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Book Reviews: Mediation and the Dynamics of Collective Bargaining

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MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING. By William E. Simkin,† Washington, D.C.: Bureau of National Affairs, Inc. 1971. Pp. xiv, 410. $12.50. Reviewed by A. Samuel Cook.††

Belatedly, many are coming to the realization that the public in a private enterprise economy such as ours has a right to secure goods and services at reasonable prices. This basic right depends on production and profit. Both of these in turn rest on the twin pillars which author William E. Simkin's professional career has been dedicated to preserving: *free* management and *free* labor.

The common law applicable to the relationship between an employer and his employees and their labor organization still vests in the employer the exclusive proprietary right to manage his business as he deems advisable, subject to such limitations as are imposed by statute or negotiated as part of a collective bargaining agreement. The language in the concurring opinion of Justice Stewart in *Fibreboard Paper Products Corp. v. NLRB*[1] is apt:

> It is possible that . . . Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act.

Over the years, institutional agencies have been created to bring agreement out of conflict between management and labor. Their structures are always undergoing change; but the art of negotiation, one of the world's oldest, remains constant. A seventeenth century writer on the subject, who obviously endured a few traumatic moments, defined it as follows:

> The compleat negotiator . . . should have a quick mind but unlimited patience, know how to dissemble without being a liar, inspire trust without trusting others, be modest but assertive, charm others without succumbing to their charm, and possess plenty of money and a beautiful wife while remaining indifferent to all temptation of riches and women.[2]

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1. 379 U.S. 203, 225-26 (1964).

2. G. I. NIERENBERG, THE ART OF NEGOTIATING 28 (1968).

Despite many misgivings and frequent failures, we still maintain that the best way to resolve labor disputes is by private agreement between the parties directly involved. When the agreement-reaching process between management and labor shows signs of failure in the form of an impasse and a threatened or actual work stoppage, one or both of the parties to the dispute may seek neutral third party intervention as an aid to reaching a settlement. As the author points out, there are "a variety of descriptive words [relating] to the work of such impartial third parties [trained to assist in settling] labor disputes."[3] The sequence includes: "conciliation, mediation, fact-finding without recommendations, fact-finding with recommendations, voluntary arbitration, and compulsory arbitration."[4] In this compilation of terms the primary distinction is between mediation and arbitration:

> There is a fundamental difference between mediation and arbitration. An arbitrator has the responsibility and authority to decide one or more disputed issues. The decision is binding on the parties. A mediator has no such authority. No decisions can be made by him. The parties make all the decisions by agreement. The mediator must rely on persuasion. He may suggest; he may cajole; he may even recommend, but the parties always have the right to say "no," even on most procedural matters.[5]

Although labor mediation is an important part of our national labor policy, and frequently plays a major role in the settlement of disputes, prior to the publication of this treatise only limited efforts have been made by researchers and authors to understand or to analyze the process.

With vast experience as both an attorney and academician, Simkin has the finest credentials for undertaking an intensive analysis of labor mediation.[6] As a practitioner representing management for some twenty-five years, I can recommend this work as a valuable handbook for all mediators, negotiators and students in the field of labor relations. Indeed, it has broader implications for negotiators in every area of people relations in which there are disputes, including the business and social worlds, and the public and private sectors of our economy. Mr. Simkin has set forth in readable format not only the integrals of collective bargaining and the dominant interests in labor disputes, but also an explanation of what mediation is, when to use it, a description of available mediation agencies, advice on selection and retention of various types of mediators, and mediation's special functions in crisis bargaining situations.

While every labor negotiation is unique, one can generally say that,

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3. W. E. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 25 (1971).
4. *Id.*
5. *Id.* at 27-28.
6. *Id.* at vi.

assuming a reasonable balance of economic power between the parties, negotiation takes place in two basic steps. Phase one involves the *power of persuasion*. This phase in its best form represents honest debate, exchanges of facts, statistics and arguments, seriously considered by both sides, with subsequent movement and compromise. Phase two of negotiations reverses the procedure. It is now the *persuasion of power* that is put to bear. Fall-back, last ditch concessions are made. The parties know that if they do not reach agreement, there can be a strike or lockout. Unions and managements who have any sophistication whatsoever further realize that: "It is of benefit to nobody to perform a hysterectomy on the goose that lays the golden eggs."[7]

Thus in mature relationships, mediation often is not required. But when, for example, what appears to be an irreconcilable impasse is approaching or a strike has occurred, when the union membership votes to reject a settlement agreed to by both union and management negotiators at the bargaining table, when personality conflicts between the parties make face-to-face confrontations difficult, when there is inequality of bargaining power between the parties; when one of the contestants desires to settle but needs a face saver, or when one of the parties is represented by an inexperienced or incompetent negotiator, a skillful and impartial mediator can be of immeasurable assistance in resolving the dispute.

In perhaps the most important section of this treatise, Mr. Simkin brings his broad experience and knowledge to bear on the subject of crisis bargaining. Here the impartial mediator's role may be critical in reaching a settlement. He must have a keen knowledge of human nature, of internal union and employer stresses, weaknesses and strengths, and of the public postures and also the underlying actual positions of the parties on the crucial issues between them. Like an iceberg, much that is relevant lurks hidden beneath the surface. The mediator must probe until he can see the entire form of the impasse in its true light.

During a speech, Simkin, obviously in a jovial mood, suggested that the following qualities are highly desirable in a mediator:

1. the patience of Job
2. the sincerity and bulldog characteristics of the English
3. the wit of the Irish
4. the physical endurance of the marathon runner
5. the broken-field dodging abilities of a halfback
6. the guile of Machiavelli
7. the personality-probing skills of a good psychiatrist
8. the confidence-retaining characteristic of a mute
9. the hide of a rhinoceros
10. the wisdom of Solomon.[8]

7. *Id.* at 15.
8. *Id.* at 53.

There is more truth than humor in this list of qualifications, for collective bargaining is a unique relationship. It is usually permanent. A resolution of the dispute must occur sooner or later, sometime, somehow. Mr. Simkin sums up his philosophy of the unobtrusive, behind-the-scenes role of the successful mediator by stating: "In the last analysis, his role [is] useful only to the extent that the 'sometime, somehow' part of the equation was shortened and was accompanied by less pain and a better quality agreement."[9]

Mediation is usually dealt with by simply asserting that it is an art which defies analysis. This thorough study by William E. Simkin makes a significant contribution by spelling out certain principles and guideposts to assist mediators and negotiators in discerning the unique factors in any dispute and then choosing between alternative approaches. Mr. Simkin makes an even more important contribution by providing negotiators representing management and labor, as well as from the business and social worlds, with a much-needed understanding of neutral third party mediation to assist the contestants in solving their impasse voluntarily and without any binding edicts.

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9. *Id.* at 159.