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Larry W. Blalock
West Virginia University College of Law

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THE CURRENT STATE OF GRIEVANCE ARBITRATION IN THE COAL INDUSTRY

The arbitration process provides for settlement of disputes through adjudication outside the normal judicial system.\(^1\) In many instances arbitration resolves disputes arising under the terms of a collective bargaining agreement. This type of labor arbitration is referred to as rights arbitration, or more commonly, grievance arbitration.\(^2\) A second type of arbitration, referred to as interest arbitration, is concerned with settling the unresolved terms of the collective bargaining agreement itself.\(^3\) This note will focus solely on grievance arbitration.

Grievance arbitration has proliferated, particularly in American industry, in the wake of the United States Supreme Court’s 1960 decisions in the Steelworker’s Trilogy.\(^4\) The cumulative effect of these three decisions was to establish the Supreme Court’s positive attitude toward arbitration and its propensity to give great deference to the private settlement of disputes arising under collectively bargained agreements. In the aftermath of the Steelworker’s Trilogy and its progeny, grievance arbitration has grown to be an integral part of most collective bargaining agreements.\(^5\) These self imposed quasi-judicial dispute resolution procedures are desirable for several reasons:

First, Congress has expressed a preference for the private settlement of labor disputes through the grievance arbitration procedure. Second, arbitration is the more efficient method for resolving labor disputes, since the Board [National Labor Re-

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2 Id.
3 Id.
5 In 1974 it was reported that 95% of the major collective bargaining agreements provided for the arbitration of grievances. See Cohen, The Search for Innovative Procedures in Labor Arbitration, 29 ARB. J. 104 (1974) [hereinafter cited as Cohen].
lations Board] and the courts are now overburdened with labor related litigation. Third, the arbitrator has a better knowledge of the law of the shop, which imbues him with greater competency in dealing with labor disputes.

Labeling these extra-judicial procedures for the settlement of disputes “arbitration procedures” is somewhat a misnomer. As the express goal of any such procedure is to settle the dispute long before the actual arbitration phase is activated, these procedures might more aptly be called dispute settlement procedures. As a means of reaching this end, many grievance arbitration procedures begin very informally with perhaps a meeting between the foreman and the grievant, they then proceed to more formal levels and finally, and only if necessary, they culminate in arbitration.

While the proliferation of grievance arbitration procedures in American industry is of only introductory importance in this note, it provides a basic background of the evolution and growing importance of grievance arbitration procedures in America. This note concerns the grievance arbitration procedure employed by the United Mine Workers of America (UMW) and the Bituminous Coal Operators’ Association (BCOA). The stability of employer-employee relations in the bituminous coal industry is essential to a resurgence of coal as America’s means of survival during the current energy crisis. To regain its prominence in both national and international markets, the coal industry must be both dependable and productive. Neither of these characteristics can exist in an industry which is unsettled in the area of labor relations.

The grievance procedure is the very heart of labor-management relations. Much has been done during the past decade by

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7 For example, in the 1978 National Bituminous Coal Wage Agreement [hereinafter cited as 1978 Agreement], the following language appears in Art. XXIII, Sec. (c): Grievance Procedure: “[a]n earnest effort shall be made to settle such differences at the earliest practicable time.”
* Id. Art. XXIII, Sec. (c) (1)-(4).
* As stated by the United States Supreme Court in United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960), “arbitration is the substitute for industrial strife.”
the UMW and the BCOA to improve the grievance arbitration procedure used in the coal industry. The purpose of this note is to analyze the effect and efficiency of these changes in the current procedure. This analysis will focus on the current system's ability to battle the major deficiencies in any grievance arbitration mechanism: cost and time-lag. The first section will survey the major changes made in the UMW/BCOA grievance arbitration procedure in the past decade. The second section will discuss the problems of cost and time-lag as they relate to grievance arbitration generally, with an analysis of the 1978 National Bituminous Coal Wage Agreement (1978 Agreement) to determine if the parties to that agreement are effectively combating these problems in the coal industry. The third section of this note will examine the effectiveness and propriety of the Arbitration Review Board (A.R.B.), discussing some extra-contractual methods of curing the inefficiencies of grievance arbitration. Finally, the conclusion will suggest some changes to improve the current procedure's ability to operate at optimum efficiency.

I. GRIEVANCE ARBITRATION IN THE BITUMINOUS COAL INDUSTRY

The 1970's brought a great deal of change to grievance arbitration procedures in the coal industry. The bulk of the restructuring occurred during the negotiation of the 1974 National Bituminous Coal Wage Agreement (1974 Agreement). These changes, along with those effectuated by the 1978 Agreement, comprise the focal point of this analysis.

