Chapter 5

FMCS AS PROACTIVE LABOR–MANAGEMENT FACILITATOR

George H. Cohen*

As an observer of many Annual National Academy gatherings, I have come to appreciate that there is a certain tradition that informs all major presenters. I can vicariously recall my first involvement as a young lawyer in the late 1960s, when I witnessed first hand one preeminent arbitrator after another offering worldly, witty insights which suffered from but one flaw: they were barely audible because they emanated through clenched teeth stomping on the omnipresent expensive pipes which were then the hallmark of every self-respecting Academy guru. This made a decided impression on me. Fortunately, those days of smoke-inspired wisdom are long gone.

Which brings me to a second noteworthy tradition: the need to provide your audience with a few anecdotes concerning the moderator, carefully designed to ensure that he or she would not deign to introduce you in any subsequent program.

Which brings me to George Nicolau. He was for many, many years a person I admired and respected on all counts that count: intellect, integrity, and charisma to name just a few. I am sad to have to report, however, that in more recent times, my admiration has been called into question. Why, I am not certain. But let me speculate. It is because George must have become dissatisfied with the "image" he had projected to his fellow Academy members. For what else could possibly explain his decision to concoct a dual life—not just of a world-class dispute resolution maven, but also—get this—a country nobleman residing in Ireland, no less! The extreme to which he has gone is telling. Many of you have been the recipient of his astonishing—some might say ludicrous—

*Director, Federal Mediation and Conciliation Service.

Season's Greetings cards. There he is next to his lovely wife in front of an eighteenth-century mansion, attired in tuxedo, glass of champagne in hand, smiling from ear to ear under a top hat—both aboard animals obviously lacking in thoroughbred credentials, apparently having just departed from a stable on their bucolic estate. Distinguished Academy members, I would like a showing of hands of those of you who would accept this "noble man" as the person who introduces you at the next annual meeting?

This brings me to the substance of my remarks. First, let me acknowledge that I have a dilemma resulting from the following indisputable facts: one minute and ten seconds after I took the oath of office on October 8, 2009, George Nicolau was on the phone enticing me with two promises were I to accept his invitation to address this body: a one-week free stay at his mansion and the opportunity to speak on what was expected to be a timely high-profile topic: How Does the Director of the FMCS Intend to Carry Out His Anticipated Multiple Responsibilities Pursuant to a Much Awaited Act of Congress—the name of which I can no longer recall, but which was commonly discussed by use of an acronym the first letter of which is a capital "E" and the last initial is a capital "A."

So, it seemed that, at long last I finally would have something of substance to offer to Academy members. Why the delay, you may ask? The answer, my friends, is a matter of recorded history. I have addressed at least four prior Academy meetings. Those remarks, of course, are memorialized in your infamous volumes of *Proceedings*. I cite you to the following:

"The Professional Responsibility of the Advocates," Proceedings of the 38th Annual Meeting, p. 106 (1985); "Arbitration in the Employer Welfare State," Proceedings of the 41st Annual Meeting, p. 104 (1991); "Erosion of the Arbitration Process by the Courts: Can the Award and the Opinion Be Immunized?" Proceedings of the 45th Annual Meeting, p. 149 (1992); and let's not forget the groundbreaking event when Ms. Jackie Drucker advised Harry Rissetto and me that, for the first time in the history of the National Academy, nonarbitrators were elevated to the Mountain—we would be participating in selecting the topics and speakers at the 2006 Annual Meeting. Amen, Amen. Furthermore, I performed a dual function: a panelist in the memorable NAA Agora: What's Right with Labor Arbitration and How to Keep It That Way and, yes, I also moderated the now-infamous panel, "Hot Topics in Sports Arbitration" in which Rich Bloch, true to

his illusionist training, provided a world-class explanation of his arbitration award in Terrell Owens and the Philadelphia Eagles. Enough said. Proceedings of the 59th Annual Meeting (2006).

