

The mediation of industrial conflict: a note on the literature

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A wise mediator once said that the mere presence of an outsider in collective bargaining negotiations, regardless of anything he says or does, brings about a change in the behavior of the parties at the bargaining table. This is true enough, and where the parties are hopelessly deadlocked any change in behavior is presumably for the better. In most situations, however, it is assumed that the third-party participant most commonly present at the table—a mediator—does something more than simply observe the negotiations. But what he does, and how and why, is largely still an esoteric subject.

During the past two decades in the United States there has been a great proliferation of literature concerning collective bargaining. One finds frequent references to mediation in this literature. It is often referred to as the catalyst of the collective bargaining process. Mediation is characterized as one of the less coercive techniques used by society for containing the

conflict inherent in a free industrial system, and is said to be responsible for the peaceful resolution of many industrial disputes. But such descriptions are no substitute for orderly and systematic analysis of the mediation process.

One might reasonably assume, in the light of the extensive literature and the considerable amount of practical development of the collective bargaining process that has occurred, that studies of the dynamics of the mediation process would be most plentiful. In actual fact, the exact opposite is true. Mediation is perhaps the least studied subject in the field of industrial relations. David L. Cole, a former Director of the Federal Mediation and Conciliation Service, commented several years ago that there is no clear agreement as to either the nature or the function of mediation. He continued, "Hitherto, mediation has been helpful in a haphazard way largely because of the talents of certain individuals who themselves would find it

difficult to say why they had been successful" (Cole, 1961, p. 48).

This note is designed to indicate in brief compass the various types of analyses of mediation that have been done, together with a few comments on their value and weakness. Some tentative suggestions are offered in conclusion as to why more work has not been done in the field and why the barriers to broader studies may be coming down. Ultimately, of course, it is hoped that this note will suggest the appropriateness of further investigation of the whole subject.

Descriptive Studies

Two early books on the subject of mediation and its role in labor negotiations were written by a member of the California State Conciliation Service (Peters, 1952 and 1955). They are primarily a series of stories, or negotiation case incidents, illustrating the issues that arise in collective bargaining and the conciliator's role and contribution in resolving conflict. (In theory, conciliation is the passive role of attempting to bring harmony and a spirit of cooperation to the collective bargaining table, and mediation the more active role of suggesting compromises and alternative settlements. In practice, the functions are largely inseparable and the two words are used interchangeably.)

Edward Peters' books have been disparaged by some practicing mediators because of their story-telling approach and because they do not deal with materials that are not already within the experience of professionals in the field. The two books do, however, provide as good an introduction to the subject matter as is available. They give a real flavor of the bargaining table and of the kinds of problems that arise there. They also answer many of the questions that are raised by the uniniti-

ated: "Why do negotiations take so long?" "Why do parties ask for so much more or propose so much less than they expect to settle for?" "Why is the whole process accompanied by so much threat and bluff?" "What does a mediator do?" All of these questions and many more are dealt with in readable and sensible fashion in Peters' books. They provide an excellent description of the setting and nature of industrial conflict and the role of a mediator in labor-management disputes.

Another largely descriptive study of mediation resulted from observation of some of the striking parallelisms between labor relations within nations and international relations among them. Elmore Jackson, in his *Meeting of Minds: A Way to Peace Through Mediation* (1952), describes the ways in which labor disputes are mediated in the United States, Sweden, and Great Britain. The techniques used by domestic mediators are then compared with those used in a number of international disputes. Jackson concludes that arrangements which appear to facilitate settlement in domestic arenas are equally likely to result in settlements of international disputes and that better mediation techniques should provide equally good results in both arenas. His conclusions as to the best mediation techniques are not particularly striking or unusual. He suggests that mediation needs to be flexible and adapted to the particular dispute. Proper timing of the mediation effort is crucial in all instances; public debate between the parties has a deleterious effect upon the likelihood of peaceful settlement in most situations; but public reports and recommendations by neutral mediators may be appropriate and useful in many disputes.

To the nonspecialist in international affairs, the basic premise of Jackson's study

—that better mediation techniques are more likely to result in peaceful settlements in all arenas—seems questionable. This doubt arises from the fact that international disputes are unlike labor disputes in one important respect: labor and management have a fundamentally inseparable relationship while international disputants ordinarily do not. In the domestic field, employees must work and the employer must have them work if the enterprise is to function. The inevitability of ultimate settlement is, therefore, one of the greatest talking points of the labor mediator. In the international arena, however, nation states need never settle their disputes, at least those in which the level of conflict is short of full-scale warfare. The relationship between Israel and its neighbors over the last decade is simply one of many examples of this point. Thus it does not seem that outstanding mediation techniques will necessarily result in an equal likelihood of peaceful settlements in both arenas. Despite this objection, Jackson's book remains as the only significant work on comparative mediation.