The grievance procedure used in the coal industry is basically a five-step process which may be outlined as follows:

1. meeting between foreman and aggrieved party, then
2. settlement is attempted by the mine management and the mine committee, then
3. the Union's District representative and a representative

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from management attempt to settle, then
4. the matter goes to arbitration, then
5. appropriate cases may be appealed to the A.R.B.\textsuperscript{11}

Several streamlining procedures were made a part of the 1974 Agreement. The meeting between the foreman and the aggrieved party at step one of the procedure was changed to require that the foreman render his decision within twenty-four hours.\textsuperscript{12} This element obviously was inserted to expedite the subsequent steps of the grievance procedure. Another streamlining element of the 1974 Agreement is found in Article XXIII, Section (b)(3), which makes the compilation of a verbatim transcript contingent on both parties' agreement. This element has both cost and time-saving implications.

Undoubtedly, the most radical alterations in the grievance arbitration procedure brought about by the 1974 Agreement occurred at steps four and five. The examination by the four person board\textsuperscript{13} was deleted and replaced by arbitration; the appropriate arbitrator to be chosen from a list of arbitrators compiled for each UMW District by the presidents of the Operators' Association and the International Union.\textsuperscript{14}

The changes made at step five of the procedure resulted from studies of the Joint Committee on Arbitration Procedures which was established under the 1971 Agreement.\textsuperscript{15} The parties provide in Article XXIII, Section (c)(5) of the 1974 Agreement that arbitration decisions rendered at step four may be appealed to an Arbitration Review Board subject to certain jurisdictional limitations. The A.R.B. was created to act as a "quasi supreme court" for coalfield arbitrations.\textsuperscript{16}

The 1978 Agreement is, of course, the controlling document at this point and therefore will be the subject of analysis, but the 1974 Agreement is still the milestone from an evolutionary stand-

\textsuperscript{11} 1978 Agreement, Art. XXIII, Sec. (c)(1).
\textsuperscript{12} Id.
\textsuperscript{13} 1971 Agreement, Art. XVII, Sec. (b)(4).
\textsuperscript{14} 1978 Agreement, Art. XXIII, Sec. (b)(1).
\textsuperscript{15} 1971 Agreement, Art. XVII, Sec. (c).
\textsuperscript{16} Horvitz, Brennan & Miller, \textit{New Approaches to Dispute Settlement, Arbitration—1976} at 221 (1976) (address by Joseph P. Brennan, President, Bituminous Coal Operators' Assoc.).
point. Notwithstanding the major restructuring done in the 1974 Agreement, the 1978 Agreement initiated some changes of its own as well as refining some of the concepts in the 1974 Agreement. The major changes can be enumerated as follows:

1. The mine committee was given the power to withdraw any grievance at step two.
2. Arbitrators were required to render decisions in an expeditious manner, and failure to do so was made grounds for removal by mutual consent of the appointing parties.
3. Settlements or withdrawals at step one of the grievance procedure were held not to constitute a precedent in the handling of other grievances.
4. The parties agreed to consolidate cases before one arbitrator where practicable in an effort to achieve the goal of "... expeditious processing of grievances."
5. Post-hearing briefs were disallowed except when deemed necessary by the arbitrator.
6. The parties agreed to continue the "appellate system" with a sole umpire as opposed to the three member panel.  

This list of important changes is not exhaustive, but contains those changes most significant and most deserving of evaluation. Each of these elements of the grievance arbitration procedure has had some effect on the cost and time-lag associated with each individual grievance.

II. TIME LAG AND COST IN GRIEVANCE ARBITRATION PROCEDURES

Having outlined the current grievance procedure used in the coal industry, and noted some of the important changes occurring recently in that procedure, it is necessary to determine the ability of this procedure to deal with the problems and inefficiencies associated with all grievance arbitration procedures—time-lag and cost. To say that time-lag and cost are current problems of grievance arbitration procedures in America is far from original. Indeed, scholars have written extensively purporting to identify these problems and have suggested methods of trimming both the time-lag and cost factors.  

\[17\] Id. This is a summary of the important changes made in Art. XXIII of the 1978 Agreement.

\[18\] See, e.g., Jaffe, It's Your Money! Cutting the Cost of Labor Arbitration, 26
the alleged inefficiencies of grievance arbitration generally and also analyze the 1978 Agreement to determine to what extent the UMW and the BCOA are employing these methods to resolve the problems of cost and time-lag. The problems of cost and time-lag are interrelated concepts; although they are conceptually distinguishable, one will always affect the other. Most suggestions regarding time-lag, if implemented, would concurrently reduce costs. Hence, much of the discussion that follows will necessarily focus on both problems simultaneously.

