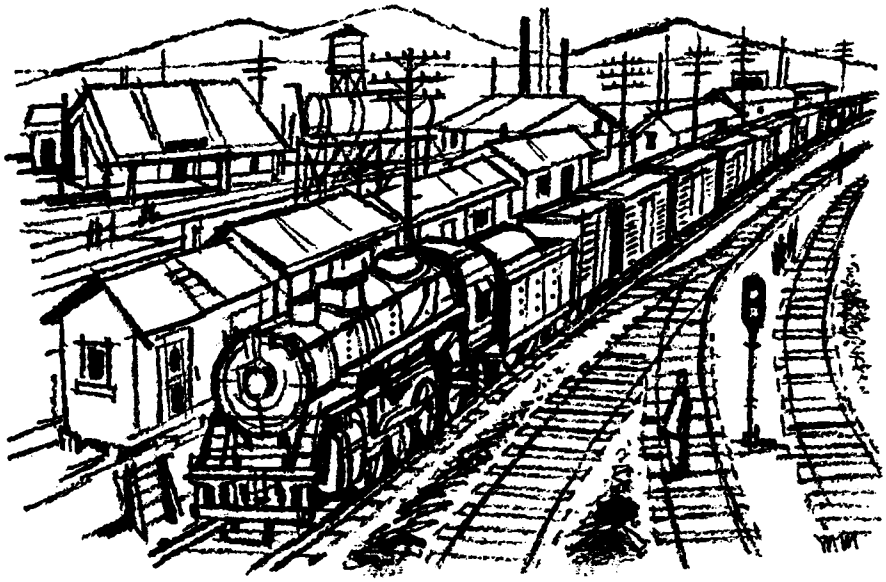


Who Will Mediate the Mediators?

EDWARD J. SILBERFARB

IT HAD TO HAPPEN. Now the referees are almost as entangled as the linemen in that vast scrimmage known as collective bargaining.

The labor peacemaker has grown in prominence over the years. He has had few rules to confine him, and, like a divinity student who just got the call, he shows zeal for his cause. Moreover, government at all levels has become increasingly active as a collective-bargaining umpire. Even private individuals and civic groups try to play King Solomon from time to time. One of the recent results has been a perhaps inevitable paradox—jurisdictional disputes among labor mediators. The men who are supposed to settle squabbles have become embroiled in squabbles themselves. The effects have been amusing, expensive, confusing, or even damaging to the negotiations that the mediators are supposed to help.

In 1960, the Brotherhood of Railroad Trainmen struck the Long Island Rail Road, the nation's busiest commuter rail line, for higher wages and a shorter work week. But the struggle between mediators was as interesting as the one between labor and management. The National Mediation Board, a Federal panel set up to settle disputes in rail and air transportation, had been at work for more than a year to avert the strike. As the peacemaking apparatus of the Railway Labor Act spun itself out, however, the strike came.

Governor Nelson A. Rockefeller of New York stepped in and established a three-man board of inquiry. Francis A. O'Neill, Jr., then chairman of the National Mediation Board, made it clear he thought the state was interfering with his job. He said he couldn't schedule negotiations because the state board kept both parties on call: "We can't work in two forums." Even Mayor Robert F. Wagner of New York City made a brief appearance, conferred with both parties, but soon retired from the already cluttered field.

Harold J. Pryor, the union leader, reluctantly appeared before the state panel but made known his preference for O'Neill. Thomas M. Goodfellow, the railroad president, approved the state's role. Whereupon the state, in the form of Governor Rockefeller, squeezed the money out of the company to meet the trainmen's demands.

Dr. Herbert R. Northrup, a professor at the University of Pennsylvania's Wharton School of Finance and Commerce and a student of the jurisdiction problem, mentioned the Long Island situation in an article last October in the *Labor Law Journal*. He said it was a case where "settlement was slowed while the parties concentrated on finding a favorable intervenor instead of working for a settlement." Like many jurisdictional disputes among mediators, this one gave labor and management something else to quarrel about.

Since the National Mediation Board has its jurisdiction clearly chartered by law, it is rarely engulfed in this kind of controversy. Most of the jurisdictional rivalry involves state mediation agencies and another arm of the national government—the Federal Mediation and Conciliation Service, whose sphere of influence is as vague as the interstate commerce clause.

The law says the FMCS may enter a dispute "whenever in its judgment such dispute threatens to cause a substantial interruption of commerce," and should avoid a dispute "which would have only a minor effect on interstate commerce if state or other conciliation services are available to the parties."

The jurisdictional boundaries for

most state mediation agencies are defined just as vaguely. In the November, 1961, transit strike in Rochester, mediators from both the Federal service and the New York State Board of Mediation were on the scene. The state mediator charged that his Federal counterpart was scheduling negotiation sessions without his knowledge and thus excluding him from the meetings. Meanwhile, the strike dragged on. The state countered by setting up a panel of its board members to take over the negotiations. The power play took the initiative away from the Federal mediator.

