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Increased Use of ADR in Resolving Human Resources Conflicts in Both Non-Union Companies and in Non-Union Departments of Unionized Companies--U.S. Perspectives

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INCREASED USE OF ADR IN RESOLVING HUMAN RESOURCES
CONFLICTS IN BOTH NON-UNION COMPANIES AND IN NON-
UNION DEPARTMENTS OF UNIONIZED COMPANIES — U.S.
PERSPECTIVES

*Robert Meade**

ED MENTIONED THE ISSUE OF THE *Dispute Resolution Journal*, the American Arbitration Association Journal for the last quarter of 1995. I would like to recommend to you the January/March issue of 1996. We have a feature article in there by Henry King, co-authored by James Graham, *The Origins of Modern International Arbitration*. Henry starts out by talking about the November 19, 1794 Great Britain-U.S. Treaty, the Jay Treaty, signed initially to resolve border disputes in the United States. It is an excellent article. It is a wonderful issue to read, and I recommend it to you. I had to pay homage to our host.

I have been involved in the dispute resolution area for twenty-nine years. I have been involved with designing dispute systems. I have been involved with disputes in construction, communities, the prisons, native Americans, national disasters, hurricanes, and labor management, among many others.

There has been no area that has been as controversial as the employment dispute area. This is the first time, to my knowledge, that the American Arbitration Association (AAA) has been boycotted by a group of plaintiffs lawyers because we are willing to provide our administrative services to employers that mandate the arbitration of employment disputes.

The National Employment Lawyers Association (NELA), is a plaintiffs bar of about 2,500 to 3,000 members, and they decided late last year to boycott the AAA because we would not refuse to provide administrative services to corporations that mandate the use of arbitration to resolve statutorily protected rights, including termination and harassment.

Ed mentioned the conclave that we put together in Washington, D.C. last September. The purpose of the conclave was to bring together all of the parties and interested individuals and entities in the employment disputes arena. It was a two-day conference. We had NELA lawyers, we had Equal Employment Opportunity Commission (EEOC)

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representatives, we had management attorneys, anybody and everybody who really wanted to voice their opinion. The one area where the parties just could not agree was whether or not employers should be able to mandate these programs.

Beyond that, they were able to reach agreement on several areas of how these programs should be structured to the point where the AAA, the ABA, and several other organizations got together and negotiated a protocol for employment disputes. It is to serve as a guide to companies in designing these systems to recognize and respect the basic due process rights of individuals.

Participants in the Protocol and the individuals who signed it; management lawyers, the president of the National Academy of Arbitrators, an attorney from the American Civil Liberties Union (ACLU), the president of NELA, the plaintiffs bar, the general counsel of International Ladies Garment Workers Union, a very diverse group of individuals, cooperated to negotiate the terms of the Protocol. I would like to go through some of the items that were covered because it is sort of a checklist for employers who will be putting these programs together, and it highlights the considerations which they will go through in designing programs.

The very first thing the Protocol addresses is whether or not employers should be able to make these programs mandatory. The Protocol indicates they did not reach agreement on that. It also discusses whether or not there should be consideration to the employee for signing these. And again, they really did not reach agreement, although in the view of many it is not a requirement that employers offer consideration. Continuing employment is the consideration for being covered by these programs.

On the point of whether or not employment dispute programs should be mandatory or not, there is discussion about whether an employer should offer a program that allows the employee to opt out or opt in, thus avoiding the issue of a mandatory program. Several of the employers with whom I have worked have introduced the programs only to new hires, and have not made it mandatory as a condition of continuing employment to people already on board, but they do offer it to them as an option to sign if they wish. Several of the companies that have done that have been very successful in getting large percentages of employees to opt in, and then making it mandatory for people coming on board. So the whole issue of whether it is mandatory as a condition of employment, or opt in or opt out, or is only for new hires is addressed in the Protocol.

One of the next points that is a very basic and important consideration is a right to representation by counsel. There were four or five mandatory employment programs which prohibited the individual from being represented by a lawyer where the issues involving statutory

rights would be resolved finally through arbitration. And that certainly raised a ruckus with a lot of the parties involved. So one of the recommendations of the Protocol is that the employee must have the right to be represented by counsel. You cannot mandate a program and not allow the individual to be represented by an attorney. Some of the programs, two or three of them, actually provide a legal assistance program for the payment of monies to the individual to engage an attorney, whether they are at the in-house step, the mediation step, or the arbitration step.

There is an article in the *Journal* by an attorney from Brown & Root. They will pay an individual up to \$2,500 to hire counsel. Phillip Morris has introduced such a program, and there are a couple of others who are doing it, so the right to representation by counsel is squarely covered.

