

Better Process, Better Results: Integrating Mediation and Arbitration to Resolve Collective Bargaining Disputes

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Introduction

Just weeks before holiday travelers took to the skies in November 2016, Southwest Airlines pilots wrapped up four years of collective bargaining negotiations with a new collective bargaining agreement featuring two-digit pay increases and an enhanced retirement package.¹ The negotiations, which entered federal mediation two years earlier, concluded on a high note, with more than eighty-four percent of pilots approving the final proposal.² The journey to that point, including lengthy negotiations, three successive pilot negotiating committees, and a contract ratification failure,³ mirrors that of many major airlines, whose labor relations are governed by the Railway Labor Act (RLA) of 1926.⁴ Protracted collective bargaining, long typical of the airline and rail industries, now occurs throughout the private sector. In the past, threats of strikes served as powerful catalysts for stalled negotiations.⁵ In this age of diminished union density and a fast-growing,

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1. Andrea Ahles, *Southwest Pilots OK new contract*, L.A. TIMES, Nov. 8, 2016, at C2.

2. *Id.*

3. *See id.*

4. Railway Labor Act, 45 U.S.C. §§ 151–165, 181–188 (2012). The Act was extended to airline carriers in 1936. *Id.* § 181. Weeks after Southwest's announcement, Delta pilots approved a contract that featured an industry-leading pay raise and profit-sharing package following a ratification failure a year earlier. Susan Carey, *Majority of Delta Pilots Approve New Labor Contract*, WALL ST. J., Dec. 1, 2016, <http://www.wsj.com/articles/majority-of-delta-air-lines-pilots-approve-new-labor-contract-1480608883>.

5. Harold Meyerson, *If Labor Dies, What's Next?*, AM. PROSPECT, Sept. 13, 2012, <http://prospect.org/article/if-labor-dies-whats-next> ("The largest strike in American history came in 1959, amid the sleepy Eisenhower years, when 500,000 steelworkers stayed

global economy, labor strife threatens to permanently drive away business and jobs to an ever-expanding number of competitors.⁶ As a result, contract negotiations linger for longer periods while mounting frustration and economic turbulence raise the stakes of provisions related to pay, benefits, and working conditions.

Mindful of the economic and psychological toll exacted by unsettled contract disputes, labor and management in many industries are exploring creative alternatives to the traditional collective bargaining process. Increasingly, parties are turning to mediation-arbitration (med-arb), a hybrid dispute resolution process, to resolve collective bargaining disputes.⁷

Med-arb starts with mediation of a dispute by a third-party neutral who, in the event that no voluntary agreement is reached, renders a final and binding decision as the arbitrator.⁸ This process, which marries the adaptability of mediation with the finality of arbitration, serves as an efficient alternative for parties seeking productive negotiating relationships and a measure of control.

For more than twenty-five years, I have arbitrated and mediated several thousand cases in a variety of industries. I have also mediated several hundred collective bargaining disputes and have specialized experience in airline and railroad negotiations as a member of the National Mediation Board (NMB). Labor and management have recently expressed growing interest in med-arb. In the last few years, I have engaged in an increasing number of these cases. Parties may choose med-arb because it is quicker, costs less, provides more certain resolution, and is less formal than traditional collective bargaining and interest arbitration. The approach may offer special advantages for sectors in which self-help actions, including strikes and lockouts, are limited, prohibited, or unlikely.

Part I of this Article introduces med-arb as a hybrid dispute resolution process and discusses how med-arb commonly works. Part II presents med-arb in practice through the author's experience as a mediator-arbitrator in an airline industry case. This Part offers nu-

off the job for 116 days. It was through such expedients that workers compelled management to let them share in their company's proceeds.”)

6. See *id.* (“The weaker unions grew, the fewer their strikes. In the early 1950s, there were roughly 350 strikes in the United States every year. Over the past decade, there have been roughly 10 to 20 per year.”)

7. Karen L. Henry, *Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes*, 3 OHIO ST. J. ON DISP. RESOL. 385, 396 (1988) (“While [med-arb] has been used in a variety of arenas such as nursing, journalism, shipping, public utilities, saloons, teamsters, and education, its greatest success has been in resolving interest disputes . . . in fields where a strike is either statutorily proscribed . . . or where the parties cannot risk the cost of a strike . . .”).

8. John Kagel, *Med-Arb After 40: More Viable Than Ever*, in NAT'L ACAD. OF ARBITRATORS, A TALE OF TWO COUNTRIES, PROCEEDINGS OF THE SIXTY-SIXTH ANNUAL MEETING 241, 241 (Matthew M. Franckiewicz et al. eds., 2013).

merous lessons learned that may be applied beyond the airline industry to the public and private sectors generally.⁹ Part III explains the advantages of med-arb compared to traditional collective bargaining. Part IV describes med-arb's use beyond collective bargaining in the resolution of grievances arising during the contract term. The Article concludes by discussing med-arb's adaptability and urges parties to analyze their needs, goals, and circumstances on a case-by-case basis to determine the most appropriate dispute resolution tool.

I. Uses, Goals, and Phases of Med-Arb

Unions and management generally use med-arb to resolve two types of disputes: individual or group grievances (grievance med-arb) or disputes arising during collective bargaining negotiations (collective bargaining med-arb). Although the two types differ in subject matter, they share a similar process. This Article focuses primarily on med-arb as an alternative to traditional collective bargaining and interest arbitration. Part IV discusses med-arb's use in grievance resolution.

Med-arb offers a unique approach to interest arbitration by affording parties maximum control over bargaining while ensuring timely and final agreements without strikes or shutdowns.¹⁰ In med-arb, a single neutral serves a dual role as both mediator and arbitrator.¹¹ The neutral begins as a mediator and, if unable to achieve full agreement, assumes the role of an arbitrator, empowered to render a final and binding decision on all issues.¹²

The parties must agree to use med-arb and actively participate in the process, ideally reaching consensual resolution before binding arbitration becomes necessary.¹³ The goal of the process is to secure “[a] final and binding result the parties themselves would have reached had they been able to resolve their dispute without the intervention of a third party.”¹⁴ Thus, the neutral acts in the *parties'* interests to the maximum extent possible and does not impose independent decisions upon them.¹⁵

Med-arb enables parties to resolve collective bargaining disputes within a set period and at reduced cost by averting the need to engage

9. See, e.g., John T. Blankenship, *Med-Arb: A Template for Adaptive ADR* 15, <http://blankenshiplawoffice.com/newhome/wp-content/uploads/2012/08/MEDARBhome1.pdf> (last visited Feb. 2, 2017) (citing 1997 survey of Fortune 1,000 corporations in which forty percent reported having engaged in med-arb).

10. Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 157, 159 (2015) (med-arb offers both finality and flexibility).

11. Kagel, *supra* note 8, at 241.

12. *Id.*

13. *Id.* at 241–42.

14. *Id.* at 244 (emphasis omitted).

15. *Id.* at 241–47.

separate neutrals regarding the same issues.¹⁶ The streamlined approach's benefits are especially pronounced if parties can resolve some, but not all, issues during mediation.¹⁷

Before med-arb commences, the parties meet and agree to the process: the time frame, schedule, and order of subjects for each phase; the selection of the mediator-arbitrator; the number of issues to be considered in each phase; and the use of subject matter experts, among other elements. A protocol agreement reflects the parties' engagement and commitment, which facilitates an efficient and productive process.¹⁸ This contrasts with the traditional process, in which various factors may be beyond the parties' control.¹⁹

A. *Mediation Phase*

In traditional mediation, a third-party neutral facilitates negotiations to help parties resolve disputes.²⁰ "[T]he third party's function is to clarify the issues, appeal to the parties' reasoning processes by using the arts of persuasion, and (when specifically authorized by the parties) make recommendations to them."²¹ The mediator may also help sequence and group issues for discussion and call for sessions with experts or leaders.

Importantly, mediators lack authority to impose solutions upon the parties, who ultimately determine for themselves how to resolve substantive issues.²² In med-arb, the mediator proceeds similarly, but potentially possesses arbitral authority.²³ The neutral derives power from the potential to act as the ultimate decider of any remaining issues and must carefully calibrate whether and when to use such influence.²⁴

The first stage of med-arb closely resembles traditional mediation. Each party meets and communicates separately with the mediator, who clarifies the facts and issues and probes the parties to determine their real interests and thoughts on how to resolve the disputes at hand.²⁵ Next, the parties meet jointly with the mediator who tries to

16. Joe Tirado, *Binding Mediation: A New Form of Amiable Composition*, 9:3 N.Y. DISP. RESOL. LAW., Fall 2016, at 44.

17. *Id.*

18. See Richard Fullerton, *Med-Arb and Its Variants: Ethical Issues for Parties and Neutrals*, 65 DISP. RESOL. J., May/Oct. 2010, at 53, 55.

19. *Id.* at 56–57.

20. WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 139 (4th ed. 2004).

21. *Id.* at 140.

22. *Id.* at 139.

23. Kagel, *supra* note 8, at 241.

24. *Id.* (citing Sam Kagel & John Kagel, *Using Two New Arbitration Techniques*, 95 MONTHLY LAB. REV. 11, 12 (1972)).

25. Fullerton, *supra* note 18, at 55 ("Mediators often meet separately with each party to explore facts and beliefs that could affect the outcome of mediation . . .").

develop common understandings and explore options for resolution. Finally, the mediator secures a final written agreement.²⁶

The mediator's success depends on identifying the *parties'* needs and wants, not simply those that the neutral might deem desirable or wise.²⁷ Consistent with this role, in the opening mediation phase of med-arb, neutrals should be reluctant to use the power they may ultimately assume as arbitrators.

B. "Muscular" Mediation

Despite a skilled mediator's assistance, parties may find themselves at loggerheads or in negotiations that do not progress. At this juncture, the mediator-arbitrator may exercise the clout afforded by the dual role and offer an opinion on how issues may be resolved.²⁸ When the parties flail, drift, or get stuck on a seemingly irresolvable issue, the neutral's authority to be an interest arbitrator can be a useful catalyst.²⁹ However, "the line between appropriate pressure to settle and inappropriate coercion" remains imprecise.³⁰ Parties have a right to make "free and informed choices as to process and outcome" in dispute resolution.³¹ Neutrals must be sensitive to the parties' desires and proceed cautiously in exercising arbitral authority to ensure they do not interfere with the parties' right to self-determination.³²

C. Arbitration Phase

While mediation offers parties exclusive control over the outcome, traditional arbitration delegates this role to a third party with final decision-making authority.³³ Arbitration involves a more formal adjudicative process, including the presentation of evidence, hearing of witnesses, and reliance upon relevant standards and principles.³⁴

26. *Id.* at 56 (if agreement is reached, med-arb is terminated; if no agreement, med-arb commences).

27. *Id.* at 54–55.

28. Christopher Honeyman, *Hybrid Processes*, BEYOND INTRACTABILITY (July 2003), <http://www.beyondintractability.org/essay/hybrid-roles> (In med-arb, a neutral's "pressure can take the form of an implied threat of an adverse decision if one party is seen as being 'unreasonable.'").

29. *Id.*

30. Blankenship, *supra* note 9, at 25.

31. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I.A (AM. ARBITRATION ASS'N ET AL. 2005).

32. *Id.* at Standard I.B.

33. GOULD, *supra* note 20, at 141. Parties may limit an arbitrator's authority by agreement. Notably, even in cases in which a party feels the arbitrator has overstepped the neutral's limited authority, courts are very hesitant to overturn the decision. *See, e.g.*, Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2000) (quoting E. Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000)) ("[I]f an 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'").

34. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 7-18, 7-25 to 7-29, 8-3, 8-7 to 8-55 (Kenneth May ed., 7th ed. 2012). Arbitrators may decide like matters distinctly, but "will

In traditional cases, arbitrators decide matters based on the record before them, which may reflect technical issues and not necessarily reflect each parties' underlying needs and concerns.³⁵ Seeking to avoid *ex parte* communications, arbitrators virtually never meet or communicate separately with a party; rather, the parties meet jointly so both sides can hear and rebut each other's arguments.³⁶

By contrast in med-arb, the parties' priorities are better reflected in any subsequent arbitration³⁷ because the mediator has become familiar with the parties' real concerns and the direction of negotiations on those issues during the mediation phase.³⁸ The neutral's intimate understanding narrows the focus to permit more expedited adjudication than would be available in ordinary interest arbitration.³⁹ Thus, parties may submit shorter briefs and oral arguments because many of the underlying facts and positions have already been developed and understood by the neutral during mediation.⁴⁰ This abbreviated review is a distinct advantage over ordinary independent arbitration that is often expensive and time consuming.⁴¹

D. Ethical Considerations for the Med-Arb Process

Identifying appropriate ethical standards for mediator-arbitrators requires a unique blend of the separate ethical models for mediators and for arbitrators.⁴² Model ethical rules for mediators demand strict confidentiality.⁴³ Mediators become privy to contract subjects and terms, as well as more personal confidences (such as the parties' poten-

often adhere to the 'law of the shop' in the form of past practices, settlements, or arbitration awards." GOULD, *supra* note 20, at 145.

