

Dispute Review Boards: Elements of a Convincing Recommendation

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Abstract: This paper will discuss the dispute review board (DRB) process and in particular the settlement recommendation and the elements thereof that may induce contractual parties to resolve their conflict. The recommendation is a document issued after the contractual parties bring a dispute to the DRB panel that they have failed to resolve. To lay the foundation for the issuance of a recommendation, the DRB process will be briefly discussed. Also discussed is the groundwork the panel itself must lay to gain the parties trust prior to the issuance of any recommendation. Given the importance of the recommendation as a linchpin of the DRB process, it is surprising to note the dearth of literature regarding it. This paper will help to partially fill that void.

DOI: 10.1061/(ASCE)1052-3928(2004)130:4(289)

CE Database subject headings: Dispute resolution; Conflict; Insurance; Construction industry.

Dispute Review Board Process

The dispute review board (DRB) process comprises a neutral panel set up at the start of construction, before a shovel is put to earth, whose purpose is to assist the contractual parties in the resolution of disputes as they may arise during the course of the work.

The DRB panel comprises three experienced construction industry professionals. One panel member is proposed by the owner, the other by the contractor, with each party approving the other party's proposed candidate. Candidates are neutral and should have no employment or consulting ties with the contractual parties. The third panelist may be selected by the first two members, but may also be nominated by mutual agreement of the contractual parties and the chosen DRB panelists. The result is a neutral panel of respected construction industry personnel that is acceptable to both the contractor and owner.

The DRB is set up generally during the preconstruction phase and is present throughout the course of the work, visiting the site periodically whether or not any unresolved disputes are present. As a result of the regular site visits, panelists become familiar with the parties and project and develop a "vested" interest in sharing the goals of the contractual parties, namely, the successful completion of the project. From the contractual parties' perspective, a successful project is one constructed in accordance with the plans and specifications, generally within the time and costs originally anticipated by both the contractor and the owner, (Harmon 2002).

Because of the manner in which the process is framed, if an

unresolved issue is brought before the DRB, the contractual parties do not need to educate the DRB on the workings of the project, the conditions of the work, or virtually any other project or industry specific information other than the conditions and events around which the conflict revolves. This saves enormous amounts of time and money when compared to arbitration, litigation, or even mediation, where third-party fact finders need to be educated on almost every aspect of the contract project, and dynamics of the parties' relationship. The DRB process is different from other alternative dispute resolution methodologies in that successful use of the process requires that unresolved issues are brought before the DRB during the course of the contract, as they arise, not at contract completion. The DRB process does not supplant the dispute resolution mechanism in the contract but rather acts as an advisory board if the parties cannot settle the conflict among themselves. When the parties agree that no further productive discussions can take place between themselves, they bring the dispute before the DRB and request the panel's recommendations as to how the particular dispute should be resolved.

It is important to note that the DRB is a servant of the contractual parties, not an adjudicatory body. What makes the DRB recommendation different from a judicial or arbitration ruling is that it is nonbinding, but, it can provide a recommendation for the results sought by a party. This rarely occurs with judicial rulings or arbitration awards. However, because the DRB recommendation is nonbinding, it must convince or "sell" the parties on the proposed outcome of the dispute. Therein lies the challenge.

Purpose of Dispute Review Board

The sole purpose of a DRB is to assist the parties in preventing and/or resolving conflicts. Although its members are experienced construction professionals, it does not act as consultants aiding in the means and methods of constructing the project, but rather as an advisory body assisting in the resolution of disputes. The DRB process recognizes that conflicts are "normal" rather than "abnormal" and that they are a part of any relationship, particularly those where complex work activities are preformed.

A conflict arises when the contractual parties have different

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Note. Discussion open until March 1, 2005. Separate discussions must be submitted for individual papers. To extend the closing date by one month, a written request must be filed with the ASCE Managing Editor. The manuscript for this paper was submitted for review and possible publication on August 18, 2003; approved on November 18, 2003. This paper is part of the *Journal of Professional Issues in Engineering Education and Practice*, Vol. 130, No. 4, October 1, 2004. ©ASCE, ISSN 1052-3928/2004/4-289-295/\$18.00.

interpretations of the contract or the conditions under which the contract work was undertaken, e.g., differing site conditions. A conflict may arise concerning extra or additional work where the contractor believes it is entitled to a change order for unanticipated costs and/or time, and the owner interprets the same work as a part of the original contract. The DRB assists the parties in resolving conflicts before they evolve into protracted disputes that may adversely affect the progress of the work.