There is also the issue of fees; whether or not attorneys fees should be subject to allocation in the award. Essentially, the guidance is that the program should allow the arbitrator the authority to award any remedy that the individual would have been entitled to had he or she litigated in state or federal court.

On another point, typically in arbitration, particularly in commercial arbitration, you usually do not have a broad right to discovery, or you have a very limited right. In this area, and they refer to it in the Protocol as "access to information," they caution employers not to be too restrictive in the discovery area, but rather leave the decision to the arbitrator as to how broad or how narrow the discovery should be. In most of the programs a certain amount of discovery will be specified. The arbitrator will have the discretion to broaden it if need be.

The Protocol devotes a considerable amount of attention to the qualifications of the mediators and arbitrators who will be serving in these areas. If an arbitrator is going to be deciding issues involving statutorily protected rights, that arbitrator has got to understand the law and the arbitrator has got to have the ability to write at least a brief opinion with a finding as to how he or she disposed of the statutory issue. The Protocol recommends that arbitrators and mediators receive training and that the groups involved in the training include government agencies, universities, academics, and organizations like the AAA. It also provides for a very stringent requirement for disclosure by the neutral party of any relationship with the parties or their counsel.

There is a concern that if an arbitrator is hearing a number of cases for the same corporation, where the individual employee is not a repeat customer, that there would be a possible bias on the part of the arbitrator in favor of the company. The arbitrators certainly will have to disclose the fact that they may have had cases in the past with this particular company.

Some programs actually provide that the arbitrator's decisions will be published in the employee newspaper, redacting the name of the individual. These companies were concerned about the credibility of the program to the point that they were willing to publish the results of the arbitrations without including the names of the individuals.

So disclosure, which is, of course, of concern in arbitration generally, is particularly important because of the lack of a history of use in employment disputes and the fact that there is a perception on the part of the individuals and the plaintiffs lawyers that it is stacked in favor of the companies who are indeed designing these programs. Also, in the area of the qualifications of neutrals, generally, the parties should have a right to select who the neutral will be from a list of qualified people. Those lists should be diverse with respect to gender, national origin, and other criteria. The Protocol further provides that biographical information should also include the names of advocates before whom this neutral has appeared, so that the parties have the opportunity to call the last lawyer before whom the arbitrator appeared to see whether or not the person had two arms, two legs, and did a credible job. That is quite different than any other area. We have adjusted our data base and we are going to start collecting that information and we will be providing it along with biographical information. That may sound very basic in terms of letting parties select neutrals, but, believe it or not, there were programs that said, "we are the company; you will arbitrate; we have put together a list of arbitrators; and do not worry, we will appoint them when you have a dispute." And that really did not set well with the individuals. It may be better in a corporate dispute, but in the context of these disputes, it just did not fly.

Finally, there is the issue of the compensation of the arbitrators and the cost of the administrative agency. If you have an arbitrator with a per diem of \$800 per day who is required to write an opinion and conduct hearings and consider briefs, it is not unthinkable that the arbitrator's compensation may be between \$2,500 and \$3,000. The administrative agencies charge a fee; our fee is \$500. So to access the system, parties would pay, let us say, \$3,000. If you have a program which mandates that an employee must arbitrate, and the employee is a seven-dollar-an-hour person, and they have to put up a deposit of \$1,500 to file a dispute, you are denying access.

Most of the companies with whom we have worked provide for a contribution of some amount of money by the individual, whether it is \$25, \$50, or \$100, or a sum not to exceed "two days' wages," and usually the employer will pick up the remainder of the fees. One of the companies has a provision that if the employee is concerned that the employer is paying the entire fee, the employee is welcome to contribute up to half of the arbitrator's compensation if he or she wishes to. No employee has, so far, chosen to do so.

These are some of the general issues in the employment dispute resolution area. It is, as I mentioned, very controversial. I should say that this is new in the context of individuals as employees being required to arbitrate as if it was a policy. It is a standard, an established practice in executive employment contracts. For many years, the Association has administered hundreds of cases involving either executive employment contracts or commissioned sales agreements. So in that respect, it is not new. I have a program in my file that was mandated by a food manufacturing company as a policy in 1955, in upstate New York. There have been some companies that have had such programs going back twenty years.

The existing employment dispute resolutions programs with which I am familiar cover about two million people, and it is expanding every day. We are concerned that if employers are not aware of the case law, not aware of the Protocol, and the information out there, they are going to design systems that are going to be rejected by the courts, and picked up by the legislators who will try to legislate them out of existence.

