



(918) 261-2500
(918) 299-1927 Fax
OPTIONSNET@aol.com
www.OPTIONSNET.net

EMPLOYEE
RELATIONS

CONFLICT
RESOLUTION

HUMAN
RESOURCES

TRAINING

ORGANIZATIONAL
DEVELOPMENT

ENTERED
Office of Proceedings

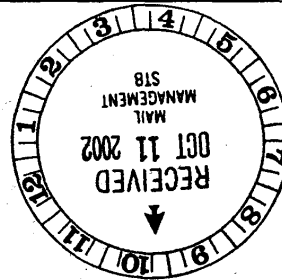
OCT 11 2002

Part of
Public Record

October 7, 2002

Surface Transportation Board
1925 K Street, NW.
Washington, DC 20423-0001

RE: *Ex Parte* No. 638



Greetings:

As an ADR (Alternative Dispute Resolution) professional, in private practice for the last eight years, I am pleased to see that the Surface Transportation Board is promoting the use of mediation to assist in the resolution of disputes between shippers and the railroads. I am a contract mediator for the United States Postal Service (USPS), the United States Department of Agriculture (USDA) and the Equal Employment Opportunity Commission (EEOC). In response to your request for comments, I offer the following statements and questions. Having never responded to such a request before, I hope my statements and questions serve the purpose for which they are intended by me and are helpful to you.

Your document states:

1. "Mandatory mediation might allow shippers and railroads to settle rate disputes -- in whole or in part -- in a more flexible, less costly, less time-consuming, and less confrontational environment."

I agree with this statement; in fact, research is showing that arbitration is proving as costly, both in money and time, as litigation. Mediation can be an excellent resource for parties in dispute.

2. "The mediation triggered by the filing of such a request would be conducted by a mediator, assigned by the Board within 5 business days of our receipt of the shipper's request."⁷

(⁷ The Board expects to use Administrative Law Judges from the Federal Energy Regulatory Commission, as it has in the past, to conduct the mediation.)

How will the Board select the mediators initially? How will the mediators be selected and assigned (first come, first serve; rotation; preference for cost and/or availability, etc.) to a case once the mediators have been initially screened and placed on the roster?

"Working With *OPTIONS* is a Better Way of Doing Business"

10435 S. Sandusky Ave. ♦ Tulsa, Oklahoma 74137

My hope would be that the Board would have an open list of external mediators who focus on the process of mediation, rather than focusing on the content that is in dispute. The USPS, the USDA and the EEOC have had great success in using mediators who are more facilitative in their style than evaluative, more process-oriented than content-oriented, more open to the needs of the parties than directive toward a settlement that the "mediator" finds worthy of consideration.

There are many mediators available to the Board. Some mediators are exclusively mediators; some are also judges, attorneys, ministers, therapists, HR directors, teachers or some in other professions when they are not mediating. Excellent mediators can be found in all of these categories. Nonetheless, I have put the word "mediator" in quotes in the above paragraph, because I question the wisdom of using judges and/or attorneys to do mediation who have a difficult time transcending from the role of judge or advocate to that of a neutral AND/OR who have a disposition to be evaluative and directive in their approach to the dispute and mistakenly call that ADR process "mediation", rather than what it is --- a settlement conference.

Mediation is a different process from settlement conferences. They have some similarities, but they are distinctively different, both in theory and in practice. A Lexus and a pick up truck will both get you to your destination, but the ride will be different and the resources and functionality available to you during the ride will likely be different as well. I hope the Board is meaning "mediation" when it says "mediation" and not confusing this ADR process with "settlement conferences", which is more often what Administrative Law Judges (ALJ) offer, even when they call it "mediation". Having said that, I will be the first to admit that this generalization is not fair to all ALJ's, some of who are excellent mediators who understand, value and utilize the benefits of a facilitated process of dispute resolution.

One of the strong points of the USPS mediation program is that its external mediators, regardless of background or training, were required to go through a USPS training program that outlined the type of process the USPS would require from its mediators. While I am not endorsing the same type of process used by the USPS, I am putting forward the idea that the mediators who are on the Board's roster would provide better service if they were educated in the Board's expectations of them as mediators in these disputes.

3. "The Board would not impose any filing fees for requests for mediation, and the mediator's services would be paid for by the Board."