"We decided to take the gloves off," was the way one state official described the situation.

In this odd duel between peacemakers over states' rights and Federal authority, there is a man in the unique position of having been in the lists for both sides. He is Joseph F. Finnegan, now chairman of the New York State Board of Mediation but, under President Eisenhower, director of the Federal Mediation and Conciliation Service.

When, as the state chairman, he offered his services last December in the New York newspaper strike, the publishers, who have always favored Federal mediation, rejected him and said, "Remember, when you were in Washington we used to ask you to call Albany and get the state off our backs."

But Finnegan says he observes the same jurisdictional standards he used when he was at the national level. "Let the Federal take all the big stuff; I've got enough here to keep me busy."

As Federal director, however, he didn't always confine himself to "the big stuff." In many cases a state had no mediation service of its own, or had one that lacked funds. The FMCS once intervened in a Texas grocery-store dispute on the grounds that the state had no one to do it. Sometimes a state mediator turned out to be a relative or friend of one of the parties and the other party called for Federal intervention.

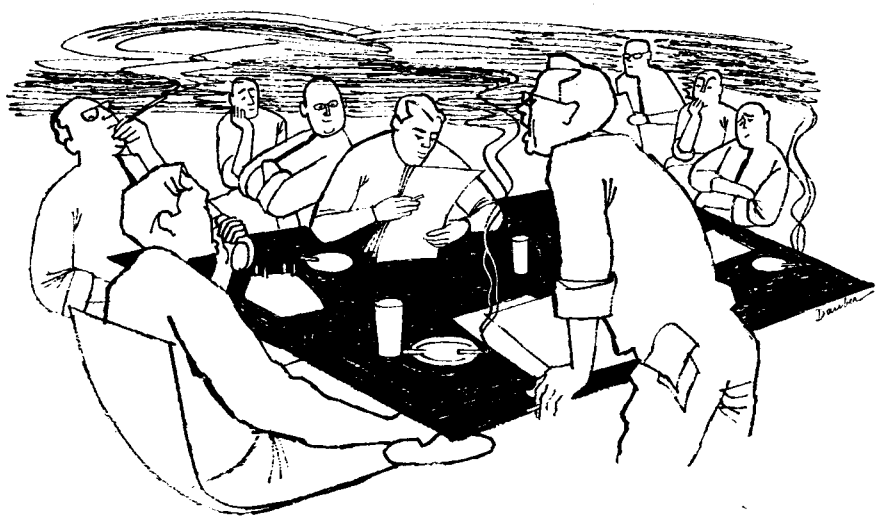
"In one state, the top mediator was just a political hack who beat the bushes for the governor. In states with powerful labor organizations, the unions hand-picked the mediation board. In states with dominant companies, the opposite happened."

Some Western unions wanted the Federal service to enter all disputes, according to Finnegan. "They told us, 'If you don't take the little cases, we won't give you the big ones.' "

A Surfeit of Helpers

But Federal and state agencies are not the only ones to become embroiled in jurisdictional disputes. Some cities have their own mediation staffs, and, as might be expected, they too join the fray. New York is one such city, and since it is usually seething with labor activity, the setting is perfect for a three-way tug of war among mediators from each level of government.

The boundaries marking the city's mediation domain are as poorly defined as those for state and Federal. Many labor disputes are obviously city problems though they involve industries that cut across city and even state borders. So perhaps it was not only in jest that a New York City official tried to divide up the mediation kingdom in such a way as to assure himself the politically rich heart of Manhattan.



"I'll take everything from the Battery to Fifty-ninth Street and you can have the rest," he said.

The jurisdictional tangle is knotted even more when top elected officials or their lieutenants at each level of government decide to take personal command of negotiations. Supreme Court Justice Arthur J. Goldberg, when he was Secretary of Labor, practiced intervention from the top in a dramatic fashion. He took charge of contract talks in such varied areas as tugboats, airlines, and the Metropolitan Opera. It was his operatic performance that brought whoops of derision from other labor specialists when they wanted to ridicule the Federal government for exceeding its jurisdiction in labor matters.

Although the records of Secretary Goldberg, Governor Rockefeller, and other high official peacemakers are impressive, many professional mediators say this technique is a usurpation of power that tends to downgrade the mediator's importance. "Because of the Arthur Goldberg pattern," Allan Weisenfeld, secretary of the New Jersey Board of Mediation, has said, "the parties won't settle for less than the top guy. Why should they take Simkin if they can get Wirtz?" He was referring to William E. Simkin, director of the FMCS, and Secretary of Labor W. Willard Wirtz.

