TECHNIQUES OF MEDIATION IN LABOR DISPUTES

Walter A. Maggiolo

Techniques of Mediation in Labor Disputes

by Walter A. Maggiolo

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PREFACE

The task of the mediator has seldom been an enviable one. Mercutio, unable to achieve any sort of accommodation between the warring Montagues and Capulets, could only exclaim in exasperation, "A plague o' both your houses."

But Mercutio was not a trained mediator, nor was mediation in his time the highly developed art that it is today. To reach its full potential, mediation had to wait until the advent of collective bargaining. Attempts at mediating labor disputes were tried in the late 19th century in the United States and even earlier in England. But really effective efforts in this country date from the establishment of the Department of Labor in 1913 and the subsequent appointment of "commissioners of conciliation," reconstituted in 1947 as the Federal Mediation and Conciliation Service we know today.

Walter Maggiolo's career spans almost the entire lifetime of serious mediation efforts in this country. During that career he has participated in the settlement of hundreds of labor disputes covering the whole spectrum of business and industry. And during that career he has picked up a wealth of skill and knowledge along the way.

This book is a distillation of that skill and knowledge. Readers will discover that mediation is indeed an art, an art demanding the utmost in human relations skills.

It is also becoming an increasingly important art. The need for skilled mediators in our society is increasing. The recent rapid expansion of collective bargaining into the public sector is creating a rising demand for mediation services at all levels--

Federal, State, and local. Nor do we see any diminution of that demand in the years ahead. Government service, particularly in the States and local communities, is one of the greatest anticipated growth areas of this decade.

But mediation is no field for the untrained or even for the merely well-intentioned. It demands a high degree of expertise in many fields, particularly in the elusive but all-important field of interpersonal relations. Mr. Maggiolo's book deals incisively with the whys and wherefores of mediation and the role of the mediator. But, more important than that, it is a "how to" book. It is replete with suggestions and advice on how to handle mediation situations--the thousand and one impasses, disagreements, traps, and problems with which the mediator finds himself confronted.

It is a book for the student and practitioner. It could only have been written by a man who has not only had long experience in actual mediation but who has trained others in this difficult art.

Mr. Maggiolo is such a man, and he has written a very useful and altogether commendable book.

J.D. HODGSON
Secretary of Labor

CONTENTS

1 THE PHILOSOPHY OF MEDIATION

To evaluate properly the role of mediation in the field of labor-management relations, it must be cast in a much broader setting. It should be assessed in the light of some of the basic concepts upon which our democratic society has been founded.

Our society is fundamentally a "meeting-of-minds" civilization. Our whole way of life is predicated on the principle that while the individual members of our society may have varying economic, political and social backgrounds and consequently divergent viewpoints, when occasion demands, they can and must subordinate and accommodate their self interest to the common good. As members of a democratic society, each individual group although starting from apparently widely divergent positions, can by the process of reasoning, utilization of the normal avenues of communication, discussion, judicious use of constructive compromise and recognition of the dignity of human ideas arrive at a "meeting of minds" and go down the road together toward a common objective--the overriding public welfare. Conflict is thus supplanted by cooperation.

Our society is also predicated on the principle of voluntarism as opposed to compulsion. Duties as well as rights flow out of the social relationship. The primary burden of carrying out the purpose of the society properly is upon the individual members or groups rather than the governing power. To the extent that the component individuals voluntarily assume and exercise their individual responsibilities as members of the society to resolve their own political, economic and social differences, a democracy is strengthened and flourishes.

Further, there is an inter-relationship between all group economic actions and the common welfare. This relationship is effectuated in our democratic society through a recognition that

private economic rights may not be exercised in a manner which will override the paramount public interest of the society as a whole.

Consistent with these basic principles, we have evolved our national policy by defining relative responsibilities for maintaining industrial peace.

This policy is not new. Its roots may be found in the Labor Board of World War I, in the 1918 recommendations of the War Labor Conference Board, in Section 7(a) of the N.I.R.A. and in Section 502 of the National Production Act. It is implicit in the spirit and letter of the Wagner Act and the Labor Management Relations Act, 1947.

Essentially, this national policy charges both labor and management with the primary responsibility of making collective bargaining work, and through acceptance of this responsibility, to seek amicable solutions to their labor disputes. In turn, the government has the responsibility of defining the base lines within which justice demands that the parties confine themselves and, as assistance, to the parties, making available to them full and adequate facilities for conciliation and mediation.

It is not the responsibility of this government, except in periods of emergency, to dictate to the parties the terms of their collective bargaining contract. This is as it should be. A basic tenet of a free society is that subsidiary groups or individuals within it should not compel the governing body to undertake functions which they themselves should perform.

