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Edited Excerpts

Mediating High-Stakes Disputes: Practice Meets Theory

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Within a week of my taking the oath of office as Director of the Federal Mediation and Conciliation Service in early August 2002, the baseball players announced that they were going to strike. Because of baseball's place in the American psyche, I believed it was worth asking them to give mediation a try.

I called both attorneys representing the parties. I knew the attorney representing the owners, as he was a former partner of mine in the law firm I had been with most recently. And I also knew the attorney for the players, who was formerly an attorney with the National Labor Relations Board.

I told the parties that, if there were a strike, I would request that they come to my office the Tuesday after Labor Day to negotiate until we resolve it. One party said, "Fine, we'll be there," the other said, in effect, "We don't need no stinking mediation, we're not coming." I have no authority to make them mediate; it's all voluntary. Fortunately, there was no strike, they reached their own settlement, and I didn't have to wrestle with the problem of one party desiring mediation and the other refusing.

But, within a week's time, Boeing and 40,000 of its employees represented by the International Association of Machinists in the Northwest reached an impasse in bargaining and a strike was imminent. I asked both parties to come to Washington, to negotiate under my auspices and hopefully resolve it without a strike. Again, one party consented, and the other did not. Ultimately, I did cajole them both to come to my office for mediation, but could not reach a mediated solution with them. The company's offer was rejected by a majority of the membership, but not by the necessary two-thirds majority. Therefore, there was no strike.

West Coast Ports

Another two weeks passed, and now, in mid-September 2002, the West Coast Ports -- 29 ports

from Seattle to San Diego -- reached an impasse in their negotiations. A slow-down by the unions, a responsive lock-out by the employers, resulted in a 10-day shutdown of the entire shipping industry on the entire West Coast of the United States, reportedly costing our economy one billion dollars a day. That is $300 billion a year of goods, and the situation caused great consternation in the Pacific Rim countries and in the American economy overall.

I traveled to the West Coast before the lock-out, while the alleged slow-down was still in progress, to see if I could convince the parties to accept mediation. Same story: One party said yes, and the other party said no. In this case, the union did not want mediation.

At the ports, there is one bargaining unit composed of 10,500 employees who are employed by the Pacific Maritime Association (PMA). The Pacific Maritime Association is an association of some 80 individual companies, major shipping lines, port operators, stevedore companies, big companies, and small companies. The employees hired by individual members of the PMA companies are sent from union hiring halls up and down the coast, every morning at the call of the Pacific Maritime Association to work the ships: Unload them, load them, move cargo around the terminals, get it on trucks, take it off trucks, put it on rails, take it off rails, etcetera.

These parties have had a collective bargaining relationship since the 1930s. The National Labor Relations Board certified the bargaining unit as one unit for the entire industry. And, for the most part, over the years, the parties got along well. But in recent years, their relationship started to fray. Personalities and dysfunctional relationships among the 80 members of the PMA were part of the problem. Tempers were short to begin with, and by the time I got out there, they were even shorter.

I spent several days convincing the union to let us try to help. It wasn't me, per se, or any particular mediator, that posed a problem. It was the idea on their part that allowing government intervention was a sign of weakness. I was also perceived as a representative of the Administration, and the union perceived the

Administration to be heavy-handed. The union believed that they were impliedly threatened with a military takeover of the ports. Accordingly, there was resistance beyond the normal, historic resistance to mediation. I spent several days just meeting with 40 or 50 union representatives in San Francisco to convince them that they might benefit from mediation.

Technology, a Key Issue

The biggest issue was technology. How so? The amount of products coming into and out of the ports increases exponentially every year, and it takes longer to bring cargo in and through those ports, either outbound or inbound. The longer it takes, the greater the cost and the delay to the consumer. Technology could significantly increase the ability of the ports to move cargo with greater efficiency. The union began representing employees at a time when cargo was checked on paper with pencils. It evolved into marking with chalk, but now it can be done with optical character readers and other technology that was only barely used at the ports in 2002. The employers reached a point where they could no longer, in their view, agree to contracts unless they had the right to introduce technology that rendered the ports more efficient, productive and, hence, profitable.

This issue was bound to produce some conflagration, and it did. Ultimately, the union agreed that I could try to mediate, but only the technology issue and no other issues that were outstanding at the time. The unions assent to allow mediation occurred prior to the Taft Hartley injunction, and once the injunction was in place, the dynamics changed, and I mediated the entire contract, not just the technology issue alone.

Compounding the problem was the methodology used by the both sides during bargaining: They only negotiated one issue at a time, and they would not move to the next issue until they resolved the one issue under discussion. And the parties were adamant that they would not discuss other issues until they resolved the technology issue.

As is almost always the case in labor negotiations, there is a nexus between one issue and

another. In this case, there was a significant connection between technology and the costs of employee benefits and pensions; the more profitable the employers, the more the union wanted a share for its members. The employers would not propose additional wages or benefits unless they got the "green light" on technology. Because I couldn't get the parties to link the two in bargaining, it became an increasingly difficult issue.

Reaching Agreement

Ultimately, the union agreed to technological changes, but the parties continued to hedge on the text of a technology agreement. Each side toyed with language until I did something my mediation team advised against: I drafted the language myself. If I had not, I believed the parties would spar over it forever. I drafted generalized language, giving each side what they needed to argue their case before an arbitrator, who will interpret the application of that language into the future.

