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Grievance Mediation: A Step towards Peace in the Bituminous Coal Industry

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Turbulent labor relations, including frequent wildcat strikes, have long characterized the unionized sector of the bituminous coal industry. In the period from 1971 through 1974, there were nearly 5,000 wildcat strikes, an average of more than 1,500 per year. In an effort to reduce the frequency of these strikes, the negotiators of the 1974 Bituminous Coal Wage Agreement sought to improve the grievance arbitration procedure, hoping that if arbitration could be made more attractive to the miners, they would turn to it, rather than to the wildcat strike, as a means of resolving their disputes with management. One improvement made by the 1974 Agreement was to replace the existing procedure under which the arbitrator decided grievances on the basis of a transcript and briefs, without ever seeing the disputants, with a procedure for “live” hearings conducted by the arbitrator at the mine site. This change was premised on the belief that if the miners participated more directly in the arbitration process, they would have more confidence in it. The negotiators of the 1974 Agreement also took steps to speed up the grievance procedure, believing that this, too, would encourage resort to that procedure, rather than to wildcat strikes.

These changes met with mixed success. On the one hand, as the negotiators had hoped, the frequency with which the miners resorted to arbitration increased substantially. On the other hand, the hoped-for reduction in the frequency of wildcat strikes did not occur. To the contrary, the number of wildcat strikes in the 1974-1977 period rose to 3,000 per year, twice what it had been in the preceding three-year period.

In an effort to determine why the increased resort to arbitration had not led to a corresponding decrease in the frequency of wildcat strikes, Professor Jeanne Brett and I conducted a 1977 study of strike patterns at over 300 mines, four of which, all located here in West Virginia, were singled out for in-depth research, including personal interviews with miners, union representatives and mine management. We concluded that the increased use of arbitration was not discouraging resort to strikes for two reasons. First, even with the procedural changes introduced by the 1974 Agreement, the time required to resolve a grievance through arbitration was averaging approximately six months, which was perceived by the miners as far too slow. Second, the results of arbitration were viewed by the miners as frequently both unfair and irrelevant to the problem that had triggered the grievance.

The miners’ sense of unfairness rested primarily on the fact that more
than two-thirds of the arbitrators’ decisions were in favor of management, fewer than one-third in favor of the miners. The sense that the arbitration decision was often irrelevant to the problem that had led to arbitration rested upon the fact that that decision was nearly always predicated solely on the terms of the contract, rather than on whether the employer’s action had been fair or reasonable in light of the legitimate concerns of the grieving employee. Indeed, evidence going to the issues of fairness or reasonableness was often held inadmissible at the arbitration hearing on the ground that the sole question before the arbitrator was one of contract interpretation. Because many of the miners’ grievances were not, on analysis, predicated on an alleged contract violation, but on a more generalized claim that they had been treated unfairly or unreasonably, many of them tended to view arbitration as frequently irrelevant to their needs. They were willing to resort to that procedure because it was easily available, but were not willing to give up the wildcat strike, which was more responsive to their needs. Not only was the strike faster than arbitration, it also forced the employer to deal directly with the issue that had provoked the strike, regardless of whether or not that issue was contractual in nature.

Our sense that the failure of the arbitration procedure to deal with the problems underlying the alleged contractual violation was an important factor in encouraging resort to the wildcat strike was strengthened by our findings as to the way in which grievances were handled at the four mines we studied in depth. At two of those mines, where strikes were frequent, grievances were dealt with by management strictly according to the contract, in both procedural and substantive terms. Grievance meetings were held at the contractually designated times, and no others; grievances that had contractual merit were granted, those that did not were denied. At the two mines where strikes were less frequent, a different approach prevailed. In addition to the contractually required grievance meetings, additional meetings were held in an effort to resolve the grievance. Furthermore, even if the grievance had no contractual merit, management made an effort to resolve it in a manner that was satisfactory to the grieving miner if that could be done without interfering with the operation of the mine, or in any other way compromising management’s legitimate interests. In short, we concluded that management and the union at the low-strike mines had a problem-solving, rather than a strict contractual, approach to dispute resolution. Stated otherwise, grievances were dealt with as problems to be solved, not as cases to be won or lost solely on their contractual merit.

Based upon this conclusion, one means by which to reduce the frequency of wildcat strikes would be to train both union and management representatives in the use of a problem-solving approach. Indeed, we did precisely that at a mine in eastern Kentucky, with substantial success in terms of strike reduction. It soon became apparent, however, that the cost of satisfactory training was enormous, and the supply of individuals with the skills necessary to conduct such training was limited.

