

## ADR & ODR at the National Mediation Board

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Dennis is a union leader who has been named the chief spokesperson for a coalition of thirteen unions working together to negotiate a collective bargaining agreement with a railroad. In addition to the usual complexity involved in collective bargaining (managing his bargaining committee, communicating with the carrier, keeping track of proposals and counter-proposals, etc.) he has the added difficulty of managing communication and consensus among the union coalition members. In addition to the complexity generated by the number of unions and all of their competing interests, the coalition representatives are spread over a wide geographic area, and have work schedules that make synchronous meetings difficult.

This combination of complexity, multiple parties, geographic challenges, and schedule conflicts is, in microcosm, the reason why the National Mediation Board (NMB) more than a decade ago established a policy of aggressively applying information and communication technology (ICT) to its dispute resolution work in the areas of Representation, Mediation, Arbitration, and Alternative Dispute Resolution (ADR).

The application of technology to dispute resolution is generally known as Online Dispute Resolution (ODR), even though some of the technology that is used in dispute resolution is not, technically "online."<sup>1</sup> At the NMB, ODR technology has been used to do many things, including:

- Holding synchronous meetings online with audio and video;

- Holding asynchronous meeting through secure chat rooms and online forums;
- Conducting multi-party arbitration hearings using web video/audio and document sharing;
- Setting agendas and exchanging information before negotiations using secure online workspaces;
- Engaging in "single text" editing in a secure online workspace, allowing the parties to work toward final language on a common document platform;
- Allowing parties to submit requests for services online;
- Allowing arbitrators to submit final decisions online;
- Allowing parties to engage in expedited arbitration using a secure "submissions only" platform in an online workspace;
- Using online and offline mind-mapping software to conduct brainstorming and negotiation sessions.

Among ODR professionals around the world, the National Mediation Board is acknowledged as a leader in government-based ODR.

The National Mediation Board has been in an advantageous position to develop its expertise in ODR technology. The parties who regularly work with the NMB bring complex issues, dealt with over extended periods of time, by individuals who are separated geographically and scattered through multiple time zones.

The NMB is the U. S. Federal agency charged with administering the Railway Labor Act (RLA), which governs labor relations in the airline and railroad industries in the United States.<sup>2</sup> Under the RLA, the NMB has both statutory authority and non-statutory, mission related goals regarding the preservation of harmonious relations between carriers and unions in the rail and air industries. The railroad coalition case outlined above touches both the statutory obligations of the NMB<sup>3</sup> under its Mediation program

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<sup>1</sup> The first general discussion of ODR, including the introduction of the concept of technology as the "4<sup>th</sup> Party," can be found in Ethan Katsh and Janet Rifkin, Online Dispute Resolution, John Wiley & Sons, 2001. A more recent discussion of the role of ODR in international dispute resolution can be found in Daniel Rainey, "Technology as a Catalyst and Barrier," in The ABA Guide to International Business Negotiations, 3<sup>rd</sup> Edition, 2009.

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<sup>2</sup> For detailed information about the NMB and its programs, and for a full copy of the Railway Labor Act, refer to the NMB web site at <http://www.nmb.gov>.

<sup>3</sup> The coalition case does not involve Representation issues, but it does involve both Mediation and ADR issues, as well as some issues related to Arbitration. Detailed information about the NMB Representation

and the non-statutory goals pursued through its ADR programs.

Mediation matters involve negotiation of collective bargaining agreements once a union has been certified to represent workers.<sup>4</sup> Mediators working under the RLA have a variety of powers that most mediators do not have. Mediation in the industries covered by the RLA is mandatory, not voluntary, and until the parties are released from mediation, the status quo must be maintained by both parties. During this period of "status quo," NMB mediators are in control of the negotiations and can establish the time and place of meetings, influence who can be at the bargaining table, and enforce mediation meetings until the Board determines that all reasonable measures to achieve a voluntary agreement have been expended.

While the NMB mediator controls the case, it is still up to the parties to bargain with each other and reach a consensual agreement on the terms of the collective bargaining agreement.

In the coalition example, the parties applied for mediation under the RLA and the NMB assigned a mediator to formally handle their case. The mediator has responsibility for calling and conducting meetings and for working with the parties as they try to reach agreement on a contract. The mediator would not, in most circumstances, be involved in the internal discussions among the coalition members.

The coalition situation involves the NMB ADR program because the unions in the coalition expressed a desire for assistance with the communication difficulties arising from the large number of coalition members, and the environment in which they were working. The NMB has, as a policy, extended the offer of ODR assistance to both parties when they are engaged in negotiations, and to individual parties on either the carrier or union side when they seek assistance in preparing for negotiations. The NMB's policy has been that any assistance given to the parties that improves communication, clarity of position, and preparation to bargain contributes to creating labor/management harmony in the industries served by the NMB.

In this coalition case, the NMB is assisting the union coalition as they prepare for bargaining sessions by making available both a secure online workspace with full capacity to share and store documents, and a new online communications tool that is particularly

suited to the collective bargaining committee setting: ShapeStuff.<sup>5</sup> Using these tools, Dennis, the coalition leader, can share information, poll his coalition members to ascertain support for bargaining positions, develop proposals, examine and discuss counter-proposals, and generally manage the communication and preparation process so that all members of the coalition are fully prepared and supportive of coalition positions as they go into negotiation sessions with the carrier and the mediator.

The RLA is a unique labor law in that it gives the NMB powers not usually available to third parties in mediation, but much of the work that the NMB pursues with the parties is designed to be consensual and cooperative. For this reason, improved communications and the innovative use of ICT have opened opportunities for the NMB staff, and for the parties who work together in ongoing formal relationships.

In 1934, the creators of the NMB could not have foreseen the impact that technology would have on the collective bargaining process, but they surely would have approved the increased avenues for dispute resolution offered by ODR technology.

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Program is available at <http://www.nmb.gov/representation/faqs-ola.html> and detailed information about the NMB Arbitration program are available at <http://www.nmb.gov/arbitration/afaq.html>

<sup>4</sup> FAQ's regarding the NMB Mediation program are available at <http://www.nmb.gov/mediation/faq-mediation.html>

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<sup>5</sup> ShapeStuff is a new program that allows one "leader" to communicate with multiple team members in a secure, asynchronous environment, particularly appropriate for the coalition bargaining environment. Information about ShapeStuff is available at <http://www.shapestuff.com/>