Chapter 8

GRIEVANCE MEDIATION: WHY SOME USE IT AND OTHERS DON'T

I. Grievance Mediation: If It's So Great, Why Isn't Everyone Doing It?

Stephen B. Goldberg*

The capacity of mediation to resolve grievances more quickly and less expensively than arbitration is undisputed.[1] The average arbitration bill in 2007 was just under $4,000; the average mediation bill was $0 when the Federal Mediation and Conciliation Service (FMCS) provided federal mediators, and $500 when the Mediation Research and Education Project, Inc. (MREP) provided private sector mediators (most of whom are members of the Academy).[2] The average time from request for arbitration to the arbitrator's decision was 259 days; the average time from request for mediation to resolution in mediation was 71 days.[3]

Similarly well documented are: (1) the preference for grievance mediation over arbitration by those with experience in both; and (2) the capacity of grievance mediation, when used regularly, to improve the parties' settlement skills and their ability to resolve grievances on their own—without the assistance of a mediator.[4] There is even evidence that grievance mediation can play a role in

*Member, National Academy of Arbitrators, and Professor of Law, Northwestern University, Chicago, Illinois. Thanks to Bill Hobgood, Marilyn Pearson, Sylvia Skratek, and Rolf Valtin for their insightful comments on an earlier draft of this presentation.

[1]Monahan, *Faster, Cheaper, and Unused: The Paradox of Grievance Mediation in Unionized Environments*, 25 Conflict Resol. Q. 479 (2008).

[2]2007 Annual Report of the FMCS, *available at* www.FMCS.gov; MREP Grievance Report (July 2008), *available at* www.MREP.org.

[3]MREP data from MREP files (available from author); FMCS data obtained pursuant to Freedom of Information Act request.

The data on time to final resolution in mediation assumes that the grievance was settled in mediation, which was true in 89% of MREP cases and 74% of FMCS cases. 2007 Annual Report of the FMCS, *available at* www.FMCS.gov; MREP Grievance Report (July 2008), *available at* www.MREP.org.

[4]Brett & Goldberg, *Grievance Mediation in the Coal Industry: A Field Experiment*, 37 Indus. & Lab. Rel. Rev. 49 (1983); Goldberg, *How Interest-Based Mediation Performs Over the Long Term*, Disp. Resol. J. (Nov. 2004–Jan. 2005).

improving union–management relations generally when used as part of an overall effort to that end.[5]

Despite all this, grievance mediation is used far less frequently than is arbitration. Nearly every collective bargaining agreement contains an arbitration clause; few provide for mediation. And while some grievances are mediated on an ad hoc basis, despite the absence of a contractual mediation clause, there can be little doubt that the number of grievances sent to arbitration in the United States far exceeds the number of grievances sent to mediation.

Why is this so?

One reason, I suspect, is simple inertia. Grievance arbitration has been heavily promoted and used since the 1940s, when the War Labor Board included it in all collective bargaining contracts directed by it.[6] Grievance mediation, while also known in the 1940s, faded away with the rise of a more legalistic approach to grievance resolution.[7] It was not until the early 1980s that grievance mediation resurfaced on a large scale, first offered in 1980 by MREP,[8] and since the mid-1990s offered by both FMCS[9] and MREP. The lengthy head start of arbitration and its long-time presence in nearly all collective bargaining contracts undoubtedly go some of the way in explaining its continuing predominance over mediation.

A related reason for the limited use of grievance mediation in the United States lies in the fact that whatever the advantages of mediation may be for the employer and the employees, its use requires that union and company representatives accustomed to and skilled at presenting grievances in arbitration learn different procedures and behaviors from those with which they are familiar. It is altogether human to want to continue doing what one knows

---

[5]Goldberg, *id.*

[6]*See* Elkouri & Elkouri, How Arbitration Works, 6th ed. (BNA Books 2003), at 18–19.

[7]Goldberg, *The Mediation of Grievances Under a Collective Bargaining Agreement: An Alternative to Arbitration*, 77 Nw. U. L. Rev. 270 (1982), at 272–74.

[8]*See* Ury, Brett, & Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Program on Negotiation at Harvard Law School: Cambridge, MA, 1993). Between 1980 and 2007, MREP mediated more than 3,600 grievances. *See* www.mrep.org.

