

IMPROVING THE GRIEVANCE PROCESS: “GRIEVANCE MEDIATION” AS AN ALTERNATIVE TO ARBITRATION

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I. EVALUATING THE EFFECTIVENESS OF THE GRIEVANCE-ARBITRATION PROCEDURE.

A. Common Sources of Grievances.

Labor-management professionals are often frustrated with the effectiveness of their grievance and arbitration procedure. The same types of grievances continue to arise and the outcome of the final grievance step is often the same. Colleagues are often dissatisfied with the result, or the lack of one, and many issues get “swept under the rug” out of a fear of going to arbitration, only to resurface in the future.

Of course, grievance and arbitration procedures in collective bargaining agreements are the quid pro quo for no-strike clauses. They were meant to be a quick and inexpensive way of avoiding work stoppages and litigation over breach of the agreement. However, decades of labor-management relations has shown that for many labor organizations and employers, the process is one of simply “going through the motions,” and while it may serve its purpose of avoiding work stoppages, many issues remain unresolved, resulting in labor-management animosity, worker dissatisfaction and lost productivity.

In evaluating the effectiveness of a grievance-arbitration procedure, labor and management should perhaps consider the following:

- Do grievances get filed due to personality conflicts between the employee, the job steward, and the supervisor?
- Are there other non-contractual or cultural issues which often form the basis of grievances?
- Do the same types of grievances continue to arise?
- Is management's final response to a grievance almost always the same?
- Do the majority of grievances appear to be filed by a group of certain employees, arising out of the same department or job classification?
- Do supervisors interpret and apply the same contract provisions in an inconsistent fashion?
- Do supervisors lack appropriate interpersonal skills and understanding of the contract?
- Do management and/or labor consider the time spent in the grievance process to be "wasted"?
- Do employees feel like they have not "been heard" in grievance meetings?
- Do some grievances go un-filed due to the perception that the exercise is futile?
- Does productivity suffer as a result of unresolved grievances and employee frustration with the process?
- Is arbitration reserved for only the most serious of grievances, while other important issues are disregarded?
- Is arbitration often avoided, even in serious cases, for fear of the costs and uncertainty of the outcome?

- Is arbitration sometimes pursued for purely political reasons, either by labor or management?
- Does management consider the union “weak” and therefore unable to bear the costs of an arbitration?
- Are there ever any work stoppages or slowdowns as the result of employee frustration with the process?

If the answer to a number of these questions is “yes,” it is arguable that the effectiveness of the parties’ grievance-arbitration procedure is suspect, and is not a truly productive method of resolving workplace disputes. Ultimately, the dissatisfaction and frustration with the process can lead to an unhealthy climate for labor-management relations, with resultant reduced productivity and profitability.

B. How Grievances are Typically Resolved.

In resolving a dispute, whether in labor-management relations or elsewhere, people tend to focus on their rights, their power, or their interests. When one focuses on their *rights*, they choose to pursue some independent remedy for the wrong they feel they have suffered. When one focuses on *power* in resolving disputes, they try to coerce or force their opponent into doing something they would not otherwise do, generally by imposing costs on the other party. On the other hand, when parties’ focus on resolving disputes by dealing with their *interests*, they attempt to address what is really driving the underlying conflict. Interests are different than one’s position on an issue. A position is the party’s stance on the issue, while interests are those needs and desires which underlie the position. (Ury, Brett & Golberg, 1988).

Applying these concepts to a dispute in the labor-management context, consider a hypothetical. Assume Joe, a supervisor, was recently promoted out of the bargaining unit to a

lead position, based primarily on the fact that he impressed management with his hard work. However, Joe is more concerned with getting product “out the door” than he is with learning the contract and dealing with his employees on a personal level. Keith, one of the employees in Joe’s department, has been with the company for a number of years, and although he’s not a bad employee, simply does not work quite as fast as some of the other employees in the department. Additionally, Joe and Keith used to work together, and while Keith would never want a lead person position and did not bid on the job, he does not like being told what to do by Joe, who has less seniority in the company.

The company has recently made some technological improvements and performed some internal engineering studies which changed the production quotas in Joe’s department. The management rights clause of the contract states that the company has the “right to determine the method and manner of operations” and “to utilize its personnel to achieve the most efficient operation of the plant”. However, the contract also requires the company to negotiate any affect on wages due to any substantial change in the methods of work. Keith has encountered some difficulty in meeting the new production standard and has been verbally counseled by Joe on two occasions, in somewhat less than a pleasant tone. The next step for Joe is to issue Keith a first written warning. Additionally, in his effort to increase production in the department, Joe has taken it upon himself to “chip in” and work on some machines during employee breaks and after hours. Obviously, the contract prohibits lead persons from performing bargaining unit work except in the case of emergencies or when bargaining unit employees are not available.

On Keith’s next day when he failed to meet production, Joe gave him a formal written warning for failure to meet production. At that time, Keith informed Joe that he was going to have the steward file a grievance not only over the written warning, but also for Joe performing

bargaining unit work. Keith's grievances are denied at the first two steps, and again at the step three meeting. The company takes the position that the written warning is valid, since it had the right to make the technological improvements and the engineering studies were valid and correct. The company also takes the position that Joe has only performed bargaining unit work in an "emergency" and when bargaining unit employees are otherwise "not available". Keith and the union are then left with the choice of demanding arbitration on both issues, or letting the grievances die with Keith simply "lumping it" and going back to work.

If Keith and the union were to focus on their *rights* under the contract, they would proceed to arbitration. Their position is that the engineering studies resulted in a substantial change in the method of work, which affects Keith's wages, and that Joe has performed bargaining unit work. Based on its rights, the company's position is that the engineering studies do not constitute a material change in the method of work, that they have the right to determine the most efficient method of operation, and Joe's work was required by necessity.

If *power* is going to be used, Keith would go back to work, unhappy, and either do just enough to avoid another write-up; or worse, deliberately slow down his production, daring Joe to write him up again to the point of termination. The company's power is in its perceived ability to more easily withstand the cost of arbitration, as well as the threat of Keith's termination.

