WYOMING LEGISLATIVE SERVICE OFFICE

Research Memo

13 RM 018

Date: **October 31, 2013**

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Re: **Arbitration and Tow Carrier-Customer Dispute Resolution**

QUESTIONS

1. **What does Wyoming law say about the state's use of arbitration?**
2. **How do other states manage tow carrier-customer disputes?**
3. **What is the potential cost of using arbitration as a method to settle tow carrier-customer disputes?**

ANSWERS

1. **Arbitration generally means the resolution of a dispute by a third party intermediary (called arbitrator) when parties to the dispute usually agree to be bound by such a decision; it can be seen as a private court that may or may not be less formal than the traditional public court system. It can be mandatory upon the parties (i.e. – under law or contract) or voluntary by the parties to the dispute. Binding arbitration leads to a decision that is legally enforceable upon the parties. Non-binding arbitration means the parties do not have to agree to the final arbitrator's decision. Arbitration is different than mediation in that with arbitration, the arbitrator looks at case evidence to assign liability, damages, etc. toward the parties whereas mediation usually asks a neutral third party consensus builder to get disputing parties to come to a compromise agreement.**

   Wyoming's Constitution and statutes provide several statements about arbitration. First, the Wyoming Constitution notes the following *prohibition on requiring* arbitration be binding upon parties (*Article 19, Section 8: Legislature to provide for voluntary submission of differences to arbitrators)*:

   > "*The legislature may provide by law for the voluntary submission of differences to arbitrators for determination and said arbitrators shall have such powers and duties as may be prescribed by law; but they shall have no power to render judgment to be obligatory on parties; unless they voluntarily submit their matters of difference and agree to abide the judgment of such arbitrators*."

   Commensurate with this Wyoming Constitution provision, there are also several places in state statute which outline the optional use of arbitration where state functions are concerned or where private parties may have disputes (see Attachment A provides a summary list of some examples where arbitration is allowed under Wyoming Statutes). Wyoming does have a Uniform Arbitration Act under the state's Code of Civil Procedure (W.S. 1-36-101 through 1-36-119), which outlines the generally recognized conditions and procedures to arbitration overseen by the state district court system.

Three examples, or models, in state statute provide different conditions on how arbitration can be handled that may better inform what to expect of such arbitration systems. First, statute allows for the employment of an ad hoc three-member arbitration board that may be employed to decide on livestock indemnity cases. The panel is selected by the parties to the dispute (i.e. – land/livestock owner, state veterinarian, etc.). A second example is the case of arbitration allowed between malt beverage manufacturers and terminated distributers. In this case, statute provides a more elaborate outline of the acceptable arbitration process, even specifying use of the American Arbitration Association's (AAA) resources. The following notes the statutory framework set out for this process:

> ***12-9-115. Reasonable compensation***.
>
> *(a) In the event that a distributor is terminated by a manufacturer in bad faith or for other than good cause, the distributor shall be entitled to additional compensation from the manufacturer for:*
>
> > *(i) The fair market value of any and all assets, including ancillary business assets of the distributor used in distributing the manufacturer's products;*
> >
> > *(ii) The good will of the business.*
> >
> > *…*
>
> *(d) In the event the manufacturer and the malt beverage distributor are unable to mutually agree on the reasonable compensation to be paid for the value of the distributor's business, as defined herein, the matter may by agreement of the parties be submitted to arbitration. If so submitted, the following shall apply:*
>
> > *(i) Arbitration shall proceed only if all parties agree in advance and submit the dispute to arbitration, and the decision of the arbitrators shall be final and binding if so agreed upon by the parties in advance of the arbitrator's proceedings;*
> >
> > *(ii) The dispute shall be submitted to a panel of three (3) arbitrators, one (1) of which shall be selected by the supplier within thirty (30) days after the parties have agreed to arbitrate, one (1) of which shall be selected by the wholesaler within thirty (30) days after the parties have agreed to arbitrate, and one (1) of which shall be selected from a list of five (5) candidates supplied by the American Arbitration Association at the request of the parties within ten (10) days after the parties have agreed to submit the dispute to arbitration;*
> >
> > *(iii) Within ten (10) days after receipt of the list supplied pursuant to paragraph (ii) of this subsection, the wholesaler and the supplier each may disqualify up to two (2) candidates from the list. The American Arbitration Association shall select the third arbitrator from the candidates not disqualified by the parties;*
> >
> > *(iv) The arbitration shall proceed in accordance with the rules of the American Arbitration Association within thirty (30) days after the selection of the arbitration panel has been completed;*
> >
> > *(v) The cost of the arbitration shall be borne equally by the parties. The award of a majority of the arbitrators shall be final and binding on the parties if so agreed upon in advance by the parties. The arbitrators shall not be permitted to award punitive damages and are bound to apply the terms and provisions of the agreement not in conflict with this act.*

