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Dispute Resolution in the Changing Workplace

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Dispute Resolution in the Changing Workplace

Abstract

For the past seven years, the authors of this paper have been conducting research on the use of Alternative Dispute Resolution (ADR) (particularly in employment disputes) by major U.S. corporations (Lipsky and Seeber 1998a, 1998b, 2000). In our research we discovered that an increasing number of American corporations are moving beyond ADR to the adoption of so-called "integrated conflict management systems" (Lipsky and Seeber 1998a; Gosline et.al. 2001). Although considerable research on the operation of various ADR procedures exists, very little has been done on the formation of conflict management strategies, including the use of conflict management systems (Ury et al. 1988; Costantino and Merchant 1996; Stitt 1998; Colvin 1999). In this paper we examine: a) the concept of an integrated conflict management system, b) the conflict management strategies used by American corporations, and finally c) the factors that account for the evolution of corporate conflict management strategies from traditional approaches (including heavy dependence on litigation) to the widespread adoption of various ADR techniques and finally on to the adoption of full-blown conflict management systems by a vanguard of U.S. organizations. In our discussion we draw heavily on interviews we conducted with top managers and corporate lawyers in more than fifty corporations across the United States.

Keywords

alternative dispute resolution, ADR, conflict management strategies, industrial relations

Comments

Suggested Citation

Lipsky, D. B., Seeber, R. L. (2004). Dispute resolution in the changing workplace [Electronic version]. *Proceedings of the fifty-sixth annual meeting of the Labor and Employment Relations Association*, 30-40.

Required Publisher's Statement

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IV. WORKPLACE DISPUTE RESOLUTION SYSTEMS

Dispute Resolution in the Changing Workplace

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Abstract

For the past seven years, the authors of this paper have been conducting research on the use of Alternative Dispute Resolution (ADR) (particularly in employment disputes) by major U.S. corporations (Lipsky and Seeber 1998a, 1998b, 2000). In our research we discovered that an increasing number of American corporations are moving beyond ADR to the adoption of so-called "integrated conflict management systems" (Lipsky and Seeber 1998a; Gosline et.al. 2001). Although considerable research on the operation of various ADR procedures exists, very little has been done on the formation of conflict management strategies, including the use of conflict management systems (Ury et al. 1988; Costantino and Merchant 1996; Stitt 1998; Colvin 1999). In this paper we examine: a) the concept of an integrated conflict management system, b) the conflict management strategies used by American corporations, and finally c) the factors that account for the evolution of corporate conflict management strategies from traditional approaches (including heavy dependence on litigation) to the widespread adoption of various ADR techniques and finally on to the adoption of full-blown conflict management systems by a vanguard of U.S. organizations. In our discussion we draw heavily on interviews we conducted with top managers and corporate lawyers in more than fifty corporations across the United States.

Methodology and Data

This article is based on data the authors have gathered from two separate but related research efforts. First, in the spring of 1997, we surveyed the general counsel or chief litigators of the Fortune 1000 companies on topics related to Alternative Dispute Resolution (ADR) (Lipsky and Seeber 1998a). This survey and two others remain the only source of empirical data on ADR usage by U.S. corporations (DeLoitte Touche Tohmatsu International 1993; American

Arbitration Association 2003). The objective of the survey was to obtain comprehensive information about each corporation's use of ADR.

The empirical results from that survey were the springboard that led to the next phase of our research. The survey results underscored our realization that a number of corporations had moved beyond the use of ADR techniques and toward a more proactive, strategic approach to conflict management. This realization motivated us to undertake case studies of workplace dispute resolution and conflict management systems in a large sample of organizations. Over the course of 1999 to 2002, we visited and conducted interviews at more than fifty corporations across the United States. The organizations we studied cover a broad spectrum of industries and represent a cross-section of approaches and philosophies to ADR and conflict management (Lipsky et al. 2003). All of the organizations we have studied are large by almost any standard, and accordingly their experience with conflict management systems does not necessarily represent the experience of medium-size and small employers. For each of the firms we visited, we tried to schedule interviews with corporate CEOs, CFOs, general counsel, human resource executives, and managers at corporate headquarters or one or more of their sites. In only a couple of cases did we succeed in interviewing the CEO of the firm; usually we were able to interview a handful of top human resource executives and in-house attorneys. We also compiled dossiers on each company we studied, consisting of annual reports, financial statements, press releases, and the like. In the end, we built a detailed understanding of the experiences of well over fifty large organizations with ADR and conflict management systems.

