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FEDERAL MEDIATION: HOW IT WORKS

JOSEPH F. FINNEGAN

INTRODUCTION

PRESIDENT EISENHOWER, when speaking on the desirability of an early voluntary settlement at a press conference held at the outset of the 1959 steel strike, stated:

The fact that the [steel] contract expired without agreement having been reached does not in any way relieve the parties of responsibility to continue to bargain without interruption.

The services of the Federal Mediation and Conciliation Service have always been available and I recommend that the parties immediately call the Director of the Federal Mediation and Conciliation Service for assistance.

I am confident that with goodwill on both sides of the bargaining table, agreement can be reached without undue delay. The American people have a deep concern in these negotiations and will rightly expect steady progress toward a just and responsible settlement.¹

The purpose of this article is to describe the Federal Mediation and Conciliation Service, its personnel, its purposes and its responsibilities. Certainly there is public interest in labor-management relations because the productivity of democratic processes depends in large measure on the ability of divergent interests to resolve their differences equitably and expeditiously.

HISTORY OF F.M.C.S.

The Federal Mediation and Conciliation Service came into existence on August 22, 1947, pursuant to the "Labor-Management Relations

¹ New York Times, p. 17 (July 15, 1959).

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Act, 1947."² For the first time an independent agency was created by Congress to mediate labor disputes (other than those occurring in the railroad and air transportation industries). Prior to this legislation the "United States Conciliation Service" operated as a function of the Secretary of Labor. That activity was authorized by the act of March 4, 1913, creating the Department of Labor, which provided:

The Secretary of Labor shall have power to act as mediator and to appoint commissioners of conciliation in labor disputes whenever in his judgment the interests of industrial peace may require it to be done.³

Acting under his authority, the Secretary of Labor, during World War I (1914), established the "Division of Conciliation and Labor Adjustment Service," which later came to be known as the "United States Conciliation Service."

When the Federal Mediation and Conciliation Service was created as an independent agency by title II of the Labor-Management Relations Act, the following significant changes in status were made:

- (1) Mediation functions were vested in a newly created "Federal Mediation and Conciliation Service."⁴
- (2) Specific jurisdictional boundaries were laid out for the Service in relation to existing state (and other) mediation agencies.⁵
- (3) The grievance dispute activity of the Service was specifically limited.⁶
- (4) The authority of the Service in the mediation of labor disputes was specifically recognized. The parties "shall participate fully and promptly in such meetings" called by the Service for the purpose of aiding in the settlement of such disputes.⁷
- (5) The duty to bargain collectively required that there be a notice filed with the Service within 30 days after the filing of a 60-day notice with the other party in advance of a proposed change in status of an existing labor agreement.⁸

From time to time there have been changes effected in the Service to provide maximum assistance to labor and management consistent

² Labor-Management Relations Act, 1947, at § 202(a)(d), 61 Stat. 154 (1947), 29 U.S.C.A. § 172(a)(d) (Supp., 1958).

³ 37 Stat. 738 (1913), 5 U.S.C.A. § 619 (Supp., 1958).

⁴ L.M.R.A., 1947 at § 202(d), 61 Stat. 153 (1947), 29 U.S.C.A. § 172(d) (Supp., 1958).

⁵ L.M.R.A., 1947 at § 203(b), 61 Stat. 153, 154 (1947), 29 U.S.C.A. § 173(b) (Supp., 1958).

⁶ L.M.R.A., 1947 at § 203(d), 61 Stat. 154 (1947), 29 U.S.C.A. § 173(d) (Supp., 1958).

⁷ L.M.R.A., 1947 at § 204(a)(3), 61 Stat. 154 (1947), 29 U.S.C.A. § 174(a)(3) (Supp., 1958).

⁸ L.M.R.A., 1947 at § 8(d)(3), 61 Stat. 142 (1947), 29 U.S.C.A. § 158(d)(3) (Supp., 1958).

with the obligations of the Service. At the present time, the field service is comprised of seven regions, with regional headquarters in New York, Philadelphia, Atlanta, Cleveland, Chicago, St. Louis and San Francisco. Each office is administered by a regional director who is answerable only to the Director of the Service. Within each region the Service maintains field offices in highly industrialized areas and there are mediators available throughout the United States. Placement of personnel varies according to the case load of the Service. The Service has offered maximum mediation assistance to labor, management and the public through the maintenance of field offices. The past few years have seen a rising mediation work load handled without an increase in the number of mediators, largely because expanded field office facilities have permitted a more effective utilization of personnel.

