

ALTERNATIVE DISPUTE RESOLUTION IN UNITED STATES

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Alternative dispute resolution, or ADR is touted as the miracle medicine for all manner of disputes north of the Border, even in criminal cases, except there it is called plea bargaining, and there it is sometimes subject to question. It is most discussed and praised in resolving disputes in employment, both collective disputes and individual disputes in employment relations.

Alternative dispute resolution-alternative to what? Alternative to courts and to economic combat. Resolving disputes in the courts is too slow and costly, as lawyers play their elaborate procedural games and judges take months to announce decisions. Those decisions are often appealed for more cycles of lawyers' games and judges delayed opinions. Economic combat—strikes, picketing and boycott— may bring quicker resolution than the courts, but is even more costly, and the results reflect the relative economic strength of the combatants, not the justice or fairness of their claims. We all seek better ways of resolving disputes than through courts or economic combat.

My purpose here is to describe the alternatives that we in the United States have developed for resolving disputes between employers, unions and individual workers. Since I have been allotted 30 minutes rather than a week, I can only outline those alternatives. First, we must distinguish between disputes in the private sector and disputes in the public sector, for the problems and the mechanisms to solve them are somewhat different. Second, we must distinguish between settling collective disputes between unions and employers and settling disputes between an individual employee and his or her employer.

I. RESOLVING COLLECTIVE LABOR DISPUTES IN THE PRIVATE SECTOR

1. *Making of the Collective Agreement*

Let me begin with collective labor disputes between unions and employers in the private sector. Here we must separate disputes over the making of a collective agreement and disputes over the interpretation and application of the collective agreement. In the making of a collective agreement there is a fundamental premise, holy writ if you will, that the agreement should be made by the parties through free collective bargaining. The government has no voice in its terms —There is no compulsory arbitration, and the parties almost never agree to arbitration—. Even in so-called national emergency strikes, the government intervenes only to postpone the strike 80 days and hold a strike vote. If no agreement is reached, the strike can go on. Congress may pass a statute prescribing terms but that has occurred only two times in 55 years, and both involved the railroads.

The ultimate method of resolving disputes over writing the terms of a collective agreement is economic combat —the strike—. The alternative is mediation to help the parties to reach an agreement. The federal government provides mediators through the Federal Mediation and Conciliation Service (FMCS), and states also have mediation services. Either federal or state mediators are involved in almost every strike or threatened strike of consequence. They do not volunteer, they must be invited in by one of the parties, but there are public pressures on the parties to ask for mediation in order to demonstrate that they have exhausted all possibilities of arriving at an agreement before resorting to combat.

The mediators are generally full time public career employees with professional training and experience. They are not political appointees; they are not guided by any government policy other than helping the parties find a solution on which they can agree. They may propose solutions which they think might be acceptable, and they may urge one or both of the parties to accept a solution, but they must preserve their neutrality, and they have no leverage to press the parties to agree, other than moral suasion.

How successful is mediation? It is difficult to measure and depends on many factors. The mediator can suggest compromise solutions which the parties have not thought of, or have hesitated to suggest for fear of looking weak. He or she may persuade one or both of the parties to retreat from unreasonable demands, or educate the parties as to practices in the industry, or suggest solutions that others have agreed on. Although they can not compel the parties to be reasonable or to agree, they have often proven very useful in helping the parties to come to agreement. Ultimately, the success of mediation depends on the willingness of the parties to compromise and their desire to reach an agreement rather than resort to economic combat.

2. Interpreting and Applying the Collective Agreement

When we turn to disputes which arise during the term of the collective agreements, there is a totally different process of dispute resolution—the grievance procedure with final resort to arbitration—. Collective agreements in the U.S. have three characteristics which frame the system of dispute resolution. First, the collective agreement customarily includes multiple provisions regulating nearly every aspect of the employment relationship—promotions, discharges, reductions in force, overtime, holidays, vacations, severance pay, pensions, medical insurance etcetera— all creating legally binding obligations. Second, collective agreements typically include a no-strike, no-lockout provisions legally prohibiting economic combat during the period of the contract. Third over 95% of collective agreements create a grievance procedure ending in binding arbitration to resolve disputes arising under the collective agreement. Thus, the parties agree that arbitration shall be the alternative to the courts or to economic combat.

I would emphasize that the arbitration provisions in collective agreements typically limit the arbitrator to “interpreting and applying the terms of the collective agreement”, frequently underlining this limitation by adding that the arbitrator “shall not add to subtract from or otherwise modify the terms of the collective agreement”.