The cost, as well as the time-lag, of arbitration has been increasing. The average cost of an arbitration has recently been estimated at over two thousand dollars per side;¹⁹ and the average lapse of time from the grievance date to the receipt of the arbitrator's award is over two hundred and twenty days.²⁰ Still, "even the most formal arbitration proceeding is much faster, less expensive, and more responsive to industrial needs than the best run courts available today."²¹ The median time required to get a case to trial after filing in federal court is one year.²² Furthermore, litigation entails attorneys' fees and extensive discovery costs which can be staggering.²³ As a result, there are few who condemn the arbitration process to the extent that its extinction seems near.²⁴ Arbitration is an efficient process in comparison to its alternative, litigation, but there is still room for improvement.

Why are costs and time-lag problems in arbitration? One major reason for the time-lag problem is the lack of "competent, experienced, and acceptable arbitrators."²⁵ It has been estimated that seventy-five percent of the arbitration cases in America are

²⁰ Id.
²¹ Id. at 34.
²² Id. at 35.
²⁴ Davey, supra note 18, at 561.
heard by twenty-five percent of the available arbitrators. Furthermore, the average age of those experienced arbitrators is fifty-seven. Industry must begin using the younger, more inexperienced arbitrators. While this is recognized as a solution by many, few are willing to implement it. Most parties to the arbitration process feel more secure with older, more experienced arbitrators; they are, it is urged, more predictable. The net effect of this attitude is that a select group of arbitrators become overburdened and unable to dispatch cases with the expediency necessary for effective arbitration. Over use of a few arbitrators obviously contributes to the time-lag problem.

Most of the documented inefficiencies of grievance arbitration contribute both to time-lag and cost. The most significant and prevalent inefficiencies include the following:

1. Improper screening,
2. Unnecessary use of post-hearing briefs,
3. Unnecessary use of verbatim transcripts,
4. Failure to use adequate pre-hearing techniques aimed at streamlining the disagreement,
5. Failure to use and develop young, inexperienced arbitrators.

A discussion of the first of these problems associated with grievance arbitration, improper screening, will be deferred to the last section of the note since it has particular application to the coal industry. The remaining problems will be analyzed in relation to the 1978 Agreement to determine whether the grievance procedure used in the coal industry is equipped to neutralize these universal problems.

Is the Coal Industry Coping With Time-lag and Cost Problems?

As noted earlier, time-lag and cost problems are characteristic of all grievance arbitration procedures—the UMW-BCOA pro-

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26 Cohen, supra note 5, at 107.
27 Id.
28 Davey, supra note 18, at 561.
29 Cohen, supra note 26, at 107.
30 Davey, What's Right and What's Wrong With Grievance Arbitration, 28 Arb. J. 209, 212-14 (1973). See also Davey, supra note 18. These two articles summarize well the current problems in grievance arbitration procedures.
31 See text accompanying notes 68-76 infra.
procedure is no exception. With this in mind, the coal industry's grievance arbitration procedure can be analyzed to determine its ability to mitigate the effects of cost and time-lag.

The lack of experienced and acceptable arbitrators is also a problem in the coal industry. The magnitude of this particular problem in the coal industry becomes obvious upon a survey of the lists of panel arbitrators composed pursuant to Article XXIII, Section (b) of the 1978 Agreement. This survey revealed several significant points. There is an obvious tendency among coalfield arbitrators to render their services in more than one district. For example, in the districts used in this survey, there were sixty-seven available panel positions. Of these sixty-seven possible positions, twenty-eight of them are filled by a small group of arbitrators. In fact, there are twelve arbitrators serving these districts who are on the panel in one or two other districts. This situation is not inherently bad, but to the extent that arbitrators become more dependent on the coal industry for their livelihood, the more compromised they may become. At the very least, this possibility offers a good reason for those who choose the panel members to monitor the situation and check its growth. These overlapping arbitrators are obviously good or they would not be so acceptable to both the union and management; however, an arbitration process loses its value when the arbiter becomes more concerned with the "season record" than with the case at hand. Furthermore, this overlap situation may accentuate the time-lag problem as the overburdened arbitrators get bogged down with work and are unable to dispose of cases in a reasonable time. Essentially, the arbitrator supply problem is as much evident in

32 See text accompanying notes 25-29 supra.
33 This survey included the following UMW districts: 2, 4, 5, 6, 11, 17, 29, and one unidentifiable district.
34 It has been reported that toward the end of the 1974 Agreement, there were only seventy-five arbitrators available to fill one hundred and fifty arbitration posts. This may be a closer approximation of the true situation. Valtin, The Bituminous Coal Experiment, 29 LAB. L.J. 469 (1978).
35 These figures, taken from recent panel lists, may have changed somewhat by the date of printing, but the general trend of concentration is fairly represented. In fact, the situation may be more acute than the figures of this survey suggest since the survey does not include all of the districts.
36 See text accompanying notes 25-29 supra.
the coal industry as elsewhere. Many of the resulting negative aspects alluded to above could be eliminated if the parties would actively seek and employ young inexperienced arbitrators. A greater utilization of these young arbitrators would help alleviate problems associated with both overlapping and overburdening.

