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HAROLD NEWMAN'S CLOUDY CRYSTAL BALL

"The man who makes no mistakes does not usually make anything."

Edward John Phelps
(1822-1900)

Next September, with appropriate ceremonies, which may include sacrifices at the bases of some of the abstract statuary on Albany's South Mall, we shall celebrate the tenth anniversary of the Taylor Law and the New York State PERB. We have paused to reflect quite often recently, on what we have done and what, perhaps, we would have done differently. The writer recalls quite well that on the day he took office as Director of Conciliation he vowed that never, but never, would conciliators be assigned to cases unless the Sacred Congregation of Rites in Albany was satisfied that the parties had, indeed, bargained in good faith and had exhausted any possibility of reaching agreement on their own. In retrospect, such an idea was compounded of naivete and chutzpah.

In the first place, the statute then and the statute now provides for a specific period during which the parties may declare impasse. It was formerly geared to the employer's budget submission date and now is geared to the employer's fiscal year, but the effect is the same. In the second place, we cannot examine by telephone the true state of negotiations in a dispute in Clinton, Cattaraugus, Columbia, Cayuga, Cortland or Chenango Counties. We cannot for that matter, know the shape of a bargaining table in any of the State's 55 other counties unless we are physically present to investigate the situation. That is quite beyond the powers of a superannuated Director and a frequently weary staff of nine mediators. Finally, although one hesitates to confess such a thing in public print, we have some uneasiness that failure to provide conciliation service on declaration of impasse may soon lead to that most horrifying of happenings - the strike.

There is yet another problem with regard to treating requests for intervention by making haste slowly. This has to do with the peaks and valleys of our case load. We are moving into that time of year when 20 and more impasse requests per day may deluge our office.

Yet, the need to insure that the parties are really at impasse only after serious bargaining is a real concern. We do not have the private sector's "genuine impasse" situation. Such a thing is impossible with the sanctions against the strike. In large measure, we are dependent on the individual panel member assigned to the dispute.

Some weeks ago, a young management advocate who represents some municipalities in the western part of the State, telephoned to protest that the union's declaration of impasse was premature. "I was shocked when I got a copy of that letter," he said. "Why we had met once - for about twenty-five minutes. I read their demands and told them that they were unacceptable - and they walked out. That was the last time we heard from them until we got the letter declaring impasse." The young advocate was informed that the panel member assigned as mediator/fact finder would determine when he arrived on the scene and had met with the parties, whether there had, indeed, been genuine bargaining and whether an impasse really existed. When the panel member did meet with the parties, he was quickly convinced that there had been no real negotiations. He lectured severely on the responsibilities of negotiators and departed after informing us by telephone what had transpired. We withheld further service and the parties reached agreement on their own.

We don't have such happy endings in every situation, of course, in which the parties have declared impasse without having bargained enough. Sometimes, the parties meet without the neutral whose services have been withheld and fail to make any progress after a number of bargaining sessions and we get the plea, "We can't do it without someone here to

keep those guys honest." After a passage of time we may have to assign someone. The presence of the impartial as everybody knows, does not guarantee a settlement. There is a school district on Long Island which seems determined to break the private sector's "Kohler" record. (Although, happily, unlike Kohler there is no strike.) Max Doner is now entertaining the parties and we fear that as Max totters into his ninetieth year, he may be force-feeding bagels and lox to the grandchildren of the present negotiators in order to get a mediated settlement. There had been a long hiatus in which we had had nobody on the scene.

Police and firefighter cases, of course, have binding arbitration as the final step when other impasse procedures fail. But as we have pointed out previously in these columns, the PERB Board has cautioned the parties that arbitration is a device of last resort and they must be prepared to demonstrate that they have bargained seriously to reach agreement at an earlier stage before they will be permitted arbitration.[1] In those disputes in which the legislative hearing is the final step, we have compiled an impressive record in conciliating the dispute to settlement when a fact finder's report has been rejected - and prior to the scheduled hearing. (We confess to a strong distaste for settlements that are not bilateral.) The real problem lies for us in school districts and at the community colleges. Without either interest arbitration or legislative hearing as a final step, we are left with somewhat opaque statutory language that would make it appear that we have ongoing responsibility to live with the impasse to final agreement. Fortunately, the language is sufficiently non-specific to enable us to treat each situation on an ad hoc basis and we sometimes give and sometimes deny post fact-finding conciliation. Unlike the problem we have at the time of original declaration of impasse, we know enough after the fact-finding stage about the specifics of the dispute to make a fairly sound judgement as to the need for further intervention and if there is such need - the type required. Sometimes, it is a matter of advising the parties that the fact finder will return for not more than one or two more sessions to mediate the matter to settlement. Rarely, we reach for the high drama of the public meeting. Frequently, we refuse to intervene further, urge the parties to try to settle on their own and respond to their furious cries - "Rumble thy bellyful! Spit, fire!, spout, rain!"[2]

There may then come a time when the parties will contact a panel member whom they know, and ask that he telephone our offices to offer his services because he knows the advocates and can put things together. This happened thrice last year and thrice we wished a pox on the parties and their helpful intervenor. We do not doubt that the panel member's willingness to intervene was well-intentioned but the determination of whether further conciliation shall take place after fact-finding must lie in Albany and nowhere else. If we are denying service, it is with good reason. When we preach that the best kind of agreement is one reached by the parties themselves, that is not public platform prattle. If we are not convinced that the parties have not bargained hard enough to reach agreement on their own, in their own best interest they should be treated with benign neglect. (The Long Island matter to which we made reference is different because we had, indeed, left the parties on their own for a considerable period and finally decided that if Max Doner wished to try to resolve that intractably difficult situation, it was worth the try. But the effort bears the *nihil obstat* of Bishop Kelly and the *Imprimatur* of Cardinal Newman.)

Of course, if the parties at the time of declaration of impasse request a specific panel member to serve them, that request will be honored. If both parties are seeking the services of a specific individual and she is willing to serve, we are, of course, delighted to appoint her. On the other hand, if one party requests a specific panel member and the other side does not join in the request, we will not appoint that individual under any circumstances.

Again, dear colleagues, we urge that in every instance where advocates seek your services in what to our continued dismay and irritation they refer to as "superconciliation", please refrain from doing more than advising that all appointments must be sought from the PERB Conciliation office in Albany. Those who have visited our offices know that the Director does not have a sign on his desk that states, "THE BUCK STOPS HERE". That is because the statement is hackneyed, superfluous and in somewhat lamentable English. He does, however, have as those who have made the pilgrimage to 50 Wolf Road know, instead of IN and OUT baskets, one box which is marked PROBLEMS and the other SOLUTIONS. Thanks in large measure to you, everything eventually ends up in the latter. Meantime, we shall continue to steer by the motto, *medio tutissimus ibis.*[3]

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1 Town of Haverstraw & PBA, 9 PERB ¶3063 (1976).
City of Binghamton & Local 729, IAFF, AFL-CIO, 9 PERB ¶3072 (1976).

2 William Shakespeare, King Lear, Act III, Scene II.

3 "In the middle course you will go most safely."