Arbitration is only the final step in the dispute resolution process. Typically, the collective agreement creates a grievance procedure. Any employee who feels wronged may file a grievance with his shop steward, a fellow employee

elected or appointed by the union. The shop steward takes up the problem with the employee's foreman, if they can not reach an agreement, the union appeals it up to the foreman's supervisor, who then discusses it with the shop committee. If they can not resolve the problem, it proceed to higher levels of management and the union. If no resolution is reached at the top level, it then goes to arbitration.

Who are the arbitrators? They are private persons, chosen by the parties—lawyers, college professors, retired judges, priests, rabbis— anyone mutually acceptable to the employer and the union. The Federal Mediation and Conciliation, equivalent state agencies and a number of private agencies, like the American Arbitration Association, maintain lists of qualified arbitrators. They will provide a lists of seven or nine arbitrators to the parties, and the parties strike the names of those they do not want. If none remain, another list is supplied, and striking is repeated. If, after two or three lists fail to produce a mutually acceptable arbitrator, a final list of seven or nine arbitrator is sent to the parties, and the parties alternately strike names until only one is left, who then becomes the arbitrator. The parties may agree on a person as a permanent arbitrator to handle all of their grievances, and he continues so long as he remains acceptable to both parties. If either party becomes dissatisfied with him at any time he can be immediately terminated and be replaced by another arbitrator acceptable to the parties.

The arbitrator arranges with the parties a time and place for a hearing, frequently in a motel or some neutral place. The hearing is informal, not bound by rules of evidence or other procedures of a court or administrative tribunal. Documents or exhibits may be presented, witnesses testify and are cross examined, and the advocates make their arguments orally, often supplemented by written briefs. Often no stenographic transcript is made, the arbitrator and the parties relying on their notes. The hearing may be much more of a discussion than a trial, with the parties informally stating their positions and the arbitrator asking questions to clarify the problem. The advocates need not be lawyers, and often are the personnel manager and a union officer, though the employer is more likely than the union to use a lawyer. The hearing of a dispute may take only a couple of hours if it concerns interpretation of he agreement and the facts are not in dispute. A discharge case may take one or two days. Only complicated cases with many witnesses take more than two or three days.

Normally, the arbitrator does not make a decision at the hearing, but within 30 days submits a written opinion stating the facts as he sees them, discussing the issues, explaining his reasons for his result, and issuing his award. The opinion may be two or twenty pages, depending on the nature of the dispute and the arbitrator's enchantment with his own words. The arbitrator's decisions are not binding precedents for future cases, though they may be highly persuasive.

The arbitrator's decision can be challenged in court, but such challenges are not common, less than one in a hundred are challenged, and most challenges do not succeed. The standard for judicial review of arbitration award, stated by the Supreme Court, is that the award should be upheld "so long as it draws its essence from the contract." In more understandable terms, if the arbitrator purports to look to the contract and rely on it rather than solely his own sense of justice, the decision will be upheld, even though the court disagrees with his interpretation or considers it unreasonable. Most courts are very reluctant to overrule the arbitrator; their logic is twofold: The court can not know as much as the arbitrator about the employment situation and the "law of the shop". The parties have agreed to have the decision made by an arbitrator rather than a judge and they have chosen the arbitrator, so they should be bound by his decision.

3. Crucial Characteristics of Grievance Arbitration

The grievance procedure with final resort to arbitration has been a most successful method of dispute resolution in resolving grievances under collective agreements. This, I believe, is due to five characteristics.

First, the structured grievance procedure solves most of the disputes. The parties meet and discuss the grievance on two or three or more levels. These meetings are held regularly to discuss all kinds of problems and the parties get accustomed to working out solutions. Learning how to agree on small problems carries over to agreeing on more substantial problems. Although hard statistics are not available, on average not more than one out of every hundred grievances go to arbitration, ninety nine are settled by agreement in the grievance procedure. Where relations between the parties are good, there may be few arbitrations, sometimes none in several years; all of their disputes

are resolved in the grievance procedure. Where relations are antagonistic and the parties stubborn, arbitrations may be a weekly affair. The number of arbitrations depends on the willingness of both parties to compromise and agree in the grievance procedure. All their disputes are resolved in the grievance procedure.

Second, arbitration works well, because the arbitrator is genuinely neutral, neither pro-union nor pro-management. He is chosen by mutual agreement of the parties, and if either union or management feels he is partial, he will soon cease being selected as an arbitrator. One or even both parties may be unhappy with a particular award, but they do not conclude that the arbitrator is partial. They accept the unfavorable decision as the arbitrator's honest judgment, and will often select the same arbitrator again for a subsequent dispute.

