

# **The Regulation of ADR: A Silent Presence at the Collective Bargaining Table**

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The conventional view is that union-management ADR, encompassing mediation over interest disputes and arbitration of rights disputes, muddles on as it has since the 1935 passage of the National Labor Relations Act<sup>1</sup>. It has worked since then to keep the lid on strikes and workplace disruption in both the public and private sector even though union membership continues to shrink as a presence in the nation's work force. The following notes describe the two procedures and the issue of regulation. It must be remembered that mediation and arbitration in the labor relations field do not serve the same role as ADR in most other fields of conflict. They are not substitutes for litigation or entered into to avoid litigation. They do not gain their legitimacy from the Federal Arbitration Act of 1925<sup>2</sup>. They are tasks usually performed by government officials in the case of mediation or in private mediation and all arbitration by mutually selected neutrals whose fees are shared equally by the disputants. These neutrals function in the collective bargaining arena pursuant to legislative endorsement by the National Labor Relations Act which recognizes the right of disputants to enter into enforceable collective bargaining agreements, and judicial encouragement of the US Supreme Court to encourage unions and management to develop their own dispute resolution system with decision makers of their own selection who would be qualified to help the parties to develop an industrial jurisprudence which the court considered beyond its competence; and expertise. Thus the two processes have been consistently relied on by the parties for half a century with little interest in or concern for external monitoring beyond the limited exercise of that function by the courts.

## **Mediation of Interest Disputes**

Mediation has long been the routine procedure for resolving interest disputes between management and labor. In the private sector the Mediators of the Federal Mediation and Conciliation Service are the stalwarts for keeping strikes over new contract disputes to historic minima. Although they worked originally in the private sector, they are now also called on to provide the same services in the public sector. Private mediators selected by the disputants, or appointed by neutral state government agencies supplement the work of the FMCS mediators. Their neutrality is enhanced by the practice of their fees being shared by the disputants if not paid by government agencies. There is rare use of mediation to resolve rights disputes pending arbitration, and the work, if done at all, is

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<sup>1</sup> As amended by the Labor Management Relations Act of 1947, 29USC Sec 141-67

<sup>2</sup> 9 USC Sec 1-14

usually done by those who regularly arbitrate such conflicts, again with compensation sharing by the parties.

Licensing or credentialing of mediators, while a topic of much discussion throughout the field of ADR, is inappropriate in collective bargaining. Most mediators of interest disputes are employees of the Federal and to a lesser extent state Mediation and Conciliation Services. They are individuals with long histories as participants in the collective bargaining process, some with backgrounds as advocates, and some with backgrounds as neutrals. Some are trained as lawyers, while others gained their expertise as participants at the bargaining table. They are vetted in their jobs and in their selection for individual mediation cases by the disputants themselves and are relied on by the disputant parties as facilitators to help the disputants reach the agreements when the parties themselves have failed to do so. As such they are merely an extension of the direct negotiation process which is the bedrock of the collective bargaining relationship. Unlike commercial or even employment ADR where the disputants may not be of equal power, the parties in the collective bargaining arena have a long history of parity in their negotiation process. Indeed they also usually have the power and authority to select their own mediators who are retained in that role for as long as they are acceptable to both in their quest for agreement. Although there have been efforts to require credentialing of such mediators, those efforts have been largely ineffective given the overriding right and privilege of the parties to designate anyone in whom both sides share confidence, regardless of prior experience, to help them in their negotiating efforts. Mediation of collective bargaining disputes has long been recognized as a private supplement to direct negotiations between unions and management as parties of equal competence to resolve their own collective bargaining interest disputes. The external concerns of statutory compliance and enforcement are unaffected by the mediation process, since the agreement though considered as private workplace contracts, still leave the parties with access to the courts and to litigation on statutory matters beyond their collective agreements.

### **Arbitration of Rights Disputes**

Just as mediation is largely confined to resolving interest disputes, arbitration is the preferred means of resolving rights disputes, or grievances, arising over the interpretation or application of the collective agreements achieved by the parties in direct negotiation or on occasion with the assistance of mediation.

An argument might be made for regulating the role of the arbitrator whose involvement in the process results in final and binding and enforceable awards based on formalized adversarial presentations of positions. But there too, the parties share the fees of the arbitrators, and have long adhered to the voluntary mutual selection of their arbitrator based on prior experience with the process and the arbitrator. Outside the world of collective bargaining where the arbitration process may involve disputants with disparate power, or where the arbitrator is imposed upon the disputants because of pre dispute commitments to use the process, or where the arbitrator is paid in full by one side, or where there is a need to assure the qualifications of the neutral, certification of arbitrators might have a place. But the arbitration of rights disputes is a procedure mutually agreed

to by the disputants as a component of their collective bargaining agreement recognizing that their agreement reflects conditions and rights at the time of signing. The parties then both recognize that future unforeseen disputes are likely to arise, and make provision for the selection of the arbitrator to interpret and apply their agreement when unanticipated issues arise and remain unresolved. As the US Supreme Court recognized in 1957<sup>3</sup>, Section 301 of the NLRA gave the courts the right to enforce collective bargaining agreements including arbitration awards rendered pursuant to the trade off of the unions surrender of its right to strike in exchange for the employers commitment to be bound by the arbitrators decision.