Inclination to Change

Organizations do not set a process of wholesale shift to new systems in motion unless there is substantial dissatisfaction with the old; that is the case with dispute resolution. A number of different trends have converged to produce motivation for corporations to change from conventional methods of dispute resolution to the use of ADR and, beyond ADR, to the adoption of conflict management systems.

First, the traditional approaches of organizations to disputes have been largely reactive, reflecting compliance with systems imposed on the organizations by outside institutions. Disputes with consumers, governmental agencies, and other organizations have generally been resolved either in the courts or in other public forums established for that purpose. The dissatisfaction with these public forums, which has been growing for some time, reached a crisis point in the last ten years. Litigation is seen as time-consuming and costly. It is also often viewed as producing results unacceptable to either party to the dispute. Organizations view compliance with court-ordered settlements with barely concealed hostility. In sum, the courts

and administrative agencies set up to resolve disputes are viewed with antipathy--if not hostility--by nearly everyone involved, except members of the legal profession, who is an integral part of the system (Olson 1991; Garry 1997; Dunworth and Rogers 1996).

A second trend in U.S. corporate life has been the long-term decline in the labor movement and thus in the use of collective bargaining and its attendant processes to resolve employee complaints. Collective bargaining as an institution reached its high-water mark in the 1950s, and since that time, the labor movement has been on a steady decline to its current status, with less than ten percent of workers now represented by unions (U.S. Bureau of Labor Statistics 2001). Collective bargaining provided explicit channels for the resolution of employee-employer disputes. Strikes were the means by which collective interest disputes were resolved and, while never viewed as positive, they were effective for that purpose. Collective bargaining nearly always established elaborate grievance systems, usually culminating in a binding arbitration procedure for the final resolution of disputes of rights (Volz and Goggin 1997).

U.S. corporations never embraced collective bargaining and tried to limit its influence by fighting the existence of unions wherever they emerged. Some corporate leaders held the naïve view that when unions did not exist, conflict would disappear. More sophisticated corporations recognized that workplaces produce conflict and that if unions and collective bargaining were not the vehicle for dispute resolution, another means would have to be substituted. Elaborate human resource systems designed to surface and channel employee dissatisfaction generally did not produce an effective substitute for this important function of unionism. Minor conflicts with employees often did not surface at all, and those that did came through unwanted, expensive litigation under the ever-growing system of individual legal rights in the workplace. Thus, employers in the 1990s found themselves facing the Hobson's choice of unions they did not want or alternative but ineffective means of dealing with employee conflict (Lipsky et al. 2003, 301-9).

A third source of dissatisfaction came from the changes made by organizations to deal with the increased competition from globalization and deregulation in the latter part of the twentieth century. Especially at a time when organizations were being forced to reinvent themselves, organizational effectiveness was critically dependent upon a committed, well-trained, and well-organized work force. Efficient work forces offered a potential competitive advantage. Conflicts that remained unresolved or that did not surface in a productive fashion severely compromise organizational effectiveness and the quality of the good or service produced (Lipsky et al. 2003, 54-58).

Although conflict was seen as a natural outgrowth of contemporary organizational life,

turnover of employees due to conflicts was viewed as an unproductive waste of talent and organizational resources. A smooth-functioning organization demanded a smooth-functioning system of dispute resolution. Yet many businesses found themselves without such a system even after they had made the other organizational adjustments necessary for survival (this and other observations we make in this section are based upon our interviews with corporate managers and attorneys).

The total effect of these forces of dissatisfaction was a powerful motivation for organizational change. Faced with the realization that conflict is inevitable, and left without effective means of dealing with that conflict, one business after another attempted to create a new system of dispute resolution. Many went well beyond that, however, into a new realm of conflict management.

Litigation, Dispute, and Conflict Management

The terms "dispute management" and "conflict management" are often used interchangeably. The lawyers we interviewed sometimes told us that they engage in ADR routinely, by trying to negotiate rather than litigate in appropriate cases. This occurs post-filing, however, and rarely involves trying to resolve disputes before they become litigation, much less trying to prevent conflicts from even becoming disputes.