Looking at the parties' *interests*, Keith wants to be treated fairly and with respect. The union's interest is in having fair production standards, and the avoidance of lead persons performing work which can and should be performed by bargaining unit employees. The company's interest is in its ability to set standards for the efficient and profitable operation of the business, having Keith perform according to the production standards, and in allowing lead persons to perform work when necessary to meet production requirements.

Depending upon the context, each approach has certain implications. Specifically in the labor-management arena, the following factors should be considered:

- **Transaction Costs.** What will be the cost of a particular approach? The most obvious potential costs will be economic. Beyond money, there is the time and emotional energy invested in the dispute. There will also be opportunity costs -- the time and money lost in pursuing the dispute that could have been used more effectively in a productive fashion.
- **Satisfaction with the Outcome.** Will both parties be satisfied with the outcome, and the process utilized to get there? Will the parties feel like they have had a “fair shake” that their concerns have been addressed, and feel some sense of approval with the result?
- **Effect on the Relationship.** What will be the long-term effect of the outcome on the parties’ relationship? Will they be able to work together productively in the future, or will there be some “scar tissue” and the relationship be weakened?
- **Recurrence.** Will the resolution of the problem last? Will the same or related dispute arise again?

(Ury, et al., 1988).

In our hypothetical, if Keith exercises his *rights* and goes to arbitration, or uses his *power* and goes back to work, except in a more unproductive fashion, there will definitely be costs involved, to both parties. The arbitrator’s fees and legal expenses will certainly be expensive. Additionally, both the union and the company will incur opportunity costs in dealing with the arbitration, when they could be spending their time in other, more productive work. Likewise, if Keith opts to “lump it” and goes back to work, there are costs in that approach as well, as his

lack of productivity will likely continue. The same rationale applies with respect to the company. Arbitration will cause the company to potentially incur financial costs; and if Keith simply goes back to work, his lack of productivity will certainly represent a cost to the company.

Arbitration also runs the risk that one or both parties are going to be dissatisfied with the arbitration process and its outcome. Few parties find the formal process of an arbitration to be satisfying. As for the outcome, there will either be a winner and a loser, or as is sometimes the case, there are two perceived losers in arbitration. Similarly, if Keith goes back to work, there is certainly no satisfaction with the outcome, as his grievance has not been fully addressed. In this situation, with several collateral issues involved, the likelihood of either party walking away with an absolute win is somewhat doubtful.

Also, regardless of which party wins the arbitration, or if Keith just goes back to work, there will certainly be an effect on the parties' long-term relationship, and their ability to continue working together productively will be damaged. If the company wins the arbitration, Keith will be unhappy and unproductive, and if Keith wins, the company's ability to manage Keith and other employees will be impaired. Again, if there is no arbitration, the relationship is not improved by Keith simply going back to work and just "getting by".

Finally, neither arbitration nor Keith's continuing to work in his present state of mind will really bring closure. If the case goes to arbitration and Keith's position fails, it is likely that Keith and perhaps other employees will resist the new standards, again, by just "getting by". On the other hand, if the company's position fails at arbitration, its ability to make further technological improvements and to manage its employees will be impaired.

The best alternative, then, may be for the parties to explore their *interests* and see if that approach can produce a more effective resolution of the problem. As mentioned above, Keith's

real interest is in being treated fairly and with respect. Does this have anything to do with the technical wording of the contract? Not really. Is there some way the parties can come up with a solution to that problem? Perhaps. The union's interest is in having fair and reasonable production standards, and keeping lead persons from performing bargaining unit work. The company's interest is in having the ability to establish production standards which increase profitability, the need to ensure employees' compliance with those standards, and the ability of lead persons to perform regular work when the need legitimately arises. While these certainly involve issues of contract interpretation, is there perhaps a way the company and the union can come up with a way to address these issues, at least until the next contract negotiations? Probably.

Focusing on interests has the potential to solve the problem underlying the dispute more effectively than a focus on rights and/or power. Focusing on interests will result in lower costs, and tends to generate a higher level of satisfaction with the outcome than determining who is right or who has more power. If the parties are more satisfied, their relationship is improved, or at least not harmed further, and the dispute is less likely to resurface. Focusing on rights and power, with the emphasis on winning and losing, usually makes the relationship more strained, and the loser looks for ways to exact revenge from the other party. (Ury, et al., 1988).

II. THE ADVANTAGES OF A GRIEVANCE MEDIATION PROGRAM.

A. Practical Issues with the Utilization of Arbitration.

Although labor arbitration has been widely used in this country since the 1940s, it has been the subject of criticism for many years. It was intended to be fast, inexpensive and informal, and certainly does meet those objectives when compared to traditional court litigation. However,

over time, much arbitration has grown into a slow, expensive, and formal process. (Goldberg, 1982; Schmedemann, 1987).

There is a sense among many labor-management professionals that the decision in arbitration is often irrelevant to the problem that caused the grievance to be filed in the first place. It is not unusual for an arbitrator to find he is unable to get to the basic issues at the root of the problem. In fact, those issues are rarely dealt with in the arbitration, and may even be inadmissible in the arbitration hearing as they do not involve “contract interpretation”. That’s certainly understandable, since in order to be arbitrable, the grievance must be based on the terms of the contract, rather than whether the employer’s action was fair and reasonable in light of the concerns of the grieving employee. (Goldberg, 1982; 2005; McPherson, 1956).

There also appears to be a sense among many labor-management professionals that the arbitration process is abused at times. It is not unusual for a union to consent to an employee’s request that a grievance be taken to arbitration, regardless of its lack of merit in the eyes of the union representative. As a democratic organization, many union officials have found it politically advisable to take a grievance to arbitration and have the arbitrator deny it, rather than tell a union member that his or her grievance has no merit. Additionally, the potential threat of a claim for the breach of the duty of fair representation may increase the union’s tendency to take a grievance without merit to arbitration. Even though the risk is small that the employee would win his fair representation claim under current legal standards, the union may opt to bear the costs of an arbitration rather than the litigation costs of defending a fair representation claim in federal court. (Goldberg, 1982).

To a similar degree, the same analysis can be applied to management. While not a democratic organization, there may nevertheless be “political” considerations involved in

denying an arguably valid grievance and forcing the union to arbitration. The employer's labor relations staff may be pushed to such a position by the employer's operations staff, and/or to avoid conceding that a supervisor erred in administering the contract. (Goldberg, 1982).