One instance where the 1978 Agreement specifically attempts to limit the time-lag problem is found in Article XXIII, Section (b)(4). This contract provision states that “[d]istrict arbitrators shall render decisions in an expeditious manner; failure to do so may be grounds for removal by mutual consent of the appointing parties.” This provision, while it has no effect on limiting the number of grievances reaching arbitration, is laudable for its effort to expedite the disposition of the grievance by arbitration. The underlying purpose of this removal process would seem to be to urge compliance with Article XXIII, Section (c)(4) of the 1978 Agreement. The extent to which this provision can effectively expedite the process is greatly limited when viewed in light of the supply problem discussed earlier. In other words, it may be counterproductive to remove a great number of arbitrators in view of the already overlapping and overburdening of the current panels. Again, a willingness of the parties to utilize the young, inexperienced arbitrators would seem to be a partial solution to this dilemma as well.

The grant of authority to the mine committee to either settle or withdraw any grievance at step two of the grievance process is one provision of the 1978 Agreement which will have the dual impact of decreasing both the cost and the time-lag associated with the coal industry’s grievance arbitration procedure. This clause, in effect, is an additional screening mechanism inserted by

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37 Id.

38 The author has no statistics on the average age or years of experience of the panel arbitrators to whom the survey in note 33 was addressed. The coal industry may in fact have many young arbitrators; however, the employment of these younger and less experienced arbitrators might still be expanded.

39 Art. XXIII, Sec. (c)(4) states in part: “If the arbitrator is unable to make his decision within 30 days of the close of the hearing, he shall promptly advise the parties of the reasons for the delay and the date when his decision will be submitted.”

40 See text accompanying notes 25-29 supra.

41 Provisions of the 1978 Agreement regarding the mine committee are found in Art. XXIII, Sec. (a).
the parties as a preventive measure. The grant of this authority to the mine committee might be of significant importance were it not for the political aspects associated with the committee (and the union in general). The committee members are elected at each mine site by the employees of that mine, and are therefore subject to both actual and potential political pressure from their peers. The effect of a union's political nature on any screening mechanism is cogently stated as follows:

A union is semi-political in nature. Refusal by a steward to file a grievance, or by a union representative to press it to arbitration, may, rightly or wrongly, alienate a member who feels he has a valid grievance, and the financial cost of having an arbitrator say No may be felt less burdensome than the political cost of having a union officer say it, particularly if a union election is coming up.

Perhaps even more significant than the political pressures on the mine committeeman, are the peer pressures. This was pointed out in a study done some years ago and is still relevant today. The author, after pointing out the economic advantages of committee membership, noted the following: "[i]n spite of these advantages, the committeeman's position is not always readily filled, and resignations of committeemen are common. The grievance committee comes under attack for delays in processing grievances and for unfavorable decisions." As a result of these various pressures under which the committeeman must operate, the grant of authority to the mine committee to withdraw grievances at step two will probably not have a significant impact on the number of grievances pressed to arbitration by the union. As a corollary to all this, it should be pointed out that improper screening also results from management recalcitrance. The simple solution is for the union to say "no" to more employee grievances and for the management officials to say "yes", and admit their wrongs more often. This panacean solution is, however, realistically

42 Id.
43 Jaffe, supra note 18, at 162.
45 Id. at 5.
46 Jaffe, supra note 18.
47 Id.
In addition to the general factors discussed above, some of the individual stages of the grievance arbitration procedure contain elements which lessen the impact of time-lag and cost on the coal industry's grievance procedure. A critical discussion of these factors is important since, unlike the general provisions discussed above, these have a direct effect on the applicable stage of the grievance process.

Step one of the grievance procedure provides that the foreman, after his initial meeting with the aggrieved employee, must render his decision within twenty-four hours following the day the complaint is made; furthermore, settlements or withdrawals at this stage of the procedure do not constitute a precedent in the handling of other grievances. The first of these, requiring the foreman to render his decision within twenty-four hours, propels the unsettled grievance into the "machinery" as quickly as possible. The second provision is the important one. The fact that settlements made by the foreman have no precedential value tend to make low level settlements more possible. This case-by-case approach allows for varying individual circumstances. It is impossible to evaluate the impact of this provision since there is generally no record made of grievances settled at the first step meeting between the aggrieved party and the foreman. This contract provision is aimed at the early disposition of grievances. It would seem, in the long-run, to have the positive effect, however intangible, of lowering the number of cases reaching arbitration during any given time period.

