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HAROLD NEWMAN'S CLOUDY CRYSTAL BALL

"When baiting a mouse-trap with cheese always leave room for the mouse"

SAKI (H. H. Munro) 1870-1916

"Government intervention in labor disputes I (and many others), have argued is best kept to a minimum. We have never ceased to repeat the theme that agreements obtained by the parties without outside intervention are the best kind of agreements. However, a pervasive problem haunts PERB and all other agencies responsible for the appointment of neutrals. How does the conciliation agency keep the parties from institutionalizing every step in statutory conciliation procedures and overusing the processes, without their giving enough time and effort to free collective bargaining on their own?

"When I was a tyro conciliation commissar some eight years ago, I crisply informed my staff that we would not automatically respond to the first cries for impasse assistance. If we deemed that the labor and management people did not appear to be far apart or had not given enough time to negotiation on their own, we would withhold service. Alas, when impasse requests came in at the rate of twenty and thirty a day, my bold plan went whistling down the wind. There was simply no time for lengthy discussion with the parties on the status of negotiations. We rarely hold back appointment of a mediator.

"Now, with the recent amendments to the Taylor Law that provide for post factfinding conciliation for some of our clients (in lieu of legislative hearing), and for binding arbitration for others, we are sorely beset by the parties' desire to play with their glittering new toys.

"This is not to say that genuine usefulness does not lie in post factfinding conciliation in school districts or that when all else fails, the parties in police and firefighter disputes should not have contract arbitration. The tragedy is that the curious mental processes of some advocates lead them to the notion that if the statute provides for mediation, factfinding, post factfinding conciliation and arbitration, it is good to taste them all. Quel horreur! It is easy to conceive of the fate of mediation and factfinding if the parties fix their eyes on the horizon for the extra step. Reports from panel last year indicated that the problem is already assuming serious proportions. Some advocates are frankly admitting that they operate from the assumption that the dispute 'will go all the way'. One lawyer-negotiator told me, 'I figure I must hold back something for the mediator, something for the factfinder and finally be ready to show my hand for the superconciliator'.

"We have fought against such distortion. Erwin Kelly and staff have coldly refused to be drawn into providing superconciliators in routine fashion, following rejection of factfinding reports. We have cautioned labor and management representatives in police and firefighter disputes all over the State that

failure to give sufficient attention to a possible mediated agreement or to the factfinding report, may lead to an arbitration award that may be painful to live with. (Perhaps we have reason to be sanguine on the police-firefighter arbitration matter since reports from Michigan and Wisconsin demonstrate that after experience, the parties do not overuse arbitration and there is no 'narcotic' effect on bargaining.[1]) But for now, in New York State, I must confess to some uneasiness.

"Arnold Zack[2] has suggested that 'consideration should be given to combining the mediation and factfinding steps in one person in order to eliminate duplication, thus giving the mediator the greater muscle of being statutorily authorized to make recommendations if his mediation is unsuccessful'. Byron Yaffe[3] made the same suggestion. We have shrunk from this except where the parties request it, because it seems to us to shadow the confidentiality of the mediator's role. Perhaps our mediators should instead push hard for a 'med-arb' role when they meet with the parties. (I must confess that my respect for that process skyrocketed when its leading proponent and practitioner, Sam Kagel, appeared at the recent IRRA convention in San Francisco with a new green Jaguar--license plate MED-ARB!) Perhaps we should adopt the proposal made by many neutrals, including members of our panel, that factfinding always precede mediation so that the real issues are illuminated for the parties and the rubbish cleared from the table.

"In any event, panel views are solicited on the prevention and cure of institutionalized procedures. The disease must not be allowed to reach epidemic proportions.

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"One of the ironies of history is that Peter Seitz who had hoped to have a bust in the Poet's Corner in Westminster Abbey will instead be enshrined in the Baseball Hall of Fame at Cooperstown as the savior of Catfish Hunter and other enslaved athletes. But Peter will be renowned through the ages as the author of the term 'preventive mediation' about which I wrote a 'Crystal Ball' several months ago. The fascinating history in its original Seitzian language is reprinted below.

> Inconsequential footnote to industrial disputes history: In 1947 I became General Counsel to the wise and loveable Cyrus S. Ching, Director of the Federal Mediation and Conciliation Service. In the legislative discussions before the enactment of the Slave-Labor Act (otherwise known as the

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[1] James L. Stern, "Final Offer Arbitration--Initial Experience in Wisconsin"; Charles M. Rehmus, "Is Final Offer Ever Final?" Monthly Labor Review, September 1974.

[2] Arnold M. Zack, "Impasses, Strikes, and Resolutions," The American Assembly, Public Workers and Public Unions, Sam Zagoria ed. Prentice-Hall, Englewood Cliffs, New Jersey, 1972.

[3] Byron Yaffe, "Factfinding in Public Education Disputes--Its Values and Limitations: A Neutral View," Journal of Law and Education. Vol. 3, no. 2, April 1974.