In conclusion, I say that mediation will never replace arbitration. Indeed, arbitration is the motor that makes mediation run. It is the fact that arbitration is out there, that it is expensive, that it takes a long time, and that the outcome is unpredictable that impels the parties to mediate and to work out settlements at mediation. While mediation, to repeat, will never replace arbitration, it is capable of reducing the frequency of resort to arbitration. It is also capable of providing more satisfactory outcomes than arbitration, and of doing so in a manner that has the long-range educational value of teaching settlement skills.

Now some of you, I anticipate, are skeptical about all this. All I can say is that skepticism before trying mediation has almost invariably been replaced by satisfaction afterwards, or, in less elegant terms, "Try it, you'll like it."[2]

II. A MANAGEMENT APPROACH

FRANK C. SARNO*

About two and a half years ago, Professor Steve Goldberg came before a group within the coal industry and said he had a new method of handling grievances. This method was quicker, cheaper, and would render better decisions than arbitration. He went on to say that, in the process of handling these grievances, the system would teach the participants problem-solving. Steve called the process "mediation" and immediately lost half his audience. For those of us within the industry who did not tune him out or mentally leave the room, the process sounded like it had some possibilities.

Those of us at AMAX Coal Company considered his proposal in the light of: (1) What benefit would "mediation" play in our overall goals and objectives in labor relations? (2) What is the level of maturity in the relationship with our employees, the union, and our mine management? (3) Are we willing to let our mine management make hard decisions?

---

[2]For a fuller discussion of the theoretical issues posed by grievance mediation, *see* Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration,* 77 Nw. U. L. Rev. 270 (1982). For a more extensive empirical report on the results of our grievance mediation experiments, *see* Brett and Goldberg, *The Mediation of Grievances in the Coal Industry: A Field Experiment,* 37 Indus. & Labor Rel. Rev. 1 (October 1983).

*Director, Employee Relations, AMAX Coal Company, Indianapolis, Ind.

Mediation meant that no longer could we rely solely on an arbitrator to render a decision. It would now be necessary to force ourselves to explore alternatives in the resolution of grievances. The goal must be to reach mutual agreement and achieve a "win-win" approach to our grievance handling versus the "win-lose" of arbitration. We felt that if individuals could come together and reach an agreement, they would be committed to that agreement. That commitment to the resolution of disputes was lacking in arbitration. How many times have we heard "we're doing it because the arbitrator made us"?

After talking ourselves into this concept, and having a labor relations goal to "Establish an attitude of mutual respect, trust and confidence between AMAX management, its employees and their representatives so that the Company mines coal safely, efficiently and profitably," we agreed that Steve had sold another customer.

Our first trial period was for six months. This trial period has now been expanded to the end of our current wage agreement, October 1, 1984. Over these past two years we have participated in mediation at nine of our mines in Illinois and Indiana. Mediation is used following the third step in our grievance procedure and prior to arbitration. During this time we had 61 cases assigned to mediation. Of these, we reached a settlement in 56, a settlement rate of 92 percent.

Under the procedural rules we agreed to with the union, either party can request mediation following the third step of our grievance procedure. The mediator is a member of a panel and is assigned cases by the mediation office. He is responsible for conducting an informal hearing of the matter, usually not to exceed two hours, and to help the parties reach an agreement that will settle the case. If agreement is not reached, the mediator will render an opinion on the dispute: "If I heard this case in arbitration, this is how I would rule." At this point the parties can accept the mediator's opinion or proceed to arbitration.

One of our concerns in implementing mediation was that the number of settlements at the third step of the grievance procedure would decline when mediation became available. This has not been the case. Our third-step settlement rate has increased significantly, from 67 to 79.6 percent, in UMWA District #11 (Indiana) and has remained virtually the same (82 percent before, 79.7 percent after) in UMWA District #12 (Illinois).

At this time we are not referring all cases to mediation after

the third step. In fact, at one of our properties, the option was not available until a few months ago because they were so opposed to it. However, in our overall experience we have found that the union representatives are just as committed to the process as we are. They want to see mediation succeed and feel that the "win-win" concept is much better than an arbitrated settlement.

From the company's viewpoint, we have seen labor relations people and operations managers stretch to seek alternatives when there are problems versus saying "no" at the early stages. This expansion in problem solving is also being shared by mine committees and district representatives.

We had problems during implementation of this new process. We had people saying "Let's mediate—we have nothing to lose." We had the complaint that the mediator was forcing decisions. We had the comment, "Why mediate? Let the arbitrator decide." We also had people say, "It's not contract."

After two years of working with mediation, it is being accepted at our locations and the problems seem to be leaving us. People recognize that mediation is voluntary and, as a result, they have become more comfortable in using it. They are no longer intimidated by the mediators and have learned to seek solutions to problems. They have learned to say "no" when they need to. This comfort and frankness during the process has helped make the system work even better.