A key difference between the first example and the second example process is the role of a state agency, program, or official as one of the disputing parties. The first example relates directly to a state authorized action with a state official (state veterinarian) involved in the management, payment, or oversight of the process. A similar process occurs when a Game and Fish Commission indemnity payment decisions for game animal damage on private lands. The second example outlines a more elaborate process for a dispute between private parties, where a state agency or official is not party to the dispute.

A third way in which arbitration can be handled is for a government body already established to handle cases to manage the process or issue a decision in a case. This may occur with the Public Service Commission in deciding disputes between private parties where one utility wants to receive just compensation for facilities acquired by another utility. The state Medical Review Panel and Professional Review Panel may both act as non-binding arbitration panels in professional malpractice cases, also disputes between private parties.

Table 1, below, notes some potential advantages and potential drawbacks with the use of arbitration as a decision-making process. The list provides example considerations and should not be viewed as an exhaustive list of all possible advantages or disadvantages. The applicability of these potential advantages or drawbacks in addressing tow carrier-customer disputes will depend on the details in designing a specific and/or new arbitration scheme.

Table 1. List of Example Advantages and Disadvantages to the Use of Arbitration in Dispute Resolution.

Potential *Advantages* to the Use of Arbitration	**Potential *Disadvantages* to the Use of Arbitration**
• When the subject matter of the dispute is highly technical, arbitrators with an appropriate degree of expertise can be appointed. • It may be faster than litigation in court. • It may be cheaper and more flexible for businesses. • Proceedings and award are generally non-public, and can be made confidential. • During proceedings the language used may be chosen, whereas in judicial proceedings the official language of the country may automatically apply. • There may be limited avenues for appeal of an award, which may limit the duration of the dispute and any associated liability.	• If arbitration is mandatory and binding, the parties waive their rights to access the courts. • Disputing parties may be required to pay for the arbitrators adding a layer of legal cost that can be prohibitive. • If an arbitrator depends on a corporate entity for repeat business, there may be a conflict of interest to go against a consumer, employee, etc. • There are limited avenues for appeal to overturn erroneous decisions. • When there are multiple arbitrators on a panel, juggling schedules for hearing dates in long cases can lead to delays. • Discovery may be more limited or entirely nonexistent. • Arbitration awards themselves are not directly enforceable; a party seeking to enforce an arbitration award must still resort to judicial remedies to "confirm" an award.

Source: LSO Research compilation from various organizations/associations.

2. **One of the main challenges to comparing other states' tow carrier-customer dispute processes is that each state's regulatory environment regarding the tow industry is unique. With deregulation of motor carriers in the 1990s, the federal government intended there to be a more freely competitive and uniform regulatory environment for motor carriers, which includes tow and recovery carriers. However, federal law does allow states to enact provisions relating to safety and pricing, for example, on non-consensual tow and recovery services.**

   In most instances non-consensual tows result from public safety concerns on roadways like wrecked or abandoned vehicles where a vehicle owner or lienholder is absent from choosing the tow and recovery carrier that must clear the vehicle from the roadway. This captive, rather than competitive, market provides challenges in balancing law enforcement's need to keep roads safe/passable with vehicle owners expectations for reasonable and cost-effective services from tow and recovery carriers. Tow and recovery carriers must also balance the value of providing an on-call service with a reasonable expectation that their businesses can remain viable and profitable.