The costly utilization of arbitration may also result from a hostile relationship between the parties which makes the internal resolution of grievances difficult. Additionally, the parties may be ill-equipped to resolve grievances on their own, due to the lack of good negotiating skills and/or an inability to evaluate the likely outcome of an arbitration. (Goldberg, 1982).

B. Understanding What Mediation Is – and its Differences from Arbitration.

Grievance mediation is the process in which the union and the employer, with the assistance of a mediator, try to resolve a grievance without going to arbitration. In a nutshell, a neutral and impartial mediator attempts to help the parties settle the grievance in a mutually satisfactory way, by going beyond the technical wording of the contract and exploring the underlying issues, sometimes in confidential private meetings with the parties. In mediation, resolving the dispute often requires innovative and creative approaches, dealing directly with the parties. The rules of evidence do not apply and no record of the proceeding is made. The mediator elicits the facts directly from the parties, in a narrative fashion, rather than through examination and cross-examination. The parties are not limited in their presentation to those matters that relate just to contract interpretation, but are free to raise any issues which may help in resolving the dispute. Although the mediator can give the parties an opinion as to how the dispute might be decided later at an arbitration hearing, he has no authority to compel the parties to accept a resolution, and cannot render a final decision resolving the dispute. If successful, there will usually be a compromise settlement which will typically have no binding effect on similar disputes. If there is no settlement, nothing said or done at the mediation session can be

used in a later arbitration. The mediator seeks to deal with the conflict as a dispute to be resolved, instead of an issue to be decided. (Goldberg 1982; 1983).

Mediation differs from the direct negotiations between the parties in the preceding steps of the grievance process. First, mediators manage the communications between the parties by creating a comfortable atmosphere in which the parties can share their interests and concerns. They assist the parties in identifying divisive issues and areas of agreement, and explore options for compromise and settlement. They move the parties away from their personal animosity towards each other, and attempt to have them focus on the underlying problem. They encourage the parties to share information in a neutral setting, allow the venting of emotions, and help them think realistically about settlement. (Schmedemann, 1987).

Additionally, mediators fill an educative role by serving as a negotiation “coach” to the parties, by providing them with the tools necessary to use effective negotiation skills. Mediators also fill a trust vacuum which has been created by the parties’ impending impasse in the grievance process. By obtaining the parties’ trust and confidence through active listening, positive reinforcement and maintaining confidences, a mediator can transfer that trust to the process itself. In this manner, the parties may jointly realize the objective of reaching an agreement. (Schmedemann, 1987).

On the other hand, arbitration is a structured process in which the neutral third party listens to evidence and is authorized to make a final and binding decision resolving the dispute. In arbitration, there is very little room for creativity by the arbitrator, who must decide the dispute solely on the issue presented under the contract and the evidence submitted by the parties. The process certainly resembles a trial, involving some formal discovery, sworn testimony with direct and cross examination of witnesses, formal admission of documents into

evidence, and other technical rules of evidence. All evidence is taken in the presence of all parties. At the conclusion, there will be a winner and a loser, and the decision serves as precedent in other cases.

C. The Benefits of Grievance Mediation

Mediation, as an alternative to arbitration, has the potential to overcome many of the frustrations mentioned above, and the limitations imposed by the process of arbitration. Studies of the grievance mediation process in various labor-management relationships over the past 25 years have proven this potential.

1. Cost Savings. Cost savings can be achieved in a grievance mediation process since there is no need for extensive preparation and presentation by attorneys; nor is there any need for transcripts, post-hearing briefs, or a written decision. (Goldberg, 1982; 2005). According to the latest statistics from the Federal Mediation and Conciliation Service (“FMCS”), the average per diem rate for arbitrators is \$912.99. The average total charge, including the arbitrator’s fees and expenses, is \$4,171.06. (Federal Mediation and Conciliation Service, 2008).

Of course, there are no actual studies on the fees and expenses of attorneys, if they are utilized, but it would not be unexpected to see those fees in the same neighborhood as the fees and expenses of the arbitrator, if not higher. The use of attorneys also increases costs due to the fact that in an effort to prevail in arbitration, an attorney is likely to broaden the scope of the arbitration to include procedural and technical issues not customarily used by non-lawyers. A common example is an issue with arbitrability due to timeliness or other defects in the underlying grievance. This increases not only the time and expense of the attorney, but also those of the arbitrator, who must consider these issues in order to resolve the grievance. (Goldberg, 1982).

These numbers pale in comparison to the expenses of mediation. First, if a mediator is utilized from the FMCS or similar state agency, there is no cost since these entities typically do not charge a fee for this service. (Gregory, 1980). The Mediation Research and Education Project (“MREP”) of the Northwestern University Law School has been conducting and maintaining records on grievance mediation since 1980. The program’s clients consist of many well-recognized companies and unions in the transportation, communication and coal industries. The records of this organization reveal that the average charge for their approved grievance mediators is \$498.94 per mediation. (Mediation Research and Education Project, 2008).

This benefit is made more attractive by the fact that many small employers and unions have limited resources to spend on arbitrations. Small employers without sufficient labor relations staff and/or legal counsel may have made an erroneous determination in denying a grievance, the dollar effect of which will only be compounded by the time consumed in scheduling and completing the typical arbitration. Likewise, a small union may have an important issue to address, but with a small or shrinking treasury, does not have the financial resources to spend on an arbitration. (Bowers, 1980).

2. Increased Speed. There is an old saying that “justice delayed is justice denied”. It is important that a grievance be settled as quickly as possible, as time delays may harden the rift between the parties. (Gregory, 1980). Likewise, in discharge cases or when the alleged contractual violation is continuing, potential monetary liability continues to escalate.

