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Labor-Management Conflict Resolution and the Larger ADR Community

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Introduction

Anyone who mediates or participates in mediation must realize that mediation is not a 20th century invention, that persons so inclined have probably been doing some type of mediation, however basic, since ancient times.

While doing research for my book, [A History of ADR](#), I learned that examples of mediation occurred as early as 1800BC. Many current mediation practitioners display little awareness of the longevity of mediation, and they are poorer for not knowing.

While my book attempts to connect the practice of mediation over the many centuries since these earliest examples, the connection is difficult to achieve because too little institution building and continuous practice occurred. Historically, mediation practice has been largely ad hoc with many fits and starts. The informality of mediation and its confidential nature has tended to avoid written records before the last hundred years.

Based on their lengthy institutional existence, several current mediation practitioner groups could lay claim to a connection to today's practitioners. These are business disputes, international diplomacy, and labor-management disputes.

Business disputes in the U.S. acquired an institutional foundation in the 1920's with several attempts that ultimately resulted in the formation of the American Arbitration Association. As their name implies, AAA in its early years focused primarily on arbitration. Mediation was added in the last 30 years.

Diplomacy largely involves negotiations between nations. Diplomacy has mediation indicia when a diplomat of one nation attempts to aid two disputing nations reach an agreement.

Labor-management mediation has the clearest link with current mediation practice based on its continuous institutional existence since the creation of the U.S. Department of Labor in 1913. The United States Conciliation Service in the Department of Labor has had a permanent staff of conciliators and an evolved body of mediation practice. The USCS operated from the first world war until 1947 when it was replaced by a new statute which created the Federal Mediation

and Conciliation Service. When that occurred, the staff and office space was all transferred to the FMCS.

As a result, labor-management mediation can claim an institutional history from 1913 to the present, almost a century of existence. (Although, the focus in this paper is on mediation, both USCS and FMCS throughout their history promoted the use of arbitration, particularly in resolving grievances.)

Given the decline of labor-management relations in the last twenty-five years, with the accompanying decline in the number of labor-management mediators, the mediators who work in other dispute arenas probably feel that labor-management mediation is passé and therefore of little interest.

Yet any organization with nearly 100 years of continuous existence with a full time staff of mediators, an extensive body of experience and training ought not to be ignored.

USCS History

The earliest Federal legislation on labor-management conflict resolution focused on railways because of their importance to the economy. The Erdman Act of 1898, authorized both mediation and arbitration in railway disputes. That law was used 61 times before its repealed in 1913. Since these cases were mediated on an adhoc basis, no institutional record or permanent staff was created. The same was not true after 1913.

On March 4, 1913, President Taft's last day in office, he signed into law the organic act creating the Department of Labor, which brought together the separate bureaus of Immigration, Naturalization, Children and Statistics. To these four functions, the new law added the mediation/conciliation function with these words:

“That the Secretary of Labor shall have the 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.”

Because Congress initially failed to provide funding for this function, Labor Secretary Wilson used money and staff from other bureaus to establish a conciliation office. It would later be called the United States Conciliation Service (USCS). Since USCS made no distinction between mediation and conciliation, these words are used interchangeably here.

In his first annual report, Secretary Wilson described his view of the conciliation function as analogous to the helping role of a diplomat in the State Department, with an emphasis on professionalism and fairness to everyone involved.

Neither the 1913 law nor regulations require anyone to request or participate in USCS mediation, nor to accept any mediator recommendation. The process imposed no compulsion.

Only 33 cases were mediated during 1913-1914, but with the advent of WW1, USCS mediated 1,217 in 1918. During the 1920s and early 1930s, the number of mediation cases dropped to around 400 annually based on significant employer efforts to return to labor-management conditions prior to the war. With legislation favoring collective bargaining in the mid 1930s, mediation expanded, reaching 4,231 by 1938. The advent of WWII greatly increased mediation numbers to 23,121 in 1945.

