

The FMCS at Age 50: 1947 - 1997

Over the past several years, I have been reinventing myself from a dispute resolver to an historian of sorts. In doing so, I have had difficulty in understanding exactly what historians do and, in fact, what history is and how does one do history.

I have sought enlightenment on my quandary from various sources. To date the source I have found most helpful, or ironic, or may be just amusing, has been the novelist John Updike. In his novel Memories of the Ford Administration, the main character is a college professor-historian trying to write, during the Ford Administration, about President James Buchanan, Abe Lincoln's predecessor. Updike's historian frequently muses about his role as historian and about doing history. Here are three examples of his musings:

Historic "texts (or documents) are like little pieces of a puzzle that only roughly fit. There are irregular spaces between them, and through those cracks, one feels, truth slips. History, unlike fiction and physics, never quite jells, it is an armature of rather randomly preserved verbal and physical remains upon which historians slap wads of supposition in hopes of the lumpy statue's coming to life." (Memories of the Ford Administration -- John Updike -- p165)

"Composing history is like packing a suitcase with objects that persist in overflowing, or under filling the space." (191)

"---- doesn't history demonstrate over and over how hard it is say what actually **did** happened." (254)

Those reflections on doing history may or may not incline you positively toward what you will be hearing from me today. You must sort that out for yourself. However, for me, those reflections help me focus on my works with humility and humor, seeing myself as more mediator than arbitrator. Having done both mediation and arbitration, I am more comfortable with the former.

What follows now is my reporting on some history on FMCS and its predecessor, USCS.

FMCS and IRRA, both now celebrating 50 years of seniority, have common origins following WWII. The IRRA, of course, having a much broader focus on the entire field of industrial relations; whereas, FMCS having the narrow focus of collective bargaining and dispute resolution.

50 Years Ago

Let me very briefly describe the historic context of fifty years ago

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

2. The largest number of strikes in U.S. history, before or since, occurred during this period. In the Winter and Spring of 1946, for example, there were industry wide strikes in coal, steel, auto, meat packing, and electrical manufacturing. And during that period, no substitutes were available since no other industrial country had the industrial capacity to replace those five major industries.

3. 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.

4. The President's National Labor-Management Conference, a tripartite commission on the labor problem, issued its report in 1945 showing very little agreement between labor and management on what to do about anything. The exception was both labor and management wanted the government's mediation function improved.

5. In January 1947, a newly elected Republican Congress came to town with labor reform in mind. (Does that sound familiar?)

6. In June 1947, Congress passed the Taft-Hartley Act creating FMCS, among a number of other things. The chief features of Taft-Hartley

that impacted mediation and the new FMCS were:

- a) 30 day notice to mediation before termination of an existing agreement.
- b) use of mediation voluntary, no compulsion to use it.
- c) bargaining in good faith was required of both labor and management.

7. President Truman vetoed Taft-Hartley. Congress easily and quickly over rode the veto. And, so:

8. 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 on the DoL premises with the FMCS director's office next door to the Labor Secretary's. (FMCS would remain housed with DoL until the 70's.) Cy 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 would make many more substantive changes.

The United States Conciliation Service

To understand FMCS, it is important to have a sense about the USCS in DoL and the evolution of the Federal government's mediation function.

The mediation function within the Dept. of Labor started shortly after the creation of DOL in 1913. The Act creating DOL authorizes the Secretary to mediate disputes and to appoint commissioners of conciliation. (The word 'Commissioners' in the DoL Act is the reason FMCS mediators even today are called Commissioner. The use of both conciliation and mediation in the statute is curious. The statute authorizes the Secretary to act as a mediator; and it authorizes him to appoint commissioners of conciliation. I'll say more about that a little later.)

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

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From a modest beginning in 1913-14 with only 33 cases conciliated, the number increased to 1,217 by 1918 and to 1789 by 1919. Following the War, during the 1920's conciliated cases decreased, never exceeded 560 per year during that decade.

In 1921 there were 49 conciliators on staff, by 1927, there were 38 conciliators.

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 RRLA. In 1939, conciliators handled 3541, about 3000 per year more than during the 20's.

Let me give you a sense of the USCS during the 30's and 40's:

John Steelman, who became Director in 1937 said the primary job of the mediator was teaching the parties 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 arbitrators of grievances. Most often arbitration cases were instigated by a work stoppage or threat of one since few labor agreements provided for arbitration of grievances. (That would come later.)