   Under these considerations, LSO reviewed several states' tow carrier regulatory structures, particularly with respect to how each state deals with tow carrier-customer disputes. The states reviewed included: Arkansas, Colorado, Nevada, New Mexico, Oklahoma, and Utah (see Attachment B for a tabular summary of selected states' tow carrier-customer dispute oversight structure).

   Overall, LSO found some common practices among most of the states it reviewed. The following summarizes those commonalities:

   - ✓ Each state generally regulates all tow carriers related to business, vehicle, and/or operator licenses or permits in order for tow carriers to provide both consensual and non-consensual towing services in the state.
   - ✓ The state designated regulatory agency will have one or more staff charged with compliance review over tow carriers. Some states' compliance staff may also have customer complaint review/assessment functions while in other states there may be a separate complaint or customer service unit which handles initial complaints before handing off to compliance and investigation staff those complaints deemed viable or valid.
   - ✓ Some states have rising levels of administrative warnings and penalties for repeat tow and recovery carrier offenders. Few complaints rise to level of administrative hearings.
   - ✓ In the states reviewed, there was no indication that tow and recovery customers had to pay for the cost of cases that go to hearing.

   One of the key factors among these states is that each state has a pre-defined tow and recovery regulatory structure in place to provide a framework under which tow carriers can operate. These regulations may be different or in addition to motor carrier regulatory requirements. The impact of having a regulatory structure authorized by both statute and administrative rule is that the state will have formal, public criteria in place on which to judge potential violations of towers. Some example criteria on which other states may judge violations or non-compliance of towers include the following:

   - Some state requires all non-consensual tows be recorded through a central reporting system within a certain timeframe after the tow. In one state, if a complaint is received and it is found that the tow carrier has not reported the tow to the system, the tow carrier must release the vehicle and cannot retain any fees. Other violations related to excessive fee charges by the tow carrier may result in the state requesting partial or full refund of money to the consumer.

- Another state may provide verbal or written warnings or assess civil penalties when a tow carrier's charges exceed the state established maximum rates.
- For validated violations, one state requires a formal consent agreement be entered between the state and tow carrier to address violations and pay any fines/penalties.
- Another state noted that a repeat tow carrier offender that continuously operates out of compliance can cause an audit to be performed more regularly than the required once every two years.

Of particular interest, the Arkansas Tow and Recovery Board is among the reviewed states in that even though it does not have authority to set rates for non-consensual towing in the state, it does have authority to render decisions on customer complaints about excessive rates. Staff for the board may evaluate rate complaints and utilized rule criteria and compare practices of similar tow carriers (see Attachment C for the Arkansas Towing and Recovery Boards Rule 11: Excessive Pricing Regulator Factors). This appears to contribute to a fair and reasonableness standard within the industry.

Overall, two considerations appear important factors in explaining these states complaint processes: 1) these states generally take ownership of a complaint and pursue investigations and remedies for statutory or rule violations; and 2) the degree to which states keep customers involved and informed during complaint review and settlement discussions varies depending on the states' authority. On one hand, a state may take on the complaint review, decision, and hearing process while keeping customers involved and a party to any settlement discussions, particularly on rate issues. On the other hand, another state may take a complaint and reduce the customer's role in investigation and remedy process as the complaint merely spurs a compliance action. In general, a key question is how far each state goes in either becoming an advocate for the customer versus using customer complaints to spur more targeted compliance activities.

