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Counterpoint: Response to Mediator Caraway

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In his article in the Fall, 1989 *Journal,* California State Mediator John M. Caraway discusses the undeniable advantages of grievance mediation, compared with arbitration, in terms of time and expense savings, and an outcome potentially more satisfactory to both the employer and the union because of increased flexibility in the manner in which grievances can be remedied or resolved.[1] Mr. Caraway's article makes no attempt, however, to address the viewpoint of the individual employees whose grievances are at stake in the process, beyond noting that the "myriad of individual grievances . . . are of great interest to the grievants."[2] Since Mr. Caraway believes that grievances with impacts limited to the individual grievants (as opposed to unit-wide impact) are the best candidates for mediation,[3] the grievant's viewpoint deserves attention. The availability to private sector grievants of National Labor Relations Board processes provides further material for review.

We do not find individual grievants writing articles or comments published in the professional journals. However, Professor Stephen B. Goldberg presents a description of the contemporary grievant's typical attitude, that the payment of union dues buys a right to have one's grievance arbitrated:

> When unionization was in its formative stage, the average member probably regarded the union as a collective grouping of employees formed to advance the employees' common interests vis-a-vis the employer. In that context, the individual member would exercise considerable self-restraint in deciding whether to utilize collective assets in arbitrating a grievance which did not involve a substantial financial claim or a matter of importance to the group. As the union movement has matured, making the organizing stage ancient history in most enter-

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1. Caraway, *Grievance Mediation: Is It Worth Using?,* 18 J. LAW & EDUC. 495, 497 (1989).

2. *Id.* at 497.

3. However, it would seem that grievances with unit-wide impact would often present symptoms in the relationship between the employer and the union which are most amenable to the "problem-solving" approach of grievance mediation. *See, e.g.,* B. Selekman, *Labor Relations and Human Relations,* 87-92 (1947).

> prises, the sense of collectivity has diminished. Consequently, the average union member regards the union more as a provider of services which he or she purchases with the payment of union dues than as a collective of which he or she is an important part. The union member thus tends to view arbitration as a purchased service and to demand that the union provide that service, without worrying overmuch about the cost or the effect that an unfavorable decision may have on the union as a whole.[4]

Of course, it is well established that individual grievants do not have a legally enforceable right to have each and every grievance arbitrated.[5] However, rank-and-file attitudes cannot be expected to conform with even well-established legal principles in this area. The widely held attitude among grievants, that they are entitled to have their grievances arbitrated, means that a union must always be prepared to defend any pre-arbitration grievance settlement, whether achieved through mediation or otherwise, against a charge or complaint that the settlement violates the duty of fair representation owed to the grievant.

As Mr. Caraway points out, one of the features of grievance mediation most appealing to employers and unions is the potential flexibility in a mediated remedy "[B]ecause this is a confidential and explicitly non-precedential arena, it is possible to entertain more flexibility in remedy than that which might be appropriate in an arbitration award, for a resolution that is more to the parties' liking."[6]

However, the compromise necessary in mediation to achieve such flexibility in remedy appears to dissatisfy most individual grievants. Professors Jeanne M. Brett and Stephen B. Goldberg reported that, in grievance mediation cases with a "compromise" outcome, 68 percent of the local union representatives involved and 89 percent of the employer local operating personnel were satisfied with the result of mediation; by contrast, only 47 percent of the grievants were satisfied with a "compromise" mediation result.[7] While Professors Brett and Goldberg did not present data exploring the reasons why a majority of grievants were not satisfied with "compromise" mediation results, it is likely that grievants believed that their cases were compromised without due consideration of the contractual merits of their grievances. Indeed, even among employer and union representatives, 25 percent of company representatives and 7 percent of union representatives commented that the mediator sometimes

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4. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration,* 77 Nw. U.L. Rev. 270, 279-280 (1982); *See also Coulsen, Satisfying the Demands of the Employee,* 31 Lab. L. J. 495 (1980).

5. See 386 U.S. 171 (1967).

6. Caraway, *supra* note 1, at 500.

7. Brett and Goldberg, *Grievance Mediation in the Coal Industry: a Field Experiment,* 37 INDUS. & LAB. REL. REV. 49, 63 (1983).

encouraged the parties to compromise without regard to the contractual merits of their respective positions.[8]

In the private sector, a grievant who believes that a grievance settlement (achieved through mediation or otherwise) violates the union's duty of fair representation can file an unfair labor practice charge accusing the union of violating Section 8(b)(1)(A) of the National Labor Relations Act (NLRA).[9] The parameters of a union's duty of fair representation are beyond the scope of this comment. What is of interest to the present topic is the procedural treatment that the National Labor Relations Board will give to such an unfair labor practice charge. In particular, will the NLRB invoke its deferral doctrine?

Over the last 35 years, the NLRB has dealt with the situation where a grievance under a collective bargaining agreement may arise out of facts that would also constitute an unfair labor practice under Section 8 of the NLRA. The NLRB has addressed this overlap by developing an evolving deferral doctrine. In 1955, the NLRB announced that it would defer its statutory enforcement processes to an arbitrator's award provided that the arbitration proceedings were fair and regular, the parties had a full opportunity to present evidence and argument, the parties had agreed to be bound, and the arbitrator's decision was not "clearly repugnant" to the policies of the NLRA.[10] In 1963, the NLRB added as a deferral prerequisite that the arbitrator has ruled on the NLRA issue.[11] Then, in 1971, the NLRB announced that it would withhold its processes and defer to arbitration even before an award was issued, provided that the NLRA issue was arguably within the contract arbitration procedure and the parties were willing to proceed to arbitration (once the arbitration award was issued, the NLRB would then apply the prior deferral tests).[12]

In 1978, a panel of the NLRB encountered a mediated grievance settlement in the case of *T & T Industries, Inc.*[13] In *T & T,* an employee charged

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8. Goldberg and Brett, *An Experiment in the Mediation of Grievances,* 106 MO. LAB. REV. 23, 27 (1983).

