CHAPTER VII

FACT-FINDING: ITS VALUES AND LIMITATIONS

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As one of that now vast horde of ex-presidents, I receive copies of the minutes of board meetings. Some years ago, in a schismatic role as member of this Academy and head of an appointive agency, I delivered a luncheon speech. A revealing line in the minutes read substantially as follows: "One member of the board suggested that we instruct the incoming Program Committee not to invite speakers who castigate us."

At the outset, I want to assure you that I have no intention or desire to castigate anybody. However, we are not just a mutual admiration society, rewarding as that exercise may be. Moreover, my principal role here today is to stimulate discussion. For that reason, some of the statements that I intend to make will be deliberately provocative—probably stronger than I really believe. To this extent, I will undoubtedly be misunderstood—and misquoted if anybody considers it worthwhile to quote. If that be risky, so be it.

The principal theme of this paper is that the words *fact-finding* should be substantially eliminated from the labor relations vocabulary or, more accurately, that they should be relegated to more limited usefulness. This has happened already in the private sector. Some day, but not soon, I predict it will also occur in the public sector.

The words fact-finding conjure up notions of preciseness, of objectivity, of virtue. They even have a godlike quality. Who can disagree with facts? In contrast, the word *mediation,* that I do espouse, tends to have an aura of compromise, of slipperiness, of connivance, and of furtiveness. Since these are frequent impressions, why prefer the vulgar to the sublime?

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There is a problem of semantics. Close examination of the actual functioning of fact-finding boards and of mediators or of mediation boards shows that the labels are quite secondary. The abilities and proclivities of the individuals named to those boards and, more important, the reactions of the parties to the process, determine what really happens. Fact-finders do or do not mediate. Some fact-finders who mediate find no facts. Persons appointed as mediators frequently do not mediate in any meaningful way but may announce some real or alleged facts and conclusions.

In view of this ambidextrous situation, I will attempt to set up a fact-finding straw man for purposes of this discussion—a procedure that is not a caricature. It will be an all-too-typical arrangement that needs no elaboration to arbitrators. It is the procedure we know so well.

It begins with formal or semiformal hearings. The parties produce the facts as they see them, or, more accurately, as they select and slant them for partisan purposes. Little or no opportunity is provided for private discussion. It may even be considered improper for the fact-finder to converse with representatives of the parties in the absence of persons from the other side. After all the evidence and testimony is in the record, the fact-finder withdraws to his sanctuary and prepares a report.

A first step in appraisal of this process is to compare it with the realities of collective bargaining of a new contract if the process is successful without any third-party intervention. When demands or requests are made by bargainers at the outset of negotiations, there is great variance both in the degree to which those demands are based on facts and in the types of facts presented. At one extreme, a demand may be made on a very simple basis: "We want it, and who cares about the facts." Raw power is the most significant fact. At the other extreme, the parties may do a tremendous amount of prenegotiation research. Positions on each issue are supported by an elaborate array of real or alleged facts. Most negotiations fall somewhere between these two extremes.

What happens to these real or alleged facts as negotiations proceed? Some facts are agreed to directly or tacitly. Some are

irrelevant. Some are soft-pedaled or quietly ignored. Some remain in dispute.

The objective of bargaining is agreement. If settlement of an issue is accomplished, the residual status of the factual discussion is of minor consequence. The facts may be means to an end, but the end may be consummated in spite of the facts.

We are talking here only about a dispute. A stalemate exists on one or more issues. The fact-finder is brought into a negotiation where the residual status of the facts may be quite variable. Important facts may still be in dispute, or there may be no great factual differences but the argument is whether the facts are relevant and, in any event, what if anything to do about them.

The two principal types of fact-finding, (1) without recommendations and (2) with recommendations, will be considered in sequence.

Fact-Finding Without Recommendations

The basic notion about this type of fact-finding is that somebody does not know the real facts and that establishment and proclamation of the facts will somehow assist in settlement. Who is that somebody who is ignorant of the facts? Is it the parties, the general public, or the public-opinion makers?

Experienced negotiators will seldom be surprised or influenced very much by the results of such fact-finding. In a limited number of situations, publication of unpleasant facts may bring pressure on the negotiators by their constituencies. Facts that are damaging to a union, published during a long strike, may result in diminished strike morale and more willingness of employees to compromise. Publicized facts detrimental to a company position may bring pressure on the company negotiators from the board of directors. However, these results are infrequent for a simple reason: Most labor disputes are so complicated that a mere portrayal of facts does not provide a "handle" for action or even suggest clear directional signals toward a likely settlement area.

