's the only model," although in practice there is a tendency to adopt standard models because the parties involved have not asked the question, "What is this relationship about?"

A major subject of negotiation in most collective bargaining relationships, therefore, is the grievance procedures, the mechanisms whereby we attempt in some orderly, sensible, pragmatic way to handle the differences that inevitably will arise. We can shape these procedures to our own situation, to suit our particular environment and our particular need. Those of us who have looked at grievance procedures find that a wide range of mechanisms is adopted because each is tailored to the problems at hand. The parties negotiate these mechanisms to solve their own problems, and the outcome of this negotiation is shaped by the views of the negotiating parties about what should be stressed, and by their relative bargaining power and skill. There is as much concern about grievance procedure as there is about other matters.

Now let me turn to the specific matters in this grievance procedure that require attention. Even though the particular form of the grievance procedure tends to vary with the situation—with the nature, size and character of the organization—virtually all grievance procedures have one characteristic in common. This is a kind of appellate arrangement in which there are numerous

steps. The number of steps may vary. The determination of who is involved at each step may depend on the character of the particular situation, and this can and should be related to the requirements of the parties in their setting. But most grievance procedures have a kind of appellate arrangement in which problems, issues or differences are first handled at some low level–at the level of the origin of the difference–and then may ultimately be taken to the top of the organization, to some higher level in which top officials or administrative officers of both organizations who had something to do with shaping the original agreement look at and dispose of the grievance.

Another problem concerns the matters that can be submitted to and processed through this machine. This is an important and critical question, and great controversies exist. I propose two possible answers: (1) any difference that may arise between the parties during the existence of this agreement may be initiated and processed through the grievance procedure; (2) any difference over the interpretation or application of the agreement may be handled under the grievance procedure. They sound alike, but are they? This is a tremendous issue, and parties argue vigorously over it. "Any difference" is one proposition; "any difference over the interpretation or application of the agreement" is a much more narrowly defined or circumscribed matter.

Another concern is with the point in this machinery where the particular issue may be dealt with most effectively. For example, if a difference arises, where in the organizational hierarchy do you take the problem? Do you always start at the lowest level, or in some cases do you say, "This is an issue of such a nature that we ought to talk about it at an intermediate level and bypass a lower level which obviously cannot resolve it"?

A fourth problem concerns the parties to the grievance and when they become parties. When a grievance occurs, should the grieving party–whether an individual or a group of employees–deal with the supervisor or administrator directly, or is it appropriate for the organization to which they belong to become involved with the grievance immediately?

Another question is whether the employee organization has independent standing to process and pursue a grievance as an organization, or whether it is solely representative of employees and can act only as the employee authorizes, delegates or designates. This is a critical question, a matter with which the U.S. Supreme Court has had to deal. Does the organization have independent standing to advance the interest of the organization and its members, or does it derive its authority to speak for the employees only as a result of a specific delegation of authority by the employees? Both positions prevail.

Another interesting problem arises in the case of reprimand or discipline. If an employee is to be reprimanded, suspended or dismissed from the job,

should the labor organization to which the individual belongs be involved at the outset in order to protect the interest of the employee? If an employee is to be disciplined, is it to his interest that he at least have the opportunity before discipline is imposed to have someone there to serve as his spokesman or representative, to look out for his interest and perhaps to protect that interest? Many labor organizations have found that in order to get maximum protection for an employee when an adverse action is contemplated, it is in the interest of that employee to be afforded the right of representation. Although arguments can be made for and against it, my bias leans toward representation before drastic action is taken to protect the rights and interests of the employee and perhaps to cool the situation before a major confrontation exists.

Another interesting problem concerns time limits for processing grievances. However we define the grievance, should there be time limits for processing it? Should there be some kind of attempt to bring the issue to the attention of those whose action is being challenged? If so, what are those time limits to be? What is the reason for the time limit? What is the function of the time limit? Should matters be allowed to ride for weeks before raising the question? That may be terribly unfair, since by the time the issue gets joined to the employer, for example, the witnesses may no longer recollect what transpired and the data and the evidence may be gone. Should the issue be joined early? The time limit may be so short that the interest of the individual or group of employees cannot be fully protected because we cannot develop data or make the necessary investigation to look out for the interest.