People have asked if the mediation process should be uniformly implemented within the coal industry. The answer is "no." Our current wage agreement allows for flexibility in the arbitration step of our grievance machinery provided (1) mutual agreement is reached between the districts and the company, and (2) the parties have final and binding arbitration available. In our view, if the mediation process is mandated on the parties, it will fail. It must be adopted on a voluntary basis; it will not work if imposed.

Another question is whether we are having problems. The answer is "yes," and we expect to continue to have problems. What we have had is a decrease in strike activity, and our labor relations problems seem to be getting easier to handle. People are discussing alternatives and are more open-minded.

If you are looking for a quick fix to your labor relations problems, "mediation" is not the answer. However, it can be a big

part of an overall program to change a hostile environment or to improve upon a good one. For mediation to work, you must be willing to listen, to seek alternatives, and to make business decisions that may or may not be "contractual"—whatever that is.

At AMAX our goal is to put Steve's mediation board out of business. We feel this can be accomplished by developing skills in communication that would allow us to resolve disputes before they reach mediation or arbitration. In the meantime, we are very pleased to have this service available.

In summary, let me leave you with a few ideas. Mediation is cheaper and quicker, and generally you will reach better decisions than in the arbitration process. Mediation has helped in the labor relations educational process of management and hourly employees. And we are resolving our problems from a "win-win" approach rather than a "win-lose." At AMAX Coal we are very enthusiastic about "mediation." It is not utopia. However, we feel it is a step forward in achieving labor peace and stability within our company.

III. CAN IT WORK IN CANADA?

JEAN-JACQUES BOURGEAULT*

The point of view I will express here does not evolve from extensive experience with grievance mediation at Air Canada. Rather, we have experimented only briefly with the concept and, I should add, with the valuable assistance of Frances Bairstow, we have been examining the potential for its wider application in our various relationships.

In a nutshell, we believe that there are substantive differences between the mediation and the arbitration of grievances. The consensual nature of grievance mediation when compared to the win-lose, unilateral decision-making of grievance arbitration suggests that the process can have a much greater long-term impact on the labor-management relationship as well as implications which extend into the negotiation process.

It is important that I position myself before I go on. As Senior

*Senior Director, Labour Relations, Air Canada, Montreal, Quebec.

Director of Labor Relations at Air Canada, I oversee a labor relations network covering 12 collective agreements and 17,000 plus employees. Our labor relations occur primarily in Canada where several sections of the labor code pertain to grievance arbitration. First, strikes and lockouts or the threat of strikes or lockouts during the term of collective agreements in Canada are illegal, and there are a number of clauses in the code that are designed to strictly enforce this provision (S180-182). Second, every collective agreement must provide for arbitration as the final dispute-settlement procedure (S155).

Over the past three years, Air Canada has processed an average of 40 arbitration cases per year in Canada. Our average direct cost has been $1000 per case, not including the fees of legal counsel and the time of company representatives involved.

From our experience, I am concerned about the effectiveness of grievance arbitration as a dispute-resolution process. My perspective on "The Promise and the Performance" does not focus so much on costs or even on time constraints, although there is no doubt that these considerations are important. Rather, in my judgment, the more important concern is the inability of the arbitration process to reach the underlying problems and its tendency to discourage dialogue, thus allowing the relationship to deteriorate despite the best efforts of many arbitrators. Lately I have seen the grievance arbitration system overburdened with cases, resulting in long delays between grievance filing and resolution, a reluctance to solve problems because both sides take a legalistic approach to grievances, and an increasingly formal approach to arbitration that erodes its effectiveness.

In any labor-management relationship, no matter how good, issues will arise that require third-party resolution. However, as a practitioner, my concern for the relationship between the company, the unions, and the employees leads me to believe that the win-lose unilateral decision-making involved in grievance arbitration when it becomes the sole means of dispute resolution is not in the best interests of the parties' long-term relationship. Grievance mediation, with its consensual approach to problem-solving, is a more promising choice for relationships over the longer term.

Grievance mediation is based on the premise that long-lasting solutions may be found to many problems that might otherwise persist or recur if left to a third party to resolve unilaterally. Obviously, the parties themselves are better equipped to identify

the source of certain problems and to treat the "disease" rather than simply the "symptom."

Arbitration is essentially a contest, with both parties trying to "shoot for the moon"—in many instances without really believing in the total validity of their respective positions. The arbitrator, in turn, must render a decision based on incomplete knowledge of the operation, as it is impossible for him or her to acquire a thorough understanding of what is involved in a relatively short arbitration hearing. Thus the parties risk receiving an award that could have a negative impact on both of them. Also, traditional arbitration may tend to create an over-reliance on the letter of the agreement as opposed to its intent, and on technicalities as opposed to merits.

