

ADR IN THE WORKPLACE

Second Edition

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Dennis R. Nolan
Richard A. Bales

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The Labor Law Group

ADR in the Workplace

Second Edition

by

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CONSUMER RECYCLED PAPER



*For J. Stewart and Mario Thomas McClendon for their
Commitment to Education in Alternative Dispute Resolution
L.J.C.*

*For Connor Nolan McCloskey
D.R.N.*

and

*For Dennis and Emma
R.A.B.*

*

Foreword

The Labor Law Group is an association of law teachers, most of whom serve on faculties in the United States; others teach in Belgium, Canada, England, and Israel.

At the December 1946 meeting of the Labor Law Roundtable of the Association of American Law Schools, Professor W. Willard Wirtz (who became Secretary of Labor in 1962) delivered a compelling paper criticizing the labor law course books then available. His remarks so impressed those present that the Roundtable Council organized a general conference on the teaching of the subject. At the conference, held in Ann Arbor in 1947, some conferees agreed to exchange proposals for sections of a hoped-for new course book. The late Professor Robert E. Mathews served as coordinator. Beginning in 1948, a preliminary mimeographed version was used in seventeen schools; each user supplied comments and suggestions for change. In 1953, a hard-cover version was published under the title *Labor Relations and the Law*. The thirty-one "cooperating editors" were so convinced of the value of multi-campus collaboration that they gave up any individual claims to royalties. Instead, those royalties were paid to a trust fund to be used to develop and "provide the best possible materials" for training students in labor law and labor relations. The Declaration of Trust memorializing this agreement was executed November 4, 1953, and remains the Group's charter.

Cooperative ventures among legal scholars are often centered around ideological orthodoxies or common experiences or identities. In contrast, the Labor Law Group has tried to expand the scope of perceptions and experiences represented within its membership. Consistent with this goal, it has attained significant diversification in the racial, gender, national, and ideological composition of its participants and, additionally, has drawn its membership and leadership from institutions that are varied in size, styles, status, and geography.

The founding committee's hope that the initial collaboration would bear fruit has been fulfilled. Under Professor Mathews' continuing chairmanship, the Group's members produced *Readings on Labor Law* in 1955 and *The Employment Relation and the Law* in 1957, edited by Robert Mathews and Benjamin Aaron. A second edition of *Labor Relations and the Law* appeared in 1960, with Benjamin Aaron and Donald H. Wollett as co-chairmen, and a third edition was published in 1965, with Jerre Williams at the helm.

In June of 1969, the Group, now chaired by William P. Murphy, sponsored a conference to reexamine the labor law curriculum. The meeting, held at the University of Colorado, was attended by practitioners and by full-time teachers including nonmembers as well as members of the Group. The conference papers and discussion summaries were distributed to law school libraries and to participants. In meetings that followed

the conference, the Group decided to reshape its work substantially. It restructured itself into ten task forces, each assigned a unit of no more than two hundred pages on a discrete topic such as employment discrimination or union-member relations. An individual teacher could then choose two or three of these units as the material around which to build a particular course. This multi-unit approach dominated the Group's work throughout much of the 1970s under Professor Murphy and his successor as chairman, Herbert L. Sherman, Jr. As the decade progressed and teachers refined their views about what topics to include and how to address them, some units were dropped from the series while others increased in scope and length. Under Professor Sherman's chairmanship, the Group planned a new series of six enlarged books to cover the full range of topics taught by labor and employment law teachers.

Professor James E. Jones, Jr., was elected chairman in 1978 and shepherded to completion the promised set of six full-size, independent casebooks. In addition, during this period supplements were published for some books. The Group continued to reevaluate its work and eventually decided that it was time to convene another conference of law teachers.

In 1984, the Group, now chaired by Robert Covington, sponsored another general conference to discuss developments in the substance and teaching of labor and employment law, this time at Park City, Utah. (The conference papers were distributed to law school libraries as well as participants.) Those discussions and a subsequent working session led to the conclusion that the Group should devote principal attention to three new conventional length course books, one devoted to employment discrimination, one to union-management relations, and one to the individual employment relationship. In addition, work was planned on more abbreviated course books to serve as successors to the Group's earlier works covering public employment bargaining and labor arbitration.

