

Sixty Years of FMCS: 1947 to 2007 (Long Version)

By Jerry Barrett

Sixty years ago in the immediate post war period, several important industrial relations organizations were born. The year 1947 witnessed the creation of the Industrial Relations Research Association (now LERA), the Industrial and Labor Relation School at Cornell University, the National Academy of Arbitrators, and the Federal Mediation and Conciliation Service, as its predecessor the United States Conciliation Service went out of existence.

This paper describes the FMCS history based on a 500 square-foot archive containing papers, memorabilia, records, books, reports, photos, equipment, film and tape recordings, over 175 taped interviews of mediators from both FMCS and USCS.

To provide the reader with a sense of the archive contents and value, two items are described below:

In 1986, the author interviewed retired mediator Martin Joseph O'Connell, 102 years old at the time. He had served with both the USCS and FMCS. During the interview in his Warrenton, Virginia home, he was seated behind a desk wearing a long sleeve white shirt with cufflinks and a tie. The interviewer sat across from Mr. O'Connell and looked in awe at this ancient man, who had obviously prepared for the interview. With a yellow pad on his desk, Mr. O'Connell, very deliberately, took his fountain pen from his shirt pocket, removed the cap and prepared to write. He asked the interviewer his full name and address, which he printed at the top of the page, along with the day's date. Then he placed the cap back on his pen, laid the pen on the desk, folded his hands,

looked the interviewer directly in the eyes and said: “Mr. ----- how can I help you?” He had just taken charge of our meeting. The formal, but comfortable, ritual the interviewer had just observed was one Mr. O’Connell had obviously done many times -- but probably not for 30 plus years. The interviewer wished he had brought a video camera rather than just tape recorder. It was an elegant moment. It was a moment about the FMCS-USCS history, because the FMCS story is not just about Directors of the Service appointed by Presidents for brief terms, nor national office competitions, promotions or policies. The history is about many individual mediators, like Martin Joseph O’Connell, who were assigned to Green Bay or Kalamazoo (and many other places), who went there, earned the acceptability of labor and management, learned the mediation trade, and practiced it well over many years. In 175 interviews, their stories have been captured.

The archive contains a copy of the “Report on the Federal Mediator: His Responsibilities, Functions, and Techniques.” This document, written in 1953 by three young FMCS mediators, describes their job, including the identification of 120 mediation techniques. The document was written at a time when there was very little literature on mediation, at a time when most FMCS mediators lacked the skill or interest in writing about their work. In contrast with today’s ADR world with its mind boggling storm of mediation literature, these three mediators were unique and their 120 item list has stood the test of time.

60 Years Ago

At the creation of FMCS, sixty years ago, the historic context offered perfect timing for reforming labor law. The following describes the environment at the birth of FMCS:

The extensive war-time controls on collective bargaining had just ended. Practitioners who had begun bargain during the late 1930's, had forgotten how to bargaining during the environment created by war-time controls, no-strike pledges, and the extensive use of arbitration of grievances.

The largest number of strikes in U.S. history, before or since, occurred during Winter and Spring of 1946. There were industry wide strikes in coal, steel, auto, meat-packing, and electrical manufacturing during that period as wage and price control ended. No substitute suppliers were available since no other country had the industrial capacity to replace those five major industries.

Giants like John L Lewis cast their shadow across the labor scene, engendering both admiration and fear. Editorial writers and cartoonist had a field day, taking shots at labor bosses and foreign ideologies. No labor leader today can match the attention John L could command.

In anticipation of the pent up demands as the economy shifted from war to peace, President Truman appointed at National Labor-Management Conference, a tripartite commission composed of the major labor, management and government players. Following lengthy meetings, the Commissioner's 1945 report showed no agreement on what to do about labor and management problems. The only exception was both labor and management wanted the government's mediation function strengthened.

In January 1947, a newly elected Republican Congress came to town with labor reform in mind. Two newly elected Congressmen, a Democrat and a Republican, both veterans of the recently ended WWII, were assigned seats on the House Labor Committee that considered legislation that became the Taft-Hartley Act. Like many others in the congress, these two congressmen engaged in public debate on opposite sides of Taft-Hartley, before moving on to bigger things. They were John Kennedy and Richard Nixon.

In June 1947, Congress passed the Taft-Hartley Act creating FMCS, among a number of other things. The chief features of Taft-Hartley impacting mediation and the new FMCS were: a) 30-day notice to FMCS before termination of an existing collective agreement; b) voluntary mediation; c) good faith bargaining required of both labor and management.