Grievance mediation would be useful in assisting the parties to reach a practical solution to a problem that was created because the specific situation was not covered by any specific provision in the collective agreement. A mediator, by virtue of his or her nonauthoritative role, would be in a better position to gauge the expectations of the parties in these cases than an arbitrator.

At this point there should be no doubt that I am a supporter of grievance mediation. Professor Goldberg has eloquently described its strengths and weaknesses and provided us with a detailed analysis of his experience. I will attempt to highlight those aspects of grievance mediation that, while often portrayed as secondary, appear to me to be worthy of more consideration in the Canadian arena and, of course, more particularly at Air Canada.

The benefits of grievance mediation seem to fall into three basic categories—cost savings, quicker results, and an opportunity to reach a final and consensual solution to difficult problems.

The cost savings and the speed of resolution are no doubt important factors for both parties, but these advantages are not exclusive to the grievance mediation process. Expedited arbitration can and has produced the same benefits. The main benefit of grievance mediation, as I see it, lies with the opportunity that it provides the parties to resolve their problems through discussion and mutual agreement. Over the longer term, communications and relationships are improved. Also, the employee, the grievant, has an increased role in the process as he becomes a comfortable participant in a procedure that is more informal and less complicated than arbitration. Grievance mediation is

consistent with an approach to labor relations that seeks to defuse problems and minimize conflict both during the life of a collective agreement and during contract negotiations.

While Canada does not have major problems with wildcat strikes during the terms of collective agreements, we do have serious problems with strikes that occur when negotiations cease short of an agreement to renew a contract. We are consistently at the top of the list of countries with the most mandays lost due to strikes—this in spite of the fact that our legislation requires that such disputes be conciliated. Bringing a third party in at this stage of negotiations is tantamount to putting a band-aid on an open wound—too little, too late.

What grievance mediation appears to offer is a forum for the parties to reach consensus during the term of the collective agreement which, in my opinion, may have a direct spillover into contract negotiations—to the extent that the mediator may even be involved during the latter process. This potential for spillover is particularly important for the airline industry where even the whisper of a possible strike can result in millions of dollars of lost revenue. This view of grievance mediation is consistent, I believe, with the parties' experience in the documented experiments where the process was used to prevent wildcat strikes and encourage consensus decision-making.

Our limited experience with grievance mediation directly affected the negotiating process. After Mrs. Bairstow, as mediator, assisted us in resolving a particularly difficult discipline case involving Air Canada and the Canadian Air Line Flight Attendants Association, the parties asked her to serve as a "preventive" mediator, right from the start of negotiations, in an effort to eliminate the need later on for third-party intervention, in accordance with our labor legislation. The Conciliation and Mediation Services of Labour Canada sponsored this experiment which resulted in the parties being able to reach a collective agreement in direct negotiations without resorting to conciliation for the first time in ten years.

I should say, however, that the arbitration system has been very good for us in Canada, as strikes during the life of collective agreements have been virtually eliminated. Grievance mediation, in my view, is not really an alternative to arbitration. Rather, it is an alternative to a labor relations philosophy and a bureaucracy that relied too much on arbitration at the expense of good old-fashioned resolution of differences through open discussion. It is an alternative to a philosophy that has normalized

confrontation and has raised expectations to the point of hampering its performance.

Grievance mediation will never *replace* grievance arbitration as a dispute-resolution procedure. No matter how positive the relationship between the parties and no matter how sophisticated their problem solving, there will always be issues to which an arbitrator's skill and thoughtful decision-making must be brought. However, to the extent that the parties to a labor-management relationship have a genuine interest in minimizing the number of "unresolvable" issues between them and in seeking to solve their problems on a daily basis at all levels of the company, then grievance mediation can be a useful approach. And to the extent the parties are successful, with the help of a mediator, at resolving their differences during the life of their agreement, these successes should carry over into the negotiation process and perhaps reduce the potential for conflict in the form of a strike.

Grievance mediation is a direct challenge to a traditional labor relations environment which has come to consider strikes and lockouts as normal tools of the trade—an environment, in short, that has not renewed itself since the fifties. I'm willing to give it a try, and I'm sure I'll like it.

IV. A UNION ADVOCATE'S VIEW

GORDON A. GREGORY*

Grievance or rights mediation as an alternative method of labor-management dispute resolution is not a new or unique technique. It has been available since the inception of collective bargaining and, indeed, has been used variously by action of the parties or the initiative of various prominent arbitrators.

In his address to the 30th Annual Meeting of the Academy, held in Toronto, Arbitrator Arnold M. Zack, in discussing "Some New Alternatives to the Conventional Grievance Procedure," suggested both a form of "med-arb" and the "controversial device" of grievance mediation. Why grievance mediation is or should be "controversial" will be considered in a moment.[1]

---

*Gregory, Van Lopik, Moore & Jeakle, Detroit, Mich.

[1]Zack, *Suggested New Approaches to Grievance Arbitration,* Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1978), 112.