According to the latest available statistics from the FMCS, the average time between the request for an arbitration panel and the arbitrator’s award is 285.86 days. (Federal Mediation and Conciliation Service, 2005). Perhaps this can be explained by the lack (or perceived lack) of arbitrators with the necessary experience to handle arbitrations who are acceptable to both

parties. It's fair to say that experienced arbitrators are in high demand, while those with relatively less experience are reasonably available for scheduling. Substantial time can also be wasted in the selection of an arbitrator (not to mention the cost involved), since each party attaches significant importance to the identity of the arbitrator. Each party tends to believe that a potential arbitrator's decision can be predicted from his or her prior decisions. The selection of an inexperienced arbitrator renders the union or company representatives subject to criticism in the event the grievance is lost. This time spent in finding and scheduling the "right" arbitrator only increases the time delay. (Goldberg, 1982).

Studies have shown that a mediation is quicker than arbitration (which can take a day to present a single case), due to the informality of the process. There is no need for the use of subpoenas and discovery, or the elaborate development of strategy by counsel. As there is no perceived bias in mediators as opposed to arbitrators, the selection process is not an issue. (Goldberg, 1982). Studies indicate that a mediation can be conducted within approximately 45 days from the date of the request for a mediator. Additionally, most mediations can be completed in a couple of hours, and several grievances can be resolved in a single day, if necessary. (Goldberg, 2005).

3. Improved Negotiation Skills and Relationships. An interesting benefit of a grievance mediation process is the likelihood that after participating in the process, the parties have an increased ability to resolve grievances without a mediator's help. After learning an interest-based approach to resolving disputes, the parties learn how to use these tools to resolve disputes without a mediator's help, at earlier stages. The tools developed in mediation can help the parties approach other disputes in the same fashion. In fact, the potential exists with mediation to

transform the groups used in mediation into groups organized for the purpose of resolving other issues in the labor-management relationship. (Goldberg, 1983; 2005; Schnedemann, 1987).

In a 2003 study, 83% of the participants in a grievance mediation program stated they were more able to resolve grievances after having participated in mediations. When asked the reason why, the participants stated that it was because they were better able to communicate. In that same study, 65% thought that the use of interest-based grievance mediation had led to an improved relationship between the union and the company. The primary reason given was that grievance mediation established a cooperative atmosphere which carried over to other issues. (Goldberg, 2005).

Along that same line, grievance mediation can help eliminate the “scar tissue” caused by arbitration. (Block, Beck & Olson, 1996). Since there is a winner and a loser in arbitration, the loser is often frustrated and hurt by the result, which impairs the parties’ long-term relationship. This effect will have its greatest impact on employers who place a high priority on promoting workable relationships with their union. (Bowers, 1980). Along that same line, arbitration typically involves the use of attorneys and other third parties whose focus is on “winning” the grievance. As these representatives are not involved in the parties’ day-to-day relationship, they may be less concerned about the future effect of the resolution on the parties’ continuing working relationship. (Goldberg, 1982).

With its focus on self-determination between the parties, mediation reduces the alienation and tension that typically arises in a labor relations dispute, and has the potential to create an environment for mutual understanding and trust. As a result, the parties find it possible to resume and promote a good working relationship. (Schnedemann, 1987).

4. Increased Satisfaction with the Process. A settlement that results from an interest-based grievance mediation process is voluntary and has the potential produce a result which is more satisfactory to both parties (compared to arbitration, where only one party wins), and therefore, more likely to last. In fact, a recent study in the coal industry revealed that the satisfaction rate with compromise outcomes in mediation was 68% for union representatives and 89% for company representatives. (Goldberg, 2005). Mediation permits the parties to address the underlying reasons why the issue arose, and the interests underlying the issue. Once this is accomplished, the parties can facilitate a solution with which both can live. In mediation, the parties generally feel as though they have participated in a fair process, if it is handled correctly, since they have had the opportunity to tell their story directly to the other side and to the mediator. Mediation gives the parties control over the process and the ability to speak directly to the mediator (in private, if necessary), and inform the mediator of what is truly important to them. Having “been heard” directly by the mediator, the parties are more likely to be satisfied with the process. (Block, et al., 1996).

Along that same line, parties in a dispute tend to feel better about a result which is based on negotiation, rather than one which is imposed by a third-party neutral. This is especially true where the disputants have a continuing relationship, as in labor relations. Turning the dispute over to a third-party decision-maker is somewhat defeatist, and has the tendency to imply that the parties cannot settle their own disputes. Certainly, it also runs the risk that one party will be found at fault. (Schmedemann, 1987).

5. Impact on Settlement Rates. The effect of mediation on grievance settlement rates is well-established. Since 1980, MREP program referenced above has conducted 3,615 grievance mediations. Of those, 85.8% have resulted in a settlement. As will be discussed in more detail

below, the effect was not impacted significantly based on the type of issue presented (i.e. discipline, discharge, or contract interpretation). As to the type of settlement, from 1990 to 2007, MREP records indicate that 78% resulted in a compromise settlement, 5.2% resulted in the employer granting the grievance, and 14.3% resulted in the union withdrawing the grievance. (Mediation Research and Education Project, 2008). In view of all of the advantages discussed in this section, it is reasonable to suggest that mediated settlements tend to be durable and enjoy a high rate of compliance. (Schnedemann, 1987).

D. Arguments Against Mediation.

Although the positives of a grievance mediation program should be evident, there are some arguments which are often made by those who are unfamiliar with the process, and should be addressed.

1. The “Narcotic” Effect. It is often argued that the availability of mediation will decrease the pressure to negotiate effectively and seek settlement at earlier stages of the grievance process. One party may view mediation as more attractive than accepting the other party’s final offer, so there may be a reluctance to make any concessions at the lower levels of the process. (Goldberg, 1983; House, 1992; Schnedemann, 1987).

While this argument may have some merit, it ignores the fact that in practice, such a strategy only prolongs the inevitable. If a mediation is to take place, concessions and compromise will occur, so the parties would be well-advised to engage in those trade-offs earlier in the process, without going through the time incurred in a mediation. Further, experience shows that the more the parties become accustomed to using the skills learned in mediation, the more likely they are to use those tools earlier in the process. (McPherson, 1956).

2. Added Time. There is also the argument that in those cases where mediation is not successful in resolving the grievance, the time involved in attempting to resolve the grievance has actually been increased. Conversely, this argument can be disposed of rather easily. If this risk is perceived to be present, the parties can agree to proceed with selection of the arbitrator and scheduling the arbitration while at the same time scheduling and engaging in the mediation. As the mediation can be scheduled rather quickly, the mediation will be concluded well in advance of the scheduled arbitration date, without any additional delay. (House, 1992; McPherson, 1956).

