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FEDERAL MEDIATION AND CONCILIATION SERVICE

"State-Federal Mediation Relationships"

Address by

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ASSOCIATION OF STATE MEDIATION AGENCIES

and

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The temptation to speak in impressive pronouncements, to talk in terms of the economy and the Nation, instead of hard, unglamorous reality, reminds one of the husband who boasted that he and his wife had no conflict whatsoever, because he made all the big decisions and she made the little ones. When pushed, he admitted that his ideas bound the family on questions such as war and peace and space exploration, while his wife decided what schools the children would attend, what kind of car to buy, and other like aspects of the family budget.

So here, there is a great temptation for the Director of the Federal Mediation and Conciliation Service to speak to the Association of State Mediation Agencies about everything but the real problems that complicate federal-state relationships. Unquestionably it is more pleasant to talk about "large" and "important" professional considerations, the collective bargaining climate, or the broader aspects of mediation policy than to talk about how we work together--both in constructive and

destructive ways. Even some members of my own staff would prefer "not to rock the boat." But, I think it is time for us to talk a little shop and to expose to mutual scrutiny some practical aspects of our relationship, including those that can be characterized as anything but sweetness and light. I know many of you agree with me that refusal to tackle areas of difference and friction is mere procrastination, the thief of time. Indeed, it is only because other matters have seemed to have priority that some of us have delayed earlier detailed attention to our mutual problems.

Our difficulties have attracted the interest of others who comment unfavorably on the general state of relationships between various governmental mediation services. You are familiar with the report entitled "The Public Interest in National Labor Policy" by an Independent Study Group of the Committee for Economic Development, issued in 1961. In discussing the mediation function, that report states:

> Conflict between federal, state, and city mediation services over which is to act in

> a particular dispute reduces the effectiveness of all and results in loss of respect by the parties for these agencies and in needless and aggravating duplication of effort. These conflicts can and must be resolved.

And, in the March 1963 issue of the Reporter magazine, Mr. Edward J. Silberfarb authors an article entitled, "Who Will Mediate the Mediators?" It can be said correctly that that particular article is not a fair portrayal of federal-state-city mediation relationships. However, it does contain just enough truth to merit careful appraisal.

Relationships between the Federal Mediation and Conciliation Service and its counterparts in the several states vary. In some states we are told that there are no problems; in other states we are told that the problems are "insurmountable." The best evidence indicates that neither good nor bad generalizations can properly be made solely on a state basis. In many respects our mutual problems and accomplishments are on a mediator-versus-mediator basis. On the whole, we work together well and

for the benefit of the parties and the public interest we serve. But, the bad sometimes tends to spoil and obliterate the good.

In those states where the state mediation service is largely inactive, we have few problems in our relationship with the state services. It might be said that the degree of potential friction between the federal and state services is in direct proportion to the energy and professional staff ability of the respective services. It is probably also true that some of the factors that can create maximum friction can be directed to maximum accomplishment.

Relationships can be and are constructive and cordial. Efforts can be complimentary and communications can be good. There is plenty for everyone to do--especially if the job is done right. One way, however, to build better relationships is to concentrate on that which needs correction rather than that which already satisfies. So, I will accentuate the negative to achieve, I hope, a positive end.

In the typically bad situation, there are a number of evils which I think should worry us both. Obviously, where there is backbiting, under-cutting, and the malignment of fellow professionals, the mediation function itself is injured. Clearly, too, the profession is cheapened and tarnished when competing agencies engage in cheap jurisdictional squabbles. When mediators hang about in lobbies of hotels or when they wait in parked cars in the hope that they will be able to entice the parties to a dispute to forego mediation by another agency and adopt their own service, both agencies suffer. Ambulance-chasing is not limited to automobile accident cases. Moreover, it is no secret that the parties to disputes are not above engaging in a little self-serving forum shopping. The old theme--"If I can't get help favorable to my side at City Hall, I'll move it to the State House; and if that doesn't work, I'll move it to Washington"--is played in a variety of arrangements both up and down the scale with the net result of impeding the settlement process.

Competition is not necessarily bad--it may produce better mediation. As is the case with a better mouse-trap, the parties are likely to beat a path to the door of the better mediator. It is the vicious, self-defeating competition we should abjure.

We should be bothered too by a tendency, rarely discussed in dual mediation situations, for a mediator to report as his own a settlement brought about by a mediator from another agency. Nor do many observers usually comment publicly on the tendency of the weaker mediator in a dual situation to coast on the coattails of a stronger man from another service. The net result of these types of behavior in dual cases is to inflate the statistical workloads of the involved mediation agencies and to contribute to waste of the taxpayer's money.

Another not so pretty condition that occasionally prevails in a federal-state mediation relationship is one in which the service most directly involved in a particular dispute refuses to inform or, even worse,

misinforms the other service. Perhaps the worst sin of all is when one mediation agency, like a bull in a china shop, crashes into the arena of a dispute being handled by another agency without ascertaining the effect of its intervention on the dispute.

Then, to complete the parade of horrors, I need only remind you of the occasional regrettable battle for glory in the public press. We all know that the press can, in specific instances, be useful or harmful in the resolution of disputes, but there is no excuse for a mediator's attempted manipulation of newspaper publicity for his own selfish ends.

Despite our many genuine accomplishments, both the federal service and the state services, collectively and as individual mediators, have been guilty of sins of commission and omission. Moreover, even without any assessment of guilt, we have found ourselves in positions of hostility and/or wasteful duplication of effort.