35. See *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) ("[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.").

36. See CODE OF PROF'L RESPONSIBILITY FOR ARBITRATORS OF LABOR-MGMT. DISPUTES § 2(D)(1)(a)-(b) (NAT'L ACAD. OF ARBITRATORS ET AL. 2007). In more formal arbitrations, "[t]he arbitrator should . . . have no contact of consequence with representatives of either party while handling a case without the other party's presence or consent." *Id.* § 2(D)(1)(a); see also Honeyman, *supra* note 28.

37. Daniel Ish, Commentary, *Mediating Grievances*, NAT'L ACAD. OF ARB. PROC. 96, 102 (1993).

38. *Id.*

39. See Blankenship, *supra* note 9, at 18. Parties may choose to limit the arbitrator's use of confidences from mediation out of concern about bias. *Id.* at 22-23. In such cases, the arbitrator will still possess familiarity with the basic issues and positions of the parties that may speed resolution of disputes. *Id.*

40. See *id.* at 18.

41. See Pappas, *supra* note 10, at 168.

42. Fullerton, *supra* note 18, at 56 ("The med-arb process has no governing ethical code of its own. For ethical guidance one must look to the Mediator Standards and the Arbitration Code.").

43. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard V (AM. ARBITRATION ASS'N ET AL. 2005).

tial areas of concession), that may not be shared with the public or other parties.⁴⁴ Med-arb potentially brings these confidences within the purview of the arbitrator, who traditionally would not possess private knowledge of this kind and would instead decide the matter on the record alone.⁴⁵ A neutral's prior understanding of the parties' confidences and positions creates potential for mediation to "taint" the process, as well as the ultimate outcome in arbitration.⁴⁶

Parties typically address potential for mediator-arbitrator bias in three distinct ways. First, parties may ask an arbitrator to ignore confidences made during mediation.⁴⁷ In traditional arbitration, if a party offers irrelevant or objectionable evidence during a formal hearing, it may be excluded. Confidences received during mediation may be similarly ignored by skilled arbitrators.⁴⁸

Second, parties may instead permit the neutral to use confidential information learned in mediation during the arbitration. This approach eliminates much of arbitration's stilted and carefully crafted advocacy and instead focuses on the parties' real underlying interests. It also enhances med-arb's central benefit—finding a result that the parties would have reached had they been able to do so on their own.⁴⁹ The combined med-arb process, using all available information, delivers the benefits of speed, informality, and lower cost.⁵⁰ On the other hand, if the parties know that the mediator will use information learned in mediation in the arbitration, they may be reluctant to share their true concerns and priorities in mediation. For example, they may not think it strategic to reveal areas in which they are willing to make concessions.

44. See Fullerton, *supra* note 18, at 55 (discussing mediator reliance on confidential information).

45. *Id.* See *Textile Workers Union of Am. v. Am. Thread Co.*, 291 F.2d 894, 901 (4th Cir. 1961) (affirming denial of union's enforcement request because arbitrator went outside record and based decision on findings from different arbitration proceeding). See also ELKOURI & ELKOURI, *supra* note 34, at 4-14 ("[O]ften disclosures will be made by a party in the course of mediation that would not be made to the neutral functioning solely as arbitrator.").

46. It is accepted practice in arbitration that "any offer made by either party during the course of conciliation [mediation] cannot prejudice that party's case when the case comes to arbitration. It is the very essence of conciliation that compromise proposals will go further than a party may consider itself bound to go, on a strict interpretation of its rights." *Fulton-Sylphon Co.*, 8 LA 993, 996 (Greene 1947), *quoted in* ELKOURI & ELKOURI, *supra* note 34, at 932; see also Ish, *supra* note 37, at 102.

47. Pappas, *supra* note 10, at 177.

48. Claude Thomson & Annie Finn, *Mediation-Arbitration: A Contentious but Often Effective Compromise*, LAW WKLY., Sept. 15, 2006. *But see* Pappas, *supra* note 10, at 177-78 ("The weight of psychological evidence suggests people have great difficulty deliberately disregarding information.").

49. Kagel, *supra* note 8, at 244.

50. See generally Blankenship, *supra* note 9, at 16-21 (discussing advantages of med-arb).

Third, parties sufficiently concerned about the use of confidential information may select different neutrals to serve as the mediator and the interest arbitrator.⁵¹ The two neutrals may proceed independently or “overlap,” with the arbitrator present for all but the parties’ individual meetings with the mediator.⁵² Naturally, by using a separate arbitrator the mediator no longer enjoys the influence inherent when serving dual roles. In addition to increased time and expense, separate roles limit the arbitrator’s awareness of the parties’ underlying interests that might have led to a resolution more consistent with their true concerns.

Parties must determine the mediator-arbitrator’s role in light of their dispute’s unique circumstances. By clarifying whether, and to what extent, the arbitrator may use confidential information obtained during mediation, parties can assess the benefits and risks of each approach and choose the process that best fits their needs.⁵³ Alternatively, the parties may intentionally not resolve the issue and allow the neutral to exercise judgment about whether some information gained in mediation may be employed to reach a reasonable and fair resolution.⁵⁴

E. Selection of the Mediator-Arbitrator

Selecting the right mediator-arbitrator is of paramount importance. A mediator-arbitrator should be knowledgeable about the relevant industry’s labor relations and trusted as a neutral by both sides.⁵⁵ Even a mediator-arbitrator with deep knowledge of an issue should not dictate the issue’s outcome on the basis of that insight. Instead, the mediator-arbitrator’s expertise can accelerate understanding of the parties’ issues, and in turn, the negotiating process.

The neutral should act modestly and refrain from exerting excessive influence in mediation (intentionally or not) that can arise from the parties’ perception of the neutral as the ultimate decider.⁵⁶ In

51. Fullerton, *supra* note 18, at 57.

52. *Id.*

53. *See id.* at 60 (“With informed consent, those who freely choose med-arb for its expediency over principle assume the risk of demonstrated flaws that may affect their specific case.”); Honeyman, *supra* note 28 (knowledge of the risks of shared neutral roles enables parties “to make creative uses of available neutral talents”).

54. *See* Blankenship, *supra* note 9, at 23 (“[P]arties to med-arb are free to fashion the process as they see fit and they can implement specific procedures or safeguards to deal with the confidentiality issues [T]his issue ultimately rests with the competence of the neutral and the trust the parties place in him or her.”).

