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The Role of Mediation in Airline Labor Disputes

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THE ROLE OF MEDIATION IN AIRLINE LABOR DISPUTES*

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THIS AFTERNOON we are going to close what has been a most extensive and intensive scrutiny of the operation and administration of the Railway Labor Act. It has probably been the most thorough review undertaken since the Act was passed thirty-five years ago. As you can well imagine, an agency with three members and a staff of twenty mediators ranks well down in the governmental pecking order. We are not only located well below the salt, but on most occasions we do not even get to the table. The sponsors of this event should be congratulated for gambling so successfully on the widespread interest manifested by this attendance in such an esoteric and neglected subject.

Various standing and ad hoc committees of the American Bar Association have been assigned jurisdiction and do review our activities. Periodic reports have been made to that body. We also find an occasional law review article prompted by a court decision arising under the Act. Still less frequently, an article of more general application will appear in an industrial relations journal. Except for discussions of emergency disputes procedures under section 10, I think it would be fair to say two things: First, in recent years very little has been said or written about the Act and the work of the Mediation Board by disinterested students of labor-management relations, especially when compared to the voluminous published material on the other federal labor-management relations statute (Brand X); and second, what little has been said or written has not always been favorable.

When an occasion such as this presents itself, one might be tempted to raise his voice in defense of the Establishment. I do not intend to do that this afternoon. Recent experience in the academic community has clearly shown that to defend the Establishment is dangerous folly and not a constructive effort. In addition, that was not my assigned task at this meeting—nor is it my disposition. However, before proceeding with my assigned topic, may I, on behalf of my colleagues, ask the judge to instruct the jury regarding the silence of the accused and the severe inhibition on inference which may be drawn therefrom.

There is an additional reason for not raising my lance at this time. Previous utterances and much of the material presented at this symposium

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* These comments represent the personal views of the speaker and do not reflect the opinions of the National Mediation Board or its other members.

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focus on and emphasize the rules of law to be applied in the administration of the statute. It would seem to me that it might be at least as profitable to pay some attention to the spirit and intent of the law and the obligations which it imposes upon the parties to a dispute about wages, hours, and terms and conditions of employment. Statutory amendments and the promulgation of amended rules might very well be helpful, but of transcending importance is the conduct and attitude of management and the unions. The much more detailed and pervasive provisions of Taft-Hartley, as well as the National Labor Relations Board book of procedures and rules, have not been a guarantor of good faith and harmony. A constructive climate of labor-management relations cannot be reached with only the assistance of a road map provided by the government.

Before coming to this meeting, I had an opportunity to spend several long nights trying to keep awake while the parties to a dispute were closeted in their respective rooms reviewing their positions. (More than likely they were merely killing time so that the other side would believe that serious consideration was being given to proposals which had just a little earlier been unalterably characterized as unrealistic, heinous, barbarous, ruinous or just plain stupid. Incidentally, these proposals so characterized later formed the core of the settlement.) As you know, waiting time, or down time, is the major element in the mediator's job description. After my usual review of the local papers, the room service menu, and the Gideon Bible in the telephone table drawer, the long night still stretched ahead. I began to think about the title of the speech that I was to give at this symposium—"The Role of Mediation in Airline Labor Disputes."

In order to get a grasp of the subject, I attempted a semantic dissection of that title. Several different approaches were necessary. My first attempt was to analyze the word "role" standing by itself. I assumed it meant function or purpose or referred to the goal or objective of mediation. As to that, the answer was obvious—the statute plainly states the goal or role is, "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions"—certainly there was not enough there to fill a luncheon speech.

Perhaps the clue for my theme or the subject matter of my remarks was to be found in the whole phrase, "role of mediation," calling for a learned discourse on the subject of mediation as an art or a science.

As you know, there is a current controversy over the correct characterization of this craft. Is the role of mediation an "art" or a "science?" This dispute has been of great interest to me. In order to sharpen my professional skills, as a practitioner with a government license, I have avidly perused the literature which has been appearing on "non-violent conflict resolution." I have read the works of some of the game theorists, the model constructors and mathematical formulae others have adducted representing the dynamics of the bargaining table. In relating these writings to my own experience, I have thoroughly enjoyed their imaginative descriptions

of what is supposed to happen in the smoke-filled rooms where the agreement is ostensibly being hammered out. I have certainly envied their ability to use computers to simulate responses and their discoveries of "signals" in bargaining.

Following this approach, during the course of that long night, somewhere close to dawn I evolved a master theory of my own called "Conflict Resolution Attitudinal Processes." After a few hours of sleep and a closer examination of this theory's short hand designation—C.R.A.P.—I abandoned that exercise and any thought of lecturing at length on that subject at this meeting.

