Effectiveness of Dispute Review Boards

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Abstract: A Dispute Review Board (DRB) is a panel of three respected, experienced industry professionals jointly selected by the owner and contractor of a project and established at the beginning of a construction project. It meets regularly at the job site to be briefed on the work, the schedule, and any potential issues in dispute. With the use of DRBs growing, a pilot study was undertaken to determine the attitudes of industry members concerning its effectiveness in preventing and contemporaneously resolving disputes.

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Introduction

The Dispute Review Board (DRB) was established in the mid-1970s as a nontraditional approach to reducing conflicts and costs on construction projects. Their development was precipitated by a growing dissatisfaction with the costly and often unsuccessful procedures associated with traditional litigation. Moreover, existing alternative dispute resolution (ADR) methodologies, such as arbitration, mediation, mediation/mediation, and mini-trials typically did not address conflicts contemporaneously. More often than not, these ADR procedures were implemented only after project completion. In recent years, the Construction Industry Institute has endorsed the use of DRBs as a “successful technique” (CII 23-2 1996, p. v) for resolving disputes in a timely and cost efficient manner (Duran and Yates 2000).

A DRB is a contractual arrangement comprising a panel of three respected, experienced industry professionals jointly selected by the owner and contractor of a project (Matyas et al. 1996). It is put in place at the beginning of a construction project and meets regularly at the job site to be briefed on the work, the schedule, and any potential issues in dispute (Matyas et al. 1996; Silberman and Batelle 1997). It continues to meet at the job site at regular intervals whether or not disputes are brought before it. The DRB hears unresolved conflicts presented by the parties and issues nonbinding recommendations, but does not supplant the contract’s dispute resolution procedures. According to statistics maintained by the Dispute Review Board Foundation projects with DRBs have a 98% success rate, with success being defined as no unresolved disputes at the time of contract completion. (The Dispute Review Board Foundation, formed in 1996, is a not-for-profit organization of individuals interested in the resolution of construction disputes through the use of the DRB process.)

In this report, I report findings from a survey designed to determine how parties to a construction contract perceive the role

and effectiveness of DRBs in reducing conflicts and/or resolving disputes. It is hypothesized that a disputing party's perceptions and behavior are influenced by (1) the DRB's expertise, (2) being given a voice in the hearing, and (3) control over the outcome of the dispute. From this framework, survey questions were developed to elucidate a number of central issues: Why are projects with DRBs successful in resolving disputes or claims prior to contract completion? How can parties to a contract effectively prevent disputes, settle conflicts, and resolve their legitimate differences during the course of the construction project? By what criteria can a process for resolving disputes and reducing conflicts be deemed effective? Such information is important and timely in bringing forth a better understanding of the effectiveness of DRBs, particularly in an industry that places a high value on both time and money.

Method

Participants

Sixty-three participants of the Fifth Annual Meeting of the Dispute Review Board Foundation held in October 2001 in Las Vegas, Nevada were invited to complete the survey. Of the 50 questionnaires returned, 48 contained useful data, yielding a 76% overall response rate. The final sample, therefore, consisted of 48 respondents (46 males, 2 females; 98% Caucasian; age range = 38–83), whose professional composition included attorneys (13%), consultants (46%), contractors (21%), engineers (13%), and owner/administrators (7%). Ninety-six percent of these individuals indicated having had some level of college education; 47% held graduate or professional degrees. Industry experience ranged from 1 to 52 years, with 48% of the sample having more than 30 years of relevant professional experience. Sixty-seven percent of the respondents had served as a DRB panel member, and 86% reported having had some experience with the DRB process within the last 5 years.

Instrument

The questionnaire consisted of 91 statements designed to assess attitudes of the respondents regarding DRBs, using a Likert-type scaling system (Oppenheim 1966). Respondents were asked to rate their extent of agreement with each statement on a five-point scale ranging from “strongly agree” to “strongly disagree,” with
the midpoint representing "no opinion." An additional seven questions were included to elicit relevant demographic information. The internal consistency of the questionnaire, as determined by Cronbach’s alpha with the current sample, was 0.88.