Accordingly, we next set out to devise a dispute resolution procedure that could provide some training in a problem-solving approach to grievances with-
out the substantial expenditure of scarce resources that is necessary for mine-by-mine training. The result of that effort was the grievance mediation procedure, which I shall describe to you today. One goal of this procedure is to resolve grievances promptly, inexpensively, and in a fashion that deals with all the issues, those that are noncontractual as well as those that are contract-based. Another goal, as I have already suggested, is to provide the participants with experience in a problem-solving approach to dispute resolution.

The essence of the grievance mediation procedure is as follows: After the final step of the internal grievance procedure, the parties have the option of going to mediation, rather than directly to arbitration. This option can be triggered by one party, or by mutual consent, as the parties prefer. In either event, the mediation procedure is wholly informal in nature. The relevant facts are elicited in a narrative fashion, rather than through examination and cross-examination of witnesses. The rules of evidence do not apply, and no record of the proceedings is made. The parties are not limited in their presentation to those matters that are contractually relevant, but are free to raise any fact or argument that they think relevant to settling the grievance.

The primary effort of the mediator is to assist the parties to settle the grievance in a mutually satisfactory fashion. In doing so, he encourages the parties to focus not only on the contract, but also to consider issues of fairness and reasonableness. This is done from the perspective of both the miners and the employer. For, just as the miners frequently complain that arbitration does not take adequate account of their legitimate interests, so, too employers complain that it does not take account of their legitimate interests in operating a profitable enterprise. The mediation process, which is not limited to issues of contract interpretation and application, permits the parties, assisted by the mediator, to consider all legitimate interests of both the employer and the miners in arriving at a mutually acceptable settlement.

If no settlement is possible, and the parties appear headed for arbitration, the mediator provides them with his opinion as to the likely outcome if they do arbitrate. This opinion is not based at all on notions of fairness or equity, but solely on the collective bargaining contract, as that is all the arbitrator will consider if the grievance does go to arbitration. The mediator's opinion is not final and binding, but is advisory in nature. It is delivered orally, and is accompanied by a statement of the reasons for the mediator's opinion. The advisory opinion can be used as the basis for further settlement discussions, for withdrawal or for granting of the grievance. If the grievance is neither settled, withdrawn nor granted, the parties are free to arbitrate. If they do, the mediator cannot serve as arbitrator, and nothing said or done by the parties or the mediator during mediation can be used against a party at arbitration.

In theory, this mediation procedure should meet the needs of the coal industry substantially more satisfactorily than does arbitration. Because there is no written decision, it should be both faster and less expensive than arbitration, in which waiting for the arbitrator to write his decision, and paying him to do so, adds substantially to both cost and delay. The absence of formalities, and the freedom of the parties to discuss anything that they think is relevant, whether contractually based or not, should make it possible for them to deal
with the problems underlying the grievance, as well as its contractual merit. This, in turn, should lead to both greater satisfaction with the process, and to more satisfactory outcomes than arbitration. Finally, arbitration remains available as a forum of last resort for those grievances that cannot be mediated to a mutually acceptable conclusion.

The mediation procedure, in which the mediator seeks initially to deal with the dispute as a problem to be resolved, rather than as a grievance to be sustained or denied on its contractual merit, should also provide the parties with experience in the problem-solving approach to grievance resolution. If, over time, they can learn from that experience, and utilize a problem-solving approach in their day-to-day interactions, they should ultimately be able to resolve a higher proportion of disputes themselves, without resort to any outside agency, be it mediation, arbitration, or the strike weapon.

The central risks of this process are two-fold: (1) Mediation will lead to few, if any settlements. This will increase, rather than decrease, the time and cost of dispute resolution. (2) The availability of mediation will diminish the pressure to settle in the internal grievance procedure, as either party may view resort to mediation, particularly if it is fast and inexpensive, as more attractive than accepting the other party's final offer. If the internal settlement rate goes down substantially, the overall cost of dispute resolution will go up.

In an effort to determine whether mediation could successfully resolve grievances faster, less expensively, and more satisfactorily than arbitration, we conducted a series of experiments with mediation in the bituminous coal mining industry. These experiments took place over two six-month periods in four states (Illinois, Indiana, Virginia, and Kentucky).

One-hundred and fifty-three grievances were taken to mediation during the experimental period. Of those, 135 were finally resolved without resort to arbitration—a final resolution rate of 89 percent. Slightly more than half (52 percent) of the mediation conferences resulted in a compromise settlement. In 22 percent, there was a noncompromise settlement (union withdrew in 15 percent, company granted in 7 percent). Advisory opinions were issued in 20 percent.