Conceptually, we believe that conflict management is much more comprehensive than dispute management. At the root of this concept is a distinction between conflicts and disputes. Conflicts can be seen as nearly any organizational friction that produces a mismatch in expectations of the proper course of action for an employee or a group of employees. Conflicts do not always lead to disputes--sometimes they are ignored, sometimes suppressed, and sometimes deemed unimportant enough to be left alone. Disputes, on the other hand, are a subset of the conflicts that require resolution, activated by the filing of a grievance, a lawsuit against an organization, or even a simple written complaint (Bacharach and Lawler 1980).

Accepting this distinction between conflicts and disputes allows the argument to progress naturally to a divergence in the attempt to manage both events. The management of disputes, which after all represent only the tip of the iceberg of conflict, is a significantly less complex problem. To manage disputes successfully, the organization need only maneuver the dispute into a forum most to its advantage to attain lower costs (transactional and outcome), a quicker speed of resolution, or simply a higher probability of a better outcome. Such activities would be seen as effective management of disputes. Thus, much of what we see of dispute management looks like forum shopping.

Organizations that desire to manage conflict must go well beyond this smaller set of processes and into more facets of organizational life, encompassing a much wider range of questions, the involvement of more parts of the organization, and a more complex system. The goals of a conflict management system are broader and more numerous. Conflict management systems attempt to channel conflict in productive directions, for example, not just to manage their resolution. Conflict management systems spread the responsibility for conflict and its resolution to the lowest levels of the organization. Thus they require more training in order to be more widespread. They seek to transform the organization, not just implement a set of processes. Because of their complexity and the potential rewards they offer an organization, conflict management systems are a much more fruitful arena for inquiry and exploration. Dispute management is always more complex than litigation management, and conflict management more complicated yet (Lipsky et al. 2003, 8-19).

Conflict Management Systems

The study of conflict management systems requires a comparison of multiple features. Systems differ on many important dimensions, each containing the potential to lead to unique outcomes. There are variations in the process of the design of a system, for example: Who is involved? How is the system created? How is the system implemented? These design features are not trivial because the values implicit in the design process are often eventually reflected in the system itself. Next, conflict management systems vary in the way they are structured: Who controls the system? Is the system centralized or decentralized? What are the goals of the system? Who is responsible?

Systems also vary in the procedures they employ for conflict resolution. In our field research we have investigated systems that include ombudspersons, peer-review panels, facilitated discussions, mediation, arbitration, and multiple variations on these basic procedures. The choice of procedures can reflect the values underlying the system itself. Some conflict management systems place value on participation in the conflict resolution process, some on having any disputes that occur be resolved as quickly as possible, some value simply surfacing conflict. The solutions created to reach these fundamental goals will be reflected in the procedures utilized within the system.

It is also important to identify and analyze the participants in the conflict management system. One simple distinction is the amount the system relies on outsiders--neutrals and consultants, for example--to feed and maintain it. But it is important to go beyond the use of outsiders and into the organization itself. The extent to which line managers are involved and

responsible for resolving conflict is an important distinction between systems. Finally, since (as one of our colleagues has repeatedly told us) "we are what we measure," it is important to analyze what is judged to be critically important by an organization by looking at the features of the system they choose to measure and evaluate success.

There is no general agreement on the precise definition of a conflict management system, even among experts. Clearly, though, an authentic system is *not* merely a practice, a procedure, or a policy. It is something more encompassing, which may incorporate all three--practice, procedure, and policy. Our understanding of systems is rooted in the classic works on the system concept (for example, see Von Bertalanffy 1976). We prefer the conflict management system definition contained in the ACR report (Gosline et al. 2001).

ADR and conflict management systems seem to have arisen largely as a response to changes--some long-term and some short-term--in the organizational environment that made their use an effective alternative to conventional litigation. These environmental changes were filtered through a set of the organizations' motivations, resulting in some organizations' choice of a conflict management strategy.

Three Strategies of Conflict Management

The dependant variable in our model--the organization's choice of conflict management strategy--is divided into three categories: contend, settle, and prevent. These categories are obviously somewhat arbitrary. In truth, organizational strategy ranges across a spectrum and grouping large numbers of organizations in a particular category may blur important differences across organizations within that category. To some degree each organization we have studied had its own unique conflict management strategy, tailored to fit its own objectives and circumstances. Yet we defend our three-part categorization because we believe it captures the most fundamental differences in organizational strategy that we observed in our research (Lipsky et al. 2003, 117-19).