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. They provided the parties with objective time and motion studies, as well as, job evaluation studies. Much of this work was done in the clothing and needle trades.

During WWII conciliation cases increased tremendously -- 6500 in 1942, 14,000 in 1943, over 20,000 in both 1944 and 1945.

While the number of cases increased greatly during WWII, the USCS and its conciliators felt up-staged by the War Labor Board apparatus. The War Labor Board process required that disputes not settled in conciliation would be referred to the NWLB for hearing and issuance of settlement recommendations.

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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 pejorative terms: conciliators were seen as reluctant to give up their case, 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

I think that it is accurate to consider the USCS as the grand parent of mediation, as the organization that institutionalized mediation in this country. However, there are some other facts that can't be ignored. I'll mention three:

1. Ad hoc mediation and arbitration were provided for under several Federal laws, such as, the Erdman Act of 1898. That Act was used 61 times in railroads before it was repealed in 1913. While these were ad hoc occurrences which did not build-up any institutional experience, they probably did provide an approach to dispute settlement for the Congress and the Department of Labor to consider when they decided to fashion a dispute settlement process for other industries.

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

3. NMB has practiced a unique form of mediation in the Rail Road and Air Line industry since the 1930's. 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.

Therefore, on balance, I think 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.

It is also accurate to conclude that the USCS played a role in institutionalizing labor arbitration in the U.S. -- that role is shared, of course, with AAA, the War Labor Board and the Supreme Court. (Larry Schultz paper will address)

Federal Mediation and Conciliation Service

I'll focus now on the FMCS history.

It is interesting to note that during the debate in Congress in the Spring of 1947, the Senate and the House disagreed on what to call the new agency. The Senate favored mediation, while the House favored conciliation. You all know the compromise they struck. That seems an appropriate process for naming a dispute settlement agency.

Mediation must be viewed as 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.

In the past decade, collective bargaining has declined in the U.S. And so has labor-management dispute mediation. The number of dispute notices received by the FMCS had declined by 7,000 between 1975 and 1990.¹ But between 1990 and 1995, that number declined by 32,000.²

The number of cases mediated by FMCS has also declined. Between 1990 and 1995 the number of cases dropped by about 2,000 (1,824).³ In the 15 years between 1975 and 1990, the number of mediated cases dropped by about 2,000 also (1,786).⁴

The number of FMCS staff has also declined. From 500 in 1975 to

¹ -- 98,515 to 91,346

² -- 91,346 to 58,470

³ -- 7,009 to 5,175

⁴ -- 8,795 to 7,009

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Since historically dispute mediation has been the major role of FMCS, given the significant decline in that work, it is not surprising that for the past several years, FMCS has been attempting to reinvent itself. The Service has been actively looking for work beyond collective bargaining, beyond its legislative mandate, some critics would say.

- *FMCS is seeking ADR cases outside of labor-management disputes,

- *they are training others in ADR,

- *they are sending mediators overseas to provide assistance.

In terms of their traditional work, FMCS is

- *reemphasizing preventive mediation and adding additional preventive programs,

- *they are also mediating more grievances. Something they only did reluctantly in the past when they read the statute more literally, again, some critics would say.

The 60's and 70's

In contrast with today, the 1960's and 70's were the hay-day of collective bargaining --and, therefore, the hay-day for mediation. Let me remind you of some features of that era:

1. All big newspapers had a labor reporter who knew that subject, wrote about current negotiations, called the mediator to find out what was going on. I mediated in Milwaukee during the late 60's; both papers had a labor report. The FMCS office heard from them regularly.

The New York Times, the LA Times and the Wallstreet Journal each had nationally known labor reporters. Abe Raskin was one of the better known. Can anyone name a current labor reporter other than at BNA?

2. Taft-Hartley National Emergency Boards were used with nationally known third parties and major news coverage. Emergency Boards were

appointed 29 times in the first 20 years of Taft-Hartley.

Some disputes even got the President's attention, or at least the attention of the White House. Both President Johnson and President Nixon were reported to have been involved personally in major disputes.

3. The 60's and 70's were an era of coordinated bargaining and corporate-wide bargaining in a number of industries: oil, steel, aluminum, meat packing, coal, cooper, auto, aerospace, electrical manufacturing and telephone. And with that was all the attendant news coverage, complexity, intriguing strategies, and the intense demand for coordination among the assigned mediators to that industry or corporation.