Publication of facts will be of some minor interest to the general public but will not usually provide an adequate basis for

translation into an informed opinion about the total dispute. The opinion makers (columnists, editorial writers, and the like) may welcome such a report. They will make fewer goofs of factual content and have a new reason for writing something. But the facts will seldom change any preconceived ideas they may have already expressed.

On a few occasions, fact-finders not empowered to make recommendations on the issues have indulged in assessing blame on one of the parties. This device seldom accomplishes anything. It is much more likely to exacerbate the dispute. In short, fact-finding without recommendations is likely to be an exercise in futility.

These observations may require modification in some current public employee disputes. Bargainers in the public sector sometimes lack some of the sophistication that is more typical in the private sector. Moreover, since the taxpayers are the employers, however far removed from the bargaining table, their appraisal of facts can assume more significance than is the case in a private dispute.

There is a potential and sometimes utilized variety of this general type of fact-finding that is seldom discussed. It is the use of impartial technicians, long in advance of negotiations, to work with the parties to develop pertinent background facts on such issues as pensions and insurance.

Fact-Finding With Recommendations

When fact-finders are given the responsibility to make specific recommendations on the issues in dispute, the process becomes very familiar to an arbitrator, assuming the fact-finding straw-man model noted earlier. It is arbitration with two major points to distinguish if from grievance arbitration. (1) Recommendations are not final and binding decisions. Either or both parties can reject. (2) The recommendations do not develop out of a contractual framework. They are legislative value judgments. Recommendations are not facts, nor are they based exclusively or even primarily on facts.

Many of you will disagree honestly with the last statement. One concept of this type of fact-finding is that the recommenda-

tions flow almost automatically out of the facts. In my considered opinion, this notion has little or no validity. I will try to amplify the point by a couple of illustrations.

Let us assume that a union in a manufacturing plant is requesting pension rights after 20 years of service, regardless of age. It is reasonably certain that the company could show beyond any doubt that such a benefit is virtually nonexistent in manufacturing. That is an important fact but it does not dispose of the issue. Collective bargaining is an innovative process. Many agreement provisions, now commonplace, started somewhere. If the fact-finder recommends against the union, as he probably will, additional considerations are involved. He may conclude that the benefit is not advisable on its merits, that the cost would be excessive, or that the request cannot take high priority among other matters. A number of other reasons could be utilized, all of which are value judgments. If he should conclude that such an obvious innovation should not be obtained by assistance of a third party, that is itself a value judgment.

This is not just a hypothetical situation. Substitute 30 years of service for 20 years of service and you have an important issue in the 1965 steel negotiations. It is almost inconceivable that a fact-finding procedure of the type under discussion here would have resulted in a recommendation favorable to the union on that issue. But it happened to be a top-priority demand, and the 1965 negotiations simply would not have been concluded peacefully without that item in the package.

During the guidepost period, it was an announced executive policy of the Council of Economic Advisers, supported by the President, that labor cost increases of new agreements should be held to an average of 3.2 percent per year. In the absence of statutory authority for that policy, it was a value judgment if a fact-finder decided to apply it in his recommendations in a specific case. In the face of a large number of departures, plus and minus, from that policy even during its most acceptable period of time, no fact-finder could take automatic refuge in it. Moreover, even if he did adopt the basic policy as an exercise of judgment, its application never was a precise matter of arithmetic. Some benefits could not be costed with accuracy. Some exceptions were stated in the policy. Did the facts of a specific

case qualify for an exemption and, if so, how much? How should costs and benefits be distributed, with respect to time, throughout a long-term agreement? In short, even a mathematical formula required exercise of value judgments, not just arithmetic.

When noneconomic but highly emotional issues are also involved, when there is an imbalance of economic power, or when serious personality conflicts exist at the bargaining table—all too frequent ingredients in collective bargaining—who can say honestly that recommendations are or can be based solely and solidly on facts?

In arm's length fact-finding, where is the fact-finder to find a basis for his value judgments? In the last analysis, all he can do is to exercise his best intellectual powers and search his own soul. He has no adequate opportunity to gauge acceptability by the parties. No hearings can ever meet that need adequately.

This is especially true because the parties have known that recommendations will be forthcoming. During the interval between the appointment of the fact-finder and the issuance of his report, any bargaining that may have occurred is almost certain to stop. All efforts of the parties have been directed to getting the best possible set of recommendations. Nor is it an adequate refuge to conclude, as is sometimes the case, that the exposure of the parties to the fact-finder so frightens them that they will reach agreement to avoid recommendations.