In the *contend* category we include those organizations that clearly prefer litigation to ADR. These are organizations that never or rarely use any ADR technique to resolve a dispute. They reject the use of ADR as a matter of organizational policy, although occasionally some of them will accept the use of mediation or arbitration in a particular dispute.

In the *settle* category, we include a majority of the major corporations in the United States. Again, we recognize that there are critical differences in organizational strategy across this large group of companies, but in general these corporations, and most large organizations, use ADR

either as a matter of policy or on an ad hoc basis in a variety of different types of disputes.

In the *prevent* category we include organizations that apparently use ADR in all types of disputes as a matter of policy. In this category are the organizations that have developed conflict management systems; that is, they do not merely use a particular dispute resolution technique as a matter of practice or even policy, but have instead developed a comprehensive set of policies designed to prevent (if possible) or to manage conflict (Lipsky et al. 2003).

The Operation of the Model

We believe an organization's choice of conflict management strategy is a function of two types of factors: environmental and organizational. In the environmental category we hypothesize that several exogenous variables influence the organization's choice of strategy. For example, we hypothesize that market factors influence the organization's choice: corporations operating in more competitive, global markets tend to rely on ADR more heavily than do organizations in less competitive markets. The underlying logic supporting this proposition is straightforward. Corporations in competitive markets need to be more diligent about controlling and reducing their costs, and ADR is a means of controlling and reducing the costs of dispute resolution. Corporations in less competitive markets have less need to be concerned with the costs of litigation (Lipsky et al. 2003, 123-24).

Our model postulates that these environmental variables operate through a set of organizational motivations. We hypothesize, for example, that an organization that has experienced a "precipitating event," such as a major multimillion dollar lawsuit, is more likely to rely on ADR than one that has not. Exogenous environmental factors may be necessary conditions for an organization to adopt a pro-ADR policy, but they are not sufficient conditions. The growth of government regulation, for example, might cause a company to adopt pro-ADR policies, but the influence of this environmental factor is filtered through organizational factors such as culture and management commitment. As another example of how our model operates, we hypothesize that an organization that both operates in a competitive market and has been a defendant in a major lawsuit is much more likely to have a pro-ADR policy than an organization that operates in a competitive market but has not experienced that type of "precipitating event." Thus, it is the interaction of environmental and organizational (or exogenous and endogenous) variables in our model that influence an organization's choice of strategy (Lipsky et al. 2003, 124).

The model does not suggest that environmental factors invariably lead to a particular conflict management strategy. Many organizations experienced rising litigation costs in the 1970s and

1980s, but not all responded to that factor by adopting pro-ADR policies. An organization that faces an escalation in litigation costs presumably considers how it might reduce or minimize those costs. It might choose ADR as a cost-saving measure. Or it might respond in a different fashion, such as by seeking other means of more efficiently managing litigation. Indeed, if the organization has reason to believe the rise of litigation costs is a transient phenomenon, it may decide to do nothing in response. How an organization makes decisions in the face of changing environmental conditions is a complex phenomenon. Clearly, organizational culture plays a critical role, but culture is an amorphous term requiring definition. The culture of an organization reflects the values, experiences, and belief structures of the organization's decision makers (Lipsky et al. 2003, 124-25; and Gosline et al. 2001, 20-21).

Similar organizations faced with a common set of environmental challenges might choose very different conflict management strategies and, in fact, this is the situation we observed in our research. One of the companies in our study (PECO Energy), for example, had adopted a sophisticated conflict management system, whereas most other utility companies had not. After PECO merged with the Unicom Corporation, headquartered in Illinois, to form the Exelon Corporation, it discovered that managers at Unicom resisted the adoption of the conflict management system favored by PECO managers. The two utilities were similar, if not identical, in most characteristics, but one strongly favored a prevent strategy and the other did not (Lipsky et al. 2003, 125).

Another company in our study, Halliburton (and its construction subsidiary, Kellogg, Brown, and Root), pioneered the use of mandatory pre-dispute arbitration agreements in employment, but most other companies in the construction business have not. The Zachry Construction Company, a large contractor also headquartered in Texas, has consciously considered Kellogg, Brown, and Root's approach and decided not to adopt it. Conversations one of the authors had with Zachry managers revealed that they were not only aware of Halliburton's approach but had tracked Halliburton's experience with it carefully. Zachry had consciously chosen the contend strategy but was continually benchmarking its key competitors, including Halliburton, and was prepared to consider an alternative conflict management strategy under the right circumstances. In sum, the decision to adopt a particular conflict management strategy is strongly influenced by environmental factors, but the organization's actual choice of strategy is ultimately determined by organizational motivations.