An important study describing and classifying mediation and mediation techniques, as well as going beyond this to analyze the results of mediation, was made in 1954. In it, Clark Kerr concluded that one of the greatest contributions of the mediator in most disputes is to supply the parties with negotiating skills which they lack—to allow them to find areas of settlement that exist but which their own negotiating awkwardness prevents them from seeing or realizing. He also notes that, contrary to what might be expected, mediation is peculiarly difficult either in situations where a broad range of alternative agreements is possible or where the costs of a work-stoppage to both parties are

unusually high. In these situations, sifting among the alternatives or selecting one solution when almost any would be preferable to disagreement can be an excruciatingly difficult task.

Another striking insight contained in this study is that there are several possible situations where mediation actually results in prolonging disputes. It can happen where those in control of negotiations have personal or institutional reasons for unwillingness to settle a dispute except on their own terms, but where they are being constrained by public authorities or those whom they represent to bring the conflict to an early end. Under these circumstances, mediation efforts can be a guise for convincing the public or the members that something is being done to force or encourage a settlement, when in fact no progress is taking place. The pressure on the negotiators to settle is thereby reduced, the dispute is prolonged, and the mediator has been a participant in hoodwinking the public or the members.

Such developments can occur only in situations where what Kerr refers to as "tactical" mediation is taking place. He later stresses the importance of "strategic" mediation: efforts designed to create the underlying conditions necessary to creative problem-solving and longer-range harmony in a given industrial relationship. Strategic mediation is today commonly referred to as preventive mediation, and receives considerable emphasis in the activities of state and federal mediation services.

The fact that Kerr was among the first to point out several of these possibilities suggests the fruitfulness of his analysis of various mediation efforts and the situations in which they make a genuine contribution toward industrial peace.

Mediator Personality

There have been a number of analyses of the personal qualities of the mediator in discussions of the mediation process. Where this emphasis is carried to extremes, it can lead to a kind of agnosticism with respect to useful analysis of the mediation process. If effective mediation is purely a matter of personality, then analysis of good and bad technique is fruitless. If the point of view is not carried to this extreme, however, the personal factor can properly be given weight as one element in the whole process.

There can be little doubt that the process of mediation is affected by the personality and personal attributes of the mediator. Thorough studies of the mediator as an individual were undertaken by Henry Landsberger (1955, 1956, 1960) in an attempt to isolate common attributes of "good" and "bad" mediators. These were based upon interviews and questionnaires of mediator users, and upon evaluations by mediators of their peers. Landsberger concluded from his studies that a "good" mediator, among other things, learns rapidly, has original ideas, and is able to sell these ideas vigorously to others.

The work of Landsberger, Wechsler (1950), and others¹ who have attempted to delineate the personal qualities of good mediators is not too helpful in analyzing mediation as a process. One is left with the general conclusion that persons possessing the "good" qualities would be as successful in any line of work as they are at mediation. Moreover, such studies cast little light on how much weight should be

given to personal qualities as opposed to other factors making for effective mediation.

Pressure Tactics

Other writers deemphasize personality factors and focus upon the ability of the mediator to bring pressure to bear upon the parties. More specifically, they emphasize that his role allows him to channelize and concentrate existing pressures to break deadlocks (Lovell, 1952; Rehmus, 1953; Warren, 1954). In these writers' view, the mediator's primary role is to force the parties to change positions rather than resolving personality clashes or providing negotiating skills. They note that many mediators rely heavily upon separating the parties and functioning as the channel of communications between them. Through this device—control of the communications structure—the mediator can reinforce or minimize the intensity of the position of one party as it is transmitted to the other. He focuses and emphasizes whatever pressures for settlement exist in the situation. The mediator can alter the timing of changes in position through temporarily withholding knowledge of such a change from the other party, and thus generally influence the progress of negotiations as seems best to him from a tactical viewpoint.