Results and Discussion

Issues

It is well recognized that all construction projects experience changes, which may thereby precipitate conflicts (Clegg 1992; Kane 1992; Augustine 1994; McManamay 1994; Fenn et al. 1997), but not all conflicts escalate into disputes. When individuals become emotionally involved in a conflict, they “magnify the importance of what is really at stake” (Greenhalgh 1999, p. 8). When you add emotions to an unresolved conflict, it spirals out of control and the net result is a dispute. Whereas conflict can have positive outcomes and be constructive, disputes routinely have negative consequences and tend to be destructive.

Unresolved disputes occurring during the course of construction can result in significant out-of-pocket costs to both the contractor and owner, including legal fees, expert witness costs, and consultant fees. In the present study, 98% of the respondents agreed that unresolved disputes result in additional financial costs and concerns, while 89% agreed that having a DRB would keep dispute-related costs to a minimum. Clearly, money paid to attorneys, consultants, or expert witnesses does not add value to the project. These costs are, in effect, the unrecoverable costs of a dispute. For the owner, money spent on resolving disputes reduces the amount of funds available for rehabilitation, repairs, refurbishment, or new construction. For a contractor, it reduces the company’s profitability. A dispute spiraling out of control can significantly affect not only the total cost of a project but also a company’s bottom line. Seventy-two percent of the survey participants believed that having a DRB assist in the resolution of disputes would enhance their company’s profitability. The predominant view (98%) was that having a DRB reduces the costs of outside counsel, while 87% believed that costs for consultants also would be reduced. The difference in the two results may be explained by the need, in some instances, for consultants to assist in the preparation of information presented at a DRB hearing. Nevertheless, the reduction in unrecoverable fees paid to a consultant or attorney to resolve disputes can be made available for more productive endeavors.

Ninety-eight percent of the participants recognized that other “hidden” financial costs may be incurred by both parties as a result of unresolved disputes. These costs may be the result of the diversion of manpower from new work to prepare for depositions and/or to be witnesses at trial or arbitration, as well as the need to bring an attorney and/or consultant up-to-speed concerning problems on the project and the nature of the work. Eighty-five percent of the respondents were concerned that unresolved disputes would force them to divert their attention from their next project. Certainly the diversion of manpower as a result of unresolved disputes is a major concern for the construction industry. Ninety-six percent of the respondents agreed that having a DRB would reduce the indirect costs of resolving a dispute by having available manpower focused on constructing new projects rather than helping to resolve disputes regarding completed projects.

Moreover, the findings overwhelmingly reflect the view that conflict creates an emotional cost in terms of the deterioration of the relationship between the parties (100% agreement); is physically and emotionally draining (98% agreement); and reduces job satisfaction among employees (100% agreement). In addition, a vast majority (87%) of the respondents felt that disputes undermine the progress of construction. Are these emotional costs ever recoverable, even if one party “wins” the case?

The construction process, if made less adversarial, could become more cost effective for both the owner and the contractor. Fees not spent on defending against litigation or other adversarial methodologies could be put to better use on additional projects reducing actual and emotional costs for both parties and increasing job satisfaction. Therefore, a DRB that resolves disputes contemparaneously with the emergence of a problem is likely to result in less stress, greater job satisfaction, and a more efficient workforce that can concentrate their efforts on constructing the project rather than resolving the dispute. This creates win/win solutions not only for the parties themselves, but also for the public as a whole because money is not diverted from new projects or company profits for the purpose of resolving disputes.

Characteristics of the Dispute Review Board Panel

Individuals who comprise the DRB panel are chosen because of their experience, knowledge, and standing in the construction industry as well as their expertise in the type of construction being performed (Battelle and Dettman 1993). In this regard, all respondents in the present study felt that panelists should be chosen on the basis of their knowledge and level of industry experience. Industry reputation (94% agreement) and knowledge of the type of work being performed (96% agreement) were also considered to be important qualifications for panel membership. These findings are consistent with research (Arnold and O’Connor 1999), which demonstrates that disputing parties’ perceptions of the expertise of third party neutrals are based on the third party’s education, training, and experience. Others (Treacy 1995; Sutherland et al. 1998) have suggested that the panelists’ standing, integrity, and technical expertise play an important role in understanding the nature of the dispute and bringing about its subsequent resolution. Such factors enable the DRB to have legitimacy and authority. In fact, in its 1996 report, the Construction Industry Institute noted that a critical element for a successful DRB is the “selection of respected construction experts” (CII 23-2 1996, p. v; see also Loulakis and Smith 1992).