Some labor experts applaud intervention from the top. Theodore W. Kheel, who did that very sort of thing in New York for Mayor O'Dwyer and now for Mayor Wagner, believes that a high officeholder's prestige is a most valuable tool for settling labor quarrels if it is used sparingly and at just the right time.

But even at that level there are jurisdictional and protocol problems. Kheel thinks the New York newspaper strike should have been tackled by the mayor from the beginning, but, he has said, "When the Secretary of Labor comes in [as he did early in the newspaper strike], this tends to isolate the mayor from the dispute."

The New York area milk strike of

1953 brought a stampede of mediators from three states, the city, and the Federal government. The parties had sent calls to the New York City Labor Department, the Federal Mediation and Conciliation Service, and the mediation agencies of New York State, New Jersey, and Connecticut. They all showed up, but most of them never got into the negotiations. "We were put in the contemptible position of having to wait in the hotel lobby for a handout," Weisenfeld told me.

Besides slowing the settlement efforts, duplicating expense, and bruising the feelings of mediators, the jurisdictional problem produces other ills. Sometimes labor or management or both will try to use the rivalry among mediators to their own advantage. This is the "If we can't do any better with you, we'll go to City Hall" approach. Sometimes one mediator may use labor or management as the device for keeping a rival mediator out of the negotiations by saying, "We'd like you to come in and help us, but the union [or company] doesn't want you."

Even worse is the occasional attempt by a mediator to play off one of the parties against a rival mediator by dangling the contract agreement as bait. Joseph A. Raffaele, the director of international industrial relations at Drexel Institute of Technology, described such a situation in the *Labor Law Journal* last March: "The mediator urged one party to withdraw the dispute from a rival agency on the promise that the shift would assure a better settlement."

WHAT BROUGHT ABOUT such jurisdictional disputes among mediators? For one thing, mediation, unlike arbitration, is not compulsory or binding on the parties. It is not a judicial or executive function. It carries no cease-and-desist order or other injunction. A mediator just tries to bring the disputing parties together so that they can reach their own basis for agreement. Anybody can be a mediator. Many try to be; some, unfortunately, for prestige purposes. As a practical matter, government agencies are in the best position to mediate labor disputes. But since a mediation agency, unlike a labor-relations board, is not a regulatory body, its jurisdiction need not be defined.

Moreover, labor disputes are as complex as the economy itself. Rare is the industry that operates along clearly defined geographical lines. The New York newspaper industry is involved in interstate commerce, but a strike in that industry seriously affects only the city. The Long Island Rail Road serves only the city of New York and two suburban

counties, yet as a carrier connecting to other railroads it is considered a national problem under the Railway Labor Act. It is also a state problem in that it depends on state legislation for its financial survival. A strike at a large automobile or electrical-appliance plant may seem to be primarily of local interest but may be part of an industry-wide collective-bargaining situation. Or an independent plant may produce parts for a national industry.

The problem is complicated by the "notification" clause of the Taft-Hartley Act. This states that at least thirty days prior to the expiration of a labor-management contract, the parties must notify the Federal Mediation and Conciliation Service and the state mediation agency, if there is one, of the forthcoming contract expiration. In theory, the Federal or the state mediation service, or both, will notify the parties that they are available, whereupon the parties may ask either, both, or neither of the agencies to enter the contract-renewal talks. If the parties do not ask assistance, the agencies may enter on their own motion if they believe the public interest is sufficiently involved.

This, then, is the machinery, but it doesn't always run smoothly. In fact, some authorities think that the Taft-Hartley notification clause throws open the door to competitive mediation and jurisdictional disputes. What can happen is that an enthusiastic agency may acknowledge the notice with a letter implying that it has assumed jurisdiction. Its mediator may call the parties regularly to remind them that his service is still available, perhaps even urge them to make use of it. He may even notify the parties that he has been "assigned" to the case and is awaiting their call to step in.

Another mediation agency, feeling it is being elbowed out, will be just as enthusiastic in offering its services. The first agency may be spurred to greater effort, and so the competition is on. William Weinberg, a staff mediator for the New Jersey board, has likened this sort of soliciting to ambulance chasing by lawyers, and says it is just as demeaning and unprofessional. Weisenfeld takes the same view and even urges repeal of the Taft-Hartley section that makes the practice possible.

WHY such jostling for work that carries no special pay? A government staff mediator receives the same salary no matter how many cases he handles. Nevertheless, a bigger case load justifies an agency's existence and its budget requests. As to the individual, he seeks a mediation showcase for his talents.