With the exception of the time limitations, steps two and three of the grievance procedure have no significant provisions aimed at battling the time-lag and cost problems. Step four of the grievance procedure as outlined in the 1978 Agreement urges the use of case consolidation. Utilization of this procedure could

48 Inefficient screening is perhaps the coal industry's most pressing problem. Education is another approach to solving the pre-arbitration screening problem and will be discussed in section three infra.
49 1978 Agreement, Art. XXIII, Sec. (c)(1).
50 Art. XXIII, Sec. (c)(4) provides in part: "The parties agree that the expeditious processing of grievances is a major function of this Article, and that consolidation of cases before a single arbitrator can aid in achieving that goal, and where applicable, this procedure should be given serious consideration. . . . grievance
have overwhelming effects on both time-lag and costs. An important saving associated with case consolidation is that each party’s presentation of his grievance tends to be shorter and more succinct, this in turn results in arbitral opinions with similar qualities.\textsuperscript{51} The time and cost saving features of this provision are obvious. However, in a system based upon a rotating panel of arbitrators, like the UMW/BCOA system, the success of such a feature would seem to be largely a function of what particular arbitrator happened to be assigned.\textsuperscript{52} Where relatively long range consolidation is necessary, the parties will probably be reluctant to consolidate without knowing which arbitrator will be assigned via the rotation.\textsuperscript{53} While this contract provision is noteworthy, the language is suggestive rather than binding, and this, more than anything else, will deter its effectiveness.

The last provisions of the 1978 Agreement to be analyzed in this section may be considered together. Both deal with improving the parties’ pre-arbitration activity and not with the arbitration procedure itself. The 1978 Agreement precludes the use of post-hearing briefs except in cases where the arbitrator deems such briefs necessary.\textsuperscript{54} The past insistence on filing post-hearing briefs may be partly based on a desire to “shore up a shoddy job of preparation and/or presentation.”\textsuperscript{55} This provision should save time, reduce cost, and insure better preparation on the representatives’ part, provided that arbitrators do not abuse their right to demand briefs.\textsuperscript{56} Although this provision indirectly urges better

\textsuperscript{51} Jaffe, supra note 18, at 161.

\textsuperscript{52} In the belief that arbitrators do tend to split decisions, some parties, especially on the management side, consider it preferable to arbitrate only one issue at a time, and to insist upon a different arbitrator for each case. See Jones & Smith, Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report With Comments, 62 Mich. L. Rev. 1115, 1149 (1964) [hereinafter cited as Jones & Smith].

\textsuperscript{53} The author observed the records of a major coal producer concerning arbitration decisions rendered under the 1978 Agreement and while case consolidation had occurred, it seemed both quite infrequent and limited to the presence of a few arbitrators.

\textsuperscript{54} 1978 Agreement, Art. XXIII, Sec. (c)(4).

\textsuperscript{55} Jaffe, supra note 18, at 175-76.

\textsuperscript{56} It is interesting to note that the 1978 Agreement allows the arbitrator to
pre-arbitration preparation, Article XXIII, Section (e) of the 1978 Agreement has direct effects on such preparation.  

By compelling the parties to disclose important facts and the contract provisions supporting their claims, both sides should be able to more adequately focus their oral arguments and case presentation on the facts in dispute. This of course should lead to a more succinct hearing which will, in turn, lead to lower overall costs.

The Impact of Step Five—The Arbitration Review Board

In most grievance procedures, arbitration is the final stage and the arbitrator's decision is final and binding upon the parties. In the coal industry, the parties, by virtue of the 1978 Agreement, may appeal appropriate cases to the Arbitration Review Board (A.R.B.). The Memorandum of Understanding contained in the 1978 Agreement, sets out the guidelines, as well as some changes, for the operation of the A.R.B. during the term of the 1978 Agreement.

The A.R.B. is a “quasi supreme court” of limited jurisdiction. The basic purpose of the A.R.B., as evidenced by the pre-
requisites for review, is to lend stability to labor relations in the coal industry. The decisions of the A.R.B. have precedential value and this is the key to its ability to create an atmosphere of stability. In this respect, the A.R.B. has had great success. One industry official has said: "Now, once you arbitrate a contractual issue, it is settled—you know that you will never (during the course of the 1978 Agreement) have to arbitrate that issue again."60

The existence of the A.R.B., however, has not been without its problems. Since its inception in 1974, the A.R.B. has been burdened with a backlog, resulting from the parties' inability to agree on the membership of the Board for some time.61 Once the tripartite Board was finally named, the petitions for review had mounted. Furthermore, the backlog and time-lag were increased when the actual caseload proved to be far greater than that which the parties had anticipated.62 Despite these problems, the existence of the A.R.B. obviously has had merit as shown by the UMW and the BCOA's decision to continue it into the 1978 term.