In choosing a DRB panel member, knowledge of the law was not considered an essential characteristic by 55% of respondents, although knowledge of claims was judged to be important by 81% of the study sample. This mirrors opinions within the industry that disputes can be resolved in a timely and cost effective manner without the use of attorneys, but with someone knowledgeable in claims practice and procedure. These findings might also explain the earlier-cited results indicating that nearly all participants believed that having a DRB would reduce legal fees, whereas substantially fewer respondents felt that it would reduce consultant fees.

Survey respondents were undivided in their views that candidates for a DRB must have the ability to render fair and impartial decisions, and that having a choice in the selection of panel members is important to the confidence they would have in the panel. Virtually all (98%) survey participants agreed that a DRB panel member needs to be unbiased and should not be an advocate for the party that chose him or her. Having unbiased, experienced, and knowledgeable panel members hearing the presentations made by the contracting parties, rather than by their attorneys, can
be a powerful tool for establishing the procedural fairness of a DRB hearing.

Procedural justice theory proposes that parties are concerned about the perceived fairness of the process and its outcome. Having a "voice" in dispute resolution procedures leads some to believe the procedure is fair (Folger et al. 1996). Having a choice in the selection of panel members, as well as the right to reject proposed panel members, and the right to tell "their own story" concerning the dispute brought before the DRB allows the parties to believe that the process is fair.

A neutral party's attention to procedural issues is said to be an important factor in appraisals of the fairness of outcomes in dispute resolution (Shapiro 1993; Posthuma et al. 2000). Fair procedures are those that include consistency, suppression of bias, accuracy, and ethical behavior (Leventhal 1980). Ninety-eight percent of the respondents to the current survey agreed that the DRB provides a forum where disputes can be fairly aired and all agreed that it allows for the impartial resolution of a dispute. The DRB process provides for all the conditions to meet the parties' needs for a fair, timely, and cost effective dispute resolution procedure. Americans put great emphasis on procedural fairness (Lind and Tyler 1988), therefore, any dispute resolution procedure that is not considered procedurally fair is not likely to be effective.

**Effectiveness of the Dispute Review Boards Process**

A 1993 construction industry survey reported that 92% of respondents agreed that any dispute resolution procedure should attempt to prevent as well as resolve disputes (Voster 1993, Appendix D-11). The construction industry has always been at the forefront of movements to resolve disputes by ADR methods (Smith 1995; Mix 1997; Brooker 1999; Keil 1999; Cloke and Goldsmith 2000), and the utilization of a DRB is a natural extension of the ADR process. But, in a real sense, the use of DRBs is not technically an ADR methodology (Harmon 2001). DRBs not only resolve disputes, they also can act as an impetus towards dispute resolution initiated by the parties themselves (Loulakis and Smith 1992; Barnett 1997; Zuckerman 1999; Chapman 2001). In the current study, 96% of the participants agreed that the mere presence of a DRB results in the resolution of disputes and 89% agreed that it reduces the number of disputes. As noted by Denning (1993), DRBs foster "an atmosphere of trust and cooperation that helps resolve minor disputes at the lowest levels" (p. 42). Indeed, part of the effectiveness of DRBs stems from their ability to engage the parties early on in the dispute resolution process, at a time when information about the issues is easily available. In other cases, the mere presence of a DRB during construction may influence the parties to resolve their differences before preparing a presentation and bringing a matter to the DRB (Technical Committee 1991; Silberman and Battelle 1997; Cox 2000). As others have pointed out (Greenhalgh 1999; Cox 2000), people often feel obligated to appear reasonable and responsible because they care more about the neutral panel's opinion of them than about their adversary's opinion. Findings from the present study confirm these observations. In addition, 94% of survey participants agreed that the presence of a DRB reduces the likelihood of insupportable claims, while 60% believed it reduces spurious claims.