Some Correlates of the Choice of Strategy

In our 1997 survey of corporate counsels, we asked a series of questions regarding how the respondents would characterize their organizations' conflict management strategies. On the

basis of their responses, we were able to group the corporations into the contend, settle, and prevent categories. The proportions listed, which must be considered rough estimates subject to the caveats previously discussed, are constantly shifting. Presumably, though, the number of corporations in the contend category is shrinking and the number in the prevent category is growing, but this is by no means certain. We estimate, nevertheless, that in 1997 about 9 percent of the major U.S. corporations studied, rejected ADR, and elected to be in the contend category, 74 percent fit in the broad settle category, and 17 percent strongly favored ADR, had some form of a system, and accordingly belonged in the prevent category (Lipsky et al. 2003, 126).

After we grouped the corporations in our sample into the three conflict management strategies, we were able to perform some simple analyses to determine the correlates of the organization's choice of strategy. Although we had not collected sufficient data in our survey to do a test of the model, we had collected enough on the basic characteristics of the corporations in our sample to perform a few elementary tests.

The corporations' choice of conflict management strategy was highly correlated with size, as measured by either revenue or number of employees. Corporations in the prevent category tended to be significantly larger than corporations in the contend category (albeit all corporations in the Fortune 1000 have revenues greater than a billion dollars) and corporations in the settle category tended to fall in the middle range.

We used a measure of industry concentration as a proxy for market pressure, and it proved to be related to the corporation's choice of strategy. Corporations in less concentrated industries, which presumably face greater market pressure, tended to choose the prevent (or system) strategy, while corporations in more concentrated industries, facing less market pressure, tended to choose the contend (or traditional litigation) strategy. Corporations in the settle category once again tended to fall in the middle.

Finally, we found a pattern between choice of strategy and the industry in which the corporation operated (specifically, the two-digit SIC industry in which the corporation conducted its primary business). Corporations choosing the prevent strategy tended, for example, to cluster in financial services, insurance, construction, and non-durable manufacturing. As the PECO and Halliburton examples suggest, the variance within an industry can be very great. Construction, for instance, is clustered in both the contend and prevent categories, because there are corporations, such as Halliburton and Zachry, in the construction industry that fall at either end of the spectrum (Lipsky et al. 2003, 1'-28).

Conclusions

Our research demonstrates that nearly all major U.S. corporations have some experience with the basic ADR processes of arbitration and mediation. A much smaller number of companies, however, have had extensive experience with ADR or have tried to use it as a general mechanism for dispute resolution. Our findings show that in most U.S. corporations mediation, arbitration, and other ADR processes are not yet institutionalized. In general, parties are reluctant to agree in advance to mediate and make that decision on a case-by-case basis. Arbitration, although less widely used, is almost always agreed to in advance.

A relatively small proportion of corporations have adopted an authentic conflict management system. The emergence of conflict management systems in U.S. corporations is such a recent phenomenon it is difficult, if not impossible, to gauge the success of such initiatives. Our respondents at these corporations told us that to date their experience had been favorable, by which they usually meant that participants in these systems (managers, employees, customers, suppliers, and so forth) said they had satisfactory experiences using these systems. The respondents also reported that most complaints had been resolved early in the procedures and few had ended up being resolved by outside neutrals. Contrary to the expectations of some skeptics, making elaborate procedures available for employees and others does not promote the filing of complaints. On the other hand, we have not been able to quantify the costs and benefits of using systems and cannot provide bottom-line measures of the effectiveness of the systems strategy.

Finally, it is highly significant that no company or organization that has adopted a workplace conflict management system has, to the best of our knowledge, abandoned that system in favor of more traditional methods of managing conflict. The long-term trend toward the privatization of dispute resolution is a social and cultural reality. Given that trend, conflict management by organizations will merely systematize the privatization under a new regime. Contemporary trends seem almost overwhelmingly to favor the continued creation of conflict management systems. It seems unlikely that reversal of those trends will occur in the foreseeable future.

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