At the conclusion of my 1991 talk, I lamented about the minimal intellectual contribution I had made in those articles. Here are my precise words: "If you ever again invite me to address the Academy, I beseech you to let it be on a subject of some substantive significance." Indeed, none other than your distinguished outgoing President, Bill Holley, who addressed you just moments ago, advised me that he is undoubtedly the only Academy member to have read any, let alone all, of my submissions. But he assured me that whatever they lacked in substance to some limited extent that was made up by their entertainment value. Hardly reassuring!

But please understand that I can now disclose that there was a method to my madness: in anticipation of *some day* being nominated by *some* U.S. President to *some* appointed position requiring Senate confirmation, I abstained from articulating anything meaningful, let alone controversial or (god help me) opinionated. In retrospect, who among you can challenge the wisdom of my strategy—a strategy which culminated in my being confirmed within just six "short" months of the date I accepted the position of Director of FMCS.

So, upon receipt of the Nicolau invite, I was all set to go: ready to prepare a talk chock full of wisdom on none other than the Employee Free Choice Act. One quick disclaimer. It is longstanding FMCS policy not take any position for or against the passage of that or any other labor legislation. Nevertheless, I was poised to explain to this body that shortly after being confirmed, I invoked the "just in case" doctrine, in other words, the steps I would take just in case there were to be an EFCA, keeping in mind that as initially drafted it included mandatory first contract mediation followed by mandatory interest arbitration where mediation did not produce an initial collective bargaining agreement. To that end, on October 26, 2009, I authored a standard survey letter to each of the approximately 1200 qualified living arbitrators on the FMCS roster (which included a majority of Academy members). I noted the need to update our data base, and then made the following request:

> Please advise us of the approximate number of any interest arbitrations you have handled for each of the following sectors: fire, police, teachers, and any private sector cases. In addition, please forward to

us three representative awards in any interest arbitration cases you have handled in the last five years.

No surprises were intended. I simply wanted to assure myself—as a matter of "due diligence"—that there was a nucleus of experienced arbitrators who would be available to handle the potential initial outpouring of cases were mandatory interest arbitration on first contract disputes to become the law. The result of the survey was illuminating: Approximately 200 arbitrators provided sufficient documentation to demonstrate they were experienced interest arbitrators. As might have been expected, a significant percentage of those arbitrators resided in states where, pursuant to public-sector statutes or ordinances, interest arbitration had become a way of life—states such as Illinois, Florida, Wisconsin, Michigan, Ohio, and Pennsylvania. Of course, the dearth of interest arbitrators in many other states led me to conclude that future training of our remaining arbitrator core should be on my agenda.

But alas, notwithstanding my preparatory initiatives, the reality is that there is not yet an EFCA. Whether there will be one and the form in which it may take remain dependent upon the mysteries of our legislative process. I only know that the topic I was invited to address is, tactfully put, in limbo. Therefore, I could have taken—perhaps should have taken——the easy path and just bowed out of today's scheduled appearance.

However, given my unwavering respect for this audience, coupled with the huge honorarium I have been promised (*not*), I bit the bullet. I negotiated an alternative topic for this speech. It is now titled, "The Challenge of Negotiating and Mediating First Contracts and Whatever Else George Decides to Talk About."

The Challenge of First Contract Negotiation/Mediation

To appreciate the precise dimensions of this challenge requires an understanding of the context in which many first contract negotiations arise. As the gray beards among you are aware, here is what all too often occurs where a labor organization wins a representational election, is certified by the NLRB as the exclusive representative of an appropriate unit of employees, and then negotiates for an initial collective bargaining agreement. At that juncture, the picture that frequently emerges is a picture not conducive to the parties even being willing to sit across from each other at the bargaining table, let alone conducive to engaging in good faith bargaining.

Conflict and acrimony are typically the common denominators in an election campaign. Union organizers, hell-bent on persuading employees of the desirability of casting a "yes" vote on the ballot, tend to be extremely zealous in selling their wares. Promises of a new world order abound. For their part, employers often mount vigorous—some have said vicious—campaigns to get "no" votes. A review of NLRB decisional law illustrates the wide variety of tactics utilized, including discharging leading union adherents to convey the message that the union is not the employees' savior, supervisors conducting one-on-one "interviews" to ascertain their employees' "leanings," and, occasionally, making promises of benefits to induce employees to vote "no."