A very substantial number of participants (96%) felt that having a DRB provision in the contract indicates the openness of the owner to resolving disputes without resorting to arbitration/litigation, thereby contributing to the satisfaction of the contracting parties. The majority (77%) of respondents agreed that a contractual DRB provision indicates the owner's willingness to resolve disputes in a timely manner as well. At the same time, however, 98% of participants in this study indicate their belief that having a DRB would not guarantee that either litigation or arbitration would be avoided. It is surprising to find that, while 53% believe that the presence of a contractual DRB provision does not provide assurance that disputes will be minimal, 40% believe that it will. These results could be the result of the variable nature of disputes and their impact on the project. Unfortunately, having a DRB is not itself a panacea for the construction industry; the parties must be committed to the process and perceive it as inherently fair. Nevertheless, DRBs are becoming increasingly more popular because of their success in avoiding litigation and encouraging cooperation between the parties (Stanislaw 1991; Denning 1993; "Turning the tide" 1994; Duran and Yates 2000). This is a self-fulfilling prophecy: The more people believe that the conflict can be successfully resolved, the more likely they are to pursue resolution as a goal (Mayer 2000).

**Dispute Review Boards Recommendation**

Since the DRB is set up prior to the commencement of a project, it establishes its legitimacy and knowledge prior to the hearing of any disputes. After the hearing of a dispute, it issues a nonbinding recommendation. The recommendation is believed to be equitable and well reasoned by 89% of the respondents, logical and timely by 92%, consistent with the terms and conditions of the contract 92%, containing useful information concerning the validity of the claim (100%), and providing useful talking points in resolving the financial impact of a dispute (98%). Arnold and O'Connor's 1999 study demonstrated that the perception of expertise of a third party was an important consideration in accepting the settlement proposed by the third party. The third party's credibility, a product of their education, experience and training, made their recommendations persuasive. Like mediators, a DRB cannot force a settlement. Therefore, its success in resolving disputes may rely on its ability to persuade the parties to accept its recommendation. A DRB panel or its individual members can cultivate the parties' perceptions of its expertise and use this as a form of social power (French and Raven 1959). This has been suggested by several authors (e.g., Kolb 1985; Ziegenfuss 1988) in other research. The more persuasive the recommendation, the more likely the parties will accept it to resolve the dispute.

In addition, the DRB may be effective because it can be considered a face saving mechanism. Disputants may be concerned about saving face during their conflict and in their negotiations (e.g., Fisher and Ury 1981; Worcel and Lundgreen 1991; Wilson 1992). Face has been described as the positive value that individuals attach to their identities (Goffman 1967), their self esteem (Worcel and Lundgreen 1991) and the image of strength individual project while in conflict (Tjosvold 1983). Making concessions can be viewed as a sign of weakness (Pruitt and Johnson 1970; Hiltrop and Rubin 1981), which can encourage the opponent to increase its demands (Brown 1968; Pruitt and Smith 1981; Worcel and Lundgreen 1991). On the other hand, the failure to make concessions may be viewed as not negotiating in good faith (Hiltrop and Rubin 1981). Then there is the paradox of the alleged inability to make concessions because of the "weakness as strength" play, claiming, "my hands are tied" (Friedland 1983). With a DRB, a party can make concessions and shift the responsibility for those concessions to the DRB and its recommendation, which is generally admissible in litigation or arbitration. As Stevens (1963) notes, by shifting responsibility to others "the
posture of retreat is more comfortable. The [disputant] has been constrained by [the DRB panel] not by his opponent..." (p. 134). Moreover, if the recommendation is fair, reasonable, and well argued, both parties can rationalize that they are making an intelligent business decision in accepting the recommendation of a DRB panel of their own choosing. In this way, the DRB saves the face of both disputants, since a business decision is allowed to be reached.