3. “Showing Your Cards”. Some parties might be reluctant to go to mediation out of the fear that the process could in some way prejudice their case in arbitration if the mediation is unsuccessful. Of course, this risk is initially reduced by the fact that the mediator cannot serve as the arbitrator of the same grievance. With that being the case, mediation can influence the outcome of the arbitration only by its effect on the presentation of the case at arbitration if the grievance is not settled. Aside from this argument there may be testimony or documents which a party believes can cause a “bombshell” effect in arbitration, and that party is reluctant to disclose that information in an attempt to settle the grievance at mediation. However, especially where both sides will have competent representation at the arbitration, the chance of being ambushed by a “smoking gun” at the arbitration is possible, but not very likely. Competent representatives for each party will often subpoena documents prior to the arbitration which will otherwise obviate the effect of such damaging evidence. A strategic decision to withhold such information in response to a subpoena may have the effect of the arbitrator ruling it inadmissible at the hearing. Additionally, if a party desires to attempt to withhold such evidence at the mediation, in the desire to hold it until arbitration, that party can confidentially disclose it to the mediator, who

can creatively utilize the information, without actually disclosing the specifics, in an attempt to help the other party realize the risk in going forward to arbitration. On the other hand, the use of mediation can result in a sharper focus on the issues and a clearer appreciation of the factors that are most relevant to a decision. As a result, the parties could actually present a better case in arbitration, having first gone through mediation. (McPherson, 1956).

4. “We Don’t Need It”. Some parties would argue that their labor-management relationship is mature and sophisticated enough that they are entirely capable of resolving their grievances without mediation. To some extent, this argument is valid. However, for it to have merit, the parties must indeed be mature and sophisticated enough to objectively evaluate the merits of a grievance and arrive at a mutually satisfactory outcome. That condition is indeed rare. Many labor-management relationships are too new to have achieved that level of refinement and skill. In many others, the level of conflict is too high, the negotiating skills too low, and the internal political pressures too great to engage in true interest-based negotiations. In some situations, the inability to settle grievances is caused by a lack of knowledge as to the likely result of an arbitration, or the failure to fully explore the various settlement possibilities and options. A skillful mediator can serve the role of a “negotiation coach,” and disarm some of the conflict by encouraging the parties and helping them to communicate more effectively. The mediator can help bring about settlement by having the parties explore different options not previously considered. The political pressures can be reduced by a mediator who is familiar with arbitration, and who can advise that a grievance should be withdrawn or granted. (Goldberg, 1982; Schnedemann, 1987).

5. Futility-No Compromise Available. The company may view the union as pressing for mediation of grievances with the hopes of obtaining some relief, but which the company believes

have no merit and/or which require a ruling, not a compromise. In response to this argument, it should first be remembered that a mediator's function does not always involve concessions or compromise. Mediation can reduce the pressure on the union to take those grievances without merit to arbitration for fear of the political and legal consequences of failing to do so. There certainly are cases where a skillful mediator can, and should, convince one party or the other that their position lacks merit. In those (few) cases which have absolutely no merit, the grievance may indeed be withdrawn. A qualified mediator can help clarify the issues and help the parties see the strengths and weaknesses of their positions. The mediator's judgment that the grievance is without merit or that a particular settlement should be accepted might be more persuasive to the grievant than similar statements by a union representative. The grievant may be aware of the financial costs of arbitration, and may discredit the same advice by the union representative as designed to conserve union funds. As a neutral expert in the field, the mediator's advice on the merits of the case may carry more weight with the grievant. (McPherson, 1956).

Beyond this analysis, there are certainly cases which, although perceived as without merit, do call for a compromise. In any legal dispute, there are rarely any "slam dunks". Even in arbitration, many awards cannot be classified as total victory for either party. It is sometimes argued that compromise decisions may be due to the lack of courage on the arbitrator's part, but are more often than not due to the failure of both parties to comply with the contract. Due to factual discrepancies or vagueness of contract language, it may be advisable for the parties to seek a compromise. The point is that compromise solutions are not unique to mediation, but are just as often found in arbitration as well, and the parties should be reluctant to hastily categorize a dispute as non-negotiable. (McPherson, 1956; Schnedeman, 1987).

6. Institutional Barriers. As indicated above, the coal industry study revealed that the majority of both labor and management representatives who have utilized grievance mediation were satisfied with the process. (Goldberg, 2005). However, other comprehensive studies of the utilization and satisfaction rate of grievance mediation are noticeably absent in the research. Anecdotally, practitioners in the field are aware that grievance mediations are conducted, often by FMCS personnel, yet the FMCS posts no statistics regarding utilization and/or satisfaction. Practitioners also generally recognize, albeit again anecdotally, that external mediation of grievances prior to arbitration is the exception rather than the norm. Different reasons have been advanced for this lack of usage. One study revealed that an employer may find some strategic benefit in forcing the union to make an economic determination on whether to proceed to arbitration. (Block, et al., 1996). Additionally, it has been argued that employers may prefer the resolution of a grievance which provides a rights-based definite answer. (Goldberg, 2005).

Beyond these arguments, perhaps a more fundamental principle is at stake regarding why grievance mediation has not achieved full recognition in the resolution of contractual grievances. Generally speaking, the organizational interests of unions may be inapposite to an interest-based resolution of grievances. It can be argued that by their very nature, unions are rights-based organizations which need to maintain membership and vigorously advocate on behalf of their members, and the grievance arbitration machinery is at the heart of that ideology. Conversely, with its emphasis on compromise and collaborative resolution of disputes, grievance mediation can be viewed as an attack on the union's organizational identity. By "winning" a grievance through arbitration, the union demonstrates its continuing relevance to its membership. Additionally, the processing of grievances through arbitration is seen as a training ground for

union stewards into leadership roles. Both of these factors help to perpetuate the union's identity as a vigorous advocacy organization, consistent with its historical tradition. (Monahan, 2008).