Jurisdictional lines could be whatever the mediators want to make them. In practice, they stake out jurisdiction much the way colonial powers staked out claims in the New World. Whoever got there first planted the flag, then over the years the colonizer developed the territory and built up equity in it. It isn't quite so arbitrary, however. Some industries are inherently the concern of the Federal government, such as steel, railroads, and airlines, and space, missile, and atomic-energy plants. Some have fallen in the Federal domain by tradition or because one of the parties, like the New York newspaper publishers, wants Federal mediation.

The FMCS has been criticized for empire building and for allowing its staff to become mired in pettiness. Joseph Raffaele is one of these latter critics. He has said the Federal service has contributed to its own

downgrading by competing with the states in small disputes and presenting "the image not of dignity and wisdom, but of a finagler."

A city also builds its mediation structure partly on tradition, partly by laying claim to certain industries that present inherently local problems. In New York, for example, the transit system has become so intertwined with municipal finances that the mayor and the city labor department are the only ones who, for practical purposes, can settle its labor disputes. In New York, bread, electricity, trucking, even the milk industry, have come to be considered under the city's jurisdiction. Yet there's nothing sacred about any of these traditions.

New York has also carved out a jurisdiction for itself among the city's voluntary nonprofit hospitals, where the issue of union recognition was explosive. During last year's strike in New York, however, Governor Rockefeller upstaged the mayor and the city mediators by promising to work for legislation that would open the way for union recognition in nonprofit hospitals. When the strike was brought to an end, the city's Democratic officials were glad to have peace restored but were confounded by the way it came about. The union leader, Leon J. Davis, praised the Republican governor and said, "He's going to be re-elected and we're going to help him."

New York State's laws allow its mediation agency to step into a dispute in any industry that does business in New York even if it is based in another state. Eric J. Schmertz, a member of New York's Board of Mediation, favors early intervention "before the positions of the parties harden." He has said: "I'm not convinced the parties know when they need mediation. They're too mindful of their own interests, as they should be. They don't realize when the public interest is at stake."

In Connecticut, there is no jurisdictional decision to make. The state law requires the Connecticut Board of Mediation to enter all labor disputes in which there is a strike or a serious threat of a strike. Since the Federal man is on the scene too, almost all Connecticut mediating is performed by a two-man team, known in the profession as a "duet." Robert L. Stutz, deputy chairman of the Connecticut board, writing in the *Labor Law Journal* last October, said the duet precludes competition between the two agencies, since both know they will have to work together anyway, and strengthens the mediation effort with a "two heads are better than one" approach. But critics of this system call it featherbedding.

What can be done to avert a collision of mediators? Some minimize the problem. Harold A. Felix, former New York City labor commissioner, said that his policy was to back off if another mediation agency was chosen. Yet the sight of city and other mediators converging on the same bargaining table remains a common one in New York. Frank H. Brown, northeast regional director for the FMCS, insists that the problem has been "grossly exaggerated." Yet he concedes there are no guidelines to indicate who has jurisdiction over what. In the view of Theodore Kheel, jurisdiction should be based not on geographical or governmental lines, but on the question "Who would be most useful in settling the dispute?" And he wouldn't hesitate to have outsiders supersede the assigned mediators if that would help. "We've got to break out of the concept of handling these disputes through routine channels. There's no reason why the mayor or the governor shouldn't reach out for whoever can help."

Kheel thinks that city mediators at the staff level have no place at all, that state and Federal staff mediators should do the routine groundwork, and that top elected officials —whether the mayor, the governor, or the President—should step in at the critical stage in major disputes.

One of the most unorthodox solutions comes from Eric Schmertz. In an area like New York City, where city, state, and Federal mediators abound, he would form a joint council of mediation chiefs composed of directors of all three agencies. They would have a rotating chairman and work as a troika to direct negotiations and thus effectively eliminate competition.

But the more disillusioned labor specialists just throw up their hands and say a truce will come only with a fourth party—a sort of supermediator to keep peace among the third parties.

The Rhetoric Of Walter Reuther

STANLEY LEVEY

When Walter Reuther was a boy in West Virginia, he and his three brothers used to take turns debating important questions of the day in the family circle. The young Walter, facile, imaginative, and articulate, usually won. In the years since, he has made thousands of speeches, stirring millions of men and women, inside the labor movement and out, here at home and in distant lands, with his vision of a better world.

He has exhorted workers and employers, politicians and opinion makers, students and teachers, friends and enemies. His voice has been that of a prophet, his words those of a moralist, his ideals those of a visionary (or realist, depending on the audience). His speeches have been delivered in full voice and with the terrible earnestness of a man convinced of the truth of his message. Yet Reuther suffers the frustration of a man who made a prophecy but was not chosen to achieve it.

In the 1930's Reuther helped build a great union, the United Automobile Workers. In the 1940's he cleansed it of Communists and took control. In the 1950's he moved on to leadership of the Congress of Industrial Organizations and then united it in uneasy but apparently indissoluble marriage with the Amer-