LEGAL RESPONSIBILITIES OF THE SERVICE

The basic responsibility of the Federal Mediation and Conciliation Service is to promote the statutory policy of the United States with regard to industrial relations.⁹ The Congress has declared that sound industrial peace can be most satisfactorily secured "by the settlement of issues between employers and employees through the processes of conference and collective bargaining;"¹⁰ that the settlement of such issues through such processes "may be advanced by making available full and adequate governmental facilities for conciliation, mediation and voluntary arbitration;"¹¹ and that certain controversies arising between parties to collective bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and employees "in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies."¹²

The Act further states that the Service has the duty "to assist

⁹ L.M.R.A., 1947 at § 201, 61 Stat. 152, 153 (1947), 29 U.S.C.A. § 171 (Supp., 1958).

¹⁰ L.M.R.A., 1947 at § 201(a), 61 Stat. 152 (1947), 29 U.S.C.A. § 171(a) (Supp., 1958).

¹¹ L.M.R.A., 1947 at § 201(b), 61 Stat. 152 (1947), 29 U.S.C.A. § 171(b) (Supp., 1958).

¹² L.M.R.A., 1947 at § 201(c), 61 Stat. 152, 153 (1947), 29 U.S.C.A. § 171(c) (Supp., 1958).

parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation."¹³ The Act also contains a general statement of the jurisdiction of the Service. "The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of any one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce."¹⁴ The Service is directed to avoid disputes "which would have only a minor effect on interstate commerce if State or other conciliation facilities are available."¹⁵

It is further declared that the desirable method for the settlement of grievances arising over the application or interpretation of an existing labor agreement is "final adjustment by a method agreed upon by the parties. . . ."¹⁶ The Service is directed to make its services available in the settlement of grievances "only as a last resort and in exceptional cases."¹⁷

The Act declares that employers and employees, to prevent or minimize interruptions of commerce growing out of labor disputes in any industry affecting commerce, shall, in the event their dispute is not settled, "participate fully and promptly in such meetings as may be undertaken by the Service under this Chapter for the purpose of aiding in a settlement of the dispute."¹⁸

The "duty to bargain collectively" is defined in Section 8(d) of the Labor-Management Relations Act of 1947 and requires, where there is in effect a labor agreement covering workers in an industry affecting interstate commerce, that the party who seeks to terminate or amend such agreement must file a notice with the other party sixty days prior to the expiration of said agreement and must notify the Federal Mediation and Conciliation Service "within thirty days after such notice of the existence of a dispute."¹⁹

¹³ L.M.R.A., 1947 at § 203 (a), 61 Stat. 153 (1947), 29 U.S.C.A. § 173 (a) (Supp., 1958).

¹⁴ L.M.R.A., 1947 at § 203 (b), 61 Stat. 153, 154 (1947), 29 U.S.C.A. 173 (b) (Supp., 1958).

¹⁵ *Ibid.*

¹⁶ L.M.R.A., 1947 at § 203 (d), 61 Stat. 154 (1947), 29 U.S.C.A. § 173 (d) (Supp., 1958).

¹⁷ *Ibid.*

¹⁸ L.M.R.A., 1947 at § 204 (a) (3), 61 Stat. 154 (1947), 29 U.S.C.A. § 174 (a) (3) (Supp., 1958).

¹⁹ L.M.R.A., 1947 at § 8 (d) (3), 61 Stat. 142 (1947), 29 U.S.C.A. § 158 (d) (3) (Supp., 1958).

In carrying out the responsibilities of the Service under the provisions described, information acquired during mediation conferences is privileged against disclosure. The parties to a labor dispute should be free to talk without the risk of their confidences being revealed.²⁰

THE THIRTY-DAY NOTICE REQUIREMENT

The thirty-day notice required to be filed with the Federal Mediation and Conciliation Service by Section 8(d)(3) of the Labor-Management Relations Act is important to the parties inasmuch as their rights and remedies are affected thereby. It is important that the parties comply with the notice provisions of Section 8(d)(3) which are designed to give the Service adequate opportunity to be of assistance. Whether or not such notice has been given may determine whether a subsequent work stoppage is legal or illegal.