III. HOW DOES GRIEVANCE MEDIATION WORK?

A. Determining What Types of Grievances are Suitable for Mediation.

As indicated above, grievance mediation has been successful in all types of grievances. According to records from MREP from 1990 to 2007, the settlement rate in discharge cases was 86.3%; in other discipline, 95.1%; and in contract interpretation, 91.7%. It is, therefore, evident that the parties can use the process effectively as an alternative to arbitration, regardless of the basis for the grievance. (Mediation Research and Education Project, 2008).

Of course, discipline and discharge cases are usually quite emotionally contentious and factually contested. Nevertheless, the mediation process provides ample opportunity for resolution. In these cases, credibility is generally an issue, and a neutral party must decide which party is telling the truth or which party's version of the facts is more credible. That being the case, there is very little need for a long written opinion explaining why the neutral accepts one party's version over the other's, and a mediator's advisory opinion can serve that purpose. Further, discipline and discharge cases often hinge not upon whether the grievant engaged in the prohibited conduct, but whether the penalty was appropriate under the circumstances. Mediation offers the potential of settlement in these cases due to the wide range of possible disciplinary penalties, without necessarily creating a precedent in other cases. (Goldberg, 1982).

Some of the same arguments arise in cases of contract interpretation. In these cases, the personal rights of an individual employee may not be as significant, so there are a wide range of potential settlements which can be negotiated between the company and the union. Additionally, while the parties may need the opinion of a neutral, they do not necessarily need a long,

expensive written opinion explaining the decision. There are also issues of contract interpretation where the contract is very vague on an issue, or does not address it at all, but the issue is too important to risk in the hands of an unpredictable arbitrator. A good example of this issue is the company's right to contract-out work. Although arbitrators frequently deal with this type of issue, a mutually acceptable resolution is rarely achieved. Mediation offers the opportunity to work out such a resolution, without running the risk of an adverse decision from an arbitrator. (Goldberg, 1982).

Of course, there are certain types of grievances that perhaps lend themselves to arbitration over mediation. Where there are complex factual issues, testimony under oath in arbitration may be necessary. Additionally, in those grievances which raise issues where the reasoning behind an action is important and a precedent must be set, arbitration may be needed. Finally, although the parties should be reluctant to accept this fact, there are cases where the parties hold their positions so firmly that compromise is unlikely, and arbitration may be needed. If this is the case, the parties should keep in mind that the more important the issue, the greater the risk of an adverse opinion from an arbitrator and its binding effect on the parties' future interests. Thus, it rarely hurts the parties to make an attempt at mediation to ascertain if those positions can be modified. (Goldberg, 1982).

Notwithstanding the above arguments, it should always be remembered that grievance mediation is a supplement to, and not a replacement for, grievance arbitration. It would be irresponsible to suggest that grievance mediation is successful in all cases, as there are admittedly grievances in which the parties' interests are too much in conflict for compromise and settlement. In those cases, and/or where the parties' require a final adjudicated resolution, arbitration will remain an option. (Roberts, Wolters, Holley & Field, 1990).

B. How the Process is Initiated.

Since grievance mediation is a voluntary process, the parties need to decide how the process is going to be invoked (assuming the contract does not require a particular method). Typically, the program is designed so that *both parties must consent* to mediation, or where *either party can submit* a grievance to mediation. An alternative procedure is for the parties to agree that all grievances will be submitted to mediation, *unless both parties agree that a particular grievance not be submitted* to mediation. The last two options essentially allow a single party to submit the grievance to mediation. The last option should logically result in the largest proportion of grievances proceeding to mediation, since the parties will assume all grievances go to mediation, unless both parties opt-out. (Goldberg, 1982).

The argument in favor of the first option is that the parties' consent to mediate shows their willingness to settle, and this generally maximizes the likelihood of success. On the other hand, if the consent of both parties is required, and one party objects, for whatever reason, the use of mediation will be reduced, which will increase the number of grievances submitted to arbitration. Likewise, if only one party's consent is required (as in the second and third options), some grievances will be mediated when one party is not willing to compromise. This may arguably reduce the likelihood of settlement. (Goldberg, 1982).

Even though there is some argument that mutual consent should be required in order to help ensure success, such is not necessarily the case. While a party might not initially consent to mediation in the first place, that position might (or should) change during the mediation process due to the cooling of tempers, the passage of time, the introduction of new facts, and/or the presence of a skilled mediator. (Goldberg, 1982). While some grievances can be more difficult to

mediate than others, there is rarely a grievance that is impossible to settle. No matter how dim the prospect is for settlement at the outset, there is always the chance that a mediator can help the parties develop a mutually satisfactory solution. Although mediation may not always be successful, it is unlikely that the parties will be able to accurately determine in advance that the effort will fail. (McPherson, 1956).

Of course, there are some relationships where mutual consent may be preferable. If the representatives of the parties are skilled negotiators and are usually successful in negotiating the settlement of grievances at earlier stages of the process, providing one party with the authority to invoke the process may not be an effective utilization of the process. By the same token, if the parties' relationship is highly contentious, allowing one party to invoke mediation may be considered a waste of time, or an attempt to abuse the process. (Goldberg, 1982).

In view of all of these arguments, it would appear that the most desirable and effective procedures are the second or third options. Especially if the parties are in the infancy of the process, the first option may be too easily dismissed. Whichever option is agreed upon, the parties can either provide for the process in their contract negotiations; or, if mid-term in the collective bargaining agreement, enter into a memorandum of understanding or similar agreement setting forth the procedure decided upon. Upon deciding the procedure for invoking the process, the parties should enter into a universal agreement to mediate, setting forth the parameters of the process.

C. The Agreement to Mediate.

After the parties have decided on a uniform procedure for how the process will be invoked and administered, the parties should sign an agreement to mediate for each grievance which goes to mediation.

Initially, the agreement should obviously provide that the grievant is entitled to be present at the mediation conference. It should also provide that if the grievant chooses not to be present, the union may proceed in his or her absence. With respect to other attendees, the agreement should state that each party will have the right to have one principal spokesperson at the conference. With respect to other attendees, the parties will need to seek agreement on how many other employees will be allowed to attend, and whether their attendance will be with, or without pay. (Mediation Research and Education Project, 2007).