55. *See* Martin C. Weisman, *Med-Arb: The Best of Both Worlds*, DISP. RES. MAG. 40, 41 (Spring 2013) (“The neutral’s personality, substantive expertise and experience all play significant roles in creating and promoting [the] trust” required for med-arb.).

56. *See* John E. Sands, *Mediation During Arbitration Part II: Should Arbitrators Mediate? Yes, No, and Maybe*, NAT’L ACAD. OF ARB. PROC. 306, 308–09 (2012) (discussing considerations for med-arb neutrals).

the arbitration phase, the neutral should remain sensitive to knowledge about the parties' inclinations gained in mediation.⁵⁷

II. Med-Arb in Practice

Med-arb offers a vibrant alternative for parties seeking to expedite and improve traditional collective bargaining.⁵⁸ It may prove particularly attractive in industries in which self-help is restricted or undesirable.⁵⁹ This Part presents an example of med-arb based on my experience in the airline sector, with the understanding that the process may be similarly applied in other industries and sectors, including those governed by the National Labor Relations Act (NLRA) and state labor laws. Naturally, mediation proceedings and deliberations require strict confidentiality.⁶⁰ The parties mentioned here—Compass Airlines and the Air Line Pilots Association, International (ALPA)—reviewed this Article prior to publication and approved discussions of my role as mediator-arbitrator as well as the content and form of their bargaining.⁶¹

A. *Traditional Collective Bargaining under the Railway Labor Act*

Drafted in an age of violent and frequent strikes,⁶² the Railway Labor Act seeks to neutralize relations in the transportation sector by extending to airline and railroad employees the rights of representation and collective bargaining and to management the promise of fewer strikes by delaying use of “self-help” measures.⁶³ The RLA directs parties “to exert every reasonable effort to make and maintain agreements” and prioritizes the avoidance of strikes through peaceful settlements.⁶⁴

57. Kagel, *supra* note 8, at 244.

58. Blankenship, *supra* note 9, at 14 (“In the labor arena, med-arb has apparently found its greatest success in resolving interest disputes (contract negotiation disputes) in fields where a strike is either prohibited or prohibitive.”).

59. *Id.*

60. *SEE MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard V (AM. ARBITRATION ASS'N ET AL. 2005)* (“A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.”).

61. Discussion on file with author.

62. Mark A. Schuler, *The Railway Labor Act of 1926 and Modern-Day Airline Labor Strife: Progress Toward Labor Peace Begins with Overruling Williams v. Jacksonville Terminal Co.*, 21 SEATTLE L. REV. 190, 191–92 (1997).

63. *Id.* at 192; *see* Railway Labor Act of 1926, amended by Act of June 21, 1934, ch. 691, 48 Stat. 1185, 1186 (1934) (current version at 45 U.S.C. § 151a (2012)). The Act was amended in 1936 to include the expanding airline industry. 45 U.S.C. § 181 (2012).

64. 45 U.S.C. § 152, First (2012). This requirement is analogous to the National Labor Relations Act's duty to bargain in good faith. *Id.* § 151(a) (seeking to “avoid any interruption” in commerce and operation as well as “prompt and orderly settlement of all disputes”).

Collective bargaining agreements (CBAs) in the railroad and airline industries remain in force indefinitely, but are typically subject to renegotiation on a specified “amendable date,” typically every three to five years.⁶⁵ Collective bargaining begins with direct negotiations between the parties, which may endure for months, years, or indefinitely.⁶⁶ In direct negotiations, negotiating teams representing management and unions bargain face-to-face without the facilitation of a neutral. During that time, parties frequently engage in “positional bargaining”—presenting opposing positions at the outset, pressing for these positions during negotiations, and ideally achieving an agreement through compromise.⁶⁷

If negotiations fail to progress, one or both parties may apply for mediation assistance from the NMB, an independent federal agency charged with administering sections of the RLA.⁶⁸ The NMB uses its “best efforts” through mediation to resolve disputes arising from “changes in rates of pay, rules, or working conditions.”⁶⁹

If parties fail to reach an agreement or reach impasse in mediation, the NMB may propose voluntary but binding interest arbitration.⁷⁰ Both parties must consent to arbitration for the offer to be deemed accepted.⁷¹ The RLA permits flexibility in the conduct of arbitration, but requires, at a minimum, that parties be provided “a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person.”⁷² The RLA permits parties and the arbitrator to determine how, and by what standards, arbitration decisions will be made.⁷³

In practice, arbitration is seldom used in collective bargaining disputes under the RLA because labor and management are reluctant, particularly after lengthy negotiations, to relinquish control over the

65. Andrew von Nordenflycht & Thomas A. Kochan, *Labor Contract Negotiations in the Airline Industry*, MONTHLY LAB. REV. 18, 19 (July 2003).

66. *Id.* at 22–23.

67. *Gen. Bldg. Contractors Ass’n v. Pa.*, 458 U. S. 375, 394 (1982) (quoting *NLRB v. Ins. Agents*, 361 U. S. 477, 488 (1960)) (“The entire process of collective bargaining is structured and regulated on the assumption that ‘[t]he parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.”); Gary Goodpaster, *Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 370 (1996).

68. 45 U.S.C. § 154–55 (2012). The NMB may also intervene of its own accord in a dispute and require mediation in cases where negotiations have reached an impasse.

69. 45 U.S.C. § 155, First. The NMB may also become involved in matters falling beyond the jurisdiction of the National Railroad Adjustment Board and system boards of adjustment. *Id.*

70. *Id.*

71. *Id.*

72. 45 U.S.C. § 157, Third (b).