Government or state mediation relies almost solely on persuasion. Unlike regulatory bodies and courts, it

does not base its vitality on statutory power. Instead, it depends on acceptability by the parties whom it serves. This accounts, in part, I think, for the imprecise delineation of the jurisdictional lines of the federal and state mediation services. As you know, the federal law states:

> It shall be the duty of the Service /FMCS/, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.
>
> The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

Because of the very general jurisdictional lines of the statute, the overlapping language of several state

laws, and the nature of the mediation process, we are not likely to solve all or even many of our possible areas of jurisdictional overlap by relying primarily on existing statutes. How, then, are we to solve the very real problems which confront us?

There is the suggestion that we go to Congress and ask the Congress to set up rigid jurisdictional lines and to stratify the agencies so that, under the principles of federal pre-emption, each agency will operate in its own sphere. One academician, for instance, urges that FMCS handle only those disputes involving more than 500 workers, except where the operation is multi-state or where the parties jointly request FMCS or where the dispute falls within the province of a specialized agency such as the Atomic Energy Commission or where no qualified state agency exists. I have no intention of seeking jurisdictional amendments to the Taft-Hartley law for a variety of reasons. So, as far as I am concerned at least, we should look for other avenues to federal-state mediation peace.

Some of your leaders have counselled that the answer to all our difficulties is for the FMCS to confine its mediation activities, in those states with active services, to large national defense cases along with a few other highly significant multi-state disputes. I must, in all candor, say: "No sale." To go along on that basis, the federal service would have to ignore its legislative charter and abdicate important areas of responsibility. We would be in a somewhat similar position to the husband who made all the "big" decisions.

Somebody has suggested that all disputes be handled by joint councils of mediation, working as duets or troikas. Again, I must disagree. I cannot accept the notion that most labor disputes need be or should be handled by dual mediation. I am convinced that it would be a distinct disservice to the parties if, every time mediation were called for, they were saddled with a two or three-headed team to supply the professional grease to the collective-bargaining machine.

I do not mean to imply that there are not occasions when a joint council of mediation agencies may prove valuable or that there should never be dual mediation. Nor would I argue that the federal service belongs in every case. I am sure that we have mediated some cases during my tenure of office in which we had no business.

You doubtless know that in those states in which there is no state mediation service, the screening out process of the federal service is different than in those states in which an aggressive, working service exists. Obviously then, the federal service has been, and is, prepared to adjust the extent of its participation in accordance with the realities of particular situations. Moreover, some of you are aware that in a few states we engage rather regularly in dual mediation. I can recall instances where panels of federal and state mediators have worked well to assist parties to arrive at a mutually satisfactory settlement of their labor disputes. In all candor, it is equally clear that there is too much dual mediation in those same states and that

relative absence of friction is bought with some waste of public funds, both state and federal.

The laws governing mediation vary widely from state to state, as do the size, quality, and facilities of the state services. Some of you arbitrate as well as mediate; we do not. Some of you concentrate on grievance mediation; we do not. We are presently emphasizing preventive work; some of you have no interest in it at all.

In the light of these and other considerations, it seems clear that we cannot, at this time--if ever, work out a single national policy which would adjust and preserve the delicate balance between FMCS and all state agencies. We can, however, make an important constructive beginning.

I should like to make two closely related but separate proposals.

The first is to develop a code of ethics for professional mediators. We need a set of canons embodying the moral and professional duties and responsibilities of mediators toward one another, toward the parties,

toward the public, and toward their respective agencies. Such a code would be an individual-mediator code, equally applicable to all professional men affiliated with all city, state, and federal agencies and even to mediators who may be retained privately by a company and a union. It would ignore the administrative or legal problems of jurisdiction and concentrate on personal and professional relationships and obligations.

The preparation of a code of ethics will not be a simple matter. We will have to reconcile strong and divergent views, and there will, undoubtedly, be a succession of drafts before we achieve a consensus. No matter how difficult the task may be, I put it to you that it should be done. First of all, the adoption and observance of such a code would raise the standards of our profession. Secondly, and equally important, living under these canons could eliminate many of the unseemly abuses I have discussed today. Without attempting to discuss the substantive content of a proposed code, I think it obvious that it could be the basis for improving

our inter-relationship

If you should react favorably to this suggestion, we in the FMCS are prepared to discuss with you, while you are still in Florida, the mechanics of getting started now.

In addition to the code of ethics, my second proposal is that representatives of each sizeable state service and the federal service should confer separately for discussion of existing agency-versus-agency problems. Some start has already been made in this direction with several state agencies, but we have not yet devoted enough time or energy to the task. The first steps are to expose the existing problems in each relationship. Then, it seems to me, we must experiment on ways to live together in a more helpful manner.

Our experimentation may produce little of a concrete nature at its inception; but I am optimistic that, as the officials of the state agencies continue to meet with us, we can eventually solve these vexing riddles. I suspect that my optimism is due in part to the great

respect I have for so many of the professionals in the state agencies. We are proud and pleased to see the quality of professional mediation on both the federal and state level rise in recent years. We want your help; and we want to help you.

There are too many large challenges to mediation today for us to create our ownproblems or to refuse to attempt to solve those that do exist. Our common obligation is to improve our services and to play our roles as industrial peacemakers with dignity. It is imperative in these difficult days that we communicate with one another, that we assist each other, and that we realize how inextricably bound together we are. Let's prove to labor and management that mediators can mediate their own differences, so that when an industrial skeptic tells us, "Physician, heal thyself," we can reply that we are healthy.