In 1989, with Alvin Goldman as Chair, the Group met in Breckenridge, Colorado, to assess its most recent effort and develop plans for the future. In addition to outlining new course book projects, the Group discussed ways to assist teachers of labor and employment law in their efforts to expand conceptual horizons and perspectives. In pursuit of the latter goals it co-sponsored, in 1992, a conference held at the University of Toronto Faculty of Law at which legal and nonlegal specialists examined alternative models of corporate governance and their impact on workers.

When Robert J. Rabin became Chair in 1996, the Group and a number of invited guests met in Tucson, Arizona, to celebrate the imminent fiftieth anniversary of the Group. The topics of discussion included the impact of the global economy and of changing forms of representation on the teaching of labor and employment law, and the impact of new technologies of electronic publishing on the preparation of teaching materials. The Group honored three of its members who had been present at the creation of the Group, Willard Wirtz, Ben Aaron, and Clyde Summers.

The Group next met in Scottsdale, Arizona in December, 1999, to discuss the production of materials that would more effectively bring emerg-

ing issues of labor and employment law into the classroom. Among the issues discussed were integration of international and comparative materials into the labor and employment curriculum and the pedagogical uses of the world wide web.

Laura J. Cooper became Chair of the Group in July, 2001. In June, 2003, the Group met in Alton, Ontario, Canada. The focus there was on labor law on the edge—looking at doctrinal synergies between workplace law and other legal and social-science disciplines, and workers on the edge—exploring the legal issues of highly-compensated technology workers, vulnerable immigrant employees, and unionized manufacturing employees threatened by foreign competition. The Group also heard a report from its study of the status of the teaching of labor and employment law in the nation's law schools and discussed the implications of the study for the Group's future projects.

In addition to this book on workplace dispute resolution, we presently have four other books in print all published by West Group.: *Employment Discrimination Law: Cases and Materials on Equality in the Workplace* by Robert Belton, Dianne Avery, Maria L. Ontiveros and Roberto L. Corrado (Seventh Edition); *Labor and Employment Law: Problems, Cases and Materials in the Law of Work* (Third Edition), by Robert J. Rabin, Eileen Silverstein, George Schatzki and Kenneth G. Dau-Schmidt; *Legal Protection for the Individual Employee* (Third Edition), by Matthew W. Finkin, Alvin L. Goldman, Clyde W. Summers and Kenneth Dau-Schmidt and *Public Sector Employment*, by Joseph R. Grodin, June M. Weisberger and Martin H. Malin. The Group is also currently at work on two additional projects. In 2005 Foundation Press will publish *Labor Law Stories*, a collection of historical essays about the most significant labor law decisions, edited by Laura J. Cooper and Catherine L. Fisk. We are also at work on an entirely new text on labor issues in the global economy.

At any one time, roughly twenty-five to thirty persons are actively engaged in the Group's work; this has proved a practical size, given problems of communication and logistics. Coordination and editorial review of the projects are the responsibility of the executive committee, whose members are the successor trustees of the Group. Governance is by consensus; votes are taken only to elect trustees and to determine whom to invite to join the Group. Since 1953, more than seventy persons have worked on Group projects; in keeping with the original agreement, none has ever received anything more than reimbursement of expenses.

The authors of this Second Edition of *ADR in the Workplace* here update their 2000 First Edition and its predecessor, the 1994 book, *Labor Arbitration: A Coursebook*, by Laura J. Cooper and Dennis R. Nolan. Laura J. Cooper and Dennis R. Nolan are members of the National Academy of Arbitrators and combine full-time academic careers with part-time practices in workplace mediation and arbitration. Professor Cooper is the J. Stewart and Mario Thomas McClendon Professor in Law and Alternative Dispute Resolution at the University of Minnesota. Professor Nolan is the Webster Professor of Labor Law at the University of South Carolina. Both have contributed to the scholarly literature of

workplace dispute resolution, with a focus on labor arbitration. Among other publications, Professor Nolan is the author of *Labor and Employment Arbitration in a Nutshell* and the co-author of the textbook, *Labor Law: Collective Bargaining in a Free Society* (Fifth Edition), both published by West Group. Richard A. Bales was an employment litigator before joining the faculty of Northern Kentucky University, Chase College of Law. His significant body of scholarship focuses on employment litigation and alternative dispute resolution in the non-union workplace. He is the author of *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell University ILR Press, 1998).