President Truman vetoed Taft-Hartley. Congress easily over rode the veto with many Democrats voting to override. On Friday, August 22, 1947, FMCS was born when the staff, records, equipment and office space of USCS shifted to FMCS control. It is interesting to note that the mediation function remained headquartered in the Department of Labor building with the FMCS director's office next to the Labor Secretary. FMCS remained there until the 70's.

Cyrus Ching, the first FMCS Director, in recalling the shift from USCS to FMCS, said: "We just changed the name on the door and the stationery." Later, he made many more substantive changes.

United States Conciliation Service

To understand FMCS, it is important to have a sense of USCS in Department of Labor and the evolution of the Federal government's mediation function. In the Department, the mediation function started shortly after the Department's creation in 1913. The Act creating the Department authorizes the Secretary to mediate disputes and to appoint commissioners of conciliation. The word 'Commissioners' in the Act is the reason FMCS mediators even today are called Commissioner.

Initially the Secretary assigned staff from other functions within the Department as ad hoc conciliators to handle a specific dispute. As more disputes occurred during WWI, the USCS was created as a Division within the Department and with a budget approved by Congress in 1917.

From a modest beginning in 1913-14 with only 33 cases conciliated, the number increased to 1,217 by 1918 and to 1,789 by 1919. Following the War, during the 1920's, conciliated cases decreased, never exceeded 560 per year during that decade. The volume of cases increased in the 30's with the passage of legislation encouraging collective bargaining. All bargaining had previously been completely voluntary, except for parties covered by the Rail Road Labor Act (RRLA). In 1939, conciliators handled 3,541, about 3,000 per year more than during the 20's.

John Steelman, who became Director in 1937, said the primary job of the mediator was teaching negotiators how to negotiate, coaching them on how the process should work, assisting with proposal drafting, discussing strategies, and writing contract language.

While most of the staff mediated, some USCS staff worked as grievances arbitrators. Many grievances were also mediated by USCS, since the USCS considered both contract negotiations and grievances as labor disputes. A few USCS staff worked as technical experts providing the parties with objective time and motion studies, as well as, job evaluation studies.

During WWII conciliation cases increased tremendously: 6,500 in 1942, 14,000 in 1943, over 20,000 in both 1944 and 1945.

While the number of cases increase greatly during WWII, the USCS and its conciliators felt up-staged by the National War Labor Board apparatus. The Board process required that disputes not settled in conciliation would be referred to the Board for hearing and issuance of settlement recommendations. Conciliators felt that this second step, following conciliation, offered labor and management a second bite of the apple, and that lack of finality made conciliation less effective. The conciliators and the War Labor Board staff viewed each other in very negative terms: conciliators were seen as reluctant to give up their cases, while the Board staff was seen as too eager to get involved, too impatient to allow conciliation the opportunity to work. The dissimilarity of staff backgrounds did not enhance their regard for each other. The Board was populated with lawyers and economists, while the USCS had many former union officials with less formal education.

Grand Parent of Institutionalized Mediation

It is accurate to consider the USCS as the grand parent of mediation, as the organization that institutionalized mediation in this country with a permanent

staff functioning under policies and developing and maintaining a body of practice. FMCS has continued this institutional history. Other contenders for that designation simply don't measure up. For example:

1. Ad hoc mediation and arbitration were provided under several Federal laws, such as, the Erdman Act of 1898. That Act was used 61 times in railroad disputes before it was repealed in 1913. These ad hoc efforts did not build-up any institutional experience.

2. While a number of States had enacted legislation on labor disputes prior to 1900, one writer characterized the impact of State legislations as negligible. Only three States -- New York, Massachusetts, Pennsylvania. -- staffed a mediation agency before WWII. Most dispute resolution by the States was ad hoc.

3. National Mediation Board (NMB) has practiced a unique form of mediation in railroad disputes since 1926, and later in airlines. Mediation by the NMB is performed in a context of controls and limitations unique to those two industries. Unlike the USCS practice of mediation, the NMB practice has not been replicated in other industries to any degree, with the possible exception of some State legislation covering public employees beginning in the 1970s.

Therefore, on balance, it is accurate to say that the main institutional mediation function in labor-management relations has been carried forward by the USCS and its successor, the FMCS. With the growth of mediation in the last 40 years in fields beyond labor-management disputes, it is accurate to say that USCS/FMCS provided an institutional model for these new dispute arenas using

ADR. In the practice of labor-management arbitration, USCS/FMCS share credit for institution building with the American Arbitration Association, the National War Labor Board, the National Academy of Arbitrators and the U.S. Supreme Court.