Matters brought before a panel vary depending on the parties' needs and requirements. Any unresolved issue can be brought before the panel if the parties so choose. Nevertheless, if the underlying dispute is a question of law, this writer would suggest that the DRB may not be the most appropriate venue. A court, not a DRB, is best suited to render decision on a strictly legal matter. An advisory body of experienced construction professionals such as the DRB is better suited to resolve cases that are mixtures of law and fact—for example, whether or not a change order should be issued for work the contractor considers beyond what the contract anticipated or required.

Unresolved Conflicts—The Hearing

When the parties have decided that their discussions concerning a proposed change order or claim can go no further and after other contractual procedures to resolve the issue have been exhausted, the issue is brought to the DRB panel. The panel then schedules a hearing at which both contractual parties present their side of the conflict. Prior to the actual hearing, the parties develop a written document that speaks to the issue(s) at hand and details each party's position and rebuttal. At the hearing, oral testimony is made by the actual project participants with first-hand knowledge of the unresolved issue. Occasionally, an expert is brought in if the contractual parties do not have the expertise to discuss the issue to the satisfaction of the panel. For example, a metallurgist might be brought in to provide expert opinion concerning the appropriateness of a specified material. However, in most cases, the individuals on the job site on a daily basis provide the information needed by the panel to fully understand the nature of the dispute. These presentations are encouraged to be made as soon as it is apparent that the parties have reached a stalemate in their negotiations but before the parties' position become inextricably fixed.

Generally, only the panel can question the witnesses, the opposing party usually does not have the right of cross-examination. The panelist's questioning skill, the ability to ask probing and insightful questions that uncover the issues as well as the parties' needs, is essential in determining what truly lies at the heart of the issue as well as the barriers that prevented settlement. The ability to gather this information is associated with the panelists' adeptness at asking pertinent questions. Although the importance of a panelist's skill in questioning and understanding the disputant's issues is widely accepted, little has been written on the matter. However, that issue is beyond the scope of this paper. Nevertheless, the panels' or individual panelist's queries during the hearing or at the regularly scheduled job-site meeting shows concern for the parties and focuses on the parties' unique problem(s) rather than just passively waiting for the entire story to be developed. The appropriate use of questions can demonstrate the panelists' competence, thereby building trust. Communication is critical in developing and sustaining effective relationships (Farace et al. 1977; Roberts and O'Reilly 1979), and it has been described as the glue that binds relationships together (Mohr and Nevin 1990).

In addition, communication has been shown to be positively related to trust (Anderson and Weltz 1992; Morgan and Hunt 1994). More importantly, communication is shown to be an antecedent to trust (Morgan and Hunt 1992). Interpersonal trust has been shown to strongly influence interpersonal and group behaviors (Heimovics 1984). Trust encompasses confidence in another's ability to get the job done and assists in making good decisions (Schultz and Evans 2002).

Questioning also can encourage meaningful two-way communication between the panel and the contractual parties. The emphasis on two-way communications suggests that questioning and listening to responses allow the parties to feel that they have been heard, thereby increasing the perception of voice. The value of voice is determined by whether it can effectuate change (Hirschman 1970). Some studies indicate that feelings of unfairness will increase if an individual's voice is ignored (e.g., Folger 1977). However, the right to be heard is an empty option when it does not include the possibility of being taken seriously and listened to (Solomon and Flores 2001). Therefore, speaking but being "silenced" by being ignored may increase an individual's perception of unfairness. Thus it is important to address each of the parties' issues. The importance of this is more fully discussed in the later section of this paper regarding drafting the parties' position as a part of the recommendation.

After a presentation is made by both parties and all documentation has been submitted as well as all queries answered, the panel closes the hearing, discusses the issue(s) in a closed session, and issues a written recommendation as to the panel's opinion on the disposition of the conflict. First and foremost, panelists should seek unanimous agreement to all elements or particulars of the recommendation. At times this is difficult, but the DRB has a responsibility to the parties to make every effort to achieve unanimity.