While the A.R.B. survived the 1978 Agreement, it was not without change. Most importantly, the parties dropped the concept of the tripartite Board and chose instead to employ a "chief umpire" system.63 This should have the effect of expediting the disposition of cases by avoiding the power struggles which plagued the 1974 tripartite Board.64 A second important change, or addition to the appellate stage, is the grant of authority to the

previously been decided by the Board, and which in the opinion of the Board involves the interpretation of a substantial contractual issue."65

The 1978 Agreement deleted the provision of the 1974 Agreement which allowed the Board to review a district arbitrator's decision if it were considered by the Board to be "arbitrary and capricious, or fraudulent." As a result, the current Arbitration Review Board has more limited jurisdiction than did the Board under the 1974 Agreement.

60 Interview with an official of a major coal company.
62 Id.
63 Memorandum of Understanding, supra note 58-59.
64 1974 Agreement, Art. XXIII, Sec. (b). Under the 1974 Agreement, there was a tripartite board consisting of one member chosen by the United Mine Workers Union, one member chosen by the Operators, and one neutral member agreed upon by the parties. With this type of organization, the possibility of disagreement between the board members is great. As a result, the change to a "chief umpire system" should go a long way towards expediting the board's disposition of cases.
respective presidents of the UMW and the BCOA to withdraw any district petition for review filed by their constituents. If the parties use this discretion wisely, and in the appropriate cases, it should also lessen the current case burden upon the Board and enhance expediency.

One criticism of the A.R.B. is that, instead of flowing with the trend and "streamlining" its procedure, the coal industry has effectively drawn the system out by adding yet another stage. However the A.R.B.'s stability militates the effect of the addition of another stage in the appellate process. In fact, the long-run effect should be to lower the total number of grievances reaching arbitration since the A.R.B.'s decision on any particular issue settles that question conclusively.

These positive aspects of the A.R.B. must be balanced against the cost of administering the appellate system. According to the Memorandum of Understanding between the parties in the 1978 Agreement, the Union and the Operator's Association are required to split the cost of the Arbitration Review Board. During the current term of the 1978 Agreement, expenses of the Board have been approximately $125,000.00 or $60,000-$70,000 per party. However the current costs of the A.R.B. are not such an extravagant price to pay as long as the Board continues to lend stability to the otherwise chaotic nature of labor relations in the coal industry.

III. EXTRA-CONTRACTUAL ISSUES AND ANSWERS

Inefficient Screening and the Duty of Fair Representation

The problems associated with the failure of management and the union alike to properly screen non-meritorious grievances were touched on at an earlier point. That discussion centered around the omnipotent political nature of unions and the occasional recalcitrance of management. As stated throughout this note, time-lag and cost are the two major inefficiencies of any grievance procedure; the major cause of these inefficiencies is that

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65 Memorandum of Understanding, supra notes 58-59.
66 Id.
67 Telephone conversation with an official of the BCOA.
68 See text accompanying notes 47-53 supra.
69 Id.
there are too many grievances being pressed to arbitration. The simple solution to many of the problems and inefficiencies is effective screening, but for the reason stated below, this solution is difficult to employ.

The problems associated with improper screening rest, at least initially, with the union. There is a force, the *Vaca v. Sipes* syndrome, arguably much more powerful than political and peer pressures, which deters the union from withdrawing those grievances which have little merit and even less significance.

From the *Steelworker's Trilogy* evolved the *finality rule* which is based on the belief that industrial disputes are best settled in the industrial setting through a mechanism of the parties' own choosing. A doctrine rising alongside and in constant conflict with the finality rule has been the doctrine of fair representation. The doctrine of fair representation was first recognized in 1944 in *Steele v. Louisville and Nashville Railroad*, and has risen to challenge the finality rule on a more equal footing in recent years. The test stated in *Vaca v. Sipes* has not been applied with particular consistency, therefore many unions are apprehensive about withdrawing grievances, especially when

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70 386 U.S. 171 (1967).
71 See note 4 supra.
73 323 U.S. 192 (1944). Black union members challenged their union's actions in agreeing to phase out black firemen. In disallowing this act of discrimination, the court imposed a dual role on the union: to represent the interests of the membership as a whole as well as to represent the individual employees of the bargaining unit fairly, impartially, and without hostile discrimination.
74 *Vaca v. Sipes*, 386 U.S. 171 (1967). In *Vaca* an employee's discharge case was taken through the first four steps of the grievance procedure and then withdrawn before arbitration. The aggrieved employee sued the union for breach of its duty of fair representation. This contention was rejected by the Court saying that the duty of fair representation is breached only when the union's conduct is "arbitrary, discriminatory, or in bad faith," *Id.* at 190, and further stated that the "union may not arbitrarily ignore a grievance or process it in a perfunctory manner." *Id.* at 191. Also adding an important element to construing this duty was the recent case of *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), which made the "finality rule" conditional upon the employee's ability to show a breach of the duty of fair representation.
75 *Id.*
considering the contingent liability left hanging over their heads. Most unions would rather bear the cost of arbitration than face the prospect of the staggering costs of litigation on the issue of fair representation.