Federal Mediation and Conciliation Service

It is interesting to note that during Congressional debate in Spring 1947, the Senate and the House disagreed on what to call the new agency. The Senate favored mediation, while the House favored conciliation. Since neither chamber was unwilling to defer to the other, FMCS was given both names.

Director Ching made several early changes from the USCS practice that amount to early privatization. He replaced staff arbitration with a panel of qualified private arbitrators from which the parties could choose their arbitrator. He also abandoned the practice of allowing technical mediators to provide time and motion studies, and job evaluations. Ching believed that such work was more appropriate for consultants.

It is important to understand that mediation is a companion to collective bargaining. Without labor-management negotiations, collective bargaining, there would be nothing to mediate. The volume of collective bargaining determines the volume of mediation. The history and fortunes of FMCS are tied to the extent and robustness of collective bargaining. During this sixty-year history, trade union membership, collective bargaining and FMCS grew and declined together.

The 50's Thru the 70's

In contrast with today, the 1950's thru the 1970's were the hay-day of collective bargaining, and, thus, the hay-day for mediation. The economy was

moving up, wages, benefits and working conditions were all being improved during each negotiations. Here are some features of that robust era for collective bargaining and mediation:

All large newspapers had a labor reporter who knew that subject, wrote about current negotiations, called the mediators to find out what was happening. FMCS field offices heard from local reporters regularly. The New York Times, the LA Times and the Wall Street Journal each had nationally known labor reporters. Abe Raskin was one of the better known. In that era, any newspaper article that included the word 'mediation' would be a story about labor-management mediation, since this was long before today's other conflicts using mediators.

Taft-Hartley National Emergency Boards were used, on major disputes with nationally known third parties and major news coverage, 29 times in the first 20 years of Taft-Hartley. Some major disputes received Presidential attention, or at least White House attention. Both President Johnson and President Nixon were reported to have been involved personally in major disputes.

The 50's thru the 70's was an era of coordinated bargaining and corporate-wide bargaining in industries, such as: oil, steel, aluminum, meat packing, coal, cooper, auto, aerospace, electrical manufacturing and telephone. Such negotiations commanded news coverage featuring intriguing strategies and other complexities. For FMCS, coordination among the assigned mediators to these industries or corporations was demanding. An example of that coordination would be a mediator in Houston calling a mediator in Washington D.C. to report that Shell Oil was about to put a "final" wage offer on the table, and asking what

is happening at the other oil negotiations, since the union is refusing to meet until they know what is happening elsewhere.

During this era, the FMCS National Office created the office of mediation and its practice of intervening in disputes being handled by a local FMCS mediator. This was not popular with local mediators who preferred to handle their cases alone. The national office mediators, jokingly referred to as paratroopers, were accused of using tactics which placed a premium on settlement over relationships --- leaving the local mediator to fix the relationship after the paratrooper moved on. During the 60's, there were six to eight mediators assigned to the national office to act as paratroopers. For a number of recent years, there has been none.

This era presented new issues to collective bargaining and mediation: new fringe benefits, new pay schemes, new forms of union security, and strange new issues like juniority. (opposite of seniority)

Beyond the challenge of new issues for the mediators, there was a vexing, new problem with mediated agreements being rejected by a membership vote. These contract rejections, which had been very rare previously, occurred increasingly during that period. FMCS responded by establishing a policy covering the circumstances under which a mediator could attend a union membership meeting where a new contract was being voted. It also provided guidance on what the mediator might do or say at such meeting.

FMCS responded to evolving new circumstance during this era on a number of different fronts with new programs and practices. By the mid 70s, the

mediation staff had expanded to its largest level, before or since, and included more women and minorities. Greater emphasis was placed on training new mediators and updating senior mediators on emerging issues and new sectors, such as public employee collective bargaining. The preventive mediation program, in which mediators assist labor and management in improving their working relationship, was promoted and expanded with new audio visual aids and new processes including relationship by objectives. More collective bargaining background information was provided to staff for their mediation work. A 1974 amendment to the Taft-Hartley Act expanded coverage to nonprofit hospitals and health care facilities, increasing mediation work and added a new board of inquiry procedures for that industry.