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Preface

The final decades of the twentieth century brought an expansion of the substantive rights of employees. Although the number of employment claims in the courts, and particularly the federal courts, has been growing at a rapid rate, so too has grown the level of frustration with the limitations of litigation as a means to effectuate those rights. Employees represented by unions have long had the strongest workplace protections of all employees and enjoyed the most efficient and effective mechanism for the enforcement of those rights—labor arbitration. Arbitration of disputes arising under collective bargaining agreements has come to be the model for resolving many statutory and common law disputes outside the union context, although many of the characteristics that permitted success in the organized setting are absent in the nonunion workplace. In addition to borrowing arbitration from the union setting, employers and employees in nonunion workplaces are increasingly using other means of alternative dispute resolution, including mediation.

These mechanisms of dispute resolution fundamentally alter the role of the advocate and even the definition of employees' legal rights. The education of labor and employment advocates therefore requires study, not only of substantive rights, but also study of the alternative means of their enforcement. Cooper and Nolan, *Labor Arbitration: A Coursebook*, comprehensively covered labor arbitration. Its successor, *ADR in the Workplace*, updated the coverage of labor arbitration and added new material on alternative dispute resolution of statutory and common law employment rights of nonunion employees. This second edition of *ADR in the Workplace* again updates the coverage of labor arbitration, but also reflects the enormous recent growth of ADR in the nonunion sector. The second edition expands significantly the coverage of empirical and normative analysis as well as the ethical dilemmas that often arise for both attorneys and arbitrators in non-union ADR.

Courses in ADR in employment are useful for law schools, business schools, and schools of industrial relations. The scope of such courses varies considerably. Some courses may be limited to labor arbitration. Some may presume that students have already studied labor or employment law. Some provide a student's first look at these subjects. Others may see such a course primarily as a means to develop practical skills. Some courses may be limited to ADR in the nonunion setting. Some may be designed to focus on a comparison of union and nonunion dispute resolution mechanisms.

This book provides a comprehensive look at the world of employment ADR—its history, procedures, law, ethics and practice—that makes it suitable for use in any of these settings. It addresses ADR topics through a wide diversity of materials including judicial decisions, arbitration awards, essays, and questions and problems for class discussion. Sections

on judicial determinations of arbitrability, judicial review, injunctions, deferral, and the duty of fair representation offer thorough coverage of legal issues for those teachers seeking to emphasize the legal context for labor arbitration. Extensive treatment of the substance and practice of labor arbitration provides teaching material for courses focusing on labor arbitration practice rather than law. Materials on dispute resolution in the nonunion setting address a broad range of issues including law, theory, practice and policy.

The chapters of the book are largely independent, allowing a teacher to design a course with as broad or as narrow a focus as the teacher desires. Those who want to look at labor arbitration as just one means of workplace dispute resolution will find here the materials to both understand other ADR mechanisms and to reflect upon them in this broader context. For teachers seeking to include advocacy skills training, the appendix includes a research guide and an essay on arbitration brief writing, and we have also made available materials for conducting classroom simulations of arbitration and mediation both in the union and nonunion setting. That book, Laura J. Cooper and Carolyn Chalmers, *Workplace ADR: Simulations and Teacher's Guide* (2d ed. 2005), is available for professors who have adopted the casebook.

We have attempted to edit the material unobtrusively. We did not indicate when we deleted internal footnotes and citations to authority, but we inserted asterisks when we deleted anything else. We retained ellipses whenever they were present in the original source. We sometimes revised citations in cases without indication, particularly to standardize the citation format. We usually retained parallel citations. Remaining footnotes have their original numbers.

LAURA J. COOPER
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January, 2005

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