FEDERAL MEDIATION AND CONCILIATION SERVICE

"Role of the Labor Lawyer in Mediation"

Address by

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As a non-lawyer, I am honored to be asked to speak here tonight to the Labor Law Section of the Kentucky Bar Association on the lawyer's role in labor mediation. As one who has spent a good part of his lifetime as a mediator and as a practitioner in that quasi-judicial function--arbitration, I have had ample opportunity to study the work of attorneys in behalf of labor or management clients. In all honesty, I would have to say that I have seen some instances where the work they did was heroic. I have other recollections of lawyers who, consciously or unconsciously, became the fly in the ointment.

The development of labor law during the past quarter-century has opened an important new field of practice and usefulness for the legal profession. It is an expanding sector of practice which I am sure will continue to grow and present new challenges for lawyers to contribute to the orderly resolution of economic conflict and to the improvement of the national economy.

Your contribution in delineating, clarifying, and guiding the ground rules for unions and management has

been tremendous. I need not tell you that it is due to the ingenuity of lawyers that we are finally finding out from the courts what some of the language of the Wagner Act and the Taft-Hartley Act really means. But, it is not your contribution in the emerging development of the ground rules that I wish to discuss with you tonight. I want to talk to you about your role on a much more central stage--that of the collective bargaining negotiation rather than the periphery of the rules surrounding it.

There is, moreover, a danger that so much of the attention of your profession is focused on the intricacies of these technical rules that there is a tendency to overlook the contribution to be made in the area with which I am most concerned--collective bargaining itself.

Lawyers, by virtue of their ethical commitment and their intellectual disciplines, are peculiarly suited to play significant roles in the central process of collective bargaining. I need not tell you that I mean your canons of ethics, your dedication to truth, and your

training in logic and reason--as opposed to emotionalism. When the going gets tough in a bargaining situation, sometimes personalities overwhelm facts, and sometimes fictional issues assume greater proportions than real ones. Ideally, lawyers for unions and companies should be, and aften are, able to assist mediation in finding areas of accommodation of the real facts in issue between the parties.

I am sure that I will not shock you when I tell you that I have heard laymen bargainers express somewhat less than enthusiastic reactions to the presence and activity of lawyers and even mediators in bargaining sessions. You have probably heard remarks like, "Let's throw out the lawyers and mediators so we can get down to business and make an agreement." So, if there exists in a few minds a prejudice against us both, perhaps that is a reasonable basis on which we can make a common bond. In all fairness, though, if we are going to work together, it is only reasonable that each of us know what the other expects--our "rights" and "duties" in your terms.

Ideally, mediators and lawyers should work together. True, the lawyer is an advocate and has as his foremost obligation the representation of his client, while the mediator is a neutral and has as his foremost obligation the representation of the public. Nevertheless, because of the nature of your profession, it is only logical and reasonable to expect that mediators count on lawyers as purveyors of truth and as the means for the distillation of ideas. The quality of factual objectivity in the members of the legal profession is, in fact, and should be so pronounced that in a tense collective bargaining situation, whether mediators are present or not, opposing counsel should be able to communicate where laymen may not. And, I suspect, even though no statistics are available, many crucial collective bargaining settlements are achieved largely through the efforts of partisan attorneys acting in a mediatory capacity. Similarly, many of our confidential case reports tell of instances where mediators were able to get the real positions of the parties only through attorneys and, by the same token,

those mediators found lawyers to be vital conduits of information, ready to convey constructive suggestions to their clients for the settlement of disputes.

On the other hand, all is not sweetness and light. Sometimes lawyers hinder rather than help the collective bargaining process. A preoccupation with legalisms, with high-flown language, and with technicalities can cast a pall on the deliberations between labor and management.

Lawyers, of course, have the responsibility of furnishing their clients with the soundest legal advice possible. But, over and beyond this, they have another and equally important responsibility. The bar must act as a constructive force in the collective bargaining arena. It must not allow itself to become so entangled in legalistics that it loses sight of the fact that the purpose of labor laws and court rules and regulations is to <u>aid</u> collective bargaining.

You are entitled to know that mediators operate within a discipline, too. Our prime responsibility is to

promote industrial peace and stability through voluntary persuasion. Every mediator worth his salt is aware of the rigid ethical requirements of absolute impartiality and complete confidentiality. If the parties or their counsel cannot rely on a mediator to respect, at all costs, every confidence, the mediator's usefulness is at an end. We are also a profession wedded to the principle of voluntarism.

The Federal Mediation and Conciliation Service relies on persuasion in its quest for industrial peace and stability. We neither have nor seek enforcement powers--we neither have nor seek decision-making power. Other federal agencies and the courts are in the business of enforcement, and, we trust, decision-making in collective bargaining will remain, where it belongs, with the parties.

While our mediators are not decision-makers, they are extremely good sounding boards. After all, the average mediator handles approximately 100 collective bargaining cases a year and most of them have been in this

business a good while. Lawyers should find it useful even before negotiations begin to try out tentative ideas of their clients on the mediator and get his reactions. A little advance spadework of this kind early in the game can benefit both lawyer and mediator.

We in the Federal Mediation Service are presently emphasizing a program of preventive mediation. It is not a difficult concept--it is, in fact, similar to systems of preventive law and preventive medicine where pre-crisis efforts are directed toward keeping the client out of trouble or the patient healthy. In our case the trick is to nip in the bud blossoming trouble in a relationship. Lawyers who know of this phase of our activity might well advise its use to a client who is a party to a deteriorating relationship or who sees looming problems incapable of solution in normal collective bargaining. Naturally, when mediators enter a preventive case and lawyers are involved, the two should "level" with each other for the best results--just as in crisis bargaining.

In difficult cases, imaginative and creative efforts may be attempted to promote industrial stability. In these instances the mediator must innovate, improvise, and persuade. Occasionally, tactful mediators find it necessary to engage in reasoned argument with the parties, and, frequently, skilled mediators have exploded some tightly-held doctrines. Sometimes we feel it necessary to engage in what we call intensive mediation--and the challenges of today's bargaining require constant experimentation.

Lawyers can help promote this development. As counsellors for parties on one side or the other in industrial conflict, they can help cultivate this innovation in bargaining that holds so much promise of insuring smooth industrial relations. After all, collective bargaining is a relatively young institution, and it is probably inevitable that new methods will be adopted to replace outmoded approaches we have been relying upon in the past.

I know of many situations where employers or unions would like to make a start at this innovating

process, to try some new mechanism to generate discussions of mutual problems in the hope that at least a start could be made toward their solution. One side or the other often hesitates to get into this sort of thing. After all, why rock the boat and get into something when you don't know what it's going to lead to? To the skeptics I say, "Give it a try in a modest way." Talk is cheap if it is understood that discussion of alternatives involves no commitment that any will be adopted. It is surprising to me how often labor and management find they have a great deal in common if they will only talk a little.

We urge you to help us open the minds of your clients and to accentuate the positive in labor relations. The great issues of today's industrial scene are not disposed of by horse-and-buggy, hide-bound thinking. The assumption of rigid conceptual positions and refusal to try new methods and approaches today is a way of playing Russian roulette with collective bargaining.

I have said it before and I am glad to restate the proposition that despite its critics, the apostles of gloom and doom, collective bargaining is doing more than a reasonably good job in a difficult environment. One thing is certain, however. The institution of collective bargaining is in need of friends today as never before. It needs friends who work with heads as well as hearts. We count you as those friends.