[9]The volume of grievances mediated by FMCS was in the range of 100–250 cases per year until the mid-1990s. (Personal communication to the author from William H. Shields, Management Analyst, FMCS, Feb. 2, 2009). Since the mid-1990s, the number of grievances mediated by FMCS has increased steadily to the following levels: Fiscal Year (FY) 2006, 1,625 cases; FY 2007, 1,753 cases; FY 2008, 1,728 cases. 2008 Annual Report of the FMCS, *available at* www.FMCS.gov.

and does well, and union and company representatives are no different from the rest of us in this respect.

Furthermore, and equally important, mediation is a risky procedure for company and union representatives. The goal of mediation is settlement, and it is rare that in a settlement each party gets everything it wants. What that means is that after every mediated settlement there is likely to be someone who will say to the representative, "You settled for that? Hell, we could have done better than that!" In arbitration, however, an unsatisfactory decision can always be blamed on the arbitrator. Thus, arbitration, in contrast to mediation, presents little risk to the prestige or job security of the company or union representative.

And if the parties are represented by attorneys, they run the same risk of post-mediation criticism as do the union business agent and the company human resources representative. Furthermore, the attorney stands to earn considerably more representing his or her client in arbitration than in mediation, where there is less witness preparation, a shorter proceeding, and no post-hearing briefs.

Yet another reason why mediation is unused in many relationships is that some unions seek to sustain the allegiance of their members by demonstrating an aura of unyielding defiance toward the employer, that, accurately or not, is portrayed as constantly seeking to undo the union's hard-won advances, as well as to frustrate further advances. Arbitration, which pits the union against the employer in an adversarial forum, fits perfectly into this world view—far better than does mediation's joint search for a mutually satisfactory outcome.[10]

The final reason for the dominance of arbitration over mediation lies, I think, in the overall nature of union–management relations in the United States. There are—happily—some relationships that are open and cooperative, characterized by a problem-solving approach to negotiations and dispute resolution by both parties. The more common model, however, is one of arm's-length dealing by the employer, whose attitude toward the union is one of grudging acceptance, if not openly adversarial—an attitude reciprocated by an equally adversarial union. And, although grievance mediation can exist in an arm's-length or adversarial relationship, such a relationship is not really compatible with

[10]Monahan, *Faster, Cheaper, and Unused: The Paradox of Grievance Mediation in Unionized Environments*, 25 Conflict Resol. Q. 479 (2008), at 484–89.

the problem-solving or win-win nature of mediation. As a result, although grievance mediation will sometimes be tried in such a relationship, it is unlikely to become the preferred method of grievance resolution.

All things considered then, it is not surprising that grievance mediation, for all its advantages, is less used in the United States than is arbitration.

This, for me, poses two questions: (1) What is there about the Canadian experience that enables the parties to surmount the barriers to grievance mediation here identified? and (2) What, if anything, can be done to encourage the use of grievance mediation in the United States?

I will leave it to Kevin Whitaker to address the first question, while I focus briefly on the second. The key, I believe, to the increased use of grievance mediation in the United States lies in management's moving away from a model of work-force management that emphasizes control of the work force and an arm's-length or adversarial relationship with the union, and toward a model that emphasizes union–management cooperation and joint problem solving. Until more companies—together with their unions—adopt this model, I suspect that grievance mediation will remain a bit player on the labor-management scene.

This is not, however, a counsel of despair. Professor Thomas Kochan has recently published the results of a series of studies in the airline industry that show that a model of work-force management that emphasizes cooperation and joint problem solving can be as successful for shareholders in terms of profit, as successful for customers in terms of reliable service, and more successful for employees in terms of stable and well-paid employment than a model that emphasizes work-force control and an arm's-length or adversarial relationship with the union.[11] To the extent that these studies encourage management in the airline industry—and elsewhere—to place a greater emphasis on cooperation and joint problem solving, and to the extent that unions reciprocate this approach, the best days for grievance mediation may lie ahead.

---

[11]Bamber, Hoffer Gittel, Kochan, & von Nordenflycht, Up in the Air: How Airlines Can Improve Performance by Engaging Their Employees (Cornell University Press: Ithaca, NY, 2009).