We now come to what I consider an extremely important part of the question of grievances: the grievance procedure itself. Who initiates a grievance? There are some cases in which employers do, but in the overwhelming majority of situations employees initiate a grievance. They contend or argue that the employer has done something improper, that he has failed to carry out an agreed-upon practice or to follow one of the established guidelines. The employees seek the redress which they believe the agreement or the guidelines provide them. Suppose we then have extended discussion through the grievance procedure. We take it through the appellate arrangement and we reach the top of the structured appellate arrangement. And the employer says, "We have heard all of your arguments and your discussions, and we're not persuaded." What do we do now? In the private sector, where the parties have the right to resort to self help, in such a situation a labor organization might say, "We have carried this through the orderly procedure as far as we can. The employer does not agree. We are not prepared to accept the employer's final answer as the final disposition, and we reserve the right to resort to self help." In the private sector this is permissible and in some cases even takes place, but the parties involved have recognized that this procedure

doesn't really make a great deal of sense. Employers do not want stoppages over these differences, and unions acting on behalf of employees don't want to shut the plant down over every difference that arises. So, in 96 percent of the agreements in the private sector, they devise a procedure in which they say that, since they are not able to resolve their difference in direct negotiations and direct consultation, they shall submit that difference to an outside party, a tribunal or an arbitrator, and agree that this outside party's determination shall be final. Each side then gets a fair shake at the particular controversy. In the private sector, employers readily agree to that kind of arrangement, provided the union agrees to not resort to a strike. This is what the Supreme Court called the *quid pro quo*. The employer agrees to let this kind of problem be resolved by some agreed-upon third party, who is to judge the case on its merits as a judge would. The employer agrees to be bound by that determination, but in turn asks the union to withhold the right of self help.

When we enter the public sector we encounter some new problems. The common condition in most jurisdictions in the public sector is that the employees do not have the statutory or judicially recognized right to strike, so they cannot give up that which they do not have. In the public sector, therefore, there is an even greater reason to consider some judicial procedure in which outside parties are in a position to make some determination when a party feels that a grievance has not been handled in compliance with the agreed-upon guidelines. The procedure whereby this outside tribunal is to be brought into play is, of course, negotiable. Parties have both the right and the bargaining capacity to negotiate the grievance procedure, and they also have the authority, power, and right to negotiate what the nature of this outside tribunal will be. What shall the composition of that tribunal be? How is it to function? What shall its procedure be? Shall it be highly structured, legal and like a court, or shall it be relatively informal? Decisions on all of these questions reside with the negotiating parties, and they have the authority to shape the arbitration process on the basis of their own experience and situation. The kinds of problems which may go to arbitration may be limited, and this is an area in which great bargaining debates can take place. The employer may say, "We are perfectly willing to talk about any matter up to the point of the employer's final determination, but we submit to the arbitrator or to the tribunal only those matters that deal with the agreement or the guidelines." The union, on the other hand, may reserve the right to strike over certain issues. These practices are negotiable, and the outcome is significant.

Thus far I have described the elements of the grievance procedure and what may or may not be a grievance. I will now make a few observations about what occurs when we use and apply the grievance procedure. The grievance procedure is the mechanism for obtaining compliance with the

results of negotiation–the dramatic part of the relationsip. It is the instrument whereby employees test an employer's action which they feel is not in accordance with those guidelines. If the challenge is valid and the employer does not agree, an arbitrator may tell him he has not complied. In other instances, a charge or contention may be raised and go ultimately to an arbitrator who determines that there really is no merit to the claim, and that the employer has in fact complied. The grievance procedure is therefore an instrument whereby an employer's actions and conduct are tested against that which the employer agreed upon in the negotiation. It is in that sense a compliance instrument, a most important part of the collective bargaining relationship.

The grievance procedure is also an extremely important communications mechanism. It is the instrument whereby parties are constantly exchanging ideas and issues as they arise and are testing them and talking about them. It is the day-to-day instrument used to deal with the nuts and bolts problems on a continuing basis. Employers and employees are engaged in a constant interchange of ideas, points of view and positions, in some cases not even dealing with grievances, for in the course of dealing with a grievance other issues may arise. It is that kind of exchange of ideas and sampling of views and opinions that gives continuity and flavor to the continuing relationship between employers and employees. My own predilections are in the direction of using the grievance procedure to the maximum, at least in the early stages, to share ideas, to hear what employees have on their minds, what concerns they have, and to try to explore ways and means of dealing with them. The grievance procedure can be looked upon as a legalistic device, a kind of court procedure in which somebody sits back with detachment and says "you were right" or "you were wrong." But it can also be used as a clinical device–to sound out the sentiments, ideas and attitudes that exist. It can be used not only to settle grievances in a legal way, but also to keep aware of the state of things in the organization.

This rather mundane, not very attractive, not particularly dramatic process of dealing with grievances is an extremely important matter, an extremely important element that adds character and quality to the relationship. I hope I have challenged you not to become so preoccupied with the niceties of the sub-part that you fail to recognize how important each of these sub-parts is in relation to the others, and how the integral parts of the whole which finally combine give character and quality to this kind of governmental relationship.