The Panel

The DRB begins to "sell" its recommendation before the first dispute is heard. Legally, the panel has no more authority than that granted to it by the contractual parties. However, it has social power vested to it by reason of its collective experience in the type of work occurring, longevity in the industry, reputation among fellow panelists, contractual parties, and contracting industry, as well as in the manner in which they personally conduct themselves during regularly scheduled meetings and at hearings. An effective panel establishes its authority as neutral experts with integrity and experience. The DRB's authority is enhanced by treating all the project participants with respect and dignity. This mixture of neutrality, expertise, integrity, and respectful behavior are the building blocks upon which trust is based.

Trust is a valuable commodity. For the DRB to have value to the parties, trust must be built and maintained. Building trust involves skill and commitment (Solomon and Flores 2001). In fact, the foundation upon which the DRB panel gains and maintains its authority is by establishing trust; trust is a dynamic precondition to an effective DRB. The contractual parties need to trust that panelists will be impartial, fair, responsible, respectful, and carry out their duties with the utmost professionalism. If the contractual parties trust the DRB, it is highly likely that they will also believe that the process is fair. Scholarly research on justice, specifically interactional justice, discusses the issue of trust and the perception of fairness in resolving disputes. Interactional justice scholars (e.g., Tyler, Bies, Greenberg, etc.) address two inter-

personal components: (1) the perceived fairness of the decision maker's procedures (Tyler and Bies 1990); and (2) the portrayal of the decision maker's image as a fair person (Greenberg 1990; Greenberg et al. 1991). It also concerns interpersonal conduct, wherein disputants are concerned with how they are treated and whether they believe they are treated with respect and honesty (Bies 1987; Greenberg 1990; Tyler and Bies 1990; Vermunt et al. 1993). This also affects the evaluation of whether a process is deemed fair. Studies indicate that individuals react strongly to the quality of interpersonal treatment they receive from third-party decision makers (Bies and Moag 1986; Tyler and Folger 1980; Vermunt et al. 1993). Therefore, the treatment the contractual parties receive by the DRB and the manner in which the panel conducts itself play a significant role in whether or not the process is deemed fair, and the panel gains the trust of the parties. Therefore, trust not only must be earned by the panel, it must also be given by the contractual parties (Solomon and Flores 2001). A nonbinding process not deemed fair and overseen by a panel that does not have the trust of the contractual parties will not be effective in resolving disputes.

Recommendation

A chief element in achieving its purpose to assist the parties to settle their conflicts is for the DRB to issue a document that will convince the parties of the "wisdom" of the panel's solution. In addition, the panel's recommendation as to the proposed settlement gives the contractual parties a view of how the dispute may be perceived by other third-party fact finders such as an arbitration panel, judge, or jury.

Components of Recommendation

What are the components for a recommendation? Can any recommendation, no matter how well written, convince the "losing" party to settle? To answer these and other questions, we must first address the purpose of the recommendation. The entire purpose of the recommendation is to "sell" the disputing parties on its reasonableness in light of the panel's experience and its familiarity with the job conditions, participants, and the contract, as well as using the trust they have established with the contractual parties. In essence, the DRB needs to convince the parties that its opinion is justified and that the steps for settlement it outlines are valid and reasonable. The parties need to trust that the recommendation has been based on their presentation of the facts, the actual jobsite conditions, contract language, the panel's expertise and neutrality, as well as the fairness of the process.

The components to a recommendation include reciting the parties' positions and rebuttals. This demonstrates an understanding of each party's position. It is not dissimilar to the theory of reflective listening, where the listener paraphrases what has been told relating just the facts without the emotional baggage. It is not merely rewriting what has been presented. It is interpreting or reframing what has been provided in writing and in oral testimony so that a complete picture of the problem is outlined. This assures the disputants that they have been listened to, and more importantly, heard and understood. By reframing the presentation and discussions, an unimpassioned narrative of the issue at hand and how both parties view those issues can emerge.

Reframing the presentation, both written and oral, accomplishes several things. First, it helps the panel demonstrate its understanding of the issues and parties positions regarding them.

Second, it provides a concise narrative forming the foundation upon which the recommendation is built. In addition, it acts as a reality check among the panelists to make sure that each panelist understands or sees the issues as their fellow panelists do. The panelists, in effect, develop a single narrative of the issues. This story is developed when the DRB caucuses behind closed doors after the close of the hearings. If there are inconsistencies or differences in the understanding of facts or problems, the DRB can seek further clarifications or submissions from the parties. A joint and agreed to understanding of the issue(s) at hand by all parties, both disputants as well as the panel itself, is an essential building block upon which the individual elements of the recommendation are laid.