The language of Section 8(d)(3) has not received uniform interpretation by the courts of the United States. In 1956, the Supreme Court of the United States declared:

Since the Board expressly found that the instant strike was *not to terminate or modify* the contract, but was designed instead to protest the unfair labor practices of petitioners, the loss-of-status provision of Section 8(d) is not applicable.²¹

Justice Frankfurter, in the course of a dissent in a case dealing with a strike on a reopener of an existing labor agreement, stated:

[D]iverse interpretations, particularly by the authorities charged with the administration of the Act, reflect not only the ambiguity of section 8(d)'s language but also the obscurity of its legislative history.²²

The most recent decision with reference to the notices required under Section 8(d)(3) was *Local Union 219, Retail Clerks' International Association v. N.L.R.B.*²³ decided by the United States Court of Appeals for the District of Columbia on March 19, 1959. The Court of Appeals did not agree with the decision in *International Union of Operating Engineers, Local 181 v. Dablem Construction Co.*,²⁴ in which the Court of Appeals for the Sixth Circuit held that a failure to give timely notice to the Federal Mediation and Con-

²⁰ Tomlinson of High Point, Inc., 74 N.L.R.B. 681 (1947).

²¹ Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270, 286 (1956).

²² N.L.R.B. v. Lion Oil Co., 352 U.S. 282, 297 (1957).

²³ 265 F.2d 814 (C.A.D.C., 1959).

²⁴ 193 F.2d 470 (C.A. 6th, 1951).

ciliation Service forever tainted the strike under Section 8(d)(4) of the Act as an unfair labor practice. The Court of Appeals for the District of Columbia, in the *Retail Clerks'* case also disagreed with the decision in *Schneid v. District 50, United Mine Workers*²⁵ which in effect held that a new sixty-day notice must be given so as to enable a timely notice to this Service. In the *Retail Clerks'* case, the District of Columbia Court held that the original sixty-day notice would still be valid and a second sixty-day notice would be a useless formalism.

The court also disagreed with the argument of the General Counsel of the National Labor Relations Board to the effect that the spirit of Section 8(d)(3) is violated only when the Mediation Service (and the state agency) does not have the thirty days to intervene in the bargaining process. The court was of the opinion that this argument did not give sufficient weight to the requirement of Section 8(d)(3) that the notice to the Mediation Service must be given "within thirty days" of the sixty-day notice given under Section 8(d)(1). The court interpreted Section 8(d)(3) as "making two demands: to require the giving of notice within a 30-day period after the giving of notice under Section 8(d)(1), and to require also a 30-day waiting period before a strike or lockout, under Section 8(d)(4). Thus if untimely notice were given, the union would have committed a violation of Section 8(d)(3). If, however, the union were to wait for thirty days beyond the Section 8(d)(3) notice, and then go out on strike, it would not be in violation of Section 8(d)(4)."²⁶ The court further pointed out that in the *Local Union 219, Retail Clerks'* case, that the union went on strike ten days after the untimely 8(d)(3) notice and ruled that the National Labor Relations Board was correct in holding the union guilty of an unfair labor practice and in issuing a cease-and-desist order.

The most recent National Labor Relations Board statement with respect to the thirty-day notice provision was dated January 20, 1959.²⁷ It is in line with prior Board decisions.

²⁵ 40 L.R.R.M. 2529 (1957).

²⁶ *Local Union 219, Retail Clerk's International Assn. v. N.L.R.B.*, 265 F.2d 814, 819 (C.A.D.C., 1959).

²⁷ *Broward County Carpenters v. Broward Builders Exchange*, 122 N.L.R.B. No. 124, 43 L.R.R.M. 1240 (1959); *United Mine Workers of America*, 118 N.L.R.B. 220 (1957).

BACKGROUND AND QUALIFICATIONS OF MEDIATION STAFF

About 33 percent of the total mediator staff of the Service have governmental or professional experience, including service as lawyers or hearing officers; 29 percent have labor backgrounds, having been employed as negotiators, business agents, international union representatives or have worked in the research and educational fields for unions; 26 percent have management backgrounds, such as bargaining negotiators, personnel managers, directors of industrial relations or have been identified with management in some executive capacity; and 12 percent have a mixture of labor and management experience.²⁸

The educational background of the mediators shows variations all the way from grade school educations to graduate degrees. Some mediators have been engineers, lawyers or experts in time study and job evaluation. In some important and difficult disputes it is not unusual for a three-man panel to be made up of one mediator who spent a major portion of his working life as a union official, another who is a former industrial relations director and a third who is a lawyer or engineer.

