

Foundation Forum

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The First Dispute Review Board

by
A. A. Mathews

The construction of the first bore of the Eisenhower Tunnel in Colorado was a financial disaster. Determined not to get burnt again, the Colorado Department of Highways, for the construction of the second bore, provided for a "Review Board" to make recommendations for the prompt resolution of disputes which could not be settled at the job level.

"This system of settling contract claims, in my opinion, proved itself beyond any expectations that anyone could have entertained."

After I was appointed to the Board by the Contractor and Charles McGraw by the Owner, we were required to select the third member. I suggested that we each nominate a candidate in the Denver area and then, together, interview each one. Mac agreed and nominated his candidate. Then I nominated Palmer King. Mac asked, "Who is he?" I replied that Palmer, now retired, was formerly Chief Counsel for the Bureau of Reclamation in its Denver office. Mac fumed, and said, "I'll never allow a damned lawyer on our Board". I reminded Mac of our agreement for selecting the third member, and he calmed down.

We drove to downtown Denver and interviewed Mac's candidate. Then, back at our hotel, Palmer King, who lived in Wheatridge, came for his interview. We then went to lunch and I noted that now we had a decision to make. I continued by saying that I was satisfied with Mac's candidate and considered him to be well qualified. Mac responded with, "You would like Palmer King, wouldn't you?" I said, "Well, I nominated him". Mac replied, "That's O.K. with me".

Some time after the job was completed, with all disputes resolved, Palmer King prepared a paper to be presented at a conference of the American Society of Soils and Foundation Engineers at Lake of the Ozarks in October 1980. However, before the conference took place, Palmer succumbed to the cancer he thought had been cured before he became a member of the first (Dispute) Review Board. To the best of my knowledge, Palmer's paper was never published. It was given to me by his widow, and I thought it would be appropriate to include at least part of it in our first newsletter. It is much too long to include all of it in this article, so I have deleted most of the narrative except that which bears directly on the Eisenhower Tunnel experience. You will notice that Palmer erroneously refers to the Board as an arbitration panel, although he does point out some features which differ markedly from normal arbitration procedures. Obviously, Palmer King appreciated the significance of this first use of the Dispute Review Board concept. (If you are interested in having Palmer King's entire paper, please ask the Foundation for a copy.)

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President's Column

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I am happy to be drafting this introduction to the first edition of the Foundation's newsletter. It all started last May seventh, barely five months before I began composing this on an airplane halfway between San Francisco and Hong Kong.

A group of seven people, all dedicated to the goals of the Foundation, met in Seattle and laid the groundwork for our organization. What followed was no piece of cake. Everything, from drafting the Articles of Incorporation up to the publishing of this, our first newsletter, consumed the valuable time of people who must still pursue their own private affairs. The energy and devotion of these people, too numerous to mention, was vital to the launching of this enterprise.

Some of our activities included the appointment of Directors, Officers, and Committee Chairpersons. This was followed by the establishment of a computerized database and joining the Internet and the World Wide Web. Form letters and business forms were designed. Correspondence within the organization and with supporters throughout the world was carried on. We now have an office to handle membership applications and follow-up correspondence.

Although we have all given our time without compensation, there were numerous expenses to be incurred. Our Charter Members generously donated the funds to satisfy that need.

The Foundation Forum is the most important element in the Foundation activities. Our members expect to get something for their money, and the Forum can satisfy that need. Feature articles will tell about the experiences and ideas of others. You will be kept up to date on the usage of DRBs, both in the U.S. and worldwide. The Letters to the Editor department will encourage members to voice their ideas and suggestions. The development of a lively dialog will attract a lot of interest, and can become a valuable educational tool. All members are encouraged to support the Forum with articles or news

items and all suggestions are welcome.

Our committees have been very active and you will find reports on their activities herein. The International Applications Committee deserves special attention. It is literally covering the world.

After personally observing the general acceptance of the Foundation by all facets of the construction industry, I am more convinced than ever that the Foundation will fulfill the vital need for a permanent organization to sponsor the use of the DRB process worldwide. During the past six months, my travels across the USA; and to countries including England, South Africa, Australia, India, and China; have revealed a strong desire to participate in this movement.

