are prepared to champion the model. You also need senior counsel who are prepared to work with such new arbitrators and you need institutional parties who are disillusioned enough with the old model that they are prepared to take some risks with a new one.

The mindset of the neutral has to be that of a problem solver who is there to get the parties a solution to their problem and then get them out the door, rather than a judicial mindset where the task is to make law and decide rights and obligations. The orientation should be to decide only what you have to—to meet the needs of the parties and not an item more, not to settle points of law or write the definitive and last award to resolve forever that thorny point of law.

So to conclude, this is now the default process in Ontario and almost all principal arbitrators work this way. A critical step in the process was the push by the big parties for a streamlined process with regular rosters, and then it was a gradual and incremental development. It must be the parties who have to want to make these changes and then give arbitrators permission to do it and to develop and acquire the skill set.

III. Mediation of Complex Grievances

Mei L. Bickner*

Kevin Whitaker has provided us with a glimpse of what the future of the dispute resolution process here in the United States might look like if the parties are as pragmatic, as trusting of the process and the skills of the arbitrator, and as interested in workable and cost-effective solutions as the Canadians seem to be.

Stephen Goldberg has suggested a number of reasons why grievance mediation has not been used more widely in this country, given that the process has shown to yield resolution of disputes in less time and with less cost. His suggestions included: institutional investment in a known process—arbitration, aversion to potential higher risks in the outcome, and the generally adversarial nature of the collective bargaining relationship here in the United States. Notwithstanding these adverse circumstances, he has not given up

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hope for an increase in parties' acceptance of grievance mediation as more employers adopt a more cooperative and joint problem-solving approach in their relations with employees and their unions.

These two speakers have made clear that progress in the use of mediation in labor disputes in the United States is likely to be slow, but there are possibly many different ways we might speed up that progress. I would like to suggest one such possibility and that, briefly, is this: we should look for those circumstances in which mediation can offer especially great advantages over arbitration, given the current context of labor relations in the United States. Over the past several years I have been asked to mediate disputes that the parties have been unable over the years to resolve, either by negotiation or by multiple arbitrations with different arbitrators. The cases I'll describe have these characteristics:

1. The underlying issue is exceptionally complex.[1]
2. Disputes related to the issue are inevitably recurrent.
3. The disputes involve different grievants over time, each in somewhat different circumstances.
4. Multiple and recurrent arbitrations result, often with diverse outcomes.
5. The final and binding arbitration decisions have not resolved the underlying issue.
6. The existing language of the collective bargaining agreement may lock the parties into recurrent conflict.

In these circumstances, what is clearly needed is mutual agreement by the parties to some mechanism, procedure, and decision criteria for confronting the underlying issue and flexibility in implementing the contract language, rather than multiple ad hoc arbitrations.

By illustration, here are two examples of cases in which mediation led to a resolution of such a complex dispute. The cases have been simplified and will sound somewhat generic.

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[1]To illustrate: Recently during a temporary impasse in the mediation process, an employer "threatened" to take the case to arbitration, taking their chances in that forum, as they felt the language was supportive of their position. The union responded: "You want to try to explain this issue in an arbitration? How many days do you think it will take? Good luck. Name one arbitrator who can really understand the problem we are trying to resolve here after you try to explain it for several days."

Case One

- The case involved two sections in a department in which employees with the same job classifications perform essentially similar work using different equipment, where cross-bidding between the sections for openings and promotions was part of the collective bargaining agreement and was an established past practice.
- At some point the equipment, and consequently the technological requirements of performing the work in Department A, changed sufficiently so that, in the opinion of the employer, with reluctant concurrence by the union, not all employees in Department B could automatically be assumed to have the capability to perform the new work.
- Triggering the arbitration that I was selected to hear was the promotion of a junior employee over a number of senior bidders for a quasi-supervisory opening in Department A on the grounds that he was the most qualified and that the senior bidders were unlikely to be able to perform the job.
- This was a recurring problem whenever senior employees from Department B applied for openings or promotions in Department A, and my grievance was one of many such grievances that had been scheduled for arbitration. In fact, virtually every selection based on the bidding procedures generated a grievance.
- Both parties were ready to have a permanent resolution of the recurring disputes over bidding and promotions, and both sides agreed to try mediation of the dispute. The parties in this case actually initiated the request for mediation, based on the initial protracted arbitration hearing during which we had many off-the-record discussions about the underlying problems—the changing technology and the contract language, which was not sufficiently flexible to take into account these changes in technology.
- The parties eventually agreed in essence to separate the two sections into two departments and to create new classifications and codes for the similar jobs, but this left many remaining issues. These other issues were:
  1. how to manage the transition period;
  2. whether and how to grandfather existing job holders in Department B, creating a grandfather eligibility roster;

3. how to modify the training provisions to help Department B employees to qualify for Department A work;
4. what kinds of trial periods should be established to demonstrate proficiency in performing the work;
5. what procedures and structures should be put in place for dealing with problems of implementing the mediated agreement; and
6. what role, if any, should the mediator play in resolving potential disputes over the implementation of the agreement.