The problems and effects associated with the duty of fair representation as outlined in *Vaca* and its progeny are beyond the scope of this note. The important point is that the problems with improper screening, at least from the union’s viewpoint, are magnified by the ambiguous standards set out by the court in *Vaca*. Despite the indirect effect that the duty of fair representation has on the withdrawal of non-meritorious grievances, union leaders could take affirmative action to protect themselves from possible claims of dissatisfied members whose grievances have been withdrawn. Union leaders should, for example, strive to treat all related grievances alike. In furtherance of this goal, union leaders should devise standards at the beginning of each contract term to guide the unions’ decision as to which grievances are important enough to press to arbitration. Having a documented set of guidelines to aid in these screening decisions would add objectivity to the decision making process and since the rank and file would presumably be given a copy of these guidelines, it would be more difficult for the employee to claim that the withdrawal of his grievance was arbitrary, discriminatory, or in bad faith.

Furthermore, the union leaders could in each case where a grievance is withdrawn, articulate the reasons why that particular grievance was withdrawn. This added feature of documentation would not only build a record to defend future withdrawals, but would also provide the aggrieved employee with an explanation of why his grievance was not pursued. Finally, if the employee is still dissatisfied and the subject matter of the grievance is relatively serious, the union leaders could give the employee the opportunity to appear at an informal conference to air his complaints. These conferences would provide a time where the union

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officials could explain their action further and hopefully convince the grievant that pressing the grievance to arbitration would be of no benefit to him/her or the union.

While these suggestions would go a long way towards increasing the ability of union leaders to effectively screen their grievances, the problem will remain until the courts become more consistent or until the Supreme Court refines the current standard so as to provide better and more reliable guidance to those upon whom the job of proper screening rests. In as much as improper screening is the major cause of much of the inefficiency associated with grievance arbitration procedures, pressing for consistency in this area must be a major goal of not only the coal industry, but of American industry in general. Screening those grievances, once filed, is the most effective way to improve grievance procedures. A second solution is to attempt to settle problems before they become grievances. In any attempt to employ this "pre-grievance strategy," education and cooperation are essential elements.

**Education and Cooperation: Examples Worth Following**

As of late, there have been several strong efforts by both union and management in the coal industry to turn the otherwise adversarial nature of the grievance procedure into a more cooperative one. A good example of such an attempt is that initiated by Westmoreland Coal Company's Bullit Mine and UMW District 28. This Westmoreland's bosses and rank and file meet regularly on a roundtable basis to clear the air about common complaints before they reach the grievance stages. This is the screening mechanism at its best. The parties can air the problems and evaluate the situation in an atmosphere of cooperation. The program is highly endorsed by the constituents of both parties, but Mine Manager Fred "Bear" Lawson states it best: "[W]e discovered an amazing fact that we all had the same purpose and the same business: mining coal." As a result of the program these parties have
cut their grievance load in half. This obvious effect on both cost and time-lag should put other union and management officials on notice of the benefits of this cooperative system.

Educational programs as a solution to the screening problems are being implemented readily by the UMW. Examples of this push toward education are found in the United Mine Workers Journal, a publication for the rank and file. The UMW has attempted to educate its members on the efficient use of the grievance procedure. These educational inserts, while their effects are difficult to assess, could have nothing but positive ramifications on the grievance procedure.

Perhaps the most significant educational program is that which was instituted on an experimental basis in UMW District 17 and is now spreading to other districts. The program, launched by the UMW in cooperation with the Federal Mediation and Conciliation Service (FMCS), is aimed at training local mine committeemen about various contract matters. The topics covered include contract interpretation, grievance handling, arbitration procedures, and labor relations in general.

The program has essentially three phases. In the first phase, mine committeemen in the various subdistricts receive eighty-hours of instruction from trained personnel provided by the Federal Mediation and Conciliation Service. In phase two, certain committeemen who have completed phase one are chosen to assist the FMCS instructors in teaching the phase one course to other miners. Thereafter, these committeemen who complete phase two of the program enter phase three, in which they teach the eighty-hour phase one course to other mine committeemen on their own. Hence, after the initial training of those selected to continue past the first phase, the program becomes self-

80 Id.
83 Id.
84 Id.
85 Id.
86 Id.
In addition to the general areas stated above, the first phase of instruction is aimed at giving the students a greater degree of expertise and understanding in the following areas:

—The preparation of witnesses for hearings;
—The differentiation between hearsay and real evidence;
—the burden of proof;
—Location of information regarding the nation's labor laws; and
—Effective communication of the labor relations concept to the membership.\footnote{id}{id}

While all of the above objectives are noteworthy, the last one is characteristic of the program, and the success of this objective is possibly the most important of all. When mine committeemen begin to look at grievances in light of the overall labor relations concept, the political and peer pressures will become less important; and the committeemens' authority to withdraw grievances at step two will be allowed to reach its full potential. Furthermore, to the extent that the mine committeemen can communicate this labor relations perspective to the membership, non-meritorious grievances will not be such a problem.