Mediation espouses and implements these fundamental social doctrines. Its very purpose is to assist the parties to exercise their baisc responsibility to maintain industrial peace. Further, it is an entirely voluntary process which permits the parties to negotiate their own agreement free from government compulsion or dictation.

2 TECHNIQUES OF SETTLING LABOR DISPUTES

In the United States today, there are four basic techniques used for the settlement of labor disputes--arbitration, fact-finding, mediation and collective bargaining.

Collective Bargaining

Collective bargaining has been described as the process by which representatives of a company and representatives of its employees meet to discuss and negotiate the various phases of their relationship, which have been declared to be proper subject matters of bargaining, with the objective of arriving at a mutually acceptable labor agreement.

An agreement arrived at by successful collective bargaining without the use of any substitute, aid or adjunct is the most desirable method of settlement of any labor dispute.

If the settlement is cast with a consciousness of the public interest, an agreement arrived at through voluntary collective bargaining reflects the full assumption of the basic responsibility for the maintenance of industrial peace by the parties themselves.

Arbitration

Arbitration, in the context of labor disputes, has been described as the submission of a dispute to a neutral or a group of neutrals whose function is to conduct a hearing and render a judgment (termed an award) which is binding upon the parties.

Arbitration can be either compulsory or voluntary. Arbitration is compulsory if the submission of the dispute to the neutral

is based not on the consent, expressed or implied, of the parties but rather an administrative or legal compulsion or direction.

In the United States today, the only instances of compulsory arbitration are found in some state statutes relating to public utilities or "industries affected with a public interest". In such states,[1] the legislature having restricted or prohibited the right to strike realized the necessity for some machinery to adjust labor disputes arising in these industries. Compulsory arbitration was the selected process.

Arbitration is voluntary when the submission to the neutral is based on the consent, expressed or implied, of the parties. This is the most widely used arbitration method. It is most prevalent as the terminal point of the grievance procedure provisions of collective bargaining contracts.

Arbitration is termed by many as a substitute for collective bargaining. However, most professional arbitrators insist that it is merely an extension of collective bargaining.

Types of Arbitration

There are three basic types of arbitration: permanent or impartial chairman, tripartite and ad hoc.

A number of collective bargaining contracts name one individual as the "permanent" or impartial chairman who has been selected by the parties to act as arbitrator for all disputes arising under the existing contract. His term of office expires coincidental with the expiration of the contract. Normally his compensation is based on a retainer plus a per diem which is shared by both parties.

Those who espouse this type of arbitration allege that such a person will become thoroughly versed in the terms of the collective bargaining contract and the application of those provisions in the particular company involved and thus assure consistency and uniformity in the awards rendered on the disputes which arise during the contract term. They further state that this type of arbitration avoids necessity of "educating" an arbitrator each time

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[1] Examples of such states are Florida, Indiana, Wisconsin and Nebraska. cf Bus Employees v. Wisconsin Board, 340 U.S. 383; Amalgamated Association v. Missouri, 374 U.S. 74.

a dispute arises as to the collective bargaining contract provisions and plant practices.

A variation of the "permanent" arbitrator type found in some contracts is the naming of three or more arbitrators. Such arbitrators serve on a rotating basis for the duration of the contract.

In the tripartite type, each party to the collective bargaining agreement selects his own representative on the arbitration panel. The two so selected then pick the neutral chairman. The three then hear and determine disputes arising under the contract as a panel. Normally the vote of the majority determines the disposition of the issue presented.

The proponents of this type of arbitration allege that this method assures that each party's viewpoint will be considered not only at the hearing but also when the panel is deliberating its award.

If this method is chosen, care must be taken to make provision for the selection of the neutral in the event the two appointees are unable to agree. The most practical way of breaking such an impasse is to provide in the collective bargaining agreement that the two appointees must agree on the neutral within a limited time period. Upon failure to do so, provision should be made that such neutral will be selected by an outside agency--either the Federal Mediation and Conciliation Service or the American Arbitration Association.

Under the ad hoc type, the arbitrators are selected on a case-by-case basis. Generally speaking, the practice is to provide that if the parties fail to agree on an arbitrator within a prescribed time period, some agency who maintains an arbitration roster will be requested either to submit a panel or to make a direct appointment of a neutral.

Those who advocate this type of arbitration assert that it has a number of advantages over the permanent chairman and the tripartite types. It is stated that one or the other party, or both, may become dissatisfied with the permanent chairman during the contract term but are not in the position to change him until the expiration of the contract which may have one or two more years to run. They also urge that the ad hoc approach is more realistic than the tripartite type. They argue that the arbitrators nominated by each party must of necessity be partisan and consequently the real decision is made by the neutral. Ad hoc arbitration, they

say cuts through this sham and additionally assures more expeditious disposition of the grievance.