On the basis of a solid understanding of the facts and issues, the panel issues a draft recommendation. The purpose of this draft recommendation is for the panel to assure themselves that they are in complete understanding of the facts as presented to them. Moreover, it is a chance for the contractual parties to correct any misconceptions the panel may have as to certain facts. However, some DRB panelists argue against issuance of a draft recommendation. These panelists believe a draft recommendation provides another "bite at the apple," which delays the issuance of a final recommendation. This concern can be eliminated if the panel directs the parties to correct only the factual errors and gets a time limit of its return. Award decisions from judges, juries, or arbitration panels often do not have this function; therefore, their decisions can be based on faulty, incomplete, or misunderstood information. The correctability of the draft recommendation prevents such difficulties. It is this correctability that is one function of the effectiveness of the DRB process. It assures the parties that the DRB knows and fully understands its positions and arguments.

Using Contracts in Drafting the Recommendation

In addition to having an understanding of the facts and parties positions, the panelists themselves must have knowledge of the contract. The contract is the rules under which both sides have agreed to "play the game." More importantly, it is a legally binding understanding by the parties of their individual rights and responsibilities. The panel must not disregard the contract in crafting its recommendation, no matter how one sided the contract may be. Just as in any game, you cannot change the rules midstream without significant adverse ramifications. If the contract is "unfair" (whatever that means) and it is so interpreted by one party, the panel neither has the authority nor the responsibility to make recommendations concerning the dispute in an effort to make up for an unfair contract. This would be totally inappropriate as well as a subversion of the DRB process. If, as a panelist, you want fair—talk to the Almighty—He/She will be the final arbitrator of what was fair or unfair in this world. It is His/Her's responsibility to make sure everyone gets a fair shake in this world, not the DRB. It is the DRB's responsibility to develop its recommendation based on the contract, the parties presentations, and the panelist's and/or parties' experience in the execution of the subject project. Additionally, in a recent national study (Harmon 2003), respondents overwhelmingly agreed that the recommendation should follow the contract.

There should be no doubt that the purpose of the recommendation is to convince the disputants as to the equitable solution the panel has proposed, which is in accordance with the contract as well as project conditions. The recommendations should also be in accordance with applicable law. It is unlikely that a DRB recommendation will be accepted by the parties if it does not gener-

ally follow the legal precedent. For example, if the DRB recommends settlement of a dispute regarding an extra work issue in favor of the contractor and during the course of the presentation it has been agreed that the contractor failed to give any notice of the extra work (with notice being the actual written notice as required by the contract or constructive notice where the issue was discussed repeatedly at job meetings or in conversation with various owner personnel), then, with a recommendation suggesting the disposition in favor of the contractor, the DRB is not fulfilling its charter. This is because the DRB is ignoring applicable contract provisions and prevailing law (for example, New York City law requiring strict compliance with the contractual notice provisions). Moreover, it is unlikely that the owner will accept the recommendation. The extra work may truly have been extra work, but the contractor's failure to give timely notice essentially denied the owner the opportunity to investigate the problem and craft its own solution.

Drafting the Recommendation

The panelists have been chosen for their experience and knowledge as well as an industry reputation for fairness, integrity, knowledge, and the like. They have a job to do, which is to write the recommended settlement in clear positive terms, focusing on key points, contract language, and arguments.

Developing the recommendation is both an art and science. If the panel wants to be persuasive in selling its recommendation, then knowledge of the target audience and parties perspective is important and necessary. Most likely, the target audience is more than the site personnel on the project on a day-to-day basis. It also may include home office executives and legal counsel. Logic and reasoning should be at the heart of the recommendation, and it should be written in such a manner that it is a "stand alone" document in that all the facts, issues, and discussions are thoroughly developed and recited. Moreover, common sense should dictate that the DRB proofread its work carefully to eliminate spelling and grammatical errors, as well as unclear logic. Additionally, it should be written in an active rather than passive voice and should not include criticism of a party or position. Further, a good recommendation answers the questions put to the panel—and no others.

