**Katarzyna Antolak-Szymanski**

- Uniwersytet SWPS z siedzibą w Warszawie (SWPS University, Warsaw; Poland)
- e-mail: kantolak@swps.edu.pl
- ORCID: 0000-0003-4853-5816

DOI: 10.15290/mhi.2024.23.01.08

# HISTORICAL CONDITIONS OF THE DEVELOPMENT OF THE INSTITUTION OF MEDIATION IN COLLECTIVE LABOR DISPUTES IN THE UNITED STATES

## Abstract

The purpose of this article is to analyze the historical conditions of the development of the institution of mediation in collective labor disputes in the United States. The unique historical conditions that fundamentally influenced the level of use of mediation as a form of dispute resolution, both in the early days of its development in the US and today, need to be characterized. The characterization involves a consideration of the introduction of regulations that initiated the use of mediation at the state and then federal levels. The reach of mediation in collective disputes expanded from its original use in the transportation (railroads and airlines) sectors to its subsequent application in most labor disputes in the private sector. Mediation became institutionalized, as well as professionalized, thanks to the important support activities of the federal government and the Federal Mediation and Conciliation Services (FMCS). Therefore, it should be considered important to look at the actions taken by the government in the past to promote the use of the institution of mediation, including through the formation of bodies (councils) that contributed to the professionalization of the profession of mediator. The issues presented herein are relevant because mediation in the United States has reached a high level of development and overall success. An analysis of these issues becomes useful in the light of the interest in the process of implementation of the American mediation model

by other countries. The sources used in the article are American publications that discuss the historical development of mediation in the US, the relevant legislation, and selected case law.

**Key words:** mediation, labor unions, history of American collective labor law, mediators, collective bargaining agreement, strike

## 1. Introduction

Mediation in the United States has achieved a high level of success. Current studies have found that about 52% of the cases in state courts referred to the Office of Dispute Resolution in Colorado, 56.9–62% of the cases referred to court mediation by the US District Court for the Central District of California, and 53–61% of all the cases referred to mediation by the US District Court for the Southern District of New York ended with a settlement.[1] Studies commissioned by the European Parliament indicate that a mediation settlement rate of 24% would result in cost savings in disputes in the EU.[2] This would support the adoption of judicial mediation programs patterned on the US model in the European Union (EU) countries as well, among other things, in order to achieve savings in litigation costs. However, these efforts have not succeeded in replicating American successes in mediation. Mediation has been used in less than 1% of civil and commercial cases in the EU.[3]

There are many theories providing interpretation of why mediation has not been as successful in the EU as it has been in the US. This article assumes that one of the main reasons for this is the different historical pattern of development of mediation in the United States. In the US, the development of mediation began with its use in collective labor disputes in the late 19th century. Several factors have contributed to this development. The parties (employees and labor unions, as well as employers)

---

1 A. Noakes, *Mandatory Early Mediation: A Vision for Civil Lawsuits Worldwide*, "Ohio State Journal on Dispute Resolution" 2020, vol. 36, pp. 409, 415–419.

2 Ibidem, p. 424.

3 *'Rebooting' the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU. Study*, Directorate general for internal policies policy department C: citizens' rights and constitutional affairs legal affairs, Brussels 2014, p. 2, https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf (date of access: 8.02.2024).

were connected by lasting, long-term relationships, which facilitated efforts to repair these relationships instead of terminating them. In addition, it was in the government's public interest to encourage the peaceful resolution of collective disputes to avoid costs to the public as a result of strikes that would lead to a disruption of public services. Initially, legislation authorizing mediation was introduced in individual states, but over time it also became a priority at the federal level. Mediation covered conflicts in railroads and airlines, and its use was later extended to most labor disputes in the private sector. Mediation became institutionalized, as well as professionalized with the participation of the federal government and thanks to the establishment of the Federal Mediation and Conciliation Services (FMCS). Later, in the 1960s and 1970s, when workers in the public sector (state and local governments) gained the right to join labor unions and collective bargaining, collective dispute mediation was also introduced in the states to resolve and prevent problems and work stoppages.