Further, a pre-election campaign is commonly characterized by a wholesale dissemination of pro- and anti-union propaganda. Aptly named "captive audience speeches" are given in which employers release employees from their duty stations during working hours and require them to attend sessions in which scripts carefully prepared by management lawyers or consultants are read. The texts may technically fall within the bounds of protected free speech but they invariably invite workers to believe that a union victory will, as the song goes, spell "Trouble in River City."

So, you all get the picture. In these circumstances, an enormous challenge to the collective bargaining process inevitably awaits the parties to their first contract negotiations. Worse still . . . I may actually have understated the problem: Small, often family-owned businesses are the source of many new NLRB certifications. Perhaps for many years or even generations, those employers have enjoyed the unilateral right to establish and revise every term and condition of employment for their workforces. Post–NLRB certification, those employers will be counseled by their attorneys that federal labor law requires that they now forego their unilateral authority and are obligated to begin to bargain in good faith over each and every term and condition of employment, often times with labor union organizers they have grown to dislike or despise over the course of a heated election campaign. In a word, nothing less than behavior modification may be what is called for.

In my *years and years and years* of experience in both private- and public-sector bargaining on behalf of unions (and occasionally representing unions as employers of their own employees), I have concluded that the three most important words in any labor–management vocabulary are: Relationships, Relationships, Relationships.

So what medicine can Dr. Director prescribe? As the ultimate professionals you know the disclaimer that is coming next. There is no simple fix and no one tactical maneuver in a mediator's arsenal that is guaranteed to produce across-the-board success. For that reason, no pearl of wisdom will emanate from my lips today. However, I have amassed an impressive body of information from a significant number of our experienced and talented mediators who have had extensive, ongoing real-life involvement in dealing with these challenges. And I can also fall back upon my own fascinating first-hand practical experiences.

The Key Role for Training

Taken together, this much now seems clear: In a perfect world there would be a two-step process—first, establishing a relationship in advance of bargaining and then getting down to the nitty gritty of successfully negotiating a collective bargaining agreement. Our mediators are capable of performing as trainers in the art of creating, then fine-tuning and ultimately developing productive relationships. They endorse the threshold importance of each party respecting the other's spokespersons and committee members as well as the need for each party to understand the other's self-interests no matter how strongly held the competing views. Likewise, teaching effective communication plays a prominent role: how to talk "to each other," not "at each other." And when it comes to the underlying merits of any negotiation dispute, the parties are trained as a general matter on how to manifest a genuine desire to reach agreement. In a more macro sense, the mediators emphasize that the *sine qua non* of achieving the ultimate goal of an agreement depends upon the willingness of the parties to explore initiatives designed to "bridge the gap" (some might dare to say "compromise") to overcome their differences.

FMCS's Training Initiatives

My focus on training provides a perfect segue to some of the pending initiatives with which the Agency is now engaged in both the private and public sectors. One preliminary comment. What follows is an insight into my mindset when accepting the Director position. I was aware of the Agency's vital historic role in assisting parties to handle what I like to refer to as "the trauma of contract expiration"—namely, helping parties to avoid or minimize strikes

or lockouts to the maximum extent possible. However, I also harbored a more expansive agenda—the overriding goal of utilizing the Agency's services to improve labor–management relationships in advance of the anticipated tensions accompanying contract expiration disputes. I was informed by my own successful experiences. I negotiated provisions requiring the establishment of joint labor–management cooperative committees authorized to meet periodically throughout the term of a contract. The nonconfrontational, informal setting offered the parties a meaningful mechanism to address any pending global disputes involving the interpretation or application of a provision(s) of the existing CBA, such as vacation scheduling or safety and health. This forum also provided the parties an excellent opportunity to exchange all relevant data and information and then to discuss a variety of subjects such as reviewing the current status of the economy, their particular industry, and the company or companies concerned—all with the view toward exploring what joint steps they might take to serve their collective interests.