73. Harry A. Risetto, *Conducting Interest Arbitration in the Airline Industry, Industry Specific Arbitration Issues: The Airline Industry*, in NAT’L ACAD. OF ARBITRATORS, WORKPLACE ARBITRATION: A PROCESS IN EVOLUTION, PROCEEDINGS OF THE FIFTY-EIGHTH ANNUAL MEETING 146, 151 (Charles J. Coleman ed., 2002).

content of their CBAs to third parties unaffected by the outcome.⁷⁴ Indeed, airline parties used voluntary arbitration in only 3.5% of contract negotiations from 1982 to 2002.⁷⁵

If either party refuses the NMB's offer of interest arbitration, the agency may issue a notice releasing the parties from mediation. This triggers a thirty-day "cooling off" period, during which the parties may not change their behavior or the contract's terms.⁷⁶ Thereafter, the parties may engage in "self-help," including strikes, lockouts, or unilateral implementation of new contract terms.⁷⁷

Alternatively, the NMB may recommend the creation of a Presidential Emergency Board (PEB) following any failed mediation that "threaten[s] substantially to interrupt interstate commerce" and to deprive a region of "essential transportation service."⁷⁸ PEBs seek to resolve the parties' disputes and preserve the status quo for sixty days, after which the parties may use self-help.⁷⁹ While the RLA envisions PEBs as the end of the statutory process, Congress may, of its own volition, become involved in settling a dispute.⁸⁰

B. *Med-Arb: An Alternative to Interest Arbitration*

In both the airline and railroad industries, the RLA bargaining process tends to take years and may require significant government intervention.⁸¹ The Supreme Court has characterized the process as "almost interminable."⁸² The NMB has virtually unreviewable discretionary authority to release parties to self-help, but it hesitates to do so in light of the powerful economic impact of shutdowns in the transportation sector.⁸³ A shutdown of freight railroads, which negotiate as a multi-employer group, would immediately affect a variety of industries, including agriculture, construction, manufacturing, mining, and

74. von Nordenflycht, *supra* note 65, at 22.

75. *Id.*

76. 45 U.S.C. § 155, First (b) (2012).

77. *Pan Am. World Airways, Inc. v. Int'l Bhd. of Teamsters, Local 732*, 894 F.2d 36, 38 (2d Cir. 1990).

78. 45 U.S.C. § 160 (2012).

79. *Id.*

80. *Frequently Asked Questions: Mediation*, at no. 28, NAT'L MEDIATION BD., <http://www.nmb.gov/services/mediation/frequently-asked-questions-mediation/>; von Nordenflycht, *supra* note 65, at 19 (Once cooling-off periods have expired, "the President can refer the case to Congress, requesting that body to legislate a settlement.").

81. *Bhd. of Ry. & Steamship Clerks, ALF-CIO v. Fla. E. Coast Ry. Co.*, 384 U.S. 238, 246 (1966); *see* 45 U.S.C. §§ 156–59 (2012).

82. *Detroit, Toledo & St. Louis R.R. Co. v. United Transp. Union*, 396 U.S. 142, 149 (1969).

83. *See Bldg. Maintenance, Serv. & R.R. Workers, Local 808 v. Nat'l Mediation Bd.*, 888 F.2d 1428, 1430, 1433 (D.C. Cir. 1991) (The scope of review of Board decisions—including determining whether the NMB acted outside of its authority in refusing to release a party from mediation—"is one of the narrowest known to the law.").

energy.⁸⁴ A shutdown of one of the four major airlines would immediately disrupt business and vacation travel for approximately 300,000 people per day and devastate business and hospitality sectors.⁸⁵

The NMB's reluctance to release parties to self-help has compelled RLA unions and management to explore more efficient and predictable bargaining models. Med-arb provides an alternative to traditional interest arbitration under the RLA, enabling parties to preserve more control over the bargaining process on a known and accelerated timeline.

1. Med-Arb in the Airline Industry: Compass Airlines/Air Line Pilots Association

Compass Airlines arose from the 2005 bankruptcy of Northwest Airlines. A 2006 letter of agreement (LOA) between Northwest and ALPA created a new regional carrier to serve Delta flights in Minneapolis and Detroit. The LOA also specified med-arb to establish an initial CBA.

The LOA's schedule mandated an expedited negotiation process, including about four months (120 days) of direct negotiations, one month (thirty days) of mediation, and finally, arbitration of up to ten issues. The parties reached agreement on most issues within six months. Based on that success, the parties voluntarily agreed to use med-arb for their 2012–2013 CBA negotiations. I served as the mediator-arbitrator for these second-round negotiations.

This time, the parties' schedule specified six months of direct negotiations, three months of mediation, and two months for preparation and presentation of the interest arbitration case. In total, the LOA allowed eleven months to arrive at an agreement—a very short period for NMB airline flight crew negotiations, which average approximately three years at the NMB. The parties limited the arbitration to twenty issues each.⁸⁶ Significantly, the parties determined the arbitrator should decide any remaining issues through a “regional carrier standard,” that is, by “selecting the proposal that more closely conforms to” that of similar carriers operating similar aircraft.⁸⁷

84. See John H. Cushman, Jr., *Most of Rail Network Shuts Down in Response to Strike at One Line*, N.Y. TIMES (June 25, 1992), <http://www.nytimes.com/1992/06/25/us/most-of-rail-network-shuts-down-in-response-to-strike-at-one-line.html>.

85. Press Release, U.S. Dep't of Transp., Bureau of Transp. Statistics, 2015 U.S.-Based Airline Traffic Data (Mar. 24, 2016), https://www.rita.dot.gov/bts/press_releases/bts018_16.

86. Pilots' Agreement, Compass Airlines, LLC & Airline Pilots Ass'n Int'l, July 26, 2007, at LOA 2007-01 (on file with author).

87. *Id.* at 1–2 (arbitrator's jurisdiction defined as “[s]ubject to the provisions of this paragraph K., as to each open issue on which the Company and ALPA do not reach agreement through direct negotiations or mediation (limited to twenty (20) issues per party), the Neutral shall decide the issue by selecting the proposal that more closely conforms to the regional carrier industry standard for carriers operating the same or similar aircraft or by fashioning a determination that in his/her judgment conforms to the regional carrier industry standard for carriers operating the same or similar aircraft”).

The process began slowly because the parties sought to address multiple issues simultaneously. They met for only eighteen days of the six months set aside for direct negotiations, discussing and resolving few issues. Then, during the subsequent ninety-day mediation period, the parties resolved nearly all of their issues. In fact, the parties extended the mediation into part of the two-month period set for interest arbitration to resolve remaining issues. Only seven issues remained for interest arbitration, and, by the end, the parties drew extremely close on those issues.

A. MEDIATION PHASE

Mediation commenced with an eye toward jumpstarting negotiations. Two parameters provided focus and baselines to guide and streamline the med-arb process. First, we identified similar carriers (comparators) in the regional industry whose contract provisions we would use as the industry standards for proposals under consideration.

Second, we generally defined the scope of the term “issue” so the parties could ascertain which kinds of disputed provisions could be submitted to the arbitrator for final decision. For example, the parties questioned whether the entire health insurance section was one issue or instead whether narrower aspects of health insurance constituted one issue (e.g., individual versus family premium rates, co-pays, out-of-pocket maximums). The parties determined that an issue was to be found somewhere in between: not a whole contract section, but not necessarily a single, isolated provision. Rather, an item or items with a strong interrelationship might be negotiated together. The parties did not create a more precise description because the conclusion depended on the subject matter and on common understandings between negotiators—something akin to “I will know it when I see it.”