In analyzing this history, this article highlights several factors: the long-term development of mediation (more than 100 years), which has influenced public acceptance and willingness to use it; the repeated legislative intervention by the federal government, which promoted mediation and even made it mandatory; and the development of a professional cadre of labor mediators, thanks to the experience they gained but also through public agencies such as the FMCS and its local counterparts that have offered training programs. These factors led to the success of mediation in labor disputes, and then the success of all types of mediation. Countries expecting the development of mediation as a form of dispute resolution are recommended to analyze these historical factors affecting the development of mediation in the US, namely the need for time, also for widespread acceptance of mediation, central government interventions to encourage mediation, and support for the development of a professional cadre of mediators.

## 2. The origins of the development of legislation relating to mediation in collective disputes

In the US legal system, government intervention in collective disputes initially took the form of police arresting workers on strike and courts ordering to halt pickets and strikes. By the end of the 19th century, government interventions became less violent. Individual states tried to create a legal framework for dispute resolution. Maryland was the first state in the US to pass legislation on mediation in collective

disputes in 1878. Other states, following this example, enacted similar laws: Pennsylvania in 1883 and New York and Massachusetts in 1886. These laws actually created a system of mechanisms for resolving collective disputes, with mediation being one element of such a system. They set out several options for the parties, including mediation, arbitration, as well as *investigation,* a procedure that would end with the drafting of a report. The executive branch of government (the governor) had the power to appoint *ad hoc* committees to resolve labor disputes.[4]

At the federal level, in 1898, the Congress passed the Erdman Act which applied to the railroad industry. The Erdman Act provided for the use of mediation and arbitration to resolve disputes between railroad employees and employers. It was enacted at a time when the US was experiencing rapid development of railroads, which were an important part of the American economy. The Congress sought to ensure that strikes would not impede this development and thus harm economic growth. The Erdman Act was ultimately successful, as out of the 61 disputes referred to mediation or arbitration, half ended in settlements. In 1913, the law was repealed and replaced by other legislation.[5]

In 1913, the US Department of Labor was established. The Department's powers included mediation in collective disputes. According to the regulations for the establishment of the Department of Labor, the Secretary of Labor has the right to act as a mediator and appoint dispute settlement committees in disputes when, in his opinion, the interest of preservation of peace in the industry requires it.[6] As the first

4 J. Barrett, *The Origin of Labor-Management Mediation: United States Conciliation Service in the U.S.*, Department of Labor, "Labor Law Journal" 2016, vol. 67, no. 4, p. 2; J. Brover, *Using Mediation to Get NHL Players Back in the Winter Olympics*, "Cardozo Journal of Conflict Resolution" 2020, vol. 22.1, pp. 127, 132 ("Using mediation to resolve disputes between unions and management has a long history in the United States."); K.S. Maccini, *When is Mediation a Good Choice for Your Client?*, "Rhode Island Bar Journal" 2017, vol. 65, no. 4, pp. 13, 15; D.T. Weckstein, *In Praise of Party Empowerment and of Mediator Activism*, "Willamette Law Review" 1997, vol. 33, no. 3, pp. 501, 512.

5 J. Barrett, *The Origin…*, op. cit., p. 2; M.J. Heilman, *The National Labor Relations Act at Fifty: Roots Revisited, Heart Rediscovered*, "Duquesne Law Review", vol. 23, pp. 1059, 1065; M.H. LeRoy, *Federal Jurisdiction in Sports Labor Disputes*, "Utah Law Review" 2012, pp. 815, 823.

6 J. Barrett, *The Origin…*, op. cit., p. 2; J. McManus, *A Motion to Compel Changes to Federal Arbitration Law: How to Remedy the Abuses Consumers Face When Arbitrating Disputes*, "Boston College Journal of Law & Social Justice" 2017, vol. 37, pp. 177, 187; who quotes: J.R. Steelman, *The Work of the United States Conciliation Service in Wartime Labor Disputes*, "Law and Contemporary Problems" 1942, vol. 9.

secretary of labor explained in his annual report, the mediation and conciliation function did not include any power to unilaterally end a labor dispute: "The Secretary's policy was to treat this statutory power as diplomatic responsibilities imposed on the Department of Labor with respect to labor disputes, analogous to those imposed on the Department of State with respect to international affairs. The Department does not dictate or adjudicate; it negotiates and recommends. (…) It is the duty of the Department of Labor to fairly represent the interests of wage earners in relation to the interests of all others."[7] The Congress granted to the Department of Labor the authority to mediate because the labor unions preferred mediation to arbitration.