Consistent with that goal, in my first eight months in office, I have endeavored to become the proverbial "pro-active," "outreach" guy—the prototype "equal opportunity facilitator." Actions speak louder than words, so take note of my calendar events. I have made speeches to, met with, lunched and dined with, and, yes, sipped wine with an ever-expanding number of kindred spirits—those who either before or after our encounters have proclaimed their allegiance to the cause of improved labor–management relations. At the top of my list are those cherished sessions where company and union representatives—often numbering in the hundreds—have sat side by side listening to the presentation (LERA sessions in Houston, Seattle, and Kentucky come to mind as well as sessions scheduled for San Antonio, Nashville, and St. Petersburg in the near term). I have also spoken at meetings in which the invitees have been exclusively management lawyers and their clients and, conversely, meetings convened only for high-ranking union officers and representatives including directors of collective bargaining. To round out my schedule, I have addressed several large gatherings under the auspices of the ABA Labor and Employment Law Section, and let's not forget today's outing. All in all, I would estimate that upwards of 3000 people have been subjected to my words.

Rest assured, I have taken great pains to convey a common message, regardless of the venue. Simply put, the FMCS has the

experience, know-how, and dedication to assist the parties in establishing and developing better relationships. The Agency stands ready, willing, and able to do so. Requests for joint training is the preferred model, but if only one party seeks assistance (e.g., a union for its newly installed officers or negotiating committee members), we will do the training provided that we offer its management counterpart an equal opportunity to obtain our services. Yes, my friends, where the FMCS is concerned, *"We are from the government and we are here to help you."* Cynics be damned, I am telling it as it is.

Private-Sector Training

Focusing on private-sector relationship training, three nationwide programs in progress are noteworthy. Perhaps the most comprehensive and exciting involves ArcelorMittal, the world's largest steel company, and the Steelworkers Union. In 2009, the parties agreed to a provision in their collective bargaining agreement to create and enhance a labor–management *partnership* with a resounding capital *P*. The intent of that partnership includes, but is not limited to, *listen please*, improving worker health and safety, improving the quality of life in the working environment, improving product quality and production efficiency, and, most important, promoting employee involvement in problem solving and improving company and union relations at *all levels within the organization*. As an integral part of this far-reaching program, the parties agreed to receive ongoing joint training utilizing the expertise of FMCS mediators. The sheer breadth of this program is highlighted when one recognizes that approximately eight years ago, the 12 plants covered by this initiative were, in fact, six different steel companies, all competing in the national and international steel markets. In sum, the parties understood that this was an extraordinary opportunity to bring together, under a partnership, the blending of wisdom, foresight, and leadership in an effort to meet the global challenges that face the steel industry today.

Given the obvious merit to this endeavor, the FMCS awarded the parties a small grant pursuant to its authority under the Labor–Management Cooperation Act of 1978.

In early January 2010, I met with Dennis Arouca, Vice President for Labor Relations, and Dave McCall, who was the lead Steelworkers' representative on this project. I received a firsthand briefing

of the services they initially desired from the FMCS and offered our Agency's wholesale support for this ambitious, well-conceived undertaking. As of today, the respective Partnership Coordinators, accompanied by FMCS mediators, have conducted a series of local labor–management committee meetings at ten individual facilities spread throughout Illinois, Indiana, Ohio, Minnesota, Pennsylvania, West Virginia, and South Carolina—all designed to introduce local plant management and their union counterparts to the available FMCS services together with a description of how our mediators can assist them with their all-important partnership efforts. The next phase for this ongoing project will be for those local committees to begin the exciting task of functioning—again with mediator assistance as needed.

By any objective standard, the dimensions of this program are extraordinary. And while it is still too early to measure "success," I remain "cautiously optimistic" that the results will justify the time, effort, and energy expended. Beyond that, our abiding hope is that this program will become a *model* for other parties contemplating the creation of their own partnerships.