These discussions, far from semantic exercises, enabled the parties to prioritize matters for discussion and develop realistic expectations of what negotiations could accomplish. Once mediation began, the parties engaged in creative problem-solving, frequently departing from practices of comparator airlines to consider their unique circumstances and needs.

We generally met twice a month. Between sessions, the parties worked on new sections, developed proposals, and crafted “what if”-style contingent proposals. As the mediator, I regularly sent summaries detailing accomplishments of the previous session and highlighting remaining issues. My communications also gave the parties specific assignments for upcoming sessions. Simultaneously, a joint labor-management drafting committee worked to craft contract language for issues on which the parties had agreed. Subject matter experts worked in joint committees on technical areas, such as retire-

ment and insurance, but refrained from exchanging proposals between negotiating sessions.

B. ARBITRATION PHASE AND FUTURE DISPUTES

During the arbitration phase, the parties each presented twenty issues in a joint session. Over several days, they jointly worked out numerous trade-offs and compromises to obtain resolutions. Seven issues remained for the neutral to resolve. Evidencing the parties' collaborative spirits, they outlined shared priorities on the remaining issues to ensure that my ultimate decision was consistent with their tacit agreement. This facilitated achieving med-arb's objective—to secure “[a] final and binding result the parties themselves would have reached had they been able to resolve their dispute without the intervention of a third party.”⁸⁸ Satisfied with the process, both sides agreed to med-arb for their 2018 bargaining.

2. Lessons Learned

The Compass/ALPA med-arb experience offers several lessons for other parties seeking to reinvigorate their own collective bargaining processes. Flexibility in both the processes and the parties' expectations proved essential to the resolution of complex bargaining issues. The mediator-arbitrator's shifting role—at times facilitating discussions, nudging action, and suggesting solutions authoritatively—compelled the parties forward without resorting to costly, high-risk self-help.

While nuances of individual negotiations and participants vary, the considerations that follow may be useful in any med-arb process.

Embrace new perspectives. Med-arb gave the parties greater confidence that they would reach a deal, motivating them to work hard toward consensus. Compared to traditional negotiations and mediation, the parties' commitment to a new process energized them and promoted a more collaborative spirit.

Identify and Address Major Issues Early. The Compass/ALPA negotiations illustrate the efficiency of clarifying issues, definitions, and scope for the entire process at the outset. For example, by identifying the comparator airlines early, both Compass and ALPA understood the economic contours of the prospective agreement when mediation commenced. By reversing the order of the subjects to be addressed—placing factors affecting economics first—the parties understood the economic contours of the deal and could focus on the details in negotiations. This approach models that employed in nearly all commercial transactions.

Limit Issues for Arbitration. Dispute resolution was accelerated by limiting the number of issues that could be arbitrated. By permitting only a few issues to reach that end stage, the parties narrowed

88. Kagel, *supra* note 8, at 244.

their focus in mediation. Efficient and timely resolution promotes good will among the parties and, importantly, sidesteps potential changes in economics, staffing, and expectations that routinely undermine negotiations of extended duration.

Limit the Duration of Med-Arb. Negotiated airline CBAs frequently meet with failed union ratification votes. This may result from the inordinate duration of the bargaining process. Constituent expectations rise and frustration grows as negotiations continue. Bargaining unit members grow disenchanted with the lack of progress, and management becomes anxious about its ongoing devotion of resources to an uncertain end. A med-arb process that addresses major issues early and concludes negotiations within a year minimizes the likelihood of devastating contract rejections.

Designating a limited period for concluding the med-arb process likewise minimizes the effect of market and personnel changes inevitable in a dynamic economy. During the three years typical of airline industry negotiations, for example, economic changes and competition often cause parties to shift their assumptions and positions at the bargaining table—a significant impediment to progress.⁸⁹ Changes to the players in collective bargaining (including members of negotiating committees, officials on master executive councils, and even management representatives) compound delay.⁹⁰ New players may be unfamiliar with the subtle trade-offs of prior bargaining, and it takes time to rebuild the trust necessary for effective problem-solving. With a known end date for mediation and arbitration, parties can prioritize issues for discussion and obtain greater predictability amid an ever-shifting playing field.

Stay Flexible. Although a general idea of how and when to use mediation and arbitration existed at the start of the Compass/ALPA process, the parties ultimately used these tools in less predictable ways. Mediation was the steady oar.⁹¹ I acted as arbitrator only when necessary, for example, to give verbal input to both sides on how I would decide certain key issues. In other circumstances, different timing and uses of both mediation and arbitration might be appropriate. A plan is helpful, but flexibility is essential. Collective bargaining is a dynamic process. The dispute resolution process should flexibly reflect this dynamism.

89. von Nordenflycht, *supra* note 65, at 25 (“[A]necdotal evidence from the industry suggests that negotiations become particularly difficult—and hence lengthy—if the economic conditions facing the bargaining parties change significantly once bargaining has started.”).

90. See Blankenship, *supra* note 9, at 18.

91. Henry, *supra* note 7, at 397 (“Negotiation, not adjudication, is the cornerstone of med-arb when used as a substitute for interest arbitration.”).

Do Not Be Afraid to Nudge. The parties occasionally felt that they were at impasse or grew seriously discouraged. At such turns, I embraced the arbitration authority of med-arb and suggested a path to agreement. The parties assumed control from there. Modeling a viable alternative brought the parties back to a constructive give-and-take each time. By contrast, in traditional mediation, a mediator lacks decision-making authority, and the suggestion of alternative resolutions risks the appearance of bias or endorsement of a particular position.⁹² Mediators necessarily self-censor and hold back in this context, and matters remain unresolved. In med-arb, use of the arbitrator role offers potential resolution of key issues.⁹³ The parties' frustration gives way, and there may be a greater willingness to embrace suggestions from a neutral with authority.⁹⁴

Reassure Parties and Accelerate the Process. Parties typically move incrementally as they test each other's depth of commitment to a position, but they often react without full information. Decisions are predictably less informed at the end of negotiations when commitment on big issues is necessary. Parties regretfully leave value on the table. As an alternative, the arbitrator might speak with each party and arrive at a suggested approach. This can reassure the parties and alleviate doubts that might otherwise prevent agreement.