We come now to the receipt of the recommendations. Either or both parties can say no. If that is not the situation, it is de facto arbitration and should be so labeled.

If a no is voiced, the dispute has not been settled. The fact-finder has been rebuffed and usually he has no place to go. If he reacts defensively, as he is likely to do, the dispute may be exacerbated. What has been a two-way dispute up to that point may become a three-way controversy.

Am I exaggerating the problems inherent in this type of fact-finding? The answer is yes. Despite the hazards, a surprising number of such operations have been successful. But if time permitted and restrictions of confidential information could be relaxed, I could cite chapter and verse of proceedings that were

disasters. Some of the gory details were worse than anything I have outlined here.

Where fact-finding has been successful, I would suggest, but cannot prove, that the fact-finder has mediated—deliberately, instinctively, or surreptitiously. When fact-finding without mediation has succeeded in the public sector, I would suspect that it is a transitory phenomenon. Until recently, and even now in some jurisdictions, public employees have been so far behind that fact-finders have a broad target range. I would predict that the range will narrow in the years immediately ahead of us.

Mediation

What do I mean by mediation? Time does not permit analysis of the remarkably wide spectrum of mediation activity—things that a mediator can or cannot do. At one end, the spectrum begins by a decision not to intervene at all, to provide no third-party assistance. At the other end of the band, the mediator can issue public recommendations. A major principle is to maximize bargaining and minimize the role of the mediator, to exercise enough patience to let bargaining work. But the mediator must also be able and willing to "grasp the nettle," to recognize when patience is not a virtue and to act accordingly. Most mediation decisions are decisions as to strategy and timing, not decisions on the specific issues.

In the hands of a skilled mediator, facts are potent tools. It is seldom that publication of facts is either necessary or desirable, but facts can be most useful in hard-hitting deflation of extreme positions. This is accomplished in separate head-to-head conferences or meetings, absent the embarrassment of the other side's presence and certainly not in the press. Public reference to the facts, if required at all, comes after a settlement to help save face.

The mediator has unusual opportunities to explore a wide variety of solutions—to "try them on for size." Thus he acquires a strong intuitive sense, if not the certainty, of the vital element of acceptability.

Package recommendations are a last-resort device, to be utilized only if all else fails and maybe not issued even then.

The mediator is never committed to use of that device, and he will steadfastly refuse to take such action unless he is convinced or has a strong hunch that it may be productive.

Procedurally, there is little resemblance between mediation and an arbitration hearing except for the opening formalities.

In difficult cases, it may be necessary to employ successive stages of mediation. Escalation may be an appropriate word. The original mediator may be supplemented by a panel, or replaced if he "breaks his pick." In my judgment, successive stages of mediation are preferable to the mediation, then fact-finding sequence. It is especially important that the mediators, at whatever stage, retain control of the determination as to whether package recommendations should be made, and when. It is recognized that recommendations will be needed more often in the public sector than in the private sector.

It should be obvious by now that it is my considered opinion that the exercise of mediation skills is the prime requirement for effective dispute settlement involving new or renewed labor agreements. That is the basis for my recommendation that the words fact-finding be relegated to obscurity. If a fancier word than mediation is desired, there is nothing wrong with the *impasse panel* label.

Let me try to illustrate the fact-finding-mediation comparison by a crude analogy. In common with many in this room, I once played football. You will recall the coach's diagrams on the blackboard. Every play was a touchdown, except a punt. But the game wasn't played that way. Try to imagine the mediation team on one side of the line and the dispute on the other. The mediation team tries one play, to be thrown for a five-yard loss. Somebody may be bloody, but if the quarterback is half smart, he has learned something. The next play makes a little yardage. With adequate tenacity and ability, some play will succeed. I will confess, however, that there have been occasions when I have resorted to the "punt and pray" strategy, hoping that some management or labor guy will fumble the ball. They quite frequently do.

Fact-finding, of the prototype noted earlier, is a one-play ball game.

Arbitrators as Mediators

The concluding phase of this talk is approached with some reluctance because it can be most readily misunderstood. Moreover, it necessarily involves some self-analysis and can almost be interpreted as a public confessional.

Can arbitrators mediate?

It should be made clear that I am not attempting here to reopen the great debate of some years ago about mediation of grievances. We will be considering only those activities associated with new labor agreements or the renewal of such agreements.