Some have criticized such tactics as bringing unreasonable pressures to bear upon the parties and being essentially deceptive in nature. Nevertheless, these methods are an important part of the arsenal of many mediators. They are at least as important to consider in analyzing the process as is personality and the "human relations" point of view. Through use of such tactics many mediators influence to some degree the kinds of settlements achieved. Yet most mediation analyses do

¹ The work of Berkowitz, Goldstein, and Indik (1964) is more concerned with mediator attitudes toward their work than with mediator personality; but one, of course, casts light upon the other.

not discuss this possibility, and most mediators refuse to admit (at least in public) that they can do so.

Game Theory Analogies

In more recent years, a number of studies of mediation have been included within the context of general analyses of collective bargaining negotiations. The underlying assumption behind these studies is that before one can analyze mediation one must first provide a theoretical structure about the agreement process; why and in what ways the parties succeed or fail in reaching agreement. One group of such studies has been concerned with the potential contributions of game theory to the analysis of collective bargaining negotiations. Perhaps the most significant of these studies are the separate work of Carl M. Stevens (1963) and Thomas C. Schelling (1957, 1960).

It should be clear, of course, that these authors are not attempting literally to represent collective bargaining as a game in the technical sense. Their hope is that, by analogy, their analysis will shed light on the strategic and communication aspects of bargaining. They discuss simplified models suggested by and related to the problems of negotiation and mediation.

In Stevens' work, for example, his book on the taxonomy of collective bargaining problems concludes with a chapter on mediation. He posits that the contract deadline establishes a game-variant sequence in negotiations: either negotiations with the assurance of no strike deadline, or negotiations under strike or lockout conditions. The introduction of a third party, the mediator, either before or after the deadline, constitutes an additional game-variant. This additional factor affects the basic tactics of negotiations—primary among which are bluff, coercive nonbluff, persuasion, and rationalization. Much of

this material may look like simply giving new names to old ideas when viewed by the institutionally-oriented investigator familiar with the real world of collective bargaining negotiations. Many of the analogies drawn, however, are extremely suggestive.

As an example, the discussion of tacit bargaining—bargaining without explicit communication between the negotiators—is interesting when compared with the analyses done by those who emphasize the potentialities inherent in the mediator's control of communication between the parties. Stevens notes that in the "divide-a-sum" game (where separated players repeatedly request a share of a fixed sum, receiving nothing if their total requests exceed the amount available) there is a tendency for the game to be "won," usually on the basis of a 50-50 split. The nature of these solutions suggests that tacit bargaining leads to the need for coordination and cooperation to dominate elements of conflict and competition. In actual negotiations the introduction of a mediator may force the parties to play something of this same kind of "game." If the parties can communicate only through the mediator, they may be forced to a more or less predetermined solution. This is particularly the case if the mediator suggested some "reasonable" solution to the parties in an earlier joint conference. By forcing them into tacit bargaining, the mediator encourages the likelihood that each will arrive at the cooperative intermediate solution and "win the game." (Inferentially, this suggests why so many skilled mediators can predict, early in negotiations, what the ultimate outcome will be. Mediators ascribe this ability to experience, but it appears equally likely that their predictions are self-fulfilling.)

One suspects that not much attention has been paid to these theoretical works by industrial relations practitioners. The reasons are probably akin to the lament of the writer who complained that no one would buy his story in which the characters and the plot action symbolized the play in the "Immortal" chess game—"Most readers don't play chess and chess players practically never read." Nevertheless, the applications of various simple games, minimax strategy, and certain unnatural games may lead in time to profoundly more sophisticated analyses of collective bargaining choices, strategies, and mediator tactics.

Settlement Psychology

Another recent work, by Ann Douglas (1962), is the first detailed attempt at psychological analysis of the interaction of bargainers and mediators. This book is based upon observation of negotiations over a period of years, tape-recordings of joint meetings and caucuses, and simultaneous continuing interviews with the participants in the process; all designed to construct a general hypothesis of the way in which the peacemaking process works.

Douglas posits that all meaningful negotiations go through three stages in each of which the parties engage in certain characteristic kinds of behavior. In the first stage, "establishing the range," the parties set outer limits upon their demands and characteristically engage in acts of institutional hostility and disparagement of each others' institutional position. In the second stage that is seen as essential to the bargaining process, "reconnoitering the range," the parties engage in personal interaction as opposed to institutional conflict. Each party continually probes and modifies positions in a search for soft areas in the other's position without themselves making firm commitments. In the third and

concluding stage, parties face a "decision-reaching crisis." At this point they frequently revert to their institutional positions; they are forced from personal interaction into maintaining contact with those outside the negotiations whom they represent, and into dealing with a mediator. Out of this crisis the interaction comes to an end with an announcement either of impasse or formal agreement.