An example of that coordination would be a mediator in Houston calling a mediator in Washington D.C. to report that Shell 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.

4. It was during that era (60's and 70's), that the National Office of FMCS expanded the office of mediation and its authority to intervene in disputes assigned to a field mediator. This was not popular with field mediators who preferred to handle their case alone. The national office mediators, pejoratively referred to as paratroopers, were accused of using tactics which placed a premium on settlement over relationships --- leaving the field mediator to fix the relationship after the paratrooper moved on. At some periods during the 60's and 70's, there were six to eight mediators assigned to the national office as mediators. Today there is one.

5. The 60's and 70's were also an era when new issues were being developed in collective bargaining: new fringe benefits, new pay schemes, new forms of union security, and strange new issues like juniority.

6. Beyond the challenge of new issues for the mediators, there was a new problem during the 60's and 70's -- it became known as contract rejections, ie: a negotiated agreement being rejected by a membership vote. These contract rejections, which had been very rare previously, occurred increasingly during that period.

Director Bill Simkin wrote a journal article about it and instituted policy

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covering the circumstances under which a mediator might attend a membership meeting to sell a tentative agreement to the membership. A high risk role for any mediator.

The 80's and 90's

In contrast with the 60's and 70's, the 80's and 90's have not been so kind to collective bargaining and mediation. It is difficult to imagine how collective bargaining could prosper with the following:

- two tier wages settlements, and give backs,
- double breasted building contractors,
- more part-timers and contract workers,
- the growth of union-free consultants, and decertifications,
- down sizing, reinventing,
- enlighten-human resource management,
- foreign competition and off-shore operations,
- tight government budgets and efforts to privatize,
- Defeat of the Air Traffic Controllers strike,
- concerns about inflation and government guidelines, 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 extend their agreement without reopening it just to maintain what they had. Not a happy time for collective bargaining.

Some Other Points

In the time I have remaining, I'll touch on a few topics that might wet your appetite to know more about the FMCS history:

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1. Director of FMCS: The President appoints the FMCS Director. Over the years, the FMCS has had good directors, great directors and directors. I won't put names under those categories for this audience. The mediators, however, have not been reluctant to express opinions. For example, one national office mediator was fond of saying, during an administration within the past 20 years: "I once was able to say that Wit McCoy was the worst director FMCS ever endured." And then after a long pause for effect he would add: "I can't say that any more."

2. Directors Background: There have been eleven Directors of FMCS nominated by the President and confirmed by the Senate. Three were Democrats and eight Republicans. Five had a management background, one a union background, and five a neutral background. They were all white males. Longest in service was seven years and ten months; shortest was one year. Six other individuals have served as acting director, the longest for 18 months, the shortest for 2 months. All but one of the acting Directors were career mediators in FMCS.

3. Peace Among Mediators: You might assume that mediators are peaceful in their dealings with each other because of their work in seeking peace and accommodation, because of their desire to find the positive and non competitive out come. That assumption may not be a good one. Here are a few examples. The first four examples involve competition over who would be the President's man on labor disputes.

a). John Steelman: After his seven and a half years as Director of USCS, Steelman became a special assistant in the Truman White House. In that position, he recruited Cy Ching to become the first FMCS director. After that, he regularly upstaged Ching on major disputes by calling the parties to the White House and personally mediating the dispute.

b). Witney McCoy: Who I referred to earlier, was the second Director of FMCS. He had been a professor of law and an arbitrator before becoming Director. McCoy got into a turf fight with the Secretary of Labor over who was the President's man on labor disputes, and specifically, the Secretary's habit of inviting McCoy to the Secretary's staff meeting and expecting a report as if McCoy was his subordinate. McCoy put his complaints in writing to the White House. But, he did not win that argument. He left after 16 month on the job.

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c). Joe Finnegan was the third FMCS Director. Before becoming Director, Finnegan had been the Secretaries labor lawyer when they both were in the private sector. During Finnegan's tenure as Director, the story is told about the Secretary wanting to know the status of a particular major dispute. To talk in person with the Director, the Secretary had to walk out of his office, thru his outer office, into the public hall way, down the hallway several yards, into the Director's outer office, thru it, into the Directors office. A great inconvenience and expenditure of time for someone in a hurry. So, on one such occasion when the Secretary wanted an immediate update on a dispute, he pointed at the common wall between his office and the Director's, and shouted at an assistant: "Get a carpenter to put a door way thru that wall." --- My source did not report whether a door way was ever made in that wall. The story does suggest something about the independence of the FMCS.

d). Bill Usery: who just introduced me, effectively resolved Wit McCoy's question about who was the President's man on labor disputes. To his title of Director of FMCS, Usery persuaded the White House to add these words: "and special assistant to the President."