The federal mediators are not included in the Civil Service. The positions are appointive and can be terminated by the National Director. Actually, mediators' positions have always been treated as nonpolitical. The Service has established standards of conduct and procedures designed to prevent arbitrary action. The jobs offer about as much security as Civil Service positions.

The qualification standards established by the Service require an appointee to have a minimum of six years of progressively responsible and successful experience in labor and management relations or closely allied fields, and this within the past twelve years. One year of college work in labor law, economics, labor personnel or similar fields, is treated as equal to six months of actual experience up to a maximum of two years of the necessary requirements.

Even when an applicant has met these requirements, he is subjected to a full field investigation. Before action is taken on his application, a national agency check covering the major portion of the applicant's life has been made, and written inquiries directed to appropriate agen-

²⁸ Report of Director, F.M.C.S., Qualification Standards of Commissioners of F.M.C.S., Fourth Annual Industrial Relations Conference, University of Michigan-Wayne State University (March 6, 7, 1958).

cies, former employers and supervisors, references, and schools and colleges attended by the person under consideration. In addition, a physical examination is required which, among other things, takes into account the stress and tension incident to mediation work.

The background brought to the job is important and the Service implements it by a mediator workshop program, to keep abreast of the constant changes in industrial relations. The workshops consist of training sessions at convenient locations throughout the United States and, recently, there have been two such programs each year for the staff. In addition to utilizing the skills of the people in the Service, outside consultants who are experts in their fields of labor relations take part in the programs. The subject matter of these workshop seminars has included conference leadership, problem-solving techniques, mediation clinics, communication skills, wage incentive systems, profit-sharing plans and other subjects closely allied with current mediation work. The objective of such training programs is to help to develop a better trained organization so that the federal mediator will be equipped to make a maximum contribution to the parties' collective bargaining effort.

SCOPE OF MEDIATION ACTIVITY

The basic policy of the Service is essentially as follows:

The prime responsibility for industrial peace rests upon unions and management; the responsibility for offering mediation services in disputes having mainly local or intrastate consequences rests on local or State mediation agencies, where available; the Federal Mediation and Conciliation Service bears the responsibility of conciliation and mediation of labor disputes the consequences of which are substantially interstate in character. In other words, the energies of the Service are to be expended and its facilities made available in those situations which are properly of concern to and within the area of interest of the Federal Government.²⁹

The major responsibility of the Service is the successful mediation of specific disputes between labor and management that arise from contract negotiations. Dispute mediation has always been the primary function of the Service and continues to be its principal responsibility.

Mediators seek to assist the principals to a dispute to develop a satisfactory solution of their mutual problem. It may develop in the course of dispute mediation that there are disruptive factors that extend beyond the specific issues "on the table," but the first order of

²⁹ Tenth Annual Report, F.M.C.S., U.S. Government Printing Office, p. 9 (1957).

business is to assist the parties to resolve the issues that block the settlement. After the settlement has been consummated, to the extent that labor and management need and want the assistance of the Service to develop procedures for promoting more harmonious relations on a continuing basis, the Service will assist labor and management to carry out such programs. This represents a case-by-case effort by the mediator to identify disruptive factors in a particular relationship and then to seek affirmatively to correct those factors. The basic law clearly contemplates this activity.³⁰

When the occasion is appropriate, mediators work with and advise the parties during early stages of negotiation, at a time when dispute mediation has not been brought into play. Such preventive activity gives the mediator an opportunity to develop attitudes, approaches and bargaining practices of a positive nature and contributes much to improving the relationship between the parties.

As part of its long-range program the Service provides an Audio-Visual program to management and labor groups at the plant level. Variations in the program have been developed and are now being shown to interested labor and management groups.

Whenever possible, the Service makes available personnel to assist in and plan educational and training conferences so that the broad experience and special skills of staff men can be used for the benefit of improved management-labor relations. Though there are limitations dictated by manpower and budgetary considerations, the Service assists the principals to build sound relationships.