The intention of the Directors and Officers is for the Foundation to be much more than just another "old boy's club". It should serve the needs of its members and the construction industry in general. This newsletter should be much more than a simple broadcaster of events. It must act as a forum where questions and suggestions regarding the use of the DRB process can be impassionately and impersonally reviewed. The Foundation will become the recognized authority on DRB matters.

The extent of our services to the construction industry and to our membership will be determined by the size of our membership roster. If we can build this up to the thousands, we will be able to sponsor and conduct seminars wherever needed. We can cooperate with similar organizations worldwide. We can furnish speakers and panelists for conferences and conventions. The members themselves can play a vital role in building up our membership. If each new member would bring in only two more acquaintances, our growth would be phenomenal.

This first edition of the Foundation Forum is of course quite modest. Our aim is to make it bigger and better as we grow. Thank you all for your support. □

A. A. Mathews, President

President's Column

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A. A. Mathews, President

Committee Reports

Statistical Database

Appendix A of the *Construction Dispute Review Board Manual*, (McGraw-Hill, 1995) provided a record of all Dispute Review Boards, past and present, known to the authors as of January, 1994. The DRB Foundation has taken on the task of updating those data.

The original list of DRB supported projects was collected and funded by P.E. "Joe" Sperry with the help of many friends and acquaintances. The recent surge in the utilization of DRBs is so great that such data collection has become a small industry in itself and will require a worldwide network of reporters with a computerized database and a generous communications budget. With a growing international membership, your Foundation is well-positioned to harvest the required information on DRB projects, maintain currency of the data and make it available to our entire membership.

It is the intention of the Database Committee of the DRBF Board to select from the membership, individuals who would be able and willing to report on projects that employ a Dispute Review Board. The Foundation, with the help of Paul Heather, is working on a database system that will allow reporting through various means. The content of the initial tabulation will be congruent with the format used in the *Manual*. We plan to create an archive of completed projects and maintain contemporaneous information on active construction projects. Your suggestions are appreciated.

A copy of a data sheet for tracking DRB-supported Projects is provided. Please feel free to duplicate and submit any information you may have. □

Robert Matyas, Chair

Membership

At the July 96 Seattle conference the founding group elected to continue the initial drive for Charter Members to August 31, 1996. Due to the efforts of the group we now have over 50 Charter Members. Thanks to the group for a great job! We have continued our membership drive by direct mailings and

advertising. In October over eleven thousand mailings were distributed and an additional one thousand were sent in November. Also look for our ad in the November issue of *ASCE News*. We plan on advertising in the *Engineering News Record* after the first of the year.

Our roster of Sustaining, Corporate, Institutional and Individual Members is constantly growing. Informational data from all members is being recorded on a database system for easy reference and retrieval.

However, it is the one-on-one contact that yields the best results. We suggest all current members take on an obligation to personally call and recruit two new members. This effort could easily fulfill our goal of 600 members by the end of 1997. If you do not have time to call or send material to potential members call our Seattle office!

Since most DRBs are established by the Architect, Engineer or Owner, we would appreciate an effort by all to send us names of projects and Owners so that we can build our current list of users. □

Roger L. Brown, Chair

International

The Committee is undertaking an international membership drive, using volunteer "Country Representatives" in each country who serve as the point of contact in coordinating solicitations to individuals resident there. So far, volunteers have been obtained for Australia, Columbia, Italy, Japan, South Africa and the United Kingdom. Contacts are continuing with potential volunteers in several other countries. As the network grows, the names and contact details for the various "Country Representatives" will be published in the *Forum*.

All Foundation members active in international projects will welcome the new Supplement to FIBIC's Conditions of Contract (International) for Works of Civil Engineering Construction, Fourth Edition, as it contains FIBIC's format for the use of the DRB concept. □

Gordon L. Jaynes, Chair

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no chairman – we all just worked together. Hearings were completely informal. The Contractor would present its evidence first, and after DOH presented its evidence, everyone was free to add whatever he liked. The parties were free to question each other and, of course, each Board Member asked whatever questions he liked. Witnesses were not sworn, and there was no transcript of the testimony, each Board Member simply making his own notes. I was designated by my fellow members to conduct the hearings and this merely amounted to recognizing speakers in some reasonable order.