Third, although the arbitrator is limited to interpreting and applying the contract, most arbitrators do not interpret with technical rigidity, looking only at the bare words. Most arbitrators look to the intent and purposes of the parties, with an awareness that the parties must live with the decision and continue to operate the business. The arbitrator searches for a solution that keeps within the words of the contract and intent of the parties, but that will enable the parties to live and work together.

Fourth, arbitration of grievances is successful because the established practice is that arbitrators write opinions justifying their findings of fact and the reasons for their interpretation of the contract. This serves two purposes. The parties know and understand why the arbitrator arrived at his result. The loser may not be persuaded by the arbitrator's argument, but will know that he has given the problem careful thought, that the arbitrator has reasons for his result. This makes the unfavorable decision more acceptable. The written opinion serves another valuable purpose. The arbitrator knows that the parties will study his opinion, and that compels the arbitrator to critically examine his own reasoning. The very process of writing the opinion requires reflection, and putting the words on paper requires additional consideration which reveal errors in initial intuitive reactions.

Fifth, grievance arbitration has served to create an accepted law of the workplace because of published arbitration opinions. Arbitration is legally declared to be confidential, and this principle is followed in commercial arbi-

tration. But in grievance arbitration it is a paper rule, largely ignored in practice. Most parties will agree that the decisions can be published, and there are two commercial publishers which each publish hundreds of arbitration decisions every year. These are elaborately indexed, so it is possible to find arbitration decisions in similar cases on almost any point. Although these are not binding precedents, even for the same arbitrator in a similar case, they may be very persuasive to other arbitrators. The parties in their arguments and their briefs will cite similar cases, and arbitrators in deciding cases may look published cases to see how other arbitrators have dealt with the problem.

As a result of published opinions, generally accepted practices and principles are established as to how collective agreements should be interpreted, how gaps should be filled and how ambiguities should be resolved. For example, the collective agreement may provide that in promotions where seniority and merit and ability are relatively equal, seniority shall prevail. It has become generally accepted that unless the junior employee is “head and shoulders” above the senior employee, seniority should control. If a supervisor gives an order which the worker believes is improper, arbitrators almost uniformly rule that the worker must obey and file a grievance, unless obeying would create a risk of serious injury. Vacation pay is considered a benefit earned during the year preceding the vacation, so that if the employee dies before vacation time his widow will be entitled to partial vacation pay. If the prescribed procedure for disciplining an employee is not followed, the discipline is voided even though the employee is guilty.

Collective agreements have provisions stating simply, an employee shall not be dismissed without just cause. Arbitrators, in interpreting “just cause”, have established a number of principles and guides, both procedural and substantive, which are generally accepted and followed. The result is a body of labor arbitration law —law of the workplace— non-binding but influential, which provides guides to employers, unions and arbitrators.

II. DISPUTE RESOLUTION IN THE PUBLIC SECTOR

Dispute resolution in the making of collective agreements in the public sector is quite different, because there is an underlying assumption that public employees should not be allowed to strike. However, public employees, do

in fact strike, even though it is illegal and enforcing the law against striking can be awkward. When teachers struck illegally, the judge sent them to jail, but then there was no one to teach the children. The court's solution was to release the teachers in the morning for the school day and require them to return to jail at night a solution which made the law a laughing stock, discrediting the law and law enforcement in the eyes of the children.

In a couple of states, arbitration is substituted generally for the strike, and in almost all states arbitration is required in disputes involving police, firefighters and prison guards. In a few states all but police, firefighters and prison guards have limited right to strike. However, in most there is no right to strike and no arbitration. Other forms of dispute resolution are generally mandated. Compulsory mediation may be imposed and mandatory fact finding may be required. In fact finding, a neutral is appointed who holds a hearing and issues a public report stating the issues in dispute with the facts and arguments of the parties. The fact finder may make recommendations as to how the dispute should be resolved. Those recommendations are not binding, but are intended to put public pressure on the parties to settle. If the parties do not reach agreement, the public employer unilaterally imposes its terms, and the union has little choice to accept those terms or engage in an illegal strike.

Arbitration, where it is mandated, is generally successful, for the parties accept the award. Strikes by police, firefighters, and prison guards almost never occur. The other procedures have limited effectiveness; fact finding seems to generate little additional pressure on the parties to come to agreement. It is often considered by one or both of the parties as only a legally required ritual. Where strikes are prohibited, the union most often unwillingly surrenders rather than strike illegally.