Throughout its history FMCS has had to deal with statutes and other forms of regulation that impacted collective bargaining and mediation. During the 1950s through the 1970s, FMCS accommodated the following statutes and regulations: National Emergency Boards under Taft-Hartley; Atomic Energy Labor-Management Panel; Missile Site Labor Commission; Energy Crisis Czar; Economic Controls on wages and benefit costs (guidelines); Post Office Reorganization Act of 1970; Health Care Amendment to Taft-Hartley in 1974; Labor Management Cooperation Act of 1978; Federal sector employees collective bargaining under Kennedy and Nixon Executive Orders and Civil Service Reform Act of 1978, various state law allowing collective bargaining for state and local public employees.

With each of these developments, FMCS worked to support free collective bargaining, assure non-compulsory mediation, and safe guard the independence and neutrality of their mediator. In all of this, FMCS sought to work in the public interest while providing competent mediation services.

The success of collective bargaining and mediation during the 1950s through the 1970s cannot be seen as an effortless time for mediators. Most mediators would characterize their work as challenging and satisfying. Reaching an agreement between a powerful and well represented union and a worthy management often was just that, challenging and satisfying. In addition, the period confronted mediators with the impact of regulations and statutes referred to above, as well as good economic times and economic slow-downs.

As the 1970s drew to a close, collective bargaining and FMCS appeared robust, suggesting no hint of what a former union president would do to these happy circumstances as President of the United States.

The 80's and 90's

In contrast with the 60's and 70's, the 80's and 90's were not kind to collective bargaining or FMCS. It is difficult to imagine how collective bargaining could prosper when one of President Reagan's early actions was the highly public firing of thousands of striking Air Traffic Controllers. This presidential action emboldened employers to take-on the unions, to depict them as the problem and not part of the solution in dealing with competition and the global economy. Thus began a series of management and governmental initiatives to diminish collective bargaining and union influence. The result was a major

paradigm shift in employment relations in which management gained the dominant position.

Those initiatives included: two-tier wages settlements and give-back bargaining; double breasted building contractors; more part-timers and contract workers; growth and success of union-free consultants, and union decertification; down sizing and reinventing; foreign competition and off-shore operations; a decidedly pro-employer National Labor Relations Board; tight government budgets and efforts to privatize; and the shift in public opinion against unions.

It is not an exaggeration to say that during the 80's many union negotiators would have gladly extended their labor agreement without reopening it just to maintain what they previously had in their labor agreement. Not a happy time for collective bargaining.

During the 1980s, union membership declined from 20,1 million (23% of the workforce) to 16.7 million (16% of the workforce). To deal with the accompanying decline in income, forty-two national union mergers occurred, along with significant staff reductions and member services curtailment.

With the decline in collective bargaining, FMCS mediation cases declined as well. That resulted in major cuts in FMCS budget and staffing during the 1980s. During an 18-month period, the budget was cut from \$26.7 million to \$22 million eliminating 75 employees from a staff of less than 500. Mediators who had never mediated reductions in pay, benefits or working conditions struggled to deal with this new collective bargaining paradigm.

The budget and staff cuts forced FMCS to identify new ways of fulfilling its mission. The assignment of cases to mediators was moved from regional offices to the national office. With the firing of all field clerical staff, primitive recording machines were provided to handle mediator phone calls from labor and management. Travel, training and office expenses were significantly reduced. Offices were closed or merged and conference room spaces was given-up. Hiring and promotions were frozen. Salary and qualifications for new hires were lowered in anticipation of hires after retirements occurred. Preventive mediation and other non-dispute mediation activities were curtailed.

As union membership continued to decline in the 1990s, FMCS continued to struggle to find its role. Two new federal statutes offered an opening for FMCS in Alternative Dispute Resolution (ADR). While FMCS had done some work beyond labor management relations, its specific statutory role was limited. In the 1970s, FMCS had been directed by statute to assist in a hundred year old land dispute between the Hopi and Navaho Nations in Arizona. Federal agencies on occasion had asked for FMCS help beyond its legislative mandate: For the Department of Interior, FMCS conducted elections for the Sioux Nation in South Dakota, and the Health and Human Services Department arranged for FMCS to mediate their discrimination cases arising under grant programs.

One new statute in the 1990s urged Federal Agencies to use ADR in administrative matters, and another statute required regulatory agencies to use ADR in their rule making processes. Given this new ADR work via statute, FMCS

was encourage to seek other opportunities for its mediators in the expanding ADR field.

Also in the 1990s, an Executive Order by President Clinton opened another opportunity for new work by directing federal agencies to use partnership arrangements and interest-based negotiation (IBN) in dealing with unions of their employees. While FMCS had only begun to use and promote IBN, the Clinton Order served as a significant milestone in the FMCS adoption of IBN, which has now become a major program in FMCS. IBN has offered FMCS a more enlightened negotiating and problem solving process that filled a need in the post 1980 labor-management paradigm.