Use the "Arbitrator Made Me Do It" Card. In traditional mediation, the power of persuasion frequently proves insufficient to overcome the parties' risk avoidance. With final and binding authority as an arbitrator, the mediator-arbitrator may make suggestions that move parties from recalcitrance to action.⁹⁵ "The arbitrator made me do it" rings a more convincing tone than "the mediator made me do it."⁹⁶ Although some may think that recommendations alone are impotent, the greater structure and formality of the process establishes a narrower range for settlement that positively affects negotiating dynamics.

III. Comparison of Med-Arb and Traditional Bargaining

Parties engage in traditional interest bargaining in anticipation of a contract's creation or amendment. Their process is often guided by terms and timelines set forth in a CBA. Management and unions exchange and press for desired contract terms, relying on information

92. See Kagel, *supra* note 8, at 242.

93. *Id.* at 244–45.

94. *Id.* at 245 (parties listen more attentively to mediator-arbitrators than traditional mediators, in part, for clues of the ultimate outcome).

95. *Id.*

96. Honeyman, *supra* note 28 (noting that med-arb suggestions "carry more weight than those of a 'pure mediator,' . . . because the mediator-arbitrator may have the final decision if the case is unresolved").

about personalities and positions from prior negotiations. Parties engage in a delicate dance of interests, compromises, and risks that may endure indefinitely. In its ideal form, traditional bargaining unites parties who approach negotiations in good faith with a shared desire for efficiency, fairness, and resolution.⁹⁷ Often, however, the uncertain duration and outcome of traditional bargaining breed discontent because deeply felt needs and desires remain unmet.

Despite these difficulties, some parties prefer traditional bargaining to alternative procedures for two reasons. First, the traditional process allows at least a *threat of self-help* (i.e., a strike or lockout) at its conclusion. The parties or their constituents might believe they can use this as leverage in negotiations, and, consequently, will be reluctant to relinquish this “ace up their sleeve.”⁹⁸ Second, both unions and management hesitate to cede final authority over a contract to any individual, perhaps especially to a neutral third party with no stake in the outcome.⁹⁹ Management resists transferring control over major financial and operational decisions to an arbitrator, and unions, in turn, resist giving up the right to self-help and its perceived leverage. Union members may be understandably reluctant to relinquish the most important power in the bargaining process—their ratification vote.

Med-arb, by comparison, offers a quicker and less volatile process, compelling parties to work, not through threats of delay and inaction, but with the promise of progress and finality.¹⁰⁰ Parties in med-arb develop and agree to the process themselves, including a mutually desirable time frame for concluding a final agreement.¹⁰¹ Consequently, parties strongly influence the outcome.

Typically, med-arb begins with mediation and concludes with arbitration of a limited number of remaining issues. Because the parties know not all issues may reach arbitration, they must prioritize concerns and assume responsibility for resolving most bargaining issues in mediation. This commitment and structure may streamline and speed negotiations, potentially avoiding the changes in negotiating participants, the economy, and industry competition that frequently

97. GOULD, *supra* note 20, at 113 (“Good faith bargaining is an attempt to consummate an agreement.”).

98. Henry, *supra* note 7, at 391 (“[S]trikes and lockouts have traditionally been the most effective albeit drastic means of promoting each parties’ bargaining position.”). Successful med-arb requires parties to forgo rights to self-help to ensure their ongoing commitment to bargaining. *See id.* at 396.

99. *See* Rissetto, *supra* note 73, at 147 (“When management and labor discuss or confront interest arbitration, everyone is uncomfortable. Collective bargaining has failed to result in an agreement, and some third person may be asked to complete the task.”).

100. Blankenship, *supra* note 9, at 21.

101. *See* Fullerton, *supra* note 18, at 56.

occur during multi-year bargaining.¹⁰² Improved communications and effective problem-solving methods can maximize each party's goals and nourish a more constructive relationship in the contract period that follows.¹⁰³ As an additional benefit, the process typically proves less costly than traditional bargaining because of defined and speedier mediation and arbitration periods and reduced expenses for planning, negotiating, and travel.¹⁰⁴

Perhaps most importantly, med-arb secures a definite agreement without resort to strikes, lockouts, or other uncertainty.¹⁰⁵ This avoids much-feared disruptive economic impacts and potentially minimizes tension, threats, and posturing—typical, and perhaps necessary, means of leverage in traditional bargaining. Because med-arb typically ends in arbitration, ratification votes by bargaining unit members are seldom necessary.¹⁰⁶ With confidence that an agreement will not meet rejection in a ratification vote and that negotiations will not be interminable, management and unions can make genuine and meaningful offers.¹⁰⁷

IV. Med-Arb of Grievances

Med-arb may be used beyond collective bargaining to resolve grievances that arise during the contract term.¹⁰⁸ Virtually all private sector CBAs provide for resolving contract interpretation and application disputes in a multi-step grievance process, usually culminating in arbitration.¹⁰⁹ Few CBAs, however, provide for med-arb of grievances.¹¹⁰ It is

102. See Blankenship, *supra* note 9, at 18 (“That med-arb possesses superior cost and time efficiency over separate mediation and arbitration proceedings is not fairly debatable.”).

103. Ish, *supra* note 37, at 98–99.

104. See Thomson, *supra* note 48 (benefits of med-arb include reduced time, expense, and inconvenience).

105. Henry, *supra* note 7, at 389–90.

106. Of course, an initial agreement to engage in med-arb may be subject to membership ratification, depending on the constitution and bylaws of the labor organization. See *Transp. Workers Union v. Hawaiian Airlines*, No. 08-00524, 2009 WL 972483 (D. Haw. Apr. 8, 2009).

107. Parties rarely invert the order of med-arb in a variation known as arb-med. In arb-med, an arbitrator (or panel of arbitrators) holds a full hearing and provides a written decision *before* trying to mediate a voluntary resolution between the parties. The arbitration decision provides a baseline alternative that ideally spurs the parties to craft a voluntary settlement of their own making. See Fullerton, *supra* note 18, at 58.

108. Kagel, *supra* note 8, at 243.

109. Grievance arbitration clauses appear in more than ninety-five percent of negotiated collective bargaining agreements. GOULD, *supra* note 20, at 142. For industries governed by the Railway Labor Act (RLA), grievance procedures are mandatory. See *Railway Labor Act*, 42 U.S.C. §§ 153, 184 (2012). Some state public sector collective bargaining statutes require that collective bargaining agreements include grievance procedures. See, e.g., MINN. STAT. § 179A.20, subd. 4 (2016); 5 ILL. COMP. STAT. 315/8 (2016).