It is in the interest of both the UMW and the BCOA to initiate programs of both the cooperative and the educational nature; the above examples are but a beginning. While speaking of the UMW/FMCS education program, one participant summed the situation up extremely well: "Education of this type has been a long time coming to the coalfields. . . . This class is a giant step on our part in obtaining peace in the coalfields."\footnote{id}{id}

IV. Conclusion

The various elements of the coal industry's grievance procedure analyzed in this note evidence the attempts made by the UMW and the BCOA to lessen the impact of the inefficiencies which are inherent in any grievance arbitration procedure. As all the inefficiencies associated with grievance arbitration ultimately affect the cost of these procedures, the apparent goal of the coal

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\footnote{id}{id} (comments of class member Jim Walker).
industry is to decrease the cost of arbitration. The term cost of arbitration can be viewed in either of two ways, and one's perspective on this term will necessarily affect the means used to attack the problem. Simply stated, the phrase cost of arbitration has a dual meaning. A decrease in the cost of arbitration can mean a decrease in the cost *per arbitration* (i.e., per case), or it can mean a decrease in the total *cost* of arbitration during a specified time period.

Viewing the problem of the cost of arbitration from the perspective of *total cost* provides the best approach, and the one most likely to produce the desired results. Approaching the problem in this light, it becomes obvious that industry officials must concentrate on improving the ability of their grievance procedure to settle disputes without forcing the issue to arbitration.

Many commentators who have addressed the problem associated with grievance arbitration have concentrated on improving the arbitration phase of the grievance procedure.\(^9\) While improvements are certainly needed at this stage of the process, greater emphasis must be placed on improvement of the pre-arbitration dispute resolution mechanism.

The inherent value of these preventive strategies is characterized by the several extra-contractual efforts recently initiated in the coal industry on a more or less individualized basis. These educational and cooperative programs should become the rule rather than the exception in the future. The entire industry must support similar programs if the necessary atmosphere of productivity and stability is to be achieved. Cooperation between the UMW and the BCOA is imperative if coal is to take its rightful place among the nation's energy resources.

In addition to the extension of these preventive programs, there are two contract provisions which might be added to the 1981 Agreement in an effort to further deter the impact of time-lag and cost on the grievance arbitration procedure used in the coal industry:

\(^*^9\) See, e.g., Davey, *supra* note 18; Jones & Smith, *supra* note 52; Cohen, *supra* note 5; and Davey, *supra* note 30. While there has been some discussion of attempts to improve the pre-arbitration dispute settlement mechanism in the past, this should be the focal point of future improvements.
1) An extension of Article XXIII, Section (e) of the current Agreement to include a requirement that informal pre-hearing briefs be submitted to the arbitrator at some reasonable time prior to arbitration.

2) A requirement that the parties meet prior to arbitration, possibly at the close of the third step of the grievance procedure when it is obvious that the parties are at an impasse. The purpose of this meeting would be to agree on the particular facts and issues in dispute. This stipulation would accompany the informal brief to the arbitrator prior to the hearing.

While these provisions would entail some added time and cost initially, they would narrow the issues to be considered at the hearing and provide for a more expedient fifth stage arbitration. Through these measures the parties might well conclude that their differences, not being so critical, can be settled without arbitration. Any set of added provisions which would effectively lower the number of disputes pressed to arbitration would, in the long run, work to the benefit of the entire coal industry.

As evidenced by the recent report of the President's Coal Commission, coal has a vital role to play in America's attempt to combat the current world energy crisis. To rise to this challenge, the coal industry must become both stable and dependable. The presence of the Arbitration Review Board has facilitated both of these characteristics, and its continuance as a part of the industry's grievance procedure is imperative.

The UMW and the BCOA have recognized the major deficiencies in their grievance arbitration procedure and have made some progress at correcting these problems. Any major restructuring of the current procedure would be a step backward rather than an improvement. The coal industry's leaders need to concentrate on improving the ability of the current procedure to resolve disputes, thereby lowering the number of cases reaching arbitration.

The status of the coal industry's present grievance arbitration procedure is questionable, especially in light of Consolidation Coal Company's recent resignation from, and return to, the BCOA and the change in leadership of the UMW. However, despite this uncertainty, the parties to the National Bituminous Coal Wage Agreement should forge ahead with continued efforts to correct the backlogs and soaring costs of the grievance arbitra-
tion procedure in an attempt to create the necessary atmosphere for a resurgence of the coal industry.

Larry W. Blalock