Grievance procedures and arbitration in the public sector is essentially the same as in the private sector. The main difference is that grievance disputes in the public sector may involve, directly or indirectly, statutory provisions, particularly civil service regulations and pension provisions, As a result, the arbitrator is not strictly limited to interpreting the collective agreement. Because public employee bargaining at the state and local level is governed by state law, The Supreme Court's limited review of arbitration awards is not applicable, and state courts generally are more ready to declare an arbitration

award invalid, particularly if interpretation of statutory or civil service regulations are involved.

III. DISPUTE RESOLUTION IN INDIVIDUAL EMPLOYMENT CONTRACTS

Arbitration in individual employment contracts, as contrasted with collective bargaining contracts, is now a most rapidly growing and controversial form of alternative dispute resolution. It is significantly different from grievance arbitration. The main source of that difference and the problems it presents is that in the United States the basic general rule is that, in the absence of a specific contract provision or special statute, employment is at will. Under employment at will, an employee can be discharged at any time with out notice, and as the courts say "for good reason, bad reason or no reason at all". Also an employer can unilaterally change the terms and conditions of employment at any time without any discussion or any reasons.

There is no statute requiring just cause for discharge, no statutory right to vacation or paid holidays, no right to medical insurance or severance pay. As a result, there is no need for dispute resolution procedures on of these matters because employees can not dispute the employer's decisions.

Employees, however, have limited statutory protection. Under the Civil Rights Law, employers can not discriminate in hiring, terms and conditions of employment, promotion or discharge because of race, sex, religion, age or disability, and must give employees leave without pay for pregnancy, childbirth or illness of a member of the family. Under the Wage-Hour Law employees are also entitled by statute to minimum wages and time and one half for hours over forty in a week. These statutory right are enforceable by individual suits in court.

Employers have found these suits expensive and juries frequently award large damages. To escape these law suits, employers have sought refuge in arbitration provisions in individual employment contracts. The arbitration clauses typically provide that all disputes, contractual or statutory relating to the employment shall be submitted to arbitration These arbitration clauses are not negotiated provisions voluntarily agreed upon by the employee, but are rather imposed unilaterally by the employer. The employer constructs the

arbitration process, writes it into the employment contract, and presents it to the employee on a take or leave it basis —accept the employer’s arbitration provisions or not work—. The employee has no realistic choice but to agree these “mandatory arbitration” provisions in what we call a contract of adhesion.

The employer arbitration provisions may be entirely fair, and advantageous to both parties, However, the employer’s lawyer who writes the contract frequently designs the rules to favor the employer and reduce the employee’s statutory rights. The arbitration provisions may allow the employer to control or influence the list from which the arbitrator is chosen; the damages may be limited to less than that allowed under the statute, and the period within which the claim must be made may be shortened. The arbitration provisions may not require that a winning employee be awarded lawyers fees, as is required by the statute; they may require the employee to pay half of the arbitration costs which may be thousands of dollars; and they may bar numerous plaintiffs from joining in a class or collective action, which is the only way workers can afford to enforce their rights through arbitration. The end result is that the employer can impose a favorable tribunal and the worker is denied the full measure of his statutory rights. The employee, seeing the costs and the cards stacked against him will be discouraged from seeking arbitration to enforce his rights.

Mandatory arbitration of individual statutory right lacks all of the virtues of grievance arbitration. It is not the product of agreement but of dictation by the employer; it has no preliminary negotiation procedures to screen and settle disputes, arbitrators normally do not write opinions explaining their awards; the proceedings are confidential in fact so that neither other employers, employees, or other arbitrators or the public know how the arbitrators are interpreting and applying the law; and there is no meaningful judicial review.

The Supreme Court has approved of this employer compelled arbitration of statutory rights, but it has not defined the limits on provisions which the employer can impose. The Court has justifiably favored grievance arbitration as an alternative method of dispute resolution, but it has thus far failed to recognize that mandatory arbitration of individual statutory rights is significantly different; that it lacks the virtues of grievance arbitration; that it can be and is used to undermine important individual rights; and that it requires more strict judicial supervision.

In closing, I would emphasize the obvious, that no system of alternative dispute resolution can work well if either part does not desire to reach an agreement. In the making of a collective agreement, mediation or fact finding can succeed only if both of the parties are willing to recognize and appreciate the concerns of the other party. Binding arbitration of grievance dispute can impose a decision on an unwilling party, but this can be nothing more than a partial truce unless both parties accept it as an appropriate resolution of the problem. ¶