



# bulletin

FOR MEDIATORS / FACT FINDERS

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## HAROLD NEWMAN'S CLOUDY CRYSTAL BALL

"You are young, Father Harold, and perhaps you're naive  
To expect that the parties will reason  
When their purpose is just to mislead and deceive,  
And avoid claims of 'sell-out' and 'treason'.

Experience teaches most labor disputes  
Are products of rampant emotion;  
Compulsive desire to stir up emeutes;  
And a thirst for chaotic commotion.

The parties agree when this instinct recedes,  
And self-interest dominates passion,  
Until this occurs, none listens or heeds  
In a logical common-sense fashion.

Disputes like a fever must run out a course  
And crisis of charges and hating!  
It's not every marriage that ends in divorce!  
There's service in patiently waiting."

Peter Seitz  
July 26, 1975

"These splendidly Byronic lines by the Laureate of the National Academy of Arbitrators are, of course, in response to my quoting Lewis Carroll's 'Father William' in the last issue of this publication. One must be moved by the lyric beauty of line and meter, but I note that referring to me as 'young' does carry poetic license a bit far.

"Peter urges patience on me. But while the parties are engaging in histrionics and bathe themselves in 'rampant emotion', the costs of conciliation spiral and like Abe Beame, I am haunted by visions of a bare exchequer. One of the devices we utilized this year to keep costs down has been to appoint fact finders - with the usual instruction to try mediation, even before the statutory fact-finding period had been reached. I was pleased to note that the CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES which has been produced by a joint steering committee of the National Academy of Arbitrators, AAA, and FMCS has given its imprimatur to mixing arbitration with mediation. According to the AAA quarterly 'Study Time'<sup>1</sup> arbitrators may now mediate under the following circumstances: (The passage you will note, suggests Talmudic or canon law.)

<sup>1</sup> "Study Time", Quarterly Letter, Morris Stone, Editor, American Arbitration Association, 140 West 51st Street, N. Y., N. Y. 10020, July 1975.

'One of the traditional questions has been whether, and if so under what circumstances, an arbitrator should attempt to mediate a dispute he or she is called upon to arbitrate. The answer of the Code is clear: If the parties want mediation or fact-finding, they should advise the panelist, leaving it up to him to accept or decline the case on those terms. 'Once arbitration has been invoked, either party normally has a right to insist that the process be continued to decision,' the document states. 'If one party requests that the arbitrator mediate and the other objects, the arbitrator should decline the request.'

'In summary on this point: 'An arbitrator is not precluded from making a suggestion that he or she mediate. To avoid the possibility of improper pressure, the arbitrator should not so suggest unless it can be discerned that both parties are likely to be receptive. In any event, the arbitrator's suggestion should not be pursued unless both parties readily agree.'

'Obviously, it takes tact, skill and judgment to suggest mediation in the midst of an arbitration without jeopardy to the arbitrator's role. No doubt it can be done more easily by an arbitrator who is well acquainted with the parties than by one who is serving for them for the first time.'

Obviously, the same concerns pertain to fact finders doing mediation and the same caveats apply, except that for myself I have no concern with whether the fact finder is 'well-acquainted with the parties'. Tom Helfrich is one of the panel members whose 'tact, skill and judgment' serve him well in getting mediated settlements even when appointed a fact finder. In a recent case in which he was assigned as fact finder following a diligent mediation attempt by someone else, he spent the first session with the parties disposing of a time clock issue that had been the reef on which the earlier mediation floundered. Even after Tom's explanation, I do not know how that was done.

"He made the issue 'go away' by suggesting that each party go to a neutral corner, agree that they disagreed and pretend that the issue had never been raised. Perhaps Tom can give us more detailed explanation at the next PERB panel seminar. But at the next formal session, the parties repeated to him their poles apart positions on all the remaining issues. 'I then took several hours of postulating, cajoling, convincing, dreaming up positions, and virtually threatening them with the horrors of letting a stupid fact finder potentially make unsatisfactory rulings on the issues dearest to their hearts. I continually pulled them back from actual fact-finding while, at each step, pushing them into situations where fact-finding became less and less desirable and the light of hope (for a settlement) all the stronger. (It sounds like a bad novel!)

"Many of our panel members, heaven be praised, can do this. Of course, there are situations where it simply should not be attempted. Again, the 'skill, tact and judgment' of the neutral comes into play. Irv Markowitz has made it always a point of honor not to fact-find but to mediate. He may well have done 100 cases for PERB over the years, and has written, perhaps, four fact-finding reports. The acceptance by the National Academy of the idea that arbitration may be mixed with mediation may lead him at long last to agree to apply for membership in that body. (We would hope that he does not consider himself too young.)

"Postulating, cajoling, convincing, dreaming up positions' are, of course, part of the mediator's function and his work. But emotional involvement in the dispute is not. We have been sorely dismayed from time to time and again very recently, by the behavior of professional neutrals who cannot keep their tempers or emotions in control. Individuals who in the workshop or the seminar can expound brilliantly on the conciliation function sometimes explode like rockets on the firing line. Please remember to be involved and yet uninvolved. Do not be like England's Charles II:

'Here lies our Sovereign Lord the King,  
Whose word no man relies on,  
Who never said a foolish thing,  
Nor ever did a wise one.'<sup>2</sup> "

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PERB is a happy place despite the storms that frequently swirl about us. And so, it is most unusual for any staffer to leave. Bill Spenla, Assistant to the Director of Conciliation, has, however, in a phrase that has become overused, "an offer he cannot refuse". His departure is painful for us personally and professionally. We think so much of him and his work with us that we have chosen a successor with precisely the same background. Ron Kurach, who will join us in early September has, like Bill, a Master's Degree from SUNY/Albany and, like Bill, is a protege of John Slocum at the University. Panel members who toil in New Jersey for PERC will see much of Bill Spenla. He is to be Assistant Director of the New Jersey State School Boards Association.

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Once again, we sadly note the passing of panel colleagues and friends. Judge Francis E. Rivers and I. Robert Feinberg both died during the past two weeks. Everybody admires individuals who are outstanding as professionals in their vocations. But that is a thin reed for remembrance. We will remember Judge Rivers and Bob Feinberg not merely because they were splendid lawyers who distinguished themselves in a variety of fields but because in Robert Hutchins' phrase, "They did not come into the world to adjust to it but to make it better."

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PANEL MEMBERS PLEASE NOTE. If you have any bills for work rendered before April 1, 1975, please submit them immediately. Our cutoff date is September 1, 1975.

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<sup>2</sup> "Epitaph on Charles II", John Wilmot, Earl of Rochester (1647-1680).