Obtaining the Services of an Arbitrator

In addition to the Federal Mediation and Conciliation Service and the American Arbitration Association, there are several state agencies which maintain a roster of people who have been selected by the agency as being qualified to handle the arbitration of labor disputes.

Many contracts provide that if the parties are unable to agree on an arbitrator either may request one of the agencies mentioned above to provide them with a panel of available arbitrators. Upon receipt of such a request, unless otherwise specified, the agency will send to each party a panel of seven arbitrators. Accompanying such panel is usually a short biographical sketch of each name appearing thereon. The parties then meet and usually by a system of alternatively striking, arrive at a selection and then advise the agency of the name of the arbitrator selected.

Another practice followed by some is for each to independently indicate opposite the panel member's name their first, second and third choice. Each then transmits to the agency his order of choice. The agency will then compare the two transmissions and appoint as arbitrator the one upon whom there is agreement, or absent an agreement, the arbitrator standing the highest in the order of preference indicated by both parties.

Upon notification of his appointment, the arbitrator has a duty to contact promptly both parties to arrange for a date for the hearing. The proceedings are then conducted under the rules and regulations* prescribed by the appointing agency.

It is important to note that at the point when the agency appoints the arbitrator selected by the parties or, if desired, by direct designation, the arbitrator so selected or designated is not an employee of the appointing agency but an employee of the parties themselves. Consequently, the questions of fee and its collection, dates of hearing, procedures, briefs, stenographic records and

* For text of rules and regulations of the Federal Mediation and Conciliation Service and the American Arbitration Association cf Appendix A and B.

the like are matters to be decided between the parties and the arbitrator.

Similarly, the merits of the award, its modification or its enforcement must be pursued by the parties. The appointing agency has no authority to review, modify or enforce the arbitrator's award.

As to the per diem fee of arbitrators, most agencies have a suggested fee. Further, as far as the Federal Mediation and Conciliation Service is concerned, each arbitrator listed on its roster must certify to the Service his normal per diem fee. The biographical sketch sent to the parties reflects such per diem charge.

The appointing agency does however, investigate complaints of excessive charges, improper conduct and undue delays in either scheduling hearings or rendition of awards.

Fact-Finding

Fact-finding has been described as the submission of a dispute to a neutral or group of neutrals whose duty it is to conduct hearings, find the facts concerning the dispute and make such findings public. Fact-finding does not necessarily imply any duty of the fact-finding body to make recommendations for the settlement of the dispute.

The theory behind fact-finding is that once the neutral or neutrals have found the facts and made them a matter of public knowledge there will be a marshalling of public opinion. The moral force of such marshalled public opinion will persuade the disputants to change their prior positions and make agreement possible.

Like arbitration, fact-finding can be either compulsory or voluntary. An example of compulsory fact-finding is found in Section 206 of the Labor-Management Relations Act, 1947, as amended, relating to the appointment of boards of inquiry in emergency disputes. A few states such as Missouri have a form of compulsory fact-finding for disputes involving public utilities.

Voluntary fact-finding occurs when the procedure is founded on the consent, expressed or implied, of the parties to the dispute. It has been utilized in disputes involving initial contracts,

contract renewals and the adjustment of grievances especially those concerned with incentive or work-load problems. One form of voluntary fact-finding is the agreement by the parties during negotiations to refer certain issues to a committee for further study during the ensuing contract term. Such a procedure when utilized in good faith (and not merely as a device to sweep sticky issues under the carpet) has several desirable objectives. It removes from the emotionally charged negotiating atmosphere issues which can block the successful conclusion of negotiations. It avoids decisions based on expediency and prompted solely by the impending economic crisis. It enables the parties calmly, thoroughly and objectively to delve into the various aspects of the problem and suggest long range approaches to its solution.

Many industrial relations students warn against the indiscriminate use of fact-finding as a labor dispute solving technique. They argue, and with some force and validity, that its potential use must be measured in each case against the background and impact of the dispute on the public. Prescinding from the cases which truly involve the national health and safety, they urge that unless there is present a strong underlying problem of public inconvenience there will be no marshalling of public opinion with its moral persuasive force. They illustrate their point by citing two situations. If a strike is called by the drivers of a major urban or inter-urban transit company, large segments of the working population are immediately affected. Their inability to travel to their place of employment or the bothersome details of arranging alternate methods of transportation are inconveniences which arouse strong and sometimes violent opinions. The findings of a board in this setting can be most efficacious since there will be a quick public opinion response.

The second illustration they offer is a strike involving a small or medium size plant in an industrial community which is not wholly dependent on it. No public convenience is involved. Persons not immediately connected with the dispute would have little interest in any findings of a board. Consequently, there is no marshalling of public opinion, one of the essential ingredients of the dispute settling process.

One of the popular misconceptions about fact-finding is that it necessarily involves the making of recommendations for the settlement of the dispute. No fact-finding board has the inherent