The agreement should also provide that any written material presented to the mediator will be returned to the party presenting that material at the end of the mediation conference, although the mediator may have the option of retaining one copy of the grievance and any settlement agreement for the purpose of record-keeping and statistical analysis. (Mediation Research and Education Project, 2007).

With respect to the conference itself, the agreement should provide that the proceedings will be informal, and that the evidence at the mediation will not be limited to the facts presented at earlier steps of the grievance process. It should also state that the rules of evidence do not apply, and that no transcript or other record of the conference will be made. The agreement should also state that the mediator will have the authority to meet with each party and/or their representatives separately, and that nothing disclosed in those conferences will be shared with the other party without the consent of the disclosing party. It should also indicate that the mediator will not have the authority to compel or issue an order resolving the grievance. (Mediation Research and Education Project, 2007).

If no settlement is reached and it appears to the mediator that the parties are at impasse, the agreement should indicate that unless both parties agree otherwise, the mediator will provide

the parties with an oral advisory opinion as to how, in his or her professional judgment, the grievance will be decided at a subsequent arbitration based upon the facts presented at the mediation. According to the agreement, the mediator will be obligated to state the legal and factual grounds for his or her opinion. The agreement should provide that either party may reject the advisory opinion, although the parties may continue to negotiate after receiving the mediator's advisory opinion. It should also be stated that the advisory opinion, if accepted by the parties, will not constitute a precedent and/or establish a practice for the resolution of any other grievances, unless the parties agree. (Mediation Research and Education Project, 2007).

If the mediation does not result in a settlement, the agreement should provide that the parties are free to request arbitration, and provide the number of days within which a demand for arbitration must be made, if it has not already been requested. Additionally, the agreement should provide that nothing contained in the mediation agreement will be considered as an acknowledgement by the company that the grievance is subject to arbitration, and the company reserves the right to raise the issue of arbitrability at a later time. (Mediation Research and Education Project, 2007).

Also concerning arbitration, the agreement should provide that if the grievance goes to mediation, no person serving as a mediator in that mediation can serve as the arbitrator of the same grievance. Further, it should state that nothing said or done by the mediator or any party can be referred to or used in the arbitration, or in any other grievance, mediation conference, or arbitration, unless it was said or done in a prior step of the grievance presented. (Mediation Research and Education Project, 2007).

D. The Mediator's Advisory Opinion.

As indicated above, if the parties in a grievance mediation appear to be at impasse, most grievance mediation programs allow the mediator to give the parties an immediate oral advisory opinion as to how the grievance will likely be decided if it does go on to arbitration, unless both parties agree that no such opinion be stated by the mediator. This opinion is not necessarily based on notions of fairness, but solely on the collective bargaining agreement, which is what the arbitrator would be deciding. Of course, the opinion is not final and binding, but is advisory. It is delivered orally, and usually accompanied by a statement of the reasons behind the opinion. It can be used as the basis for further settlement discussions, or for withdrawal or granting of the grievance. If the case does later go to arbitration, the advisory opinion is not admissible. (Goldberg, 1982; 1983).

There are two reasons for the rendering of an advisory opinion. First, the opinion gives the union and the company some comfort in realizing that, even if the grievance is not settled, they have nevertheless learned a skilled neutral's evaluation of their case. Second, the advisory opinion may discourage the use of arbitration when no settlement is possible. This may be the result of providing the parties with an analysis of the case which was previously not understood or appreciated, or by giving the representatives the information necessary to show their constituents that their position is not valid. If that is the case, further settlement discussions after the opinion is given can enhance the possibility of settlement. (Goldberg, 1982).

There are certainly some arguments against the use of the advisory opinion. First, the opinion may strengthen the "winner's" determination to go to arbitration if the "loser" does not accept the opinion. Second, the mediator's opinion, without having the opportunity for a full hearing on the case, could be wrong and ultimately different from the arbitrator's eventual ruling.

Third, there is the risk that the mediator will use the opinion in confidential meetings to persuade one party to modify their settlement position, and use a different opinion to persuade the other party to do the same. The fourth argument is that an advisory opinion may distract the parties from the goal of settling the grievance through interest-based negotiations, and cause them to rely excessively on persuading the mediator on the correctness of their argument based on the facts and contract interpretation. (Goldberg, 1982).

With respect to the first argument, it should be pointed out that while the opinion may encourage the winner to stand firm on his position, it discourages the loser from doing so, and should ultimately reduce the likelihood of the case going to arbitration. As for the second argument, the probability of the mediator's opinion being different from the arbitrator's ultimate ruling is not likely. In most cases, the arbitrator forms a tentative decision at the conclusion of the hearing. There is no reason to believe that the information gained in the mediation would be materially different from the evidence in arbitration, and the opinion from each should therefore be essentially consistent, especially if the underlying issue involves a principle on which most arbitrators agree. The third argument can be addressed by assuring that the mediator is careful not to "talk out of both sides of his mouth" in confidential meetings, but provide the opinion only in a joint session when it appears the parties may be at impasse. (Goldberg, 1982).

Perhaps the strongest argument against an advisory opinion is the fourth issue. By concentrating on pure contract interpretation principles, the parties and the mediator are certainly not promoting the parties' relationship and their long-term problem-solving abilities. That is why the advisory opinion should be reserved until there has been a thorough discussion of the interests and needs of the parties, and only after a substantial effort has been made to formulate a settlement without regard to the likely outcome of the arbitration. The parties can be more

creative if they are thinking about mutually satisfactory outcomes than if they are making arguments which are intended to persuade the mediator about which party is “right” under the facts and the contract. (Goldberg, 1982).

Having addressed the advantages and disadvantages of the advisory opinion, it does serve a useful purpose, especially where the representatives of the parties are not highly-skilled in evaluating the probable outcome of arbitrations. Likewise, where the parties’ representatives need an advisory opinion in order to convince their constituents of the futility of going to arbitration, it would be unwise eliminate the advisory opinion.