Two other projects merit brief mention. The first involves Kaiser Permanente and a coalition of numerous labor unions (including SEIU, AFSCME, OPEIU, UFCW, IBT, USW, and nurses' organizations), who together represent approximately 100,000 employees in health care facilities throughout the country. In advance of the upcoming round of collective bargaining, the parties have again requested (I believe for the third time in ten years) assistance in their national and local negotiations using an interest-based bargaining approach. Second, Alcoa Aluminum Company and the Steelworkers Union also have requested and will receive FMCS assistance in connection with their upcoming negotiations involving workers employed at a number of the company's plants.[1]

For those of you nonarbitrators in the audience, I mean those of you who earn your living representing the parties to collective bargaining, the good news is that any and all newcomers are welcome in our house!

---

[1]It is noteworthy that both of the two training programs cited culminated in collective bargaining agreements entered into shortly after my presentation at the Academy meeting.

President Obama's Executive Order 13522

Finally, I have been the innocent beneficiary of yet another major challenge falling in my lap by virtue of President Barack Obama having issued Executive Order 13522 on December 9, 2009, just 60 days after I assumed office. The high-sounding and far-reaching policy statement in Section 1 of that Order sets the stage. Each federal agency and its respective labor organization(s) is obliged to "collaborate" and "develop solutions jointly" in a "nonadversarial forum," with the goal of not only promoting "satisfactory labor relations" but also, of paramount importance, "improving the productivity and effectiveness of the Federal Government." Apart from these heady declarations, the policy expressly identifies the former enemy at hand: "predetermined solutions" by management.

To help educate myself about the unique mysteries of federal-sector labor–management relations, I poured over the excellent Tobias/Masters/Merchant paper[2] describing the checkered history of those relations. I developed an instantaneous appreciation for the trauma that both management and labor representatives must have endured over the past two decades. During the Clinton Administration, labor–management "partnership" was the watchword; by marked contrast, the mantra of the Bush Administration was to forget partnership and substitute instead the "freedom to manage" unilaterally. And now, the Obama initiative blew the whistle on that philosophy and reinstated, with emphasis, the requirement for joint labor–management decision making. A schizophrenic reaction from all parties would be perfectly understandable.

So my first therapeutic initiative was to prescribe an antidote. At several recent well-attended conferences, I offered federal-sector labor–management representatives alike some aspirin. Even in advance of the Executive Order, in fiscal year 2009, FMCS had responded affirmatively to more than 300 requests for joint programs to provide training on relationship building. In addition, I noted that the FMCS has a track record in successfully assisting a significant number of government agencies and their respective

[2]Robert Tobias, Marick F. Masters, and Christina Sickles Merchant, "Engaging Federal Employees Through Their Union Representatives to Improve Agency Performance," February 2010 (unpublished).

labor organizations in establishing and developing "partnerships" pursuant to the Clinton Executive Order.

Armed with this information, immediately upon assuming office, I contacted John Berry, the Administration's newly appointed Director, Office of Management and Budget. I offered the FMCS's full cooperation in meeting the enormous challenge of the new government-wide initiative he was to oversee. Specifically, I advised that training "forums" on how to establish and develop meaningful relationships was our Agency's stock in trade. For his part, John Berry enthusiastically embraced the offer, and our agencies are working cooperatively as I speak.

In addition, a number of federal agencies, together with their respective labor organizations, have contacted the FMCS and several forum training projects already are under way. A carefully developed 40-page slide presentation prepared by mediators with hands-on federal sector experience is but one of the numerous tools being used in connection with that training.

With that same end goal in mind, FMCS has embarked upon a joint program with a sister agency, the Federal Labor Relations Authority, offering a two-day introductory course in eight major cities throughout the country to be attended by federal managers and their union counterparts. It is anticipated that the courses will be repeated in the same locations later this summer.

What all these comments add up to is the reality that, while effectuating the Executive Order is still in its formative stage, I am pleased to report that the FMCS is at the forefront of the effort to accomplish that goal.