What Can the NHL Lockout Teach Us About Mediating Non-Compete and Trade Secret Disputes?

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After 113 days, the NHL lockout ended with the NHL and its players association reporting that they have reached a tentative deal. Although they say that a lot of i's need to be dotted and t's need to be crossed, it looks as if North America's hockey fans will get to watch hockey again this winter.

By all accounts, federal mediator Scot Beckenbaugh, played a significant role in helping the parties break their stalemate, and it only took him six weeks to do it! That's right. On the 72nd day of the lockout, the NHL and its players association agreed to mediation in an effort to break their stalemate. By that point, the parties had seen millions of dollars in revenue go down the drain. In fact, the NHL is rumored to have thought the lockout would never get this far because the difference in the parties' positions reportedly translated to the amount of money the players lost after being locked out for eight games. Now, three months into the hockey season, it appears that hockey's 82 game season will be reduced to 48 or 50 games at best.

What has been the toll? The players lost their livelihood in the interim. The NHL's image has been tarnished, and it remains to be seen whether fans will return to a sport that has enjoyed a surge in

popularity over the last few years. In addition, the relationship between the players and the owners has been strained to say the least.

What does all of this have to do with mediating non-compete disputes? Probably not much. But as a hockey fan and non-compete mediator, let me attempt to draw a correlation.

The dispute between the NHL and its players lasted 72 days before a mediator got involved. It took another 41 days for the mediator to bring the parties to an agreement in principle. During that time, the mediator faced a mountain of obstacles, some of which are present in every dispute, and some of which arise when parties to a hardened dispute fail to get a mediator involved early on.

First, when the mediator arrived on the scene, the parties already had lost a lot of money. Second, their emotions began to shape their negotiations sometimes resulting in offers that were more about punishing the other side than about addressing the offeror's interest. Third, the longer the dispute dragged on, the more the resolution became hostage to negotiating conventions rooted in the ritual of exchanging offers and counteroffers (more on this below). Fourth, the owners made a severe miscalculation. They incorrectly believed that the players would fold quickly because they stood to lose more the longer the lockout lasted. Fifth, each side suffered from principal/agent problems. The players wondered whether Gary Bettman truly had the support of the owners, and the owners likewise second guessed whether the players' trust in Donald Fehr would continue.

And there you have it. The lockout lasted as long as it did in large part due to emotions, each side's desire to punish the other, mounting sunk costs, a mistaken belief that negotiations must always adhere to an offer/counteroffer process instead of mutual problem solving, clashing personalties not trusted by either side, and initial miscalculations which exacerbated all of the problems discussed above.

Enter the mediator. It is hard to envy a mediator who had to step into the middle of this mess after parties had become entrenched both in their positions and processes. But it is easy to see how a mediator's involvement from the outset could have shortened the life -- and therefore the expense -- of this dispute.

First, what is a mediator's job? To help the parties negotiate an agreement? Well, sort of. A mediator's task is to help the parties determine whether an agreement as possible, and if so, to help them achieve that agreement. But not just any agreement. The agreement must be durable, and it must be mutually acceptable to the parties.

Second, much has been written about whether mediators should be facilitative or evaluative. Facilitative mediators help the parties reach an acceptable resolution by listening to everyone and helping them analyze the issues and explore options. A facilitative mediator does not recommend a solution, but he or she may share his or her opinion.

In contrast, an evaluative mediator behaves more like a judge in a settlement conference by exploring weaknesses in each side's arguments and emphasizing each side's alternative to a negotiated resolution.

So is one approach better than the other? Or perhaps a combination of both? Just as a carpenter seeking to attach two pieces of wood may realize that he can do so by using a hammer and a nail, a screwdriver and a screw, velcro, glue, tape, or any other number of adhesives, a good mediator too must be open to using all of the available tools at his or her disposal. A good mediator brings to the table an independent perspective. Not just a perspective independent on the merits, but independent in terms of the path to a successful resolution. A good mediator sees potential solutions where parties see conflict. And this is where we see the lessons that non-compete and trade secret disputants may take away from the NHL lockout negotiations.

First, just as the lockout got expensive fast, so too can non-compete and trade secret litigation. Of course, all litigation can be expensive, but non-compete and trade secret disputes have all of the hallmarks of litigation compressed into a short, expedited, emotionally driven timeframe. Consequently, the parties may quickly reach the conclusion that they have sunk too much investment into the litigation to settle. With each dollar spent, the range of acceptable solutions short of litigation tends to shrink.

Second, emotions often run high in non-compete and trade secret disputes. Plaintiffs often feel betrayed, and their perspective may be colored as much by a desire to punish as it is by a desire to be made whole. Defendants feel that their livelihoods are on the line, and they see plaintiffs as overreaching.

Third, mediators can bring creative solutions to the table that are tailored to meet the interests of the respective parties. This is particularly true in these types of cases because courts have wide discretion to fashion equitable remedies. Parties can be equally creative in mediation.

Fourth, mediators with subject matter expertise are essential. The NHL and its players association chose Beckenbaugh to serve as their mediator for a reason. During the 2004-2005 NHL lockout, he served as their mediator. Consequently, he had a heightened familiarity with the issues between the parties. Using a mediator with significant experience in non-compete and trade secret litigation is essential. These cases are often like snowflakes. Although they appear to be similar upon quick review, no two cases are alike. The outcome of each case is driven by a panoply of factors ranging from the judge assigned to the case, the applicable state law, and the individual facts and circumstances. Moreover, the path to resolution can vary significantly just as courts have wide discretion to determine the procedures to be used (e.g., whether a motion for injunctive relief will be resolved on the papers or after presentation of live testimony; whether expedited discovery will be permitted; etc.). It is essential that the parties choose a mediator who has significant experience in non-compete and trade secret litigation so that the mediator can quickly and incisively cut through

the issues. It will also ensure that the mediator can help to craft and propose enforceable and creative non-monetary solutions to the extent appropriate.

In short, mediating a non-compete and trade secret dispute is different than mediatiing general commercial disputes. Early involvement by a mediator experienced in such cases can go a long way toward saving parties time, money and anxiety.

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