The United State Supreme Court in 1960 recognized that the collective bargaining process is an ongoing procedure and that grievance arbitration is a part of that continuum filling in the gaps that the parties could not have anticipated at the time of signing their contract.<sup>4</sup> It also endorsed the role of the arbitrators selected by the parties as having the requisite expertise for resolving disputes which are beyond the justices' experience.<sup>5</sup> In so holding, the Court itself endorsed the preference for the parties selecting their choice of arbitrator to bind them, obviating the requirement that some higher authority set restrictions on whom the parties might select for their decision maker. This total freedom to select the mutually acceptable arbitrator has proven to be a successful measure of self regulation, with an estimated 10% of the arbitrators being selected to resolve some 90% of the cases, with membership in the National Academy of Arbitrators a frequent qualifier relied on by both sides.

Although the Court has effectively precluded external regulation in the parties' choice of arbitrator, it has also recognized that decisions rendered by arbitrators are indeed subject to some regulation by the court. The Court recognized that it had no business weighing the merits of the arbitrators' decision or whether a party was right or wrong, and that "even frivolous claims may have their therapeutic value". It stated that the function of the Court was to assure that the arbitrator had been granted the jurisdiction to decide the pending case under the parties agreement and submission to arbitration, to assure that the award was legitimate in drawing its essence from the parties' agreement, to avoid fraud and impropriety while assuring that implementation of public policy remained the province of the Courts.<sup>6</sup>

Thus, since 1960 the judiciary has effectively served as a regulator of the grievance arbitration process, and by extension, the interest arbitration process by assuring 1. that the arbitrator decides only those issues submitted for arbitration, 2. that the arbitration be free of fraud and impropriety, and 3 that the judiciary in reviewing arbitration awards recognize its responsibility for protecting public policy.

It is in this third arena that the courts have been most active in overseeing arbitration awards. The case law on arbitrators exceeding their jurisdiction and in issues of fraud and

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<sup>3</sup> Textile Workers v. Lincoln Mills, 353 US 448 (1957)

<sup>4</sup> United Steelworkers of America v, Warrior and Gulf Navigation 363 US 547 91960)

<sup>5</sup> United Steelworkers of America v, American Manufacturing Company, 363 US 564 (1960)

<sup>6</sup> United Steelworekrs of America v. Enterprise Wheel 363 US 593 (1960)

corruption has been mercifully sparse. But invocation of public policy has enabled the courts to utilize that authority to intrude on what the parties themselves had agreed was to be subject to the arbitrator's exclusive authority.

A review of a few recent court decisions shows how the courts are eager to assert their regulatory authority to undercut the Supreme Courts empowerment of arbitration to resolve workplace disputes without court appeal.

In Continental Airlines v. Teamsters<sup>7</sup> the Fifth Circuit overturned an arbitrator panels interpretation of a last chance employment Agreement on the grounds that it exceeded its authority because its interpretation was not an arguable interpretation of the agreement In Citgo Asphalt Refining Co v. Paper, Allied Industrial Chemical and Energy Workers Intl Union<sup>8</sup>, the Third Circuit held that an arbitrator acted beyond his authority in declaring the Company's zero tolerance drug policy was unreasonable. In 187 Concourse Associates v. Fishman<sup>9</sup>, the Second circuit found that an arbitrator could not reduce a penalty if he found an employee's termination was for just cause.

### **Conclusion**

The regulation of ADR may have its value in assuring that the parties employ qualified, neutral and skilled mediators and arbitrators in resolving a wide variety of disputes. But in the narrow long experienced niche of disputes between employers and unions, there is no evidence to suggest that such external controls are needed. For half a century the parties themselves have monitored the integrity and qualifications of their neutrals. In mediation the federal and state agencies who employ mediators vet them with the parties who can ask their removal if objected to. In mediation where the parties select private non government mediators, that monitoring is complimented by the fact that the parties share in the compensation of such neutrals, better assuring their freedom from bias. In arbitration, whether of interests or rights disputes, the same process of joint selection and joint funding coupled with mutual selection of neutral from a tried and experienced cadre of professional arbitrators further assures their independence and neutrality, with protection of their integrity as their only ticket to future designations.

As to regulation of the final product of their work, obviously in mediation the product is that agreed to by the parties themselves, freeing the mediator from any responsibility for the outcome. In arbitration the standards for qualification of the arbitrator's decision are set forth in the 1960 Supreme Court Steelworkers Trilogy cited above. The regulation of the arbitrator's product by those decisions, established the superiority of the parties developing and being bound by their own industrial judicial machinery, largely free from appeal to and intervention from the court system. In the areas of exceeding jurisdiction, protection of disputants from fraud and corruption, and in retaining its authority to invoke public policy responsibilities when the arbitrators erred, the Court set forth adequate and effective regulatory standards. After 45 years that limited regulatory role is sufficient to

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<sup>7</sup> 2004 WL 259195 (5<sup>th</sup> circuit, Nov 15, 2004)

<sup>8</sup> 2004 WL 2303315 (3<sup>rd</sup> Circuit, Oct14, 2004)

<sup>9</sup> <http://caselaw.lp.fikndlaw.com/data2/2nd/04284p.pdf>

assure the independence and integrity of ADR as implemented in our collective bargaining system.