Later, in 1917, the United States Conciliation Service (USCS) was established as a separate branch of the Department of Labor. A staff of permanent "commissioners of conciliation" (conciliators) was appointed to help resolve collective disputes. The procedure offered by the USCS was voluntary. The Conciliation Service was not granted law enforcement powers and rule-making authority. The parties had no obligation to request assistance from commissioners of conciliation, or to accept the content of the proposed settlement.[8] Nevertheless, in 1918 a significant number of disputes (1217) were resolved as a result of these proceedings.[9]

In the railroad sector, a new Transportation Act was passed in 1920, which eliminated the use of mediation[10] and gave dispute resolution powers to the new Railway Labor Board. However, both labor unions and the employers opposed the elimination of mediation from the dispute resolution process and called for reform of the law. As a result, after reaching a consensus to amend the law, the Congress passed the Railway Labor Act (RLA) in 1926. In 1934, a special National Mediation Board (NMB) was established to implement the provisions of the RLA. In 1936, the RLA was amended so that its provisions would cover both airlines and the railroad sector.[11]

---

7 J. Barrett, *The Origin…*, op. cit., p. 3.
8 Ibidem.
9 Ibidem.
10 T.A. Smith, *A Comparative Analysis: The Effect of American and Canadian Labor Laws and Economic Conditions on Union Participation*, "The George Washington Journal of International Law and Economics" 1991, vol. 24, pp. 691, 692.
11 J. Barrett, *The Origin…*, op. cit., p. 3; F.A. Ruiz, *Labor Law – The Railway Labor Act: The Employee's Right to Minority Union Representation at Company-Level Grievance Hearings*, "Western New England Law Review" 1989, vol. 11, pp. 27, 34–35; D. Baker, *The Not So Friendly*

The RLA introduced a relatively complicated dispute resolution method. The specific resolution method depended on whether the dispute was “minor” or “major.” The “minor” dispute category includes issues concerning wages and terms or conditions of work covered by a collective bargaining agreement. In the event of such a dispute, the parties were required first to try to resolve the dispute through conciliation and through the grievance procedure contained in the collective bargaining agreement. If this did not result in a resolution, the dispute could be referred to the National Railway Adjustment Board. This Board was established as a body consisting of an equal number of representatives of labor unions and company executives. If the Board could not reach a majority decision, a neutral member could be appointed (or in the absence of agreement on the matter, the NMB could appoint such a member). The neutral member essentially acted as an arbitrator issuing a final and binding ruling that settled the dispute.[12]

A “substantial, major” dispute, on the other hand, within the meaning of the RLA, concerned the terms of a collective bargaining agreement and usually occurred when the agreement was terminated. The party seeking to change the terms of the agreement should give 30 days’ notice to the NMB. The NMB would then attempt to resolve the dispute through mediation. During the mediation, the labor union was not allowed to go on strike, and the employer was not allowed to change the existing terms and conditions of employment for the employees. The functioning of the NMB has a significant impact on when a labor union has the right to go on strike and when an employer can make any changes to the working conditions. It results from the fact that this is allowed only upon completion of the mediation.[13] The parties also have the option of resolving a “significant dispute” through a special arbitration procedure, if they decide so.[14]

The number of conciliators in the USCS was increasing, prompting the start of a training program. The conciliators were involved in mediating various types

*Skies: Pilots’ Attempt to Claim Employer Collusion with Rival Pilots Union During Collective Bargaining Fails in Beckington*, “Journal of Air Law and Commerce” 2020, vol. 85, pp. 167, 168.

12 H. Kramer, *Alternative Dispute Resolution in the Work Place,* par.2.04, New York, 2004; quoting: 45 U.S.C. par. 151 et seq. (RLA).

13 H. Kramer, *Alternative Dispute…, par.2.04*, op, cit.; cf. also: A. Goldman, *Comparative Analysis of Labor Mediation Using a Bargaining Strength Model,* “Kentucky Law Journal” 1993–1994, vol. 82, pp. 939, 955.

14 H. Kramer, *Alternative Dispute…, par.2.04*, op, cit..

of labor disputes over working hours, work evaluations, and employee workload levels.[15] The main disputes concerned wages, working hours, and negotiations of new collective bargaining agreements. The work of the USCS was intensified as a result of President Roosevelt's New Deal, a program of economic reforms initiated in the 1930s, which recognized and supported labor unions and collective bargaining. The conciliators often prepared the terms and conditions of any agreements reached between labor unions and company management, and trained both sides in collective bargaining.