Format

The written recommendation should follow some simple guidelines as to format and should be straightforward and simple. Inasmuch as the decision is likely to be "sold" both to upper management as well as counsel, it may be advisable to draft the recommendation similar to legal opinions that follow the old army method: Tell them what you are going to say, say it, then tell them what you said. In short, the suggested format is (1) a short summary of the recommended settlement; (2) the nature of the dispute; (3) the parties positions; (4) DRB's findings on those merits; and (5) a full discussion of the reasoning behind the recommendation, including applicable contract language, law, and each party's presentation. A well-explained recommendation will allow the disputants, counsel, and upper management to understand the reasoning; and therefore, they will be more capable of making an independent decision as to whether or not to accept the DRB's advice.

First—Recommended Settlement

The recommended settlement should be succinctly stated. You only want to decide the kernel of the problem brought before you and only address the issue as parties frame it to you. Like any arbitration award or court order, we all go to find out what the ultimate decision is. So why not put it up front? This document is not a great mystery novel to be savored. No one wants to read all the juicy details before finding out that Colonel Mustard killed Professor Plum in the library. While there may be some debate about putting a summary of the decision first, consider this, we all know the story of the Titanic. On its maiden voyage the boat sank, but we still want to read all about it because we are fascinated by the topic. The point being that even if we know the ending, particularly in the settlement of a conflict, most, if not all the parties, are interested in how the suggested recommendation came about.

Second—Nature of Dispute

The nature of the issue brought before the panel should be described and should include a statement noting its most important aspects. It should also include pertinent background data, the remedy requested, and the contract provisions.

Can the remedy be gleaned from the parties' presentation? Although common sense would dictate that the parties when outlining their position would also outline their proposed solution to their problem, namely, the sought after remedy, and occasionally this does not occur. Unfortunately as renowned psychologist Alfred Adler noted "common sense is not so common," and the hoped for remedies are not always articulated. Nevertheless, with some careful questioning the DRB can determine what the sought for remedy is, and it is in this section where the requested remedy should be clearly stated (e.g., the contractor seek a change order for ... in the amount of \$150,000 and a time extension of 15 calendar days...).

Third—Parties' Positions

Position statements, should narrow the issues and remove as much extraneous matter as possible. The DRB should use its best efforts to enhance the understanding of the parties on positions and rebuttals each hold. The discussion should begin with an overall statement with the parties' positions in sequential order. This overall statement should note the most important aspect of the dispute in crisp, clear language so that it is a good starting point for the remainder of the discussion. It is important that the DRB address the parties positions as valid and worthy of a reasoned response, regardless of how "off the wall" they might be. No one likes to be marginalized, and, in many cases jobsite personnel, not legal or consulting experts, develop the presentation. Therefore, the written presentation as well as the testimony may not be as sophisticated as those developed by professionals whose main business is conflicts. Hence, the DRB positions should focus on the issue's strength with weaker attributes shown to be offset by one or more primary issues. Additionally, addressing each issue will demonstrate to the parties not only that they have been heard but also that the panel listened to each party's position. As any married couple knows, there is a difference between hearing and listening. The DRB needs to do both to be effective.

There is an old saying, less is more, and sometimes that is true, but less is not necessarily better because this approach requires complete confidence and trust in the panel's wisdom, experience,

expertise, and judgment. Although the project participants on site might believe this, in today's litigious times it is best to be logical, clear, and concise in addressing each and every position, to enable individuals not intimately familiar with the project to understand what was presented or argued. Thus, frame the factual and legal (if any) issues and note agreement or disagreement with the facts as if preparing a document for those other than jobsite personnel to read.

Fourth—Dispute Review Board Findings as to the Merits of Party's Positions

In reciting the facts and the parties' positions, the panel needs to be aware that some disputants will take a "kitchen sink" approach to quoting contract provisions. Therefore, pertinent contract clauses should be included, and the reasoning behind rejecting other clauses as pertinent should be detailed. Additionally, the panel needs to detail which positions have merit and were strongly considered and which positions are not supportable by either the facts, generally accepted construction practices, and/or the contract.