In any event, my present predilection leans toward that school which declares that mediation is an "art" and not a "science" at all. This "art," as I now view it after many years of practice, seems to resemble a Jackson Pollack more than it does a Rembrandt, and thus, defies description. You must really experience abstract art, not just view it.

Now that I had discarded the idea of talking about the role itself or the role of mediation, there I was with only the "airline industry" portion of my speech title left from which to launch this address.

Well, perhaps, it was not yet time to despair. Perhaps, airline mediation problems were different, unique or might one say, peculiar? I went to an old experienced management man in the airline industry and asked him how I might distinguish the airline industry and its problems from those of other industries. "Tell them how much we pay those glorified truck-drivers," he said, "$75,000 next year to fly the 747 for about 53 hours a month. Tell them about the $300,000 we have tied up in training one of those bus jockeys." As I left his office, I spent a few minutes chatting with his secretary. (I always do this when I pay him a visit because she reminds me of an outstanding woman who I respect and admire—Gina Lollobrigida.) "Tell them," she said, after I related my conversation with her boss and asked for her opinion about the uniqueness of the airline industry, "that this is the only industry that pays off with a once a year free flight instead of cash. I could make $50 a week more working down the street for those lawyers. As for training, I had to pay my own way through secretarial school before he would take me off the reception desk. Now that we have a Pacific Route, he has demanded that I go to night school and learn Tagalog on my own time or back I go to the reception desk."

Another industry spokesman, to whom I made the same request, wanted me to be sure and mention the amount of regulation to which the industry is subjected. "You tell them that the government tells us where we can fly, when we can fly, how much we can charge and what's a fair return on our investment. We just can't jack up our prices at will every time we are blackjacked into making an exorbitant settlement." However, working with the railroad industry and having previous experience with motor freight, maritime operators and utilities, I knew that the airlines did not stand alone at all when it came to government regulation and control.

Now there is no doubt that the airline industry is more glamorous than

most any others you might mention. There is romance and beauty in the wild blue yonder. Mary Wells has made sure that we know all about that, and most airlines "flaunt it." Unfortunately, the glamor and the romance do not seem particularly relevant when we talk about wages, hours and other terms and conditions of employment, such as the degree of consaguinity to the deceased necessary to qualify for funeral leave with pay. The glamour does not seem to have any more impact or importance in dispute settlement in this industry than the lack of same might have in the fertilizer industry.

At this point in my analysis of the subject, with the "role" out, the "role of mediation" out, and the "airline industry" just about out, I was about to conclude that I was stuck with a lousy title! Then, sitting in my office at the National Mediation Board, I had a brilliant intuitive flash. Except for the railroad industry, the airlines are the only group to bargain under the aegis of the Railway Labor Act! Could any distinctions be found there?

Unlike the rest of industry, our labor agreements are, by statute, not written for a fixed term. They are only amendable through the process of serving a notice of intent to seek a change in specific existing conditions, and time limits or moratoriums on filing such notice do not appear in the law. Although this distinction has some validity in the railroad industry, and perhaps an affect on the institution of collective bargaining, in fact, the airlines and their unions have acted as if their agreements were for a fixed term. This was no help.

Another possible distinguishing characteristic impinging upon the bargaining process under the statute was that, by court decision, it has been determined that a union may not strike over "minor disputes," or grievances arising over the interpretation or application of agreements. Yet in the vast majority of collective agreements not under our jurisdiction, contractual provisions dealing with the disposition of grievances and resort to arbitration have virtually eliminated the need for mediators' skills in peacefully settling this type of issue. Again, perhaps this was a distinction, but it was only a blurred one with minimal impact upon the bargaining process in the airline industry.

There is still another distinguishing characteristic of bargaining under the Railway Labor Act, and this one may be of some greater significance. Only under this statute must there be a finding by a *government agency* that the best efforts to bring about an amicable settlement through mediation have been unsuccessful. Then and only then, after a required proffer and declination of arbitration by either party, and an additional waiting period, may the parties resort to the exertion of economic pressure. Only in the airline and railroad industries must a government agency determine when the green light will flash and when movement toward the moment of truth will occur, even in cases not of national importance.

This special power which the Board possesses has been the subject of some recent comment from both labor and management in the airline in-

dustry. One labor organization has publicly taken the position that the Board is prone to abuse this power, to hold on to cases in mediation, and is a poor judge of when its best efforts in mediation have failed. This organization has contended that the proffer of arbitration, which sets the clock running, is a ministerial act and the proffer must be made upon the request of either party in mediation. I believe the union has further suggested that if the Board should fail to heed such a request within a reasonable time, a mandamus action would be appropriate.