Conclusions
To resolve a conflict, the first step is to create an atmosphere that will be effective to the resolution process (Weeks 1992). Is a DRB effective in resolving disputes? Conflict theorists note that a competitive, argumentative, and win-lose form of dispute resolution is ineffective in resolving disputes (Augburger 1992). The construction industry is coming to this same conclusion. Moreover, parties directly involved and heavily invested in a dispute are least likely to settle it constructively (Augburger 1992). Constructive alternate methods to resolve disputes are most likely to come from third parties (Augburger 1992). The German scholar, Jurgen Habermas, noted that positive change originates from commutative action. This action is the capacity of people to work through and resolve disagreements to achieve effective solutions to problems. Rubin and Brown (1975) assert that the mere presence of an independent party may be a significant factor in the dispute resolution process. The presence of a DRB can circumvent the negative attitudes and posturing by both parties that occur when disputes linger for years and when attorneys, either in-house or outside counsel, are actively involved in the dispute process.

The present findings confirm the perceived importance, among industry professionals, of third party assistance and procedural fairness in resolving complex construction disputes. At the same time, the survey results provide an extension of previous work on conflict management technologies. A DRB seeks to change the dynamics of the adversarial stance so that it is noncompetitive and nonexploitive while enhancing the participant’s belief in a collaborative problem-solving approach to problems that are an inherent part of every construction project. Having a DRB, with the parties committed to the process and its success, is the foundation for creating a project environment in which quality and productivity can enhance performance.

Also, numerous studies have demonstrated that disputants coming together on an equal basis (Amir 1969; Cook 1985) and working toward a common goal (Sherif et al. 1961; Worchel et al. 1977) is the most effective means of conflict resolution, because both parties believe they have equal power to influence decisions. The DRB process allows both parties to have equality. In addition, focusing on a common goal of resolving the dispute can divert attention away from the party’s differences and concentrate them on problem solving as their common interest. It also demonstrates the party’s commitment to the DRB process in resolving disputes.

Overall the results of this survey indicated that 87% of the participants had positive experiences utilizing DRBs and 100% of the participants agree that DRBs contribute to the success of a project. Clearly, a project’s well-being depends upon the parties’ approach to conflict and dispute resolution. An important goal of every construction project should be the early recognition and action on potential and/or actual conflicts before the parties are polarized in their positions. A process that allows for the evaluation of the full consequences and costs of a dispute may deter the parties from escalating the matter into a needless series of extensive, unsatisfactory occurrences. The DRB mechanism is such a process.

DRB indicates that the parties are creating a new mind-set in that the resolution of differences is designed to be a collaborative process and not to be sloughed off on others for binding decisions. The collaborative process is built on cooperation in reaching mutual goals and objectives as well as the efficient use of time and limited resources. Having a DRB as an aid to facilitating the dispute resolution process still leaves the final resolution of the dispute with those most interested in the outcome—the parties themselves. However, it also recognizes that the parties who are directly and emotionally involved in the dispute are “in the worst position” and least equipped (Augburger 1992, p. 5) to resolve the dispute on their own. The benefit of a DRB is that it seeks to create a contemporaneous win/win attitude absent from other dispute resolution methodologies.

Although preliminary, the results of this study indicate that the presence of a DRB can assist the parties in resolving conflicts before they escalate into costly disputes. The DRB process provides a forum that allows the maintenance of the relationship and cooperation between the parties while resolving disputes in a timely and equitable manner.

Finally, it is useful to outline several limitations to the present study. The most important of these revolves around the issue of generalizability. In particular, the sampling was limited to attendees of the Dispute Review Board Foundation annual meeting. It is difficult to determine whether the same findings would have emerged if participants had been from another construction industry sampling base. Fortunately, the present findings are consistent with the published opinions of industry experts, thereby lending some credence to the present conclusions. Another limitation is grounded in practical constraints that arise from the construction process itself. A direct comparison between two like projects, one with a DRB and one without, would not be possible because each project is unique, with its own set of plans, geological and environmental conditions, and different parties responsible for its successful completion. However, because the success of DRBs remains in the realm of opinion and experience, attempts to establish their effectiveness can usefully be implemented with a quantitative survey approach, such as that adopted in the current study. Nevertheless, encouraged by the promising findings of the current survey, and the positive perceptions of DRBs by industry professionals overall, alternative research strategies should be brought to bear to enrich our understanding of the relative costs and benefits of the process.

References