4. Another example of competition among mediators involved the FMCS relationship with state mediation agencies: During the 50's and 60's, a number of States created their own mediation office. As a result, a practice developed called duel mediation, consisting of the pairing of an FMCS mediator and a State mediator on the same case, a form of mediator "feather bedding." The most out landish example of this practice occurred with disputes in the City of New York where three mediators and their agencies could claim jurisdiction of a dispute. The Feds, State and City mediators.

An article in the Labor Law Journal in 1962 on this subject was entitled: "Troikas, Duets and Prima Donnas in Labor Mediation." As might be expected of good mediators, they developed a process to deal with these problems. It was called the Code of Professional Responsibility.

5. The Code was developed and adopted by ALMA, the Association of Labor Mediation Agencies, which includes State mediation agencies and FMCS. The code sets out appropriate behavior among mediators and establishes a complaint and review process. The Code exists yet today.

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6. Throughout its history, FMCS has worked with other dispute resolving organizations and arrangements. During the past 50 years, concerns about the negative consequences of free collective bargaining have moved those in power to place restrictions on the process, and provide substitutes or modifiers on the process, these have included fact-finding, guidelines, boards of inquiry, panels of private mediators, arbitration, etc. Some of these statutes, institutions and arrangements have excluded:

National Emergency Boards under Taft-Hartley

Atomic Energy Labor-Management Panel

Missile Site Labor Commission

Energy Crisis Czar in the 1970's

Economic Control --- guidelines or guideposts

Post Office Reorganization Act of 1970.

Health Care Amendment to Taft-Hartley of 1974.

Federal Sector Employees frame works -- 30 years of them
from the Kennedy E.O. to the Clinton E.O, and the
Civil Service Reform Act of 1978.

States without mediation function for government employees -
Ohio and Iowa, for example placed a high demand for
mediators during the season for teacher negotiations.

With all of these statutes, institutions and arrangements, FMCS has attempted to make them work in the public interest, while, at the same time, being loyal to the FMCS concept of competent mediation practice. In that the Service has been successful

7. The Red Scar or Joe McCarthy Era: This refers to the anti-communist madness that followed WWII, extending from the late 40's into 50's. The paranoid period cost a few mediators their job, because of prior friendship and affiliation which were deemed security risks. Since many

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mediators had a labor background, many knew individuals who leaned to the left politically. That same quilt-by-association mentality kept Edgar Warren, the last director of USCS, from becoming the first director of FMCS. The Chairman of an important Congressional Committee wrote next to Edgar Warren's name in his notes: "Pink if not Red!" That same Congressman insisted that FMCS would have no budget unless he liked the first Director.

8. Unionization attempts by mediators: From time to time, FMCS mediators have attempted to form an independent union.⁵ The third such effort is currently underway. They have not succeeded in the past. Well that may depend upon how success is defined. It may be reassuring to the current Director to suggest that the movement toward unionization of mediators seems to occur only when a Democratic is in the White House.

9. Finally, how about the future? You might ask at this point what the future hold for the FMCS and mediation? You might put that question to Director Wells. As someone trying to sound like a historian, I'd have to say I don't know, that's not my job, historians look backwards. However, if you tell me how well collective bargaining will be doing in the future, I'd offer an opinion.

And, finally, some words about what I have done on the FMCS history:

- *created the Friends of FMCS History -- a non profit organization to collect, preserve and report on the USCS and FMCS history.
- *taped interviews -- 170
- *archive -- files, books, reports, dissertations, tapes, transcripts, projectors, film and slides,
- *several papers, my dissertation, summaries
- *starting a web site = [HTTP: ADAMS. PATRIOT.NET/~FMCS](http://ADAMS.PATRIOT.NET/~FMCS)

I'd be pleased to have you as a supporter, as a Friend of FMCS

⁵ Non mediators in the FMCS National office have been in a bargaining unit since the early 1980's.

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History, for a one time, tax deductible contribution of twenty-five dollars. The address is on the materials I have handed out. If you send a check, I'll send a receipt.

Thank you.

I'll be glad to answer your questions.