9. 29 U.S.C. § 158(b)(1)(A) states:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

. . .

A union's violation of its duty of fair representation violates this statute. *See, e.g., Local 12, Rubber Workers (Goodyear Tire & Rubber Co.),* 150 NLRB 312 (1964), *enf'd.* 368 F.2d 12 (5th Cir. 1966), *cert. denied* 389 U.S. 837 (1967).

10. *Spielberg Manufacturing Co.,* 112 NLRB 1080 (1955).

11. *Raytheon Co.,* 140 NLRB 883 (1963), *set aside other grounds* 326 F.2d 471 (1st Cir. 1964).

12. *Collyer Insulated Wire,* 192 NLRB 837 (1971).

13. 235 NLRB 517 (1978).

the employer with violating his right under the NLRA by discharging him for refusal to drive a tractor which he alleged to be unsafe. One of the employer's defenses to the unfair labor practice charge was a mediated settlement of a grievance that had been filed under the collective bargaining agreement protesting the discharge. The grievance settlement was achieved in a meeting held before a mediator provided by the Michigan Employment Relations Commission. Under the mediation-produced settlement, the discharged employee was to be reinstated to a nondriving job at the same pay rate as his former driving job, but without any back pay. The employee was not present at the mediation meeting, and he refused to accept the resulting settlement. Nevertheless, the employer urged the NLRB to defer to the mediation settlement under the Board's *Spielberg* arbitration deferral doctrine.

The NLRB panel in *T & T* rejected the employer's deferral argument, stating:

> Although the contract provided for a grievance procedure culminating in binding arbitration, the parties settled the grievance at an earlier stage of the procedure. In these circumstances we conclude that "the full range of the mechanism for the determination of the dispute has not been utilized and there is no award that may be examined for its conformity with *Spielberg* requirements." *Whirlpool Corporation, Evansville Division,* 216 NLRB 183, 186 (1975). Although the agreement was reached at a meeting held before a mediator provided by the Michigan Employment Relations Commission, there was no formal hearing and the record does not establish that the mediator had the authority to make a determinative resolution of the dispute. Accordingly, we conclude that there is no showing that the *Spielberg,* requirements have been met.[14]

The *T & T* decision was cited in 1979 by an NLRB Administrative Law Judge in support of the proposition that "present Board law . . . appears to require as a condition of deferral that the issues be resolved through an arbitration award," rather than through any pre-arbitration grievance settlement.[15] Thus, for a while the NLRB appeared to be headed down the path of generalizing the ruling in *T & T* to all pre-arbitration grievance settlements, even when they were the product of mediation. As Professor Mollie H. Bowers observed, such a path "would put the agency [NLRB] in the unsupportable position of stimulating arbitration by discouraging efforts to settle, rather than promoting the process."[16]

The *T & T* decision has not been cited as precedent in any NLRB case

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14. *Id.* at n.13, citing *Super Value Xenia, a Division of Super Valu Stores, Inc.,* 228 NLRB 1254 (1977).

15. *U.S. Postal Service,* 245 NLRB 901, 910 (1979); *see also Laredo Packing Co.,* 245 NLRB 1, 5 (1981); *Melones Contractors,* 241 NLRB 14 (1979).

16. Bowers, *Grievance Mediation: Another Route to Resolution,* 59 Pers. J. 132, 135 (1980).

since 1984. While the NLRB has never expressly overruled the *T & T* decision, recent decisions imply the deferrability of unfair labor practice charges to grievance settlements achieved short of arbitration. For example, a panel of the NLRB wrote in a 1989 decision that:

> Accordingly, we shall defer both cases to arbitration and dimiss the complaints. However, we shall modify the judge's recommended Order to retain jurisdiction, as is our usual practice, so that we may further consider these matters if it is alleged that the dispute has not promptly been **settled** or arbitrated, or that the grievance-arbitration procedure has not been fair or regular or has reached a result that is repugnant to the Act.[17]

The continuing trend toward expansion of the NLRB's deferral policies obviates the fear created by the *T & T* decision, that pre-arbitration grievance settlements, even if reached through mediation, could not qualify for deferral. It appears that the NLRB is now willing, in a proper case, to defer to a pre-arbitration grievance settlement.

That of course, is good news for employers and unions. Individual grievants dissatisfied with the process of grievance mediation can be presumed to be less pleased over this news. Nevertheless, in deferring to nonarbitrated grievance settlement (achieved through mediation or otherwise), the NLRB must, as a condition of deferral, be satisfied that the settlement is not repugnant to the purposes of the NLRA. That should be at least some comfort to those grievants who worry that their rights are being trampled in mediation, as the union appears to be pushed toward compromise in order to achieve settlement.

17. *E.I. DuPont de Nemours and Co., Inc.*, 293 NLRB 109, 131 LRRM (BNA) 1193, 1195 (1989) [emphasis added]).