The parties also had to deal with the problem of agreeing to a modification of the contract language mid-contract, superseding existing contract language. The union had an additional political problem, having mediated such an agreement, and part of my mediation task was to bring the representatives of the affected employees along so they would understand and accept the mediated agreement. In this case, mediation proved to be sufficiently flexible to produce a solution for both parties, which recurring arbitrations with different arbitrators and different outcomes had failed to do in the past, and was not likely to do in the future.

Case Two

- This case involved an alleged violation of the collective bargaining agreement by the employer when it assigned components of higher-skilled work to a lower-skilled and lower-pay classification.
- The employer gradually had been assigning more and more components of the higher-pay, skilled work to lower-pay, less-skilled employees, arguing (1) a need for flexibility, and (2) ambiguity of the respective job descriptions.
- The union grieved to have the work reassigned to the higher-pay, skilled classification, as many employees were laid off as a result of the reassignment of the work.
- My initial suggestion to mediate the dispute was rejected and I heard the first case as an arbitrator, issuing the decision in favor of the union that, having prevailed, now found itself faced with numerous grievances by the lower-pay, low-skilled employees.

- By the time I heard the second case with the same issue but a different grievant, the parties were open to mediate the dispute.
- Using the mediation process, rather than piecemeal arbitration, the parties were able to do the following:
  - Tweak job descriptions of both groups to clarify the work belonging to each group.
  - Create a new Hybrid job classification that met the employer's needs for flexibility and satisfied both the skilled and the low-skilled groups.
  - Manage the transition and grandfathering of the skilled employees and some of the low-skilled employees who were able to perform the work in the new Hybrid classification.
  - Create overtime centers for all three groups of employees: the higher-pay, skilled group; the lower-pay, low-skilled group; and the Hybrid group.
  - Create procedures for the low-skilled group to qualify and train for both skilled and Hybrid positions.
  - Create a process for filling openings in the higher-pay groups, giving preference to low-skilled employees.
  - Create promotion ladders for the low-skilled employees.
- As the mediation progressed, the parties started expanding the number of disputes to include related disputes on the use of subcontractors:
  - Under what conditions subcontractors could be used for some of the jobs performed by higher-paid, lower-paid, and Hybrid workers.
  - The creation of a joint Labor-Management Committee to review the use of subcontractors and the adoption of a decision rule that specified that, if the employer exceeded a specified rolling 3-month average use of subcontractors, the employer would hire a new low-skilled employee (with extenuating circumstances to be taken into account).
- The mediated settlement also required a few changes in the language of the collective bargaining agreement that would supersede the existing contract language. The parties were to revisit this language during the next contract negotiations and adjust it based on their experiences with the implementation of the settlement.
- When the mediation agreement was signed, the parties had settled 41 grievances, which they enumerated as part of the settlement.

One additional very worthwhile byproduct of such intensive mediations, in my experience, has been the increased and improved communication between the parties. In some cases the mediation process was the first time the parties actually shared information with each other, which helped each side appreciate the considerations the other side had to take into account.

Not all of my proposals to mediate have been accepted, the parties often preferring an arbitration decision. Others accepted my proposal to mediate, but after exploration, the parties determine that they needed an arbitrator's decision rather than a mediated settlement—for political and other reasons. In one unusual mediation, I had to resort to ratios and magnitudes rather than specific numbers because the parties wanted to preserve my status as arbitrator, should the mediation not result in settlement. Fortunately, a settlement was reached, but it felt strange mediating a settlement when you really didn't have the actual data to with which to work.

I do not know whether my mediation experience of these complex cases was unique or commonplace, but in these examples mediation was a cost-effective, and perhaps optimal, way to resolve the dispute, and I am hopeful that more parties will consider this option.

IV. Grievance Mediation: A Good Tool, Not a Panacea

Marilyn A. Pearson*

My first introduction to grievance mediation was at a conference in the late 1980s, where I heard mediator-arbitrator Bill Hobgood promote it as an alternative to arbitration. Bill used a phrase to describe why parties should try grievance mediation, which I am sure you've heard, and I've repeated many times: "When every tool in your toolbox is a hammer—every problem looks like a nail." It made sense to me and I returned from that conference and

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