Arbitrators start off with significant assets. We are or should be fully familiar with labor agreement language and intent. We know a great deal about motivation and personality characteristics that influence behavior at the bargaining table. But we also possess disqualifying attributes.

A successful arbitrator makes his living by making decisions. Because this is so, the arbitrator-mediator instinctively develops quite quickly his own concepts of good solutions. But decision-making on the issues is not a basic mediation function. It is the parties who make the decisions. Any too-ready propensity by a neutral to make tentative decisions in his own mind or recommendations on the issues to the parties can be fatal.

A closely related problem is that arbitration is not a process favorable to development of humility. The authority to make final and binding decisions immunizes us from the notion that we can be wrong. If we are fired as permanent arbitrators or never used again after an ad hoc decision, what are the reasons? Our likely reaction is that somebody was a poor loser. How often do we admit, even to ourselves, that we goofed? Mediators have egos too. This must be so if they are to survive. But the food for ego comes not from decisions on the issues; it comes from a belief that the mediator somehow assisted in a solution reached by others. And if a mediator does the very best job, he does not even get adequate recognition for a good idea. The parties grab it and claim it as their own.

Another frequent disqualification is that we tend to be thin-skinned. Defensive reactions to criticism are probable rather

than possible. In contrast, a mediator is thoroughly accustomed to being rebuffed. Parties say no directly and positively, with picturesque embellishments and with great frequency. When a mediator hears the word no, he is not gleeful, but his instant reaction is the necessity to do something different. There can be no personal stake in an idea.

Without overemphasizing the point, let us examine the typical arbitrator's aversion to tripartite grievance arbitration boards. There are legitimate objections to such boards. Additional cost and additional time requirements are illustrative. But do we honestly answer the hard question: Is such aversion due to the fact that we shrink from the necessity of face-to-face justification of a decision? Believe me, that is an infinitely easier exercise than trying to make some tough cookie change his own mind.

These observations about the arbitrator's problems when he acts as a mediator do not develop out of any lack of high regard for members of this Academy. They come from reflection on my own experience and performance. I had to fight the disadvantages that have been noted. In every case of personal mediation involvement over an eight-year period, other mediators working with me taught me valuable lessons—prevented me from goofing. In some instances when I did not heed their advice, I learned my error the hard way. In self-defense, I will say that this was not a one-way street. Some actions, taken against my colleagues' advice, did work out. The hard fact remains that adaptation of an arbitrator to the mediation function is not an easy transition.

That it can be done is proven by the many excellent arbitrators in this Academy who are very skilled mediators. That it needs to be done cannot be questioned. The rising flood of public employee disputes is requiring an ever-increasing number of persons who can act as skilled mediators in an ad hoc capacity. Even in the absence of these new developments, there were never enough competent and available men to meet the needs of national-emergency or near-emergency situations in the private sector. On numerous occasions in the eight years I was in Washington, we were almost desperately searching for the right men who could be available at the time of need.

This is why I was and am in such wholehearted support of the special program of the past two days. We have started a long-needed endeavor. It is a significant beginning. Let us see to it that this effort will be expanded and pursued.

Comment—

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Fact-finding as a means of resolving collective bargaining impasses in the public sector is defended and criticized by persons moved to put pen to paper or who appear at meetings, forums, programs, and institutes.

Indeed, experts have discussed legislative determination of working conditions, advisory arbitration (another name for fact-finding), voluntary arbitration, compulsory arbitration, and strikes in the public sector almost to the point of saturation. All methods to resolve impasses in the public sector, singly or combined, have been successfully defended and successfully demolished. Each critic cites examples of failure; each advocate notes examples of success.

Bill Simkin has summarized well the procedures and objectives of fact-finding. He has noted its merits and its flaws. His paper has added to our knowledge of the fact-finding process.

Perhaps a few comments based on our Michigan experience are in order. Since the enactment of the Public Employment Relations Act in 1965, the Michigan Employment Relations Commission has appointed 52 fact-finders, who have served in 305 cases. Of our 52 fact-finders, 15 have been members of the National Academy of Arbitrators. There are 32 Academy members in Michigan. Some Academy members have been "too busy" to serve.

Bill Simkin suggests that fact-finders be renamed. A bill pending in the Michigan legislature would call the process "advisory arbitration." This item seems of little importance. In the words of Danton, "Let my name wither, so long as France is free." [1]

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[1] Danton, in the National Convention, March 8, 1783. Carlisle, *French Revolution,* Vol. III, Book 3, Ch. 4.