3. **In order to define the estimated cost of providing for an arbitration forum to resolve tow carrier-customer disputes, it is necessary to understand the type (i.e. – abandoned vehicle tow, tow of wrecked vehicle on roadway, private property trespass tow, etc.), volume, complexity of cases that may be processed. However, these variables are very difficult to predict, especially without a baseline of historical information.**

Additionally, the structure (i.e. – single arbitrator, arbitration panel/board, etc.), formality (i.e. – adopted procedures and protocols), and time requirements established by the forum will have bearing on the expected costs to process and decide a case. Without reasonable caseload estimates or forum conditions outlined, a system-wide or cost-per-case estimate is indeterminable.

As noted under Answer #1 above, the different models of arbitration that are allowed under state statute may lead to different cost factors. For example, the ad hoc livestock indemnity arbitration board allows the board members to be paid $100 per day by state appropriated funds, while investigating and deciding such cases. However, under the malt beverage manufacturer/distributer disputes, the statutory process reflects and entirely private court structure using a national association as its primary component. Under these circumstances, a commercial claim fee schedule may apply.

However, in a tow carrier-consumer dispute, the American Arbitration Association's non-binding Business and Consumer fee schedule may be more illustrative. Table 2, below, summarizes the AAA Business and Consumer arbitration fee schedule. In some cases, other costs may include hearing room rentals and other case-specific costs. Additional information gathered by LSO indicates that independent arbitrators may charge hourly or daily rates to hear cases. Hourly rates can range from $200 to $700 per hour.

Table 2. American Arbitration Association's Current Non-Binding Business and Consumer Fee Schedule.

Amount of Claim	Fee Owed By Consumer	Fee Owed By Business
Less than $75,000	Half of arbitrator's fee, up to $125	$650 Administrative Fee and remaining arbitrator fee $125 to $650
Greater than $75,000	$125 of arbitrator's fee	$1,025 Administrative Fee and remaining arbitrator fee $625 to $1,375

Source: American Arbitration Association.

Finally, LSO surveyed several additional state agencies that conduct hearings related to citizen/customer disputes either with state or local government agencies. These agencies include: 1) the State Board of Equalization, which may hear taxpayer disputes related to the Department of Revenue or local county boards of equalization; 2) the Office of Administrative Hearings, which may hear a variety of cases as requested upon appeals by citizens or state agencies (i.e. - workers' compensation benefits, food stamps and other welfare benefits, driver’s license citations, state employee personnel disciplinary actions, child and adult abuse central registry determinations, professional licensing boards’ disciplinary and licensure actions, and other disputes); and 3) the Wyoming Medical Commission for Workers' Compensation appeals.

For the Board of Equalization, disputing parties that request a hearing before the board must pay the fees associated with their case (i.e. – court reporter, attorney fees, etc.). The Board does not cover the costs of conducting the hearing except for its own administrative personnel.

The Office of Administrative Hearings notes that it charges a flat rate of $120 per hour for time required of hearing officers to prepare, hear, and render decisions on cases. Since each case is unique and may require varying levels of preparation, some may or may not go to hearing, and other considerations, the agency was not able to provide further detail on the average cost per case processed by the Office.

In terms of the Wyoming Medical Commission hearings for Workers' Compensation (WC) appeals, the disputing party's preparation and hearings costs are paid for by the Workers' Compensation Fund, so a claimant has no financial liability for the hearing. According to Commission staff, if a claimant utilizes an attorney, the attorney bills the Commission and then the Commission submits the bill to the WC office for final review and payment. The WC office utilizes a standard fee schedule for such things as attorney's fees.

Though these example state hearings processes are not specific to the use of arbitration in the state, they do illustrate the variety of ways in which state agencies are engaged in rendering dispute resolutions outside the courts. They also reflect different conditions on financial liability for the disputing parties in paying for such hearings processes.

If you need anything further, please contact LSO Research at 777-7881.

