FEDERAL MEDIATION AND CONCILIATION SERVICE

"Labor Mediation--Its Challenges and Frustrations"

Address by

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Negotiation of terms and conditions of employment are of obvious importance to any person who works for or with another. At its simplest level, the negotiation may be about the price for mowing a lawn or for securing a baby sitter for an evening. My father operated a hardware store for many years in upstate New York. He had occasional man-to-man talks about wages and related matters with the two men who worked for him. At earlier times in some countries the size of a bride's dowry was a matter for negotiation between the parents. The vestigial remains of that practice may persist in the minds of some young men and women today as they do their own negotiating. As a different level, a Swarthmore faculty member or a faculty group may make known to the college administration that psychic income derived from association with students must be supplemented by more tangible and earthy considerations.

Mediation--the assistance of some disinterested third party in negotiations--is not unknown but is not

often utilized in any formal way in the types of relationships just noted. The interested parties usually deal directly with each other, and if the results of such negotiations are not generally satisfactory to both, the relationship terminates. Some economic hardship and non-economic pain and anguish may accompany termination of a relationship, but the possibility of termination exists as a strong inducement to settlement.

Negotiations between management and labor in the major parts of our present-day industrial world are much more complicated and institutionalized. Employees are represented by unions. Ownership is represented by professional management. Union representatives and management representatives negotiate terms and conditions of employment, covering a wide scope of matters. Collective bargaining is the common name given to this process. This process of collective bargaining can be divided roughly into two parts.

The first part consists of the settlement of day-by-day problems. These matters are resolved within the framework of a written labor agreement by the grievance procedure and by the occasional use of arbitration. For the most part, this has become a process in which industrial peace is not disturbed. Many things could be said about these aspects of collective bargaining, but I do not intend to discuss that subject this morning.

The second major part of collective bargaining is the process of negotiating the labor agreement. These labor agreements are written documents embodying the principal "rules of the game" for a period of time. They vary in form and content. Some are short and contain only a basic skeleton of the agreed upon relationships. In such cases, the skeleton is given flesh during the life of the contract. At the opposite extreme, some written contracts are long and very specific about many subjects. In either case, the labor contract represents the legislative intent of a company and of a union, "hammered out" across the bargaining table.

The typical duration of a present-day labor agreement is two years or three years. As recently as fifteen years ago, a typical contract was for only one year. It is at the end of the labor agreement that the public becomes most aware of the collective bargaining institution. It is at this time that a legal strike or lockout can occur.

It was noted earlier that in many of our simpler relationships, the alternative to agreement is termination of the relationship. This is not so in contract bargaining. Occasionally, a union may lose its representation rights or a company may go out of business. But in most instances, termination is not possible. Even a strike or a lockout is only a temporary separation; divorce is not available. Agreement must be reached--somehow and at some early date.

Labor mediation, as it will be discussed here today, will be confined to the work of the impartial mediator as it relates to negotiations immediately before

the terminal date of a contract and subsequently, if a strike or a lockout should occur. This is the principal function and responsibility of the Federal Mediation and Conciliation Service. In order to appraise this work, it is advisable to examine some of the collective bargaining procedures and problems that are encountered.

In a typical contract negotiation, the union starts off with a long list of demands, frequently of astronomical cost proportions. The company begins with a "stand pat" position and, in an increasing number of instances, with a list of changes it desires. In some instances, the company demands include significant backward steps, as viewed by the employees.

The first task of the parties and of the mediator is to "separate the wheat from the chaff." This process of finding the real issues and of narrowing the differences on them is not always easy nor is there any universal formula. Sometimes the lesser issues are "washed out" openly at an early stage. Sometimes they

remain as stated issues until the last hours or even minutes before a strike deadline. In any event, the mediator and the principal negotiators must find the "hard core" of the differences at an early date if the negotiations are to be successful.

One of the major problems in this connection is that neither the union nor the management negotiating team is likely to be a completely united group. On the union side of the table, individuals may represent divergent interests of their own immediate/constituencies, varying degrees of internal union power, and different degrees of personal persuasiveness. It is not unusual to find several issues that are the minority demands of a small but potent group. The "labor boss" notion has been greatly exaggerated. One of the ironies of collective bargaining is that a high degree of internal union democracy can make bargaining more difficult. A management negotiating team is likely to be more unified but, here too, cracks may open up when the chips are down. The industrial relations manager,

the negotiators representing the production team, and the negotiators whose primary interest is financial may have divergent points of view. The simple factors of personality dominance and ability to hold up under pressure may also be very significant.

Assuming that the "hard core" issues have been found and that the differences continue to be substantial, collective bargaining and mediation "simmer down" to a process of changing men's minds. How is this accomplished?

The highest level of mind changing occurs when logic prevails and a careful analysis of facts leads to an answer that is recognized on both sides of the table as being mutually desirable. Many issues arise out of plant problems that must be solved. The mutual-interest aspects of a sound answer are more compelling than the divergent-interest aspects. If both company and union negotiators can get into a frame of mind in which the mutual-interest concept dominates, solutions can be found

that are much better than either the company or union would be likely to devise unilaterally. This is the truly creative function of collective bargaining. It is realized much more frequently than most people know. Both company and union negotiators can and do conclude bargaining sessions with a feeling of deep satisfaction that at least some problems have been solved for the foreseeable future and with almost no recollection of the respective positions of each side when the discussions began.

The creative function of collective bargaining bears a close relationship to a well-conducted Quaker business meeting. The underlying concept is the same whether it be labeled as "the sense of the meeting," "a meeting of minds," or simply "an agreement." The mediator acts as "clerk of the meeting."