There is statutory emphasis on voluntary arbitration and the peaceful and orderly solution of grievance disputes arising out of the application or interpretation of the labor agreement.³¹ Prior to the transfer of all its conciliation functions from the Department of Labor to this Service, that Department provided arbitration assistance somewhat similar to that which is now provided, except that presently the Service's arbitration function is divorced from its mediation function. Federal mediators are not permitted to arbitrate disputes.³² The Service does, however, maintain a nationwide roster of about six

³⁰ L.M.R.A., 1947 at §§ 201(c), 203(a), 204(a)(3), 205, 61 Stat. 152 to 154 (1947), 29 U.S.C.A. §§ 171(c), 173(a), 174(a)(3), 175 (Supp., 1958).

³¹ L.M.R.A., 1947 at § 201(b), 61 Stat. 152 (1947), 29 U.S.C.A. § 171(b) (Supp., 1958).

³² Statement by George E. Strong, General Counsel, F.M.C.S., made before the Seventh Annual Union-Management Conference, University of Notre Dame (Feb. 27, 1959).

hundred arbitrators from which, upon the joint request of the parties, it furnishes panels of arbitrators for their consideration.

Arbitrators selected from a list provided by the Service have no legal relationship with the Service. Their relationship is with the disputants that select them to arbitrate. Their authority and duties stem from the agreement of the parties to arbitrate and not from their designation by the Service. They are paid by the parties for whom they arbitrate. They receive no pay or compensation from the Government.

The Federal Mediation and Conciliation Service does, however, require arbitrators, whom it nominates and who are chosen by the parties, to conform to basic and generally accepted ethical standards for arbitrators. Further, they are requested to furnish the Service with copies of their arbitration awards and with details as to fees and expenses charged the parties.

Consistent with the prescribed functions of the Service, the above-described arbitration procedure aids in the maintenance of industrial peace and indirectly eases the pressures normally attendant in collective bargaining. Grievances not satisfactorily settled through arbitration may well appear "on the table" at the next bargaining go-round, and such factors can be disruptive. Conforming to the national policy that arbitration is the desirable method for settling grievances arising under labor agreements, the Service has consistently recommended that the parties include provisions for arbitration as the terminal step in their grievance procedure. About 90 percent of all labor agreements provide for terminal arbitration of grievances.

THE MEDIATION PROCESS

It is the responsibility of labor and management to come to the bargaining table equipped with all the skills and tools that can serve to achieve positive goals. The parties make the decisions and there is no outside force imposed on them. That means that the parties must be prepared to substantiate their point of view by the rigid test of argument and counter-argument. To do that effectively they must be prepared to listen to the other man's point of view, to evaluate constantly the merits of the respective positions. It has been said:

Our research and experience to date would make it appear that breakdowns in communication, and the evaluative tendency which is the major barrier to communication, can be avoided. The solution is provided by creating a situa-

tion in which each of the different parties comes to understand the other's point of view. This has been achieved, in practice, even when feelings run high, by the influence of a person who is willing to understand each point of view emphatically, and who thus acts as a catalyst to precipitate further understanding.³³

Disputes and disagreements are minimized when the parties come to grips flexibly with the hard core of the dispute. The mediator approaches each situation knowing that the vast majority of labor-management contract negotiations are settled with no active participation by the public peacemaker. What factors come into play as the mediator proceeds to work with the disputants to find the solution of their dispute?

The mediator must be a good listener. Whether in joint session or separate caucus, the mediator must hear out the parties patiently and with detachment. Patience by all participants is a basic requirement in collective bargaining, for there is no quick way to arrive at a settlement. Many things are said in the presence of the mediator that are not specifically in dispute, but it is useful that they be said. The mediator serves as a sounding board.

Certainly the mediator must understand what he hears. He must recognize the issues and class them apart from other matters that invariably come up at bargaining time. The terms used in labor-management relations have their own meaning, for we have here a special language.³⁴ Mediators come to know the terms by background, training and constant contact with them. One of the functions of the mediator is to keep abreast of negotiations, settlements, business conditions and trends.

The mediator must be tactful. He can not last in this arena without tact. Generally speaking, it is a natural trait and is seldom learned. It is a necessary attribute in this business. It is truly basic equipment. In a given dispute, there may be a need to bear down, but how it is done and when it is done are critically important. Though timing be right—and that is no easy decision to make—a tactless approach will derail progress toward settlement.