Some airline spokesmen have another view of these unique powers given to the Board under the statute. They hold that the Board can, by greater exercise of discretion than heretofore employed, achieve more meaningful direct negotiations and effective mediation. They argue that the parties ". . . shall exert every reasonable effort to make and maintain agreements. . . ." That duty is imposed on the parties by the language of the statute, and the National Mediation Board should carefully examine the conduct of the parties, in direct negotiations, to see that they have fulfilled their statutory duty before the Board dockets the case for mediation, and thus possibly gets it on the track toward eventual resort to self-help. These spokesmen further suggest that, after a case has been in mediation, the Board once again exercises its discretion—which they allege exists under the statute—by not releasing jurisdiction, and start the 30 day period running with a proffer of arbitration, if either party has not, in the opinion of the Board, "made every effort to resolve the dispute. . . ."

In usual mediator fashion, I find merit in both the contentions of the union and the proposals of the carrier spokesmen. However, both sets of proposals raise some questions. Does the union's contention that the mediator should get in and out of a case purely at the will of either party fail to recognize the requirement of the statute that they *shall* make every reasonable effort to peacefully resolve disputes? More importantly, does this union contention overlook the public interest and stake in disputes in the transportation industry and the whole thrust of the law which emphasizes this and the Mediation Board's responsibility for the peaceful resolution of such disputes? As to the carriers' proposals, before taking jurisdiction and assigning a mediator to the case, how is the Board to determine whether a good faith effort was made by either or both sides in direct negotiations? Basically, is there statutory language to allow the Board to make such a determination when the statute also says the parties or either party may invoke the services of the Board? That question aside, in what way does the Board gain the knowledge necessary to make a determination that both or either party has not exerted every reasonable effort in direct negotiations? Will a unilateral contention of one of the parties suffice? Shall the Board demand affidavits, investigate or conduct a hearing? In any event, how does such a proceeding or action insure good faith and best efforts in further direct negotiations? Basically, will such governance by the Board realistically assist in furthering a peaceful resolution of the issues?

Once a case is in active mediation, the Board receives periodic confi-

dential reports from its mediators. These reports on the progress of the case might, in certain instances, provide some intelligence about the efforts each of the parties is making at the bargaining table. Even with such information at hand, what criteria shall the Board employ in making a determination that one side or the other deserves to be held in status quo? I need not dwell upon the difficulties inherent in making determinations about good faith bargaining. We are all too familiar with the legal history of enforcement of this requirement under the other statute.

A few comments concerning both sets of proposals—those from the union and those from some carrier representatives—may be in order here. Does this union proposal reflect a more widespread opinion among unions dealing with the airlines that in this industry realistic bargaining only takes place under the gun? Are they saying that there is more foot dragging and procrastination possible in bargaining under the labyrinthic procedures of the Railway Labor Act? Are they saying that such tactics are more prevalent in this industry than elsewhere? Do the carrier proposals suggest that some of their representatives are uncomfortable bargaining in the face of possible immediate economic pressure, although all industries not under this statute do so almost all of the time? Do the industry proposals indicate that in someone's opinion there is a qualitative difference existing between bargaining directly, bargaining in mediation and bargaining during the period immediately before the parties can resort to self-help?

Fundamentally, are both these sets of proposals symptomatic of a more deep seated malaise that requires something more in the way of corrective action than a government agency's lighter or heavier foot on the speed controls? Personally, as a Member of the Board, and again speaking only for myself, such proposals raise additional disturbing questions regarding our administration of the law as it is now written. Can we act in a purely ministerial fashion on the one hand, when the statute mandates that we use our best efforts to bring the parties to agreement? Can we be called upon to make judgments concerning the good faith of the parties, on the other hand, when our major task is conflict resolution and our only tool to accomplish this is peaceful persuasion? Will the adoption of either suggested course jeopardize the fiduciary and confidential relationship with the parties which mediators and their agency must have in order to be effective? Whether you regard mediation as an art or a science, there should be general agreement about one thing. The mediator is to be neither a judge nor an evaluator; he is neither a fact finder nor an arbitrator. It may be fatal in some instances to confuse these roles. If you require that he wear one of these other hats and also try to mediate, will you destroy his usefulness and acceptability as a mediator? I think the mediator has a creative role to play in the bargaining process, but are these parties indicating by these proposals that they are only looking for a traffic cop?

In concluding, may I just call your attention again to the fact that I have adopted some old mediator's tricks of the trade in this address. These proposals advanced by each side have been duly transmitted. I have an-

swered most questions with another question. Personal judgments, evaluations and characterizations of these ideas have been avoided. Nor have you heard any mediator's proposals. It does not appear that the parties are quite ready for these to be laid on the table. The time may come when the mediator's proposal is a constructive act in conflict resolution. When and if appropriate, my views will be put forward. You see, we always stand ready, in true mediator fashion, to help the parties help themselves.