FMCS History

With the end of WWII, came a period of adjustment as production shifting from war to peacetime, and war veterans returned home. FMCS was created during this period as the replacement for USCS. The two most significant changes from USCS to FMCS were:

1. Negotiating parties were required to provide FMCS with a 30-day notice prior to the expiration of their collective bargaining agreement.
2. The use of arbitration to resolve grievances had become almost a universal practice by the war's end based on strong government pressure. FMCS established and maintained a roster of qualified arbitrators to service this expanding dispute resolving process.

The thirty-five years from the war's end through the 1970s were boom years for collective bargaining, mediation, and grievance arbitration. The prevalence of these three ADR processes in labor-management relations during that period was so daunting that any news reference to those processes would be, with few exceptions, referring to a labor-management dispute. Changing circumstances ended labor management dominance in ADR, while new conflict arenas pushed ADR practice beyond anything imaged earlier. Today's ADR practitioners, of every type, can find the roots of their work in labor-management conflict resolution.

Another source of labor-management mediation and arbitration is state agencies providing such services. While a number of states had enacted laws concerning labor disputes by 1913, few had appropriated funds to maintain full time staff. By the 1930's only the more industrialized states between Massachusetts and Minnesota had full time mediators. With the boom of public employee unionism in

the 1960's, additional States began providing mediation assistance using either staff or adhoc mediators and arbitrators. This development greatly expanded the membership of the Association of Labor Mediation Agencies (ALMA), which subsequently changed its name to Association of Labor Relations Agencies (ALRA).

FMCS, ALRA and the National Academy of Arbitrators' (NAA) provided enough opportunities for mediator and arbitrator training, development and networking that they had no need for other organizations of neutrals. Yet members of these organizations could not ignore the civil rights disputes, Vietnam War protests, campus unrest, and the general unrest of the 1960's that were straining, if not exceeding, the capacity of traditional peacekeepers (police) and dispute resolvers (courts).

In response, a few labor-management mediators wrote about the potential use of mediation in civil rights and community disputes based on the labor-management model, and a few labor management mediators actually tried to use mediation in these emerging dispute areas. Two foundations supported groups staffed by labor dispute resolvers, who attempted to apply their skills in these new dispute areas. The National Center for Dispute Settlement in Washington D.C. and the Center for Mediation and Conflict Resolution in New York were the best known.

SPIDR History

While the idea of a larger umbrella organization of dispute settlers had been discussed in the past, the need had never developed to a critical mass. Until the late 60's, most dispute resolvers practiced in the labor-management arena, and their professional needs were satisfied through NAA, ALRA, AAA or FMCS.

In 1971, FMCS assigned a senior mediator the task of contacting state mediation agencies, ALRA, NAA and AAA to discuss the need for a more inclusive organization to assist mediators and arbitrators in these new dispute areas. As a result of this effort, a committee drafted a proposal for forming an organization.

In September 1972, the Society of Professionals in Dispute Resolution (SPIDR) issued charter membership to 146 individuals from 26 State, Washington D.C. and Canada. In Chicago a month later, the 34 members at the first membership meeting signed the Certificate of Incorporation (Charter). All 34 were labor management dispute resolvers, seven would later become president, four were women, two were Canadians, several were already working in these new areas, referred to at the time as "new dispute areas" or "non labor disputes."

Workshops at the first several SPIDR annual conferences were primarily on labor management topics with the idea that people from the new dispute areas could and should learn from the labor-management experience. Gradually, this changed to less labor management topics and more new area topics. That shift

was accompanied by a decline in labor management neutral attendance at SPIDR conferences, and their failure to renew their SPIRD membership. However, the role of labor management practitioner in SPIDR leadership continued. At SPIDR's 25th anniversary, 21 of its 25 past presidents had labor-management experience.

* Barrett is the author of a History of ADR (Jossybass 2004), a history of SPIDR, and many papers and articles on USCS and FMCS as historian of FMCS. He is one of the 34 signers of the SPIDR Charter. Prior to the signing, he had been, on leave from FMCS, working with NCDS on community, racial and campus disputes, and had written two published article urging new area disputants to use the labor-management model to resolve their disputes. His website is mediaionhistory.org