The first bore of the Eisenhower Tunnel had resulted in enormous claims, on which DOH had paid out some \$50,000,000. But with the second bore, the biggest problem the Board had was that we went along for over two years with no problems. I suggested facetiously to DOH and the Contractor that they should at least pretend to get into some disputes so that the Board would feel needed. Well, in about the last year they did commence to send us some claims, but they were rather small. I wrote rather lengthy draft decisions for the first three claims, and they were then reviewed and edited by the three of us. The fourth and last claim was for about \$550,000 and involved claimed changed conditions in one reach of the tunnel. This one involved some rather difficult engineering determinations, and if the claim was found to be valid, some complex mathematics to arrive at the amount to be paid. As in other cases, the three Board members first pondered the question of whether there was liability on the part of DOH, and resolving this in favor of the Contractor, we then developed the conceptual framework as to how the amount payable would be calculated. When my engineering brethren got through with their calculations it came out about half the amount claimed. Whatever DOH and the Contractor may have suspected, this was not a Solomonian judgment to split the baby in half – it just came out that way. My engineering brethren shared the burden of drafting the decision and they made all of the calculations.

Now for some serious conclusions. This system of settling contract claims, in my opinion, proved itself beyond any expectations that anyone could have entertained. The Colorado Department of Highways' plan for regular meetings at the tunnel kept the Board abreast of progress and problems, and in my opinion, is an excellent arrangement where the magnitude of the job warrants the expense. In this case, with some \$50,000,000 paid out in claims on the first bore, it was eminently justified.

As for the inner workings of the Board, I don't believe that if there had been an observer in attendance, he could have guessed which member was chosen by the Contractor, which by the State, and which by the other two. I could never see that either of my brethren showed the slightest disposition to favor the party appointing him.

As has been said, the hearings were extremely informal. No rules of evidence, no objections, no lawyers (except myself), no motions, no continuances, no court reporter, no delays, no transcript, and no briefs. Each witness simply told his version of the facts, and answered whatever questions the other side or the Board Members asked.

Construction contracting is a specialty, and underground construction is a specialty within a specialty. The need for a deciding agency with experience in that field is obvious, and among this Board there was at least a century of such experience. My fellow Board Members were Engineers of high international reputation. I would speculate that if the claims had been submitted to the litigative process, they probably would not have been settled before 1985 at earliest. Even if I had not long before become disillusioned with the "litigative" process as a way to settle construction contract disputes, and become a convert to arbitration, this experience would have convinced me that arbitration is the only way to go.

I appreciate the opportunity of making this presentation to this group on a subject in which for years I have been so deeply interested. Thank you. □

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THE FOUNDATION'S MISSION

The Foundation exists mainly to serve its members and to assist the construction industry in the optimum utilization of the Dispute Review Board concept.

To achieve its goal, the Foundation intends to publish a periodic newsletter and an annual membership directory, as well as to update and maintain its database for past DRB projects. Also, the By-laws provide for an annual meeting of the membership. Other activities to foster and improve the use of the DRB concept are being discussed. In order to concentrate on the activities which attract the greatest interest of the membership, it is necessary for all members to convey their opinions and suggestions to the Foundation Office. The principal subjects are briefly described in the following paragraphs.

1. The Newsletter. Should it be published quarterly or at some other interval? What type of subjects should be covered by feature articles?

2. A simple annual meeting has been proposed. It could be held in the fall of 1997 and in a central USA city. Arrive on Friday night and adjourn on Sunday noon. Organize discussion groups to explore various sensitive DRB subjects. Publish informal proceedings. A registration fee to help defray the Foundation's operating costs would be set. A more elaborate annual meeting could last for two full days. It would

include papers of popular DRB subjects with audience participation and panel discussions. Non-members would be invited at a somewhat higher registration fee. It might not be practical to schedule such a meeting before the spring of 1998.

3. The Foundation could sponsor and conduct training workshops for actual and potential DRB members. One workshop might last for one full day. One and one-half day faculty training sessions would be necessary in advance. The participants need not be Foundation members. A list of people who have completed a training workshop would be published but would not constitute an endorsement by the Foundation. A reasonable fee would be charged.

4. The Foundation could furnish panelists and conduct a private seminar for any organization or firm which desires to indoctrinate its employees, contractors, managers, or associates regarding the use of the DRB process.

5. The Foundation could organize and conduct special seminars open to the public. □

It is requested that all members complete the enclosed "Member Survey" and return it to the Office promptly. All of your comments and suggestions will be deeply appreciated. □

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