The mediator must be enterprising. Every dispute has an answer somewhere, sooner or later, and the mediator works with the dis-

³³ Rogers and Roethlisberger, *Barriers and Gateways to Communication*, Harvard Business Review, p. 49 (July-August 1952).

³⁴ Roberts, *Dictionary of Labor-Management Relations*, University of Hawaii (1947-1948).

putants to find it sooner. It is generally agreed that most people will ultimately find a way to solve problems by themselves. The mediator, on behalf of the public and the participants, works to assist the participants to find the answer at the earliest possible moment. Again, it bears repeating that the parties settle or fail to settle their own disputes. That is their responsibility and it can not be placed elsewhere.

The mediator must be honest and impartial. Though the mediators come from a variety of backgrounds, they must treat all situations as *amicus curiae*. The public interest requires that the public peacemaker stay in the middle of the dispute—for both sides and for neither side.

To be effective as a mediator, there must be optimism. It is a most dangerous situation in which there is a pervading feeling that a settlement is impossible. The mediator must go forward, always probing for the solution, confident that there can be a solution. If it can not be developed now, it will be developed later.

Having briefly described some of the qualities of the mediator, let us turn to the processes involved in mediation. Labor and management are materially aided when they recognize these processes and use the mediation tool efficiently and productively. Lawyers have a special interest in these processes because they can materially enhance the possibility of settlement by utilizing mediation.

The mediator has no more useful function to perform than to keep open the channels of communication between the disputants. At the outset, labor and management communicate directly and continue face-to-face to the point that progress toward settlement ceases. The mediator typically enters negotiations when there has been a breakdown in useful communication and the parties have become deadlocked. The mediator is equipped to resume productive communication and maintain it until there is complete agreement.

It has been previously stated that the Federal Mediation and Conciliation Service is charged with the duty to proffer its services to disputants in a labor crisis. To minimize or prevent an impasse, and to the degree necessary, the mediator calls meetings and encourages the parties to resume useful communication. When it is suitable to proceed with the parties in separate caucus, the mediator moves back and forth between the parties. In one way or another, then, the channels of communication are reopened. The channels are kept open and, in due time, communication leads to agreement.

It is obvious that communication is an integral part of the process of labor mediation.

Identification of the elements of dispute

At the outset, the mediator approaches the bargaining table unaware of the technical aspects of the dispute. Though the mediator may have secured some of the details by periodic contacts with the parties, he must now, in active mediation, identify all the elements in the dispute. One might suppose that the issues, at this point, are clear-cut in the minds of the disputants, but experience shows it is not necessarily so. The parties have met face-to-face a number of times and have discussed many different matters. The technique involved in skillful bargaining precludes the disputants from giving away all their bargaining position until a settlement is within reach, and, in a crisis, the mediator often finds the issues and positions are "up in the air." The existence of an impasse means that the parties have not yet succeeded in gaining their objectives and that their positions are in various stages of dispute.

Initially, the mediator must seek to identify the scope of the dispute so that all issues blocking a settlement are "on the table." In that way the four corners of the disagreement are marked and the dispute can now be identified, issue by issue.

Finding the "keys"

The mediator must proceed to find the "keys" to the dispute. Communication is an integral requirement and the use of separate caucuses, if properly timed, aids materially. The disputants usually talk more freely under such circumstances, and the trusted mediator can obtain an accurate picture of the parties' basic sentiments and objectives. Perhaps the parties know what the "keys" are and the mediator can verify them. There are times, however, when the parties can not identify the "keys" to the dispute, and under such circumstances the mediator endeavors to pinpoint them. It is important to recognize that objectives vary according to time and position, and that the "keys" do not remain stationary. Communication through mediation can provide the disputants with the key questions, the answers to which will ultimately unlock the impasse.

To find the "keys" is by no means a simple procedure and all the skills of the mediator are brought into play. He must listen, understand and evaluate, and he must move ever forward, tactfully and patiently, to probe for a breakthrough. In the course of communicating with the parties separately, the mediator may begin to raise doubts in

the minds of the parties about the position they have been maintaining in the dispute. The question has been asked:

How can you get parties who are wide apart to an agreement?³⁵

The answer is:

They, or one of them, obviously must voluntarily recede from an extreme position. One way of facilitating this process is to raise legitimate doubts in their minds about positions firmly held.³⁶

Acceptability and reliability are important, for the disputants must feel free to "level" with the mediator and he must feel free to question, probe and raise doubts with the parties.