This type of presentation is similar to a summary-of-benefits approach to selling (Wagner et al. 2001), where the focus of the sales "pitch" is how the "product," or in this case, the recommendation, will benefit the "buyer," i.e., the contractual parties. The summary-of-benefits selling strategy concentrates on "providing the most favorable product-related information possible to lead the buyer to a positive evaluation of the product" (Wagner et al. 2001, p. 291). This approach will allow not only jobsite personnel but also others the ability to structure their own decision while letting them operate effectively in concluding the validity of the DRB's recommendation. For example the DRB can state: here we found that ... moreover they did not follow contract procedures as noted in Section X of the contract ... and although the Contractor cited Section Y, we do not believe this section to be applicable because... thus we conclude... .

According to research, selling skills or procedural knowledge (Rentz et al. 2002) consists of several components:

1. Interpersonal skills—knowing how to cope with and resolve conflicts (Churchill et al. 1985; Dawson et al. 1992; Castleberry and Shepherd 1993);
2. Salesmanship skills—knowing how to make a presentation and close sales (Ford et al. 1987); and
3. Technical skills—knowledge of product features, engineering skills and procedures required by company policies, and meeting the customer's needs (Walker et al. 1977; Smith and Owens 1995).

An effective panel writes a well thought out and logical recommendation that uses all these components.

The Recommendation as to the Disposition of Conflict

The most important aspect is the soundness of the recommended disposition of the matter, and it should be made with a detailed explanation as to how the recommended settlement was reached. This part should be unambiguous, so the parties have a clear understanding of the proposed settlement and instructions for its implementation. (For example, the DRB found that the Contractor complied with the Owners directive to perform the work as required by Contract Section A and in doing so performed extra work, therefore the Owner should award the contractor a change order in the amount of X and a time extension to the contract of Y.) Simply put, be very clear in stating the suggested settlement

for both merit and quantum. If the panel was asked to render a recommendation on just the liability aspects of the dispute and not the damages, the decision should be limited to the liability issue (merit). If it was asked to comment on liability (merit) and resulting damages (quantum), it should do both. The DRB is a servant of the contractual parties, not its master.

The panel might also influence the party's decision structure by suggesting constraints (i.e., this contract provision is not applicable to this situation because ...) to simplify the choice and to suggest the best solution for resolving the issue between the parties. The contractual parties who use the suggested constraints will then reject the other alternatives (i.e., leaving the matter unresolved to the end of the job, pursuing litigation or arbitration, etc.) while keeping the DRB's suggestions under consideration. Thus, the party's decision structure is modified by altering criteria (the constraints) and rule of choice (by applying constraints to eliminate alternatives), and the alternatives considered (those that satisfy the constraints, namely the DRB recommendation), thereby accepting the DRB's suggestions for resolution. By influencing a decision maker's agenda, studies shown that it can substantially alter the probability of choice outcomes (Glazer 1991; Hauser 1986; Kahn 1987).

The DRB process can be effective and compelling if viable solutions are proposed for settlement. The absence of a well-crafted recommendation represents a missed opportunity to assist the parties in settling their conflict. The DRB can only influence the decision makers by making recommendations as to how the dispute should be settled. Those recommendations may or may not be followed. Nevertheless, the parties are more likely to accept the panel's suggestions about how to structure a settlement if the recommendation is well justified and a natural part of the decision-making process. Thus, any strategy attempting to affect the party's decision structure should be compatible with the contract as well as applicable laws.

Issuing a Draft Recommendation

Before circulating a draft recommendation to the contractual parties, the DRB panelists should ask themselves, "Are we effectively selling our position?" Conventional wisdom recognizes the importance of a well-argued recommendation. Selling effectiveness is the "degree in which the preferred solutions of salespeople are realized across their customer interactions" (Weitz 1981, p. 91). The DRB is the salesperson selling their product, which is the wisdom and reasonableness of their recommendation, to the client, the contractual parties. Also, the draft recommendation allows the parties to correct any misstatements as to the facts upon which the recommendation may be based. This correctability is not available in most other dispute resolution processes. Knowing that the DRB is relying on correct facts leads the contractual parties to believe in the fairness of the process.

Usefulness of the Recommendation

The usefulness of a well-crafted recommendation is not limited to the current issue at hand. A wider and potentially more cost-effective potential of the recommendation lies in its application to other smoldering disputes and, of equal or greater importance, conflict prevention. Strategic objectiveness in "selling" the proposed settlement recommendation often involves changing the parties' beliefs and evaluations concerning the issue in the conflict. It is an attempt to influence the structure of the parties'

decision on whether or not to accept the panel's recommendation. If the panel succeeds in influencing the contractual party's decision, some important benefits may follow. The panel might be able to focus the contractor's attention on criteria on which the owner has distinct preferences. The DRB might also suggest specific future behavior to prevent disputes from reoccurring or create a better working alliance. Thus, the DRB has the potential to influence decision criteria on whether or not a conflict would be better settled among the parties without DRB involvement, which can lead to more enhanced beliefs about the abilities of how the project participants view each other.