It worked. At 4:00 a.m. on a Friday morning in October, they agreed to the language on the technology agreement. But the agreement was keyed to another issue unique to that industry: their arbitration system. For decades, they had three arbitrators: one in Southern California, one in Northern California, one in the Puget Sound area. And those arbitrators would be the first "deciders" of any dispute. However, the arbitrators were selected by parties in such a fashion that a person could legitimately question whether it was a neutral selection.

The parties also had a coast-wide arbitrator to whom the parties could file an appeal from one of these local arbitrators. The coast-wide arbitrator could only overturn the local arbitrator if that local arbitrator's interpretation was "repugnant to the plain words of the agreement." Since that was rarely the case, the local arbitrator's decision could not effectively be overturned. The union saw this as a basis for seeking the right to select the contract arbitrator for the new agreement in exchange for conceding on the technology agreement. Ultimately, the parties agreed on an arbitration system that allowed for appeals to a coast arbitrator, so there

remained some consistency in the application of the technology agreement.

The technology agreement and methodology for arbitration has now been in place for a year, and there hasn't been any real test of it. However, I'm confident that the approach that I chose, and that the parties assented to, will stand the test of time.

Resistance to Federal Mediation

The overarching point that I take from the ports negotiation, from baseball, Boeing, Verizon, SBC, and the Southern California supermarkets (all of which I personally was involved with) is the difficulty in securing the parties agreement to accept mediation. There is a reason why the parties reject mediation. In any negotiation, labor or otherwise, one party or the other thinks they have the advantage. That party often views mediation as an attempt to level the playing field, eliminate the advantage, help the party that doesn't have the advantage, and make it "equal." Frequently the party who either has, or thinks it has, the upper hand resists mediation. Let me assure you that, despite these concerns, mediators do not make value judgements as to which party has the upper hand and do not intervene to 'level the playing field.' We help the parties reach agreements, and if I, or any mediator, tried to take away the parties' leverage, they're going to continue resisting mediation efforts.

There are situations where we are successful in persuading the parties to use mediation. There are cases where each party has sufficient doubt as to who has the relative balance of power. That doubt creates a sufficient opening for us to intervene. We are most successful in intervening when the parties are faced with "externalities" that drive the negotiations. "Externality" is something that is beyond the control of one or both parties.

Importance of External Issues

A very good example of that today is health care costs. Health care is the single most vexatious

problem in collective bargaining today, and in part because the parties, either separately or together, can't do anything about it. They can't control the costs for all practical purposes; they cannot affect the delivery system of health care; and they cannot do anything about the overall quality of health care. These are issues which, as a nation, we have to resolve. Until we have a broad-based national consensus, unions and management will "pull their hair out" at the bargaining table, pushing costs back and forth as to who pays for the cost of the health care system we have.

This problem exacerbated the California supermarkets strike, which went on for 4-1/2 months until February 29th of this year (2004). I personally spent a month in California, day and night, trying to get it resolved. A similar situation arose earlier this year with SBC Communications Inc. They have 102,000 employees through 13 states in the West and the Midwest, and their issue was retiree health care costs as well as active employee health care costs.

Technology is another externality. In the Ports situation, it was the primary issue, but it showed up in a different way in the Verizon Communications negotiations that I mediated last summer, another 13 state bargaining unit with close to 80,000 employees. In that industry, technology is revolutionizing. Communication is revolutionized beyond telephone lines: It's wireless technology, it's broadband, it's internet service. All of these factors are driving former Bell companies out of their traditional business and into a new product that is still evolving. Technology is your friend, if you're an employer that uses it wisely, and your enemy, if your competitor uses it better than you.

Technology and health care bedevil the parties, and it is here, when dealing with these complex "externalities," that they are willing to accept mediation help.

Elimination of economic borders is another externality that will influence collective bargaining negotiations. Information technology revolutionizes how we produce goods, and where we produce them. The

industrial revolution, which was the defining purpose for the creation of National Labor Relations Board and the FMCS, is long gone, but we are into a new 'revolution.' Perhaps it can be called a technological revolution. It completely transforms the location of production, how it's done, the structures under which it is done, and how fast it is being done. Indeed, it can be done around the corner, around the block, or around the globe.

New Global Environment

An employer and a union in any single bargaining situation cannot affect that. They can find a way to deal with it, and at the FMCS, we can be most helpful to the parties by explaining that the old paradigm of adversarial power application does not work in this kind of economic environment, which has no borders. If an employer faces labor strife through a strike or a lockout, another employer, around the corner, or around the world, will stand ready to replace that company and provide that component of a service or product without suffering a strike or a lockout.

And so it behooves unions as well employers, under all of these circumstances, to find ways to collaborate, to make each employer profitable enough, efficient enough, productive enough so that the business, the capital and the investment stays with that company.

On the subject of borderless economies, I recently returned from Slovenia, where I spoke to the 10 new Eastern European countries that are joining the European Union. As a condition of membership in the EU, they are required to develop systems of labor dispute regulation and resolution. I explained to the prospective EU members how we resolve labor conflict in the United states, and how it moves our own political and economic systems. It's clear to me that, while these countries will develop a system that bears resemblance to their cultures, their history, their attitudes towards collective bargaining, they prefer the U.S. system better than their European counterparts. There is a reason: These countries want to attract investment, they want to be competitive in the new borderless economy, they want jobs, and they view our system as friendly to

entrepreneurial activity, to enhancement and to technology.

Our system is not perfect but it works. We should appreciate its contributions to a democratic society, as have other countries around the world.

Thank you.