Testing alternatives

The mediator can assist the parties to end the crisis by channeling new and varied approaches to them. Once the "keys" have been identified and verified, alternatives must be developed to satisfy the critical demands, and that will be accomplished by a continuous exchange of ideas. The ideas may be completely new or may be merely variations of positions previously laid down.

The mediator is equipped to test alternatives, although in the final analysis, the parties will determine its success. It has been stated:

There was also general agreement between labor mediators and U.N. mediators on the third major step, which is perhaps the crucial part of the mediation process. That is the "art" of proposing the alternate solution. When the parties feel unable to recede any further from announced positions, which seem to be rigidly held, a mediator may sometimes come up with a new solution to take the place of the two positions—with a gap between them. If the gap seems to be unbridgeable maybe both parties can go down the chasm a little way and cross by a method now suggested. The art of the alternative solution certainly seems to me to be the essence of the mediation process.³⁷

The skilled mediator has dealt with issues of similar importance in other labor-management disputes and has often been a factor in developing useful solutions. The skill of the parties in combination with the day-to-day know-how of the mediator will go far to make alternative-testing productive. The ability to reach agreement depends on the flexibility, ingenuity, experience, tact, and the will of the participants. Once again we see that communication in the form of joint and separate caucuses is invaluable.

³⁵ Address by George W. Taylor to Regional Directors' Conference, F.M.C.S., Washington, D.C. (June 23, 1952).

³⁶ *Ibid.*

³⁷ *Ibid.*

Position-protecting

The mediator utilizes communication to identify issues, to find "keys" and to test alternatives. These procedures are carried out by the mediator while protecting the positions of the respective participants—a most important phase of mediation. To some degree, perhaps, the parties in crisis-bargaining can identify issues, find "keys" and test alternatives, but *they cannot do those things while at the same time maintaining and protecting their official positions*. How can one maintain that he is standing pat when he is actively seeking to discover the changes he would have to make to reach a settlement across the table? It takes a third party, skilled in the art of peace-making, someone other than the disputants, to do that. The efficient mediator is able to leave undisturbed the official positions of the parties while exploring possible roads to agreement.

Why is position-protecting so important in crisis-bargaining? In times of crisis, variations in official position that fall short of resolving the crisis may well cause the recipient of the new offer to feel, "it is going our way now, we'll just sit tight." Position-protecting does away with marking time and the mediator can provide a two-way prospect of bringing about changes of official position when they will "buy" something.

It is also important to recognize that alternative-testing has a better chance of success when the parties are encouraged by the efforts of the mediator to feel they are entertaining alternatives that have a chance of bringing an end to the impasse. The mediator bends his efforts to explore the key areas in dispute, knowing well that the goal is not change for change's sake. The goal is an equitable solution.

The mediation process herein described offers to the parties in labor-management disputes an orderly and productive way to resolve mutual problems. Initially the parties are brought together to find ways to end the crisis. The mediator proceeds according to his own plan (a) to identify the scope of the dispute, (b) to define the stumbling blocks to settlement and (c) to set up the pattern of settlement while the stated positions of the parties are protected. At the earliest possible moment the parties signify assent and the crisis is over.

WHAT CAUSES LABOR DISPUTES?

The federal mediator is faced with a variety of problems and issues when he goes into a meeting with the parties for the first time.

There are basic economic issues, readily identifiable, such as wages, hours, vacations, holidays, pensions, health and welfare. There are fundamental non-economic issues, such as seniority, layoffs and recalls, transfers, promotions, job bidding and bumping. There may be union security problems, such as union shop, maintenance of membership or check-off provisions. Some of these items are classed as "fringes" and management will tell you they *all* cost money. Whether purely economic, institutional or principle, such issues are difficult to settle and all the mediator's skills are called upon.

In addition to the substantive differences between labor and management there are often disagreements caused by a procedural failure to develop a basis on which agreement is possible. It has been described by some as "the evaluative tendency."³⁸ Such procedural issues have been characterized as "phantom disagreements," and they arise from the appeal of one's own point of view, a "me-too" attitude, personal ill-feeling and lack of trust, an inability to consider another man's point of view and lack of an observable goal.