110. Patrick R. Westerkamp, Esq., *Dilemmas Facing Advocates and Arbitrators Who Mediate Grievances*, AM. ARB. ASS'N (Oct. 22, 2014), <https://www.aaau.org/media/22435/supplemental%20material.pdf>.

more common for agreements to require mediation of grievances, and then, absent resolution, arbitration by a different neutral, although many grievance procedures make no reference at all to mediation.¹¹¹

Grievance med-arb enables informed and efficient decision-making in contract disputes, culminating in a settlement or binding arbitration decision. The process allows parties to raise their concerns, obtain a neutral evaluation of their dispute by a third party, and create a resolution that meets their shared needs. In so doing, med-arb avoids the win-lose result of pure arbitration, which can harm the parties' relationship and lessen their ability to work together to resolve future conflicts. Grievance med-arb is typically less expensive, contentious, and time consuming than a series of arbitrations.

Moreover, med-arb can go beyond the narrow confines of a single pending grievance to reach consensual solutions that avoid future disputes. Grievance med-arb uses labor-management collaboration to resolve disputes that might otherwise accumulate in lengthy and formal arbitrations or arise as issues in future collective bargaining. The flexible process, created by the parties themselves, allows participants to address issues in creative ways that best meet their needs. If existing contract terms inadequately resolve a dispute and gap filling is required, the mediator-arbitrator is better able to predict the resolution parties would have reached in negotiations. The process might lead to a new solution, such as a letter of agreement or memorandum of understanding. The process promotes mutual trust and openness that allow the parties to respond quickly and fairly to dynamic economic conditions during the term of the CBA.

Grievance med-arb has been criticized for undermining enforcement of the parties' contract terms by permitting resolution through trade-offs, similar to those in collective bargaining, that broaden the focus beyond the terms in dispute. However, the process is not intended to be a vehicle for continual renegotiation or reconsideration of contract terms, which would foster uncertainty and instability and undermine future bargaining. If a party attempts to expand issues beyond the existing contract's terms in med-arb, the opposing party may request, and arbitrators may provide, formal arbitration hearings and formal decisions and awards based on evidentiary presentations alone. Of course, if the parties wish to use med-arb to address extra contractual issues, they may do so voluntarily.

At the end of their bargaining process using med-arb, the parties in the Compass/ALPA dispute requested my assistance in dealing with

111. See Honeyman, *supra* note 28 (distinguishing med-arb's use of a shared neutral from the common, sequenced use of dispute resolution processes, "such as a grievance procedure that provides first for negotiation, then mediation, and finally for arbitration, where each of these processes is carried out by a different person").

future grievances under their contract. The parties determined that my prior experience with the contract terms, the parties, and the compromises embodied in the agreement would foster a speedier and smoother grievance process, without need for extensive formal presentations of evidence to explain contract disputes.

The parties' expectation proved accurate. During my work as a grievance mediator-arbitrator for the parties several times each year, the parties have engaged in constructive dialogue and arrived at resolutions relatively quickly. When the parties fail to reach agreement, despite facilitation, a statement of my likely findings in arbitration fosters more realistic assessments of positions and allows the parties to craft novel compromises. Full arbitration decisions, while occasionally issued during this process, were most often awards reflecting the consent of the parties, rather than my own independent solutions.

Changes to negotiating teams and other staff commonly occur during multi-year contracts, and the participants in the Compass/ALPA med-arb process are no exception. Union officials and members of the negotiating committees on both sides have changed significantly in the two years since the contract's formation. As the mediator-arbitrator at the inception of negotiations, I remain one of the lone constants from the bargaining stage. This continuity is a distinct advantage of grievance med-arb and lends credibility to my assessments, which may be more important than the power I wield as an arbitrator with final and binding authority.

Generally, parties can call for an ad hoc mediator-arbitrator to resolve a particular grievance.¹¹² My experience as the mediator-arbitrator for contract disputes at Compass/ALPA was rather unique. Regardless of which approach is used, a mediator-arbitrator's familiarity with the issues, the contract, and the parties, along with the multiplicity of procedural tools, enables fair and quick grievance resolution.¹¹³

Conclusion

Med-arb provides a flexible and powerful process for achieving collective bargaining agreements when it aligns with parties' desires and expectations. Each negotiation is unique, and the selection of the best dispute resolution approach demands consideration of the specific parties' needs and circumstances.¹¹⁴ Parties must balance several factors, including the financial condition of the company, union cohesiveness,

112. Kagel, *supra* note 8, at 243–44.

113. Henry, *supra* note 7, at 393 (“By eliminating the judicial nature of arbitration, med-arb effectively reduces costs and resolves grievances in one to seven days, depending on the number of issues to be resolved.”).

114. Sands, *supra* note 56, at 315 (whether to use med-arb “will vary with the circumstance of each case, with the identity of the parties and their counsel”).

company and union leadership and experience, personalities, and negotiating history when determining the appropriateness of med-arb.

For parties seeking constructive and more direct communications, speed, lower cost, and greater informality, med-arb proves a capable alternative to lengthier, more traditional collective bargaining.¹¹⁵ The process offers particular advantages in industries and circumstances where self-help, such as strikes and lockouts, are economically undesirable or unavailable.

Parties selecting med-arb for collective bargaining disputes enjoy great flexibility to create the process that best suits them and can best take advantage of this opportunity by meeting early to clarify procedures and goals in a written agreement.¹¹⁶ The parties' agreement should address such factors as how confidential information will be treated, how long mediation and arbitration periods will endure, and whether arbitration decisions will be rendered by the arbitrator's discretion or through "final offer" arbitration. By collaboratively defining their med-arb process and goals at the outset, parties are prepared to negotiate solutions that satisfy their mutual interests.

Med-arb may prove an awkward fit, however, for parties that typically use self-help or whose constituencies or historic relationships demand a strong bargaining style. In traditional bargaining, threats of economic force by employers or employees act as leverage to secure desired terms and agreements. Med-arb removes this tool from negotiators, and moreover, gives final control over the outcome to a neutral third party should the parties fail to reach agreement.

Various statutory frameworks, including the RLA, the NLRA, and state statutes, allow parties to craft individualized med-arb processes that promise finality while preserving significant party control. As industries evolve to meet new economic challenges and technological realities, parties will naturally adapt their bargaining priorities and positions. Med-arb enables them to deploy multiple flexible dispute resolution tools to resolve their disputes. Med-arb proves a fittingly dynamic tool for dynamic collective bargaining processes.

115. See generally Blankenship, *supra* note 9, at 16–21 (discussing advantages of med-arb).

116. See generally Fullerton, *supra* note 18, at 55.