IV. LEGAL ISSUES UNDER A GRIEVANCE MEDIATION PROGRAM.

A. Issues with the Duty of Fair Representation.

Under the duty of fair representation, the union is required to represent all bargaining unit employees without discrimination or hostility, and in good faith. In the context of grievance handling, the U.S. Supreme Court has stated that a union is not required to process every grievance to arbitration, and employees have no absolute right to have a grievance taken to arbitration. Additionally, the Court has encouraged settlement of grievances informally, which should support the idea of grievance mediation. Specifically, the Court has indicated:

Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem area in the interpretation of the collective bargaining contract can be isolated and resolved.

(Vaca v. Sipes).

In pursuing this process, the Court has stated that union discretion is essential to the proper functioning of the collective bargaining system, and has given unions broad discretion in the handling and the processing of grievances. *(Electrical Workers v. Foust)*. Generally, the

courts allow a union to decide whether to take a case to arbitration, if the chances of success in arbitration are slight. (*Buchanan v. NLRB*).

As indicated above, it is sometimes argued that unions often arbitrate grievances which do not have merit because of internal union pressure or the threat of a suit for breach of the duty of fair representation. One of the advantages of the grievance mediation process is that it can reduce the pressure on the union to arbitrate grievances which fall into these categories. As also indicated above, mediation has the potential to accomplish this result since the advisory opinion of a neutral mediator that a grievance does not have merit, or that a particular settlement proposal should be accepted, may be accepted by the grievant more readily than the same opinion from a union representative. If the grievant accepts the mediator's opinion, it is reasonable to expect that the chance of a lawsuit for breach of the duty of fair representation is reduced. (Goldberg, 1982).

There is an additional positive effect which grievance mediation brings to the risk of an allegation that the union breached its duty of fair representation. If the grievant does insist that a frivolous grievance go to arbitration, the mediation process can strengthen the union's refusal. If the grievant does file suit for breach of the duty in that case, the union could defend the case by showing that the mediator provided an advisory opinion that the union was likely to lose at arbitration. Since the advice of legal counsel to the union that a grievance lacks the merit to go to arbitration can serve as a defense to a suit for breach of the duty of fair representation, it is reasonable to expect that the mediator's opinion should have essentially the same effect. (Goldberg, 1982).

B. Grievances that Involve Unfair Labor Practices.

In the case of grievances for contract violations where the employee has also filed an unfair labor practice ("ULP") charge with the National Labor Relations Board, the Board will

generally defer its decision on the charge to the arbitration process, if certain requirements are met. In the context of arbitration, those requirements are as follows:

- (1) The arbitration proceedings were “fair and regular”;
- (2) All parties agreed to “be bound” by the arbitrator’s ruling;
- (3) The facts and issues surrounding the unfair labor practice must have been raised and considered in the arbitration; and
- (4) The arbitration decision should not conflict with the requirements of the National Labor Relations Act.

(Spielberg Mfg. Co.; Collyer Insulated Wire).

Although this analysis would seem to apply to cases involving mediation of grievances, many earlier decisions of the Board refused to apply it in that context. The Board had indicated that grievance settlements could not satisfy these requirements since the settlement agreement did not address the ULP charge, or that there was no hearing or ruling that the Board could review to ensure that the requirements had been met. In short, the Board seemed to indicate that an adversarial arbitration would be required in order for the Board to defer its decision to the arbitration process. (Bowers, 1980; Gregory, 1980; Hardin & Higgins, 2001).

In more recent rulings, however, the Board has indicated some support for deferral when settlement is the result of negotiations between the parties. Not surprisingly, the Board has stated that deferral to settlements supports the law’s policy of favoring private resolution of labor disputes. In fact, deferral to negotiated settlements serves that objective better than the arbitration process, since a settlement is the result of collective bargaining, while arbitration is the result of an adversarial hearing. Of course, the settlement process in mediation will still need to comply with the Board’s requirements. (*Alpha Beta*; Hardin & Higgins, 2001).

In order to satisfy the first criteria, that the mediation process be “fair and regular”, this requirement can easily be met. Even when there is no technical record in arbitration, the Board itself typically conducts an investigation of the underlying facts, which serves as a substitute for the written record of a hearing. Of course, that investigation should reveal that the grievant had notice of and was present at the mediation, and had an opportunity to speak in support of his position. The second requirement, that the parties have agreed to be bound by the arbitrator’s decision, will certainly be satisfied in any negotiated settlement, since the parties will have signed the settlement agreement. (Goldberg, 1982).

The third requirement that the facts and issues surrounding the ULP have been raised and considered at the arbitration, can also be satisfied in the mediation process. Where grievances also involve ULP charges, the settlement agreement can simply reflect that the facts surrounding the ULP were also raised and discussed, and that the settlement resolves the ULP as well as the grievance. Finally, grievance mediation can comply with the fourth criteria that the settlement be consistent with the National Labor Relations Act and Board policy. Simply stated, mediators who perform grievance mediations should have a good working knowledge of the NLRA and Board decisions, and ensure that the settlement is in compliance with those requirements. When these conditions are met, it is reasonable to suggest that the Board will defer to the negotiated settlement agreement. (Goldberg, 1982).

V. CONCLUSION

Briefly returning to the hypothetical grievance introduced earlier in this paper, there are several viable alternatives which the parties might explore in order to avoid the costs and other effects inherent in the arbitration route. With regard to Joe’s apparent lack of interpersonal skills, perhaps the company would agree to provide Joe (and possibly other lead persons) with training

in communication skills and related supervisory skills. Concerning the union's issue with the new production standards, perhaps the parties could agree to have an independent engineering study performed, with the results provided to the union, in order to justify the new standards. With respect to the union's grievance against Joe for performing bargaining unit work, perhaps the parties could enter into a memorandum of understanding more specifically setting forth the conditions under which lead persons can perform bargaining unit work. While each of these alternatives places some burden on the company and the union, it is reasonable to suggest that these proposals address the underlying interests of the parties, and have the potential to provide a cheaper, quicker, and more satisfactory resolution than could be obtained through arbitration.

While arbitration has been and will continue to be necessary for resolving many disputes in labor relations, grievance mediation has the potential to provide a more effective resolution of many grievances by focusing on the parties' interests, instead of on their respective rights and power. Not only does grievance mediation represent a savings in terms of transaction costs as opposed to arbitration, it has the real potential to create solutions which are more satisfactory to the parties, resulting in a more durable and improved labor-management relationship.

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