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

*DLA Piper, USA. I want to acknowledge and thank Peter K. Anderson for his research and assistance on this presentation.

urged my client to give it a try at a major airline. The senior lawyer on staff was skeptical—saying a good union representative and a good manager could always settle any issue with the potential to be settled and questioned the benefits of adding yet another step in the process—even if it was relatively inexpensive. Nonetheless, the parties agreed to give it a try, and we implemented grievance mediation shortly thereafter. The process has caught on and is used widely throughout the airline industry.

I was extremely excited about the process, which is clearly cheaper and faster than arbitration, and expected that creating a less formal, interest-based dialogue would help change the paradigm of adversarial labor-management relationships that seemed to plague much of the industry. It seemed logical that if the parties worked with a facilitator and learned to approach disputes from a problem-solving viewpoint, over time they might engage in ways that were more constructive. Since then, the airline industry, perhaps more than many others in United States, has adopted grievance mediation to resolve disputes. Yet, many of the labor-management relationships in the airline remain troubled.

It's my view that grievance mediation can be an important tool to resolve disputes. At the same time, I have come to believe that traditional grievance mediation does not produce changes in the overall relationship and is not necessarily the means to a better labor-management dynamic. So, I'll describe some of the impediments to the effectiveness and therefore the growth of grievance mediation as a dispute resolution mechanism in the United States.

Unions are political organizations that create and maintain membership loyalty based on the impression that they fill an essential role in "fighting" for worker rights, and individual union leaders, grievance representatives, and staff retain their positions by maintaining this perception. Camille Monahan's excellent essay, *Faster, Cheaper, and Unused: The Paradox of Grievance Mediation in Unionized Environments*,[1] points out how unions advertise their victories as a means of demonstrating to the membership their continued relevance in the workplace. Monahan states:

> Grievance mediation, with its emphasis on compromise and creating collaborative relationships, flies in the face of the labor movement's self perception as fighters. . . . Compromising with the employer to

[1] 25 Conflict Resol. Q. 479 (2008).

> reach a settlement involving a high symbolic value grievance is inconsistent with the mandate to "stand firm against the forces of . . . unfair employment practices." In this context, unions may perceive the expediency that mediation provides as a fast track to the betrayal of unionism.[2]

This pressure has increased with the advent of the Internet, which provides disgruntled members and union competitors easy access to members of a bargaining unit. In large bargaining units, unions used to be able to control the flow of information and the debate about labor issues through closely held membership rosters, union meetings, and the practical difficulty of individual members broadly reaching the membership as a whole. Now the situation is reversed; Internet chat rooms and other forms of electronic communication make it increasingly easy for critics to attack union policies and leaders who are seen as too collaborative or soft (many times without even being factually correct). This places even more strain on union leaders not to be seen as too cooperative and to resort to rights- or power-based strategies—even when those strategies may be destructive of their members' job security in the long run.

So, one impediment to grievance mediation is the pressure on union leaders to not appear collaborative with management. In fact, mediation can become an addictive way for some unions to avoid grievance screening, even when there is no realistic concern that the grievant will otherwise sue the union, alleging a violation of the duty of fair representation. This further strains the labor-management relationship because management does not see grievance mediation reduce the number of grievances, and instead may see less effort to weed out unmeritorious claims, especially in discipline/discharge cases. This "narcotic effect" may result in the parties becoming "so dependent on mediation that they cease to resolve disputes unaided."[3]

Let's consider the airline industry for example. Under the Railway Labor Act, there is a provision for carriers and unions to establish System Boards of Adjustment, including a 4-person Board consisting of two union and two management representatives to hear grievances. Prior to deregulation, and well into the

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[2] *Id.* at 487, 490.

[3] Schmedeman, *Reconciling Differences: The Theory and Law of Mediating Labor Grievances*, Indus. Rel. L.J., Vol. 9, No. 4 (1987), at 536.

mid-1980s, many airlines with these 4-person System Boards informally and relatively inexpensively resolved many grievances without a neutral, and at least one System Board member had to vote with the other side. These 4-person Boards have disappeared for precisely the same reason that grievance mediation is not more widely successful—the parties just could not take the heat for settling cases.

My impression is that many companies resist grievance mediation because they fear it will add cost by reducing the incentive for unions to screen grievances that lack merit and encourage workers to take a shot at getting half a loaf in the process, and because they see little or no real impact on the union's overall relationship with management. The rhetoric remains aggressively adversarial and management rarely is given credit for making good decisions or solving problems. Further, management may be reluctant to spend time and money on meditation, as the quality of mediators is widely disparate. Of course, that problem can be solved by resorting to private mediators mutually selected by the parties, but typically this comes with added cost.

Another impediment is that grievance mediation often comes too late in the process, as it is typically used as a last step prior to arbitration. At this point, management has already spent time and money defending its decision, managers may have hardened their views, and the requested remedy is likely more costly. Unions have similar issues, as pointed out in a journal article by Betty Robinson:

> On a whole, union advocates had more faith in a cooperative problem solving approach at the earliest levels of the grievance process or even prior to filing a formal grievance. At this stage of the dispute, they felt that less damage had been done to a grievant and there was more opportunity for both sides to compromise. At later stages, their experience was that positions on both sides hardened, making problem solving less likely and informality less effective. Consequently, mediation might only create another step in a grievance process that is already bogged down.[4]

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[4]Robinson, *Considering Grievance Mediation*, Employee Resps. & Rts. J., Vol. 5, No. 2 (1992), at 149.

Of course, we all know the threat of arbitration costs, time, and risk of loss creates a powerful motivation to settle. However, that motivation exists without grievance mediation and should be the last opportunity for the parties to settle. As Kevin Whitaker points out, in some situations it also may be beneficial to allow an experienced arbitrator to function in a med-arb dynamic at that stage of the process. Many times, my clients have allowed that process to evolve when they trust the arbitrator hearing the grievance.

In closing, I'd like to highlight some alternative dispute resolution systems with which I am familiar that may work better at delivering some of the long-term benefits advocated by supporters of grievance mediation. American Airlines and the Association of Professional Flight Attendants have long used a system that Steve Goldberg helped them design and establish. Interestingly, their mediation process takes place at the earliest stages of the dispute and does not employ an outside mediator. In fact, an independent/objective manager works as the facilitator. The trade-off for using a manager to act as the facilitator is that if the parties do not reach a negotiated settlement, the facilitator makes a settlement recommendation, which the union may reject. However, if the union accepts the settlement, then management is bound by it. Joint labor-management training is conducted on a fairly regular basis to ensure that union representatives and managers know how to use grievance mediation effectively. This process gives ownership, responsibility, and credit (when problems are solved) directly to the parties.

More recently, United Airlines' management and the Association of Flight Attendants-CWA established a creative new system for dealing with individual contract disputes. Disputes that remain unresolved are subject to a simplified, expedited arbitration process. Arbitrators hear numerous cases per day, because each party is limited to a 30-minute presentation. Cases are presented in a simplified, abbreviated, and less legalistic format and the decision does not set a precedent. This new process is less costly, more efficient, and is helping to clear up a heavy backlog of grievances.

Notwithstanding its limitations, I encourage clients to use mediation and will continue to do so with the caveat that it is not a panacea for a troubled or destructive labor-management relationship.