About half of the advisory opinions were accepted, and another half went to arbitration. Of the twelve cases that went to arbitration after the mediator had given a prediction as to the probable outcome at arbitration, nine were decided as the mediator had predicted.

The issues involved in mediated grievances covered the contractual spectrum, with one significant exception—no grievances involving the discharge of an employee were mediated. This was because union representatives believed that the union could not, for internal political reasons, accept any resolution, short of an arbitrator's decision, that left the grieving employee without a job.

The final resolution rate did not vary substantially by the nature of the issue presented. From 75 to 100 percent of all grievances, regardless of the issue, were resolved without recourse to arbitration. Here, too, there was but one exception. Of those grievances in which the issue involved layoff, recall or realignment of the work force, only 38 percent (%) were finally resolved at
mediation. To some extent, this figure is deceptive, as three of the five grievances that were not resolved grew out of a single incident and presented a common issue. Nevertheless, it is possible that because layoff and recall grievances, like discharge grievances, present the question of whether or not the grieving employee is to have a job, they may be difficult to settle in mediation.

The time and cost savings of mediation over arbitration were great. The average grievance was resolved in fifteen days from the date on which mediation was requested, which was three months faster than resolution through arbitration. The cost of mediation averaged $295 per grievance, less than one-third of the cost of arbitration. The total financial savings to the parties during the twelve-month experimental period were approximately $100,000.

There was no over-all drop in the internal settlement rate with the advent of mediation. One state did show approximately a 10 percent drop, which may or may not have been causally related to the availability of mediation. Because, however, those grievances that were not internally settled went to mediation, rather than arbitration, and because mediation is substantially less expensive than arbitration, in that state, too, the parties spent less money on dispute resolution than they had prior to the availability of mediation.

User satisfaction with mediation was tested among five groups—company labor relations representatives, union representatives, company operating personnel, local union officers, and grievants. A substantial majority of all groups was satisfied with all aspects of the mediation procedure. When asked which procedure they preferred—mediation or arbitration—all groups preferred mediation, particularly at the local level, where company operating personnel preferred mediation 6 to 1 and union officers did so 7 to 1.

While both the time and cost advantages of mediation were referred to by the participants as a partial explanation for their preferring mediation to arbitration, the primary reason they gave was that they preferred the informal, problem-solving approach of mediation to the more formal, contract-centered approach of arbitration. A few excerpts from the interviews will convey the flavor of the responses better than I can:

I like the informality. It creates an atmosphere of people trying to solve problems through talk, rather than being enemies in a legal process. This is a much better way to approach these problems. (District 12—Company)

There was a better feeling on both sides after everything was done. In arbitration, there is usually one side that is very unhappy. Also it is more open which leads to a better understanding of what the problem is about. (District 28—Company)

The big thing is that each party lays the case out on the table, which you can’t do at arbitration. I think it leads to cooperation, unlike the dog-eat-dog atmosphere of arbitration. I think mediation can lead to a decision both sides can live with, unlike the situation that often results in arbitration. (District 28—Union)

Another aspect of mediation that was frequently commented upon favorably by both union and company personnel was that it encouraged the parties
to resolve their own problems, rather than giving their problems to an arbitra-
tor for decision. For example:

I like the fact we sat down and talked it over and got more facts out and
explained the problem to the mediator. I think it is better if the parties can
work out an answer than having the arbitrator take it home with him to make
a decision. (District 28—Company)

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I like both sides presenting a case, then getting some input from a neutral
before a final decision is rendered. I like both parties making a decision to
solve a problem rather than an outsider. (District 28—Union)

One would hope that the problem-solving approach of mediation, which is
clearly liked by the miners, would diminish their tendency to resort to wildcat
strikes. Unfortunately, we do not yet have enough experience to know if it
does. The wildcat strike rate is down throughout the industry, undoubtedly
due in part to the depressed state of the economy, and only time will tell if
mediation can be successful in helping to keep it down. So, too, it is too soon to
tell if the parties’ experience in problem-solving at mediation will lead to an
improvement in their day-to-day dispute resolution procedures.

In conclusion, I do not want to oversell the advantages of mediation. Our
experience is limited (though we have now mediated over 300 grievances with
essentially the same results), the participants thus far have been volunteers,
and we may all have been motivated by a missionary zeal that will not with-
stand the test of time. Still, our experience does suggest that, as long as arbi-
tration remains available for those grievances that cannot be settled, mediation
has the potential to serve as a major step towards labor peace in the bitumi-
no us coal industry.