Douglas questions three areas of the conventional wisdom of mediators and negotiators about collective bargaining. She characterizes as fictions (a) that the possibility of a strike is essential to resolution of conflict, (b) that compromise is an essential part of agreement-making, and (c) that the ultimate agreement is narrowly circumscribed by market economics. All three of these points are controversial. Her case for the first, for example, is far from overwhelming. The conclusion that the possibility of a strike is extraneous to agreement-making assumes that before every negotiation begins there is overlap within the initial range of expectation and desire of each party. This conclusion does not jibe with the experience of most negotiators. Practically all who have had personal experience with collective bargaining feel that the mutual capacity for injury is the constant prod which changes the bargaining range, thus forcing inconceivable settlements to come within the realm of the possible. Whether discussed during negotiations or not, the possibility of a strike is in the most fundamental sense the ultimate incentive for peace.

Douglas' second and third conclusions about collective bargaining also disturb those with experience in industrial relations. Negotiators and mediators find it hard to believe that, if the process of bargaining is satisfying to the negotiators,

agreement will result without regard to the content thereof. Similarly, economists are dismayed by the psychologist's judgment that collective bargaining is largely unconfined by market economics. Both conclusions seem seriously to question the rationality of those who represent American unions and management, elevating their personal psychological needs above their institutional obligations.

These qualms, however, do not alter the fact that the Douglas book is a valuable addition to the literature on dispute resolution. It is filled with insights into the bargaining process and the impact of mediation upon it. The psychological factors that are emphasized in it do unquestionably play a role in collective bargaining, just as does the personal interaction of bargainers and mediators. If these factors are overemphasized in Douglas' work, this is no more than most have done who have looked at the problem of dispute resolution from the methodological bias of their own particular discipline.

Art vs. Science

The foregoing brief summaries of the literature on mediation, each emphasizing different aspects of the whole process, suggest the single-faceted nature of the studies that are presently available. It is apparent that no analysis of the mediation function as an entirety is yet available. In part, this lack of a "whole" approach may be due to the hostility of many practicing mediators toward the theoretician's analysis of their work. This hostility ordinarily takes the form of assertions that the institution of mediation is not susceptible to systematic analysis. It is stated that it is an art rather than a science, and thus that no general rules are applicable. It is often pointed out, quite correctly, that different mediators get equally good results by dif-

ferent methods. The argument is carried further to say that mediation technique is so highly individual, so much a matter of the personal qualities and instant decisions of the mediator himself, that the process does not permit generalizations.

The objection to analysis among the professionals may result in part from the universal claim of "neutrality" made by all mediators. Douglas has suggested that this claim is essentially spurious, like the argument that the patient's getting well or succumbing is irrelevant to judging the efficacy of the doctor's treatment. The mediator's claim of neutrality not only preserves his acceptability, it also shields him from responsibility for the peacefulness of negotiations or the content of the settlement. A profession which has traditionally been hostile to even a simple box-score rating of success and failure is not likely to welcome even more careful analysis of the way in which the work is done and the results it achieves.

This judgment may be unduly harsh. A number of experienced mediators have been willing to speak and write of techniques they have felt are important to effective mediation, and to discuss situations where they feel it might have been more effective.² Moreover, contemporary mediators are men with increasing understanding of the uses of theory as well as practice,³ and they have sympathy for the

² Leiserson (1951), Taylor (1952), Meyer (1960). Joseph Shister (1958) would support the doubtful view, however, stating that willingness to disclose even this much is unusual.

³ For example, see Mackraz (1960), Simkin (1961), and Schlossberg (1962). Of special interest in connection with the study of mediation is a code of ethics for mediators recently agreed upon by American labor mediation agencies. The text may be found in Simkin (1964).

idea that systematic analysis can supplement intuition and experience. With their cooperation considerably more work could be done than is presently available to provide more understanding and a better appraisal of the mediation process.

In any event, the claims about the uniqueness of every labor dispute and the consequent requirement for tailor-made mediator responses should not prevent further research in the field. Behavioral scientists must maintain the belief that human characteristics and responses share enough in common to warrant the search among them for general organizing principles. Many analyses of collective bargaining negotiations have been undertaken, and while some of these are ephemeral, others are of real and lasting value. Mediators are unanimous that their work should be considered an integral part of the collective bargaining process. If so, then mediation too is susceptible to systematic analysis, just as is any other social phenomenon.

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