Whether the dispute is substantive or procedural, communication must be maintained to reach an equitable and expeditious settlement. The mediator summons all his skills to assist the parties to deal successfully with the issues. The role of federal mediation as prescribed by the law of the land is to represent the public interest in labor-management disputes. Both parties are part of that public and the mediator will move between the parties, keeping open the channels of communication, to assist them to resolve their problems. It has been said: "There is nothing new under the sun, except perhaps a combination of new concepts of the old." Admittedly, mediation brings to the dispute new techniques to complement the techniques of the parties themselves. Mediation itself involves no secret formula and no new ideas, though some different techniques are used in its application. In its simplest form it involves having the right man on the job at the right time, and the right man is basically a practical, trustworthy and capable labor relations expert who is experienced and grounded in labor problems and their solution. He is one who can command the respect and confidence of the disputing parties.

STRIKES

It is generally acknowledged that nobody wins a strike. The employer loses valuable production, customers and working capital. The

³⁸ Note 33, *supra*.

employees must live without vital pay checks. Often the losses incurred by both sides exceed their gains, and sometimes they are never recovered. The employer may be forced to close his doors and his employees may have to look elsewhere for jobs which may be nonexistent—lucky for both employers and employees that strikes are *not* the usual method of resolving labor-management differences, and that most differences are successfully resolved through collective bargaining.

The fact is that most mediation activity does not involve strike activity in any form, but rather takes place in orderly collective bargaining wherein neither side gets all it wants, but avoids a resort to economic action.

Over the past ten years the total amount of working time lost by strikes in the country has been very small, actually 0.36 percent. This means that working time *not* lost through labor-management disputes amounted to 99.64 percent of all time actually available for work. In 1958, there were 3,694 strikes in the United States.³⁹ They lasted an average of 19.7 days, involving 2,620,000 employees or 4.8 percent of all those employed. Total man days lost was 23,900,000 or only 0.22 percent of total working time.

In 1957 the same figures were slightly lower. In general, 1958 seemed less active than 1956 or 1957 and was well below post-war averages.

In 1958 “pay” was the prime strike issue, involving 32.6 percent of all strikes. “Job security” was next, involving 11.7 percent. Others were “union organization”—9.8 percent; and “shop conditions and policies”—9.7 percent. The Federal Mediation and Conciliation Service believes that it plays an important part in keeping these figures as low as they are.

CONCLUSIONS

The theory of legislating industrial peace has been much discussed. It has a certain attraction, but history has shown it to be an imperfect and complicated approach to the ideal of industrial justice for both employer and employee without sacrifice of the public interest. Many consider this theory to be impractical and generally inconsistent with democratic principles. Attempts to outlaw strikes and lockouts in special “public interest” segments of the economy (e.g., public utilities) has not proven to be universally satisfactory in the United States.

³⁹ Bureau of Labor Statistics, Dept. of Labor (June 1959).

There is no substitute for a real desire on the part of bargainers to reach mutually acceptable agreements to avoid the use of economic force with its short and long range repercussions. It has been said:

The paradoxical truth of the matter is that under normal circumstances there is no deterrent to strikes so effective as the strike itself.⁴⁰

The principals in labor-management relations are charged with the responsibility to bargain in good faith and to make every effort to reach agreement. Alert and responsible labor and management are prime requisites to protect the public interest. Also, the parties must have the knowledge, skill and desire to reach agreement. Mediation is the tool designed on behalf of the public to prevent and minimize labor disputes.

The following statement sums it up:

But no lasting stability can be achieved if either side arrogates to itself such Olympian wisdom that the other's views are excluded from meaningful consideration. For one bargaining team to feel that it is *omniscient* enough to balance all the conflicting claims of owners, employees and buyers with no help from the other, is hardly fitting in a society that would rather make its mistakes democratically than have all the crucial decisions made by any power elite.⁴¹

⁴⁰ Straus, *Laws Won't Stop Strikes*, *Harpers' Magazine*, p. 26 (July 1952).

⁴¹ Raskin, *Labor: A New "Era of Bad Feeling"*, *New York Times Magazine*, p. 19 (July 5, 1959).