It would not be accurate or sensible to suggest that all collective bargaining conforms to the notion just expressed. Some issues are handled on a simple "horse-trade" basis. Minds are not changed basically

as to the merits of certain issues, but each side retreats from positions on some in trade for gaining its position on others. Some issues are compromised in a manner not fully satisfactory to either party. Finally, in situations where the power factor is overwhelmingly on one side or the other, complete surrender may occur with the loser licking his wounds without convincement and hoping to "live to fight another day."

The actual results of new contract negotiations throughout the United States run the full spectrum between the ideal picture and reluctant surrender accompanied by/bitterness and hatred. The challenge lies in the search for and attainment of the ideal. Frustration occurs when the result is only an uneasy truce.

Available time is one fundamental difference between securing a "sense of the meeting" by Quakers on a business matter and collective bargaining. Better Quaker historians than I am can advise as to the time required for merger of the two Philadelphia Yearly Meetings. A period of years was necessary after serious

discussions began. Labor agreement negotiations proceed over a limited period of time with a strike deadline at a known date. This time limitation helps/explain many 1500 unsatisfactory negotiations. It is important to note that many companies and unions now recognize that discussions outside the pressure period are needed. The Human Relations Committee and its several subcommittees, established by the steel industry settlement in 1959, began their work this year long before formal negotiations began. The settlement just announced specifically recognizes the contributions of these committees. The new agreement continues the Committee and gives it more scope. The formal steel negotiations also began three months earlier than usual to avoid some of the consequences of crisis bargaining. As labor negotiations become more complex and difficult, /this feature of the 1600 current steel negotiations and other generally similar procedures in other industries may establish a new type of bargaining.

The role of the strike or lockout in the collective bargaining picture can be discussed here only very briefly. A strike or lockout can and often does serve a very useful and constructive function of convincement. As most strikes are conducted in recent years, violence is negligible. Unfortunately, logic must cometimes be reinforced by economic sanctions. But the point of diminishing useful returns is reached fairly soon in most strikes, even as respects the parties themselves. In other situations, the consequences of a strike on the public and for the economy are far more serious than to the parties. Private interests must be subordinated to the public interest. Some other strikes do not "make sense" by application of any criteria. The right to strike or to lock out must be preserved. The ways in which that right is exercised require careful scrutiny.

What is the role of the mediator in this collective bargaining scene? In an ideal industrial world, he would

have little or no function. Even in collective bargaining as it is practiced today, relatively little outside assistance is required. In about two-thirds of the cases that are considered important enough to assign to a mediator, he now functions in a very limited way--to ascertain that the patient is healthy and needs no assistance. The Service would prefer that the parties resolve their own problems. The necessity for active mediation assistance arises in the remaining one-third of assigned cases. Even as to these cases, it is our policy to encourage a maximum of direct negotiation and to use only those mediation tools and devices that are necessary in that particular case.

The first and probably paramount source of both challenge and frustration is that the mediator has no decision-making powers. He is limited to certain procedural tactics and by his ability to persuade. This aspect of mediation cannot be overemphasized.

The simplest mediation and conciliation functions are essentially procedural. The mediator may insist that

the parties meet and talk when neither party would initiate a meeting and sometimes when both parties do not think that they want to meet. When meetings are under way and real progress is being made, the mediator may insist that talks continue without a break. It is well known to most of us that there is some inevitable lost motion and backtracking associated with a recess. All-night negotiation sessions are fairly common just before a strike deadline or when a strike is being settled. Despite or perhaps because of fatigue, more can often be accomplished in 24 consecutive hours than in twice that time, interspersed with rest and contacts with colleagues who have not had the benefit of the discussion. A mediator can often use another procedural device. He may be able to secure a postponement of a strike when initiation of such an idea by either party would be construed as a sign of weakness.

A second and important function of a mediator is to act as a channel of communication. It is a characteristic of bargaining that it is difficult for either party

to retreat from a proposal made officially and directly. The same proposal made through a mediator in whom the parties have confidence need not have that same effect.

The more creative mediation function is in the suggestion-making and recommendation area. A knowledgeable mediator can propose new ideas and "try them on for size." Indications of receptivity by either or both parties may lead to an area of agreement. In the very exceptional and difficult case, the mediator may make specific formal proposals for settlement of all issues if other tactics have been unavailing and if such a procedure is likely to be fruitful.

A principal challenge of mediation is that it is by no means a "cook book" process. A device or tactic that may be useful in one case would be disastrous in the next one. To know when not to do something is just as important as to act when the time for action has arrived. Moreover, it is a highly personalized process. No two mediators of equal competence would perform in exactly

the same way. All of us have our strengths and our weaknesses. It is for this reason that we frequently use a two or three-man mediator team in the most difficult cases.

The principal frustrations develop out of recognition and inability to change human weaknesses in persons at the bargaining table, out of the enormity of some of the problems that must be solved and out of the honest mediator's candid recognition of his own fallibility and of mistakes that he will inevitably make.

We realize that the results will be far from complete, but when we hire mediators we look for the best combination of the following qualities:
The patience of Job, the sincerity and bulldog characteristics of the English, the wit of the Irish, the physical endurance of the marathon runner, the broken-field dodging abilities of a half-back, the guile of Machiavelli, the personality-probing skills of a good psychiatrist, the confidence-retaining characteristic of a mute, the hide of a rhinoceros, and the wisdom of Solomon.