FMCS began to charge for services previously provided free: overseas training and consulting, preventive mediation to Federal agencies and their unions, fees charged to parties seeking arbitrators from the FMCS roster, and fees from arbitrators listed on the FMCS roster. FMCS created an institute through which it offers multiple-day courses on mediation, negotiations, and problem solving. Unlike previous training offered to labor and management without cost, the institute courses are open to public participants at market rate tuition.

Recent Years

FMCS has taken full advantage of the Information Technology (IT) age. Every mediator has a laptop and cell phone as a constant companion, to keep in continuous touch while traveling and at home. This has made office space much less important. Their Blackberry-equipped boss, the National Office, and what

they now call their customers are just a text message, voice message, email or a live voice away. Technology has transformed FMCS as it has workplaces everywhere. From home or hotel room, the mediator can, electronically, check voice, text and email messages; modify their agenda; file a travel reimbursement claim or case report; receive new case assignments and close old assignments; schedule or cancel a meeting; check a data base on industry trends for tomorrow's mediation session; download a power point for a luncheon presentation; read FMCS news releases, policies, and ethical guidance; draft a new power point or training lesson plan; check the FMCS website or Wikipedia.

IT has allowed FMCS to move some national office functions to field locations where rent is less. The FMCS Institute for Conflict Management is now headquartered in Seattle and the Labor-Management Grant program is located in New Jersey. Also a cost savings was realized by eliminating small field offices by allowing the mediator to work from home,

It has also allowed FMCS to institute a program called Technology Assisted Group Solutions (TAGS), which utilizes computers to help parties reach consensus either on the internet or in face-to-face meetings. This process has even been used to conduct a long standing program called Relationship by Objective.

When Congress urged FMCS to share its conflict resolution expertise to help reduce youth violence, another innovative program resulted. FMCS partnered with communities and other organizations nationwide to teach children and young adults the skills needed to manage conflicts in their lives. In support of

this effort, FMCS produced a publication called: "Creating Harmony in the Classroom."

To help focus its role in the post Reagan era, FMCS has engaged professional help to survey its customer-base to gain data on how well FMCS is performing and what other assistance is needed.

FMCS contracted with the Employment Policy Foundation to develop a model to determine the cost of work stoppages. By using that model on strikes during the past two years, FMCS learned how significant strikes impact the economy: \$950 million in lost wages, \$263 million in company lost profits, and \$1.7 billion impact on ancillary business. Using the model, FMCS demonstrated to the Congress that a savings of \$1.7 billion in lost wages and company profits was achieved when FMCS mediators reduced strike duration in 196 cases and prevented 251 strikes.

FMCS modified the categories under which activities are reported. The following are the new categories with the author's notes in parenthesis:

Collective Bargaining Mediation (traditionally the core of mediation work)

5,484 cases mediated in FY 2006

Grievance Mediation (traditionally, a very limited activity)

1,625 cases mediated in FY 2006

Employment Mediation (involves non unionized employment)

1,022 cases mediated in FY 2006

Relationship Development & Training (Formerly Preventive Mediation)

2,445 training classes conducted in FY 2006

Outreach (Formerly called public information)

3,859 cases in FY 2006

Much has changed over the 60 years since the creation of FMCS as the successor to USCS in 1947. The most dramatic is the decline of the labor movement and collective bargaining since the 1980s. The response by FMCS to its new environment imposed by the decline is remarkable given the FMCS initial mandate. The large increase in grievance mediation stands in stark contrast with strict restrictions FMCS placed on using resources on grievances. Only a strike threat would have allowed it in the early days. The amount of overseas work was very limited before 1980, and none of it was as comprehensive as recent work. But the most surprising development is the mediation of employment cases in organizations without union representation.

The technology advancement is also remarkable. The amount of communication routes available for today's mediator in contrast with a 1960s mediator calling a federal phone operator to place a call, and often waiting five minutes to be connected. A more vividly dramatic example is the vision of 1970s mediator struggling to carry a 75 pound 16 mm film projector with a pick-up reel and a film container from the parking lot up two flights of stairs to a union office to conduct a steward training program. While today's mediator carries a laptop computer containing several power point training programs and several training CDs.

Happily, some things have not changed. There has been no change in the commitment to helping, to working things out peacefully, to maintaining neutrality

and confidentiality, to struggling for another idea or process suggestion, to feeling the work is a calling.

This paper is dedicated to all the mediators who have responded to that calling.