Who sets the fees for service and what criteria will be used to determine what is a reasonable fee? Will the fees paid for by the Board be a flat rate for each dispute that is mediated or for each mediation session, if the mediations take more than one session per dispute? Will the fees be at the discretion of the mediator? Will the mediators be paid on an hourly basis, half-day basis, or full-day basis? Will the Board pay for expenses incurred by the mediators in setting up the mediations, in

traveling to and from the mediation, or in administrative costs post-mediation? Will payment be made through a vouchering system? Will direct deposit to the mediator's account be required?

4. "Within 5 business days of the assignment to mediate, the mediator would contact the parties to discuss ground rules and the time and location of any meeting. The precise procedure that would be used to facilitate the mediation would be flexible and left up to the mediator's discretion, who might for example conduct joint and separate meetings with each party. All procedures used would be designed to avoid imposing significant resource burdens on either party and would in all events be informal."

In talking with Mr. Stillings, I came to the conclusion that there was an assumption by the Board that the mediations would likely occur in Washington, DC, where many, if not most of the parties would have representation. It seems to me that once again, a "settlement conference" mindset is in play here. In the overwhelmingly large majority of disputes I have mediated (several hundred), the parties were not the attorneys, but rather the principles in the dispute. The principles often had representation, i.e. their attorneys, but it was the principle stakeholders who were involved; in this case it would be the shippers and the railroads. Who does the Board envision being present for the mediations? Only attorneys, or would officers of the shippers and railroads be present, along with attorneys?

With the above experience in mind, I ask: Is it correct that the shippers and railroads are headquartered in Washington, DC? If this is not the case, if the principles in these disputes are located around the country, will the mediators go to the principles or will the principles come to the mediators? Alternatively, if the mediations are going to be held in one or a few locations, such as Washington, DC, San Francisco, New York, Denver, etc., is the Board open to having mediators on its roster who are willing to travel to the mediation site and still be competitive in fees for service?

For example, I am interested in being listed on the roster of mediators for the Board. I am willing to be competitive in my fees in order to be a frequent provider of mediation service. Although I live in Oklahoma, I believe I can be a dependable resource for the Board in assisting the parties to come to a resolution of their dispute through mediation, by being clear about my process, open to the needs of the parties regarding time, date and location, and competitive in my fees.

5. "The entire mediation process would be private and confidential, and would be completed within 60 days of the filing of the shipper's request."

My experience as a mediator for the USDA has demonstrated that the notion of confidentiality can mean different things to different people and organizations. For example, there have been several issues of confidentiality develop around requests for auditing of files developed during mediation. USDA says that mediations are confidential, but only recently has there been a determination that they are

confidential only in respect to the content of the mediations themselves, but not in reference to the participants or the administrative components of the mediation. For some this distinction had always been clear...but for others there has been a long standing belief that the entire file was confidential and not subject to even federal auditors from the Office of the Inspector General. This lack of clarity about confidentiality led to miscommunication and sometimes disputes between mediators, parties, representatives and the federal agencies involved. Clarifying what confidentiality means and what it does not mean would be a helpful use of the Board's time, in my opinion.

6. GENERAL CONCERNS:

1. Forms: What forms will be used by the Board to support the mediation proceedings, e.g. Agreements to Mediate, Confidentiality Agreements, Settlement Agreements, etc. Whose forms will be used: the Board's or the mediator's?
2. Administration: Who will administer the mediation program for the Board? Will it be staff already in place or will an ADR coordinator be selected? If an ADR coordinator is selected, who will do the selecting, what process will be used, who can be considered, and will it be a national and open search or an internal selection?
3. Training: If training is offered for the mediators, who will do it? How will the trainers be selected? What will be the focus of the training? What material will be covered? Where, when and at what cost will the training be offered and to whom?
4. Education: Who will educate the parties about this new program? What will the parties be told about cost, accessibility, and number of mediations available to them? What will be mediable?
5. Accountability: To whom will the mediators be accountable for service, professionalism, ethics, etc?

Thank you for your consideration of my comments and questions. I appreciate the opportunity to submit these musings. I look forward to the Board's responses to my comments and questions. My best to the Board and your constituents as this program develops.

Sincerely,


Ray Hickman