Attachment A Summary List of Example Arbitration Activities Allowed Under Wyoming Statutes

(Note: This list does not detail all references to the use of arbitration allowed by Wyoming law)

- An arbitration board may be appointed and employed to decide on whether livestock owners claims for indemnity benefits are valid related to livestock disposed of by state order as a result of disease (i.e. – scrapie, brucellosis, tuberculosis), when the state veterinarian first denies a claim (W.S. 11-19-106);
- Private parties may use arbitration to settle damages resulting when domesticated buffalo breach an enclosure and onto another landowners property (W.S. 11-28-108);
- Arbitration may be used when a malt beverage distributer is terminated by a manufacturer for issues related to reasonable compensation of such things as fair market value of its remaining assets (W.S. 12-9-115);
- Arbitration may be used when a landowner appeals a Game and Fish Commission decision regarding claims for damages done by big or trophy game animals or game birds (W.S. 23-1-901);
- Arbitration may be used when there is a dispute arising from an audit by an independent auditor and an insurer (W.S. 26-3-306);
- Arbitration shall be used on unresolved issues when an agreement is not completed between a bargaining unit of fire fighters and the corporate entity with which it is bargaining (i.e. – city, town, county; W.S. 27-10-105);
- The state Public Service Commission may act as an arbitration board in disputes between an electric utility and an approved franchise on just compensation for facilities transferred to the acquiring utility (W.S. 37-2-205);
- Arbitration may be used when a condemnor and condemnee cannot reach an appropriate compensation agreement in eminent domain cases (W.S. 1-26-509);
- The state Medical Review Panel and Professional Review Panel act as non-binding arbitration panels in malpractice disputes (W.S. 9-2-1513 through 1523 and 9-2-1801 through 1812, respectively);

Attachment B Tow Carrier-Customer Dispute Programs for Selected Other States

State	Board/Authority	Authority Over Consumer Complaints?	Hearing Process?	May Assess Civil Penalties?
Colorado	Public Utilities Commission – Transportation Division	Yes	Yes. If complaints go to hearing, handled administratively within department, no hearing board.	Yes
Nevada	Nevada Transportation Authority	Yes	Yes.	Yes
New Mexico	Public Regulatory Commission	Yes	Yes. If complaints go to hearing, handled administratively within department, few may be heard by full Commission.	Yes
Utah	Utah Department of Transportation	Yes	Yes. If complaints go to hearing, handled administratively within department, no hearing board.	Yes
Arkansas	Towing and Recovery Board	Yes	Yes. Board or staff may handle non-rate compliance cases. Board handles all excessive rate issue cases that go to hearing.	Yes
Oklahoma	Corporation Commission	Yes (only complaints regarding rates)	Yes. Final complaint resolution is Commission responsibility.	Yes
Louisiana	Public Service Commission	Yes (only complaints regarding rates)	Yes. If complaints go to hearing, handled administratively within department, few may be heard by full Commission.	Yes

Source: LSO Research compilation of other states website and interview information.

Attachment C Arkansas Towing and Recovery Board's Rule 11: Excessive Pricing Regulatory Factors

Rule 11: Excessive Pricing Regulatory Factors
The Arkansas Towing and Recovery Board may consider the following factors in determining if the pricing is excessive or unnecessary under A.C.A § 27-50-1203(e)(1)(C), and (D).

1. Tow vehicle(s) required and size of tow vehicle(s);
2. Total time to accomplish recovery/tow;
3. Number of regular employees required to safely complete recovery/tow;
4. Number of extra people needed/used to effectively complete recovery/tow;
5. Special equipment required to recover or tow;
6. Location of vehicle recovered/towed;
7. Hazardous materials or cargo recovery involved in recovery/tow;
8. Comparison with reasonable prices in region;
9. Weather conditions;
10. Computation of days of storage: midnight to midnight is presumed to be a reasonable period;
11. Any other relevant information having a direct affect on the pricing of the recovery/tow.