The second most important matter a recommendation can do is actually work for the contractual parties to help them to achieve their mutual goal—to complete the project within the anticipated time and costs, while assuring that all conflicts are resolved contemporaneously, thereby providing the contractual parties with a successful project and good working relationship, as well as possibly shaping the parties' future relationships.

The entire DRB process provides the contractual parties with a methodology to deal with the rough spots in their relationship and to keep it and the project working. The value added by the DRB's recommendation lies in its ability to move one or both parties off their positions by providing a candid evaluation of the issue(s) and by illustrating both that adhering to their position has risks as well as costs and that there may exist a more suitable resolution enabling a better solution than by binding decisions or even win-win situations. Additionally, a well-crafted recommendation can be helpful if there are third-party interests such as subcontractors or internal politics within the disputant's organization who have certain expectations as to the outcome of the dispute.

Conclusion

Individuals react more favorably to decisions based on perceived fair procedures than to those believed to be unfair (Cropanzano 1993; Cropanzano and Greenberg 1997; Greenberg 1987, 1990; Lind and Tyler 1988). Leventhal and colleagues (Leventhal 1976, 1980; Leventhal et al. 1980) proposed six rules that individuals use to measure fairness: (1) consistency; (2) bias suppression; (3) accuracy; (4) correctability; (5) representativeness of all concerned (also known as "voice"); and (6) ethicality. Greenberg (1986) identified five similar rules. In this paper, the writer discussed that the DRB's building of trust prior to hearing the first dispute is an important component to its effectiveness in selling the recommendation and meeting the needs of the contractual parties. Trust building involved neutrality (bias suppression), integrity (ethicality), and experience. This paper also discussed the conduct of the panel at the regular jobsite meetings and at the hearing itself in communicating with the contractual parties, listening as well as hearing what was said, and giving voice to the disputants (interactional justice and representativeness). The writer also detailed the elements of a well-crafted recommendation allowing for accuracy and correctability.

A solution will only be accepted by the parties if it meets their needs, and it is only achievable if the process by which it is achieved gives voice to everyone who has a stake in the outcome. A well written and argued recommendation by three neutral, respected, professional, and knowledgeable industry experts can be the voice of reason, allowing the parties the room to end their dispute. The recommendation is to be a tool for settlement. It should be crafted so as to sell the parties the logic and reasoning behind the suggested settlement. To do so, it must demonstrate an

understanding of the issues, contract, parties, and positions as well as provide a convincing analysis of the facts and how they relate to appropriate contract provisions, oral, testimonies, and exhibits, as well as the parties needs. If the "sales pitch" is not logical, well argued, with emphasis placed on the key elements of the dispute, it is unlikely that the parties will "buy" the proposed settlement.

Will using these strategies and guidelines always result in the parties' acceptance of the DRB decision? No. There will be instances that no matter how well argued or how well the DRB implemented its strategy in attempting to restructure the parties' decision structure, one party will not accept the suggested settlement, even despite the logic of settling rather than bringing the matter before a binding process. Many factors influence the parties to settle or continue the conflict. Some of these factors include entrapment and face-saving, where the emotional costs of settling the dispute are considered "too high." These issues may play a shadow-type role in whether or not settlement is even desired.

Consumers are always shopping for value, and contractual parties are no different. What value does a DRB bring to the project if it does not have the respect of the parties? What value does the recommendation have if it is poorly crafted, and/or it is at variance with the contract and/or applicable law? A DRB is not only serving the contractual parties themselves but also the construction industry as a whole because it is an example to the entire community that disputes do not have to be derisive, time-consuming, expensive lessons in frustration but can be handled like any other difficulty—head on, with the contractual parties and panel working together to craft solutions. Every successful DRB project is an example to the entire contracting community as to how disputes can be managed. It has a ripple effect on future projects involving the present contractual parties, either as another contractual entity or as ambassadors to the process.

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