During World War II, maintaining peace in the workplaces was essential to the war effort. The labor unions promised not to go on strike in exchange for the introduction of a new mechanism for resolving wage disputes. Under the new procedure, labor unions and employers agreed to conciliation proceedings with the help of the USCS. If a dispute was not settled, it could be referred to the newly formed National War Labor Board (NWLB). The NWLB consisted of representatives of workers, employers, and the government, and made decisions on wage disputes. While there were still some strikes during the war, for the most part the actions taken by the USCS and the NWLB were effective in maintaining peace in the workplace.[16]

After the war ended, there was frustration among unions and workers over the relatively slow rate of wage growth. President Truman abolished the NWLB and transferred its powers to a new board responsible for wage and price control. However, the new board was dissolved and price and wage control was finally abolished in 1946. During that period, a massive wave of strikes swept across the United States. The USCS achieved conciliation in more than 16,000 disputes which helped to avoid strikes in 75% of all disputes. Just before the wave of strikes, a government-appointed labor-management committee suggested that the USCS should provide better training for new conciliators, develop improved ways to keep

15 Cf. J. Barrett, *The Origin…*, op. cit., p. 5; cf. J. Barrett, *Notes on: Mediation Institutions Adjusting to New Environments: The USCS and FMCS Story*, "Labor Law Journal" 2017, vol. 68, no. 1 (it should be noted that in 1934 a special section, the Technical Service Division, was created in the USCS to study time and movement at work).

16 Cf., among others: R. Davies, *Strike Season: Protecting Labor-Management Conflict in the Age of Terror,* "Georgetown Law Journal" 2005, vol. 93, pp. 1783, 1801 (on the establishment and effectiveness of the NWLB during World War II).

them informed of developments in labor relations, and initiate improved mediation techniques.[17]

Efforts were made to expand the operations of the USCS and to hire more conciliators, but they were thwarted by the anti-worker sentiment that prevailed in the United States during the early after-war period. The public turned against workers for two reasons. Firstly, a large number of strikes across the country caused inconvenience to many people and businesses, and disrupted services. Secondly, labor unions and their sympathizers were seen as supporters of communism, and communism was identified as an anti-American activity. The head of the USCS was considered a “pinko”[18]and his staff (as well as the employees of the entire Department of Labor) as having pro-worker sympathies. Business owners questioned the neutrality of the Department of Labor, given such statements by its representatives as the statement that it is the duty of the Department of Labor to represent the interests of wage earners fairly in relation to the interests of everyone else.[19] In the light of these accusations, the staff of the USCS was reduced from 60 to 38 at a time when mediation was badly needed.[20]

Under these circumstances, there was a demand for a reform of the labor law[21] and the USCS. Critics wanted to separate the USCS and its mediation function from the Department of Labor and make the USCS a separate agency. As part of broader amendments to the National Labor Relations Act (NLRA) introduced in 1947 by the Taft-Hartley Act, the Congress, abolished the USCS and created a new federal agency, the Federal Mediation and Conciliation Service (FMCS). The use of the separate terms “mediation” and “conciliation” in the name of the new agency was not justified by the need to distinguish between the activities undertaken by the newly created FMCS, and was a political compromise between those who wanted to specify mediation as the agency’s goal and those who wanted to use the term conciliation to describe this activity.[22]

---

17 Cf. J. Barrett, *The Origin…*, op. cit., p. 3.
18 A communist sympathizer, cf. J. Barrett, *The Origin…*, op. cit., p. 6.
19 J. Barrett, *The Origin…*, op. cit., p. 6.
20 Ibidem.
21 Cf. R. Barnes, *FMCS on the Cutting Edge,* “Pepperrdine Dispute Resolution Law Journal” 2002, vol. 2, p. 321.
22 J. Barrett, *supra,* note 1, pp. 6–7.

## 3. The Federal Mediation and Conciliation Service and the resolution of disputes between labor unions in the post-war period

According to the Taft-Hartley Act, the statutory purpose of the FMCS was to prevent or minimize interruptions to the free commercial flows resulting from labor disputes, to assist parties to disputes in industries affecting commerce, and to resolve such disputes in conciliation and mediation proceedings.[23]

FMCS is headquartered in Washington, DC, but also has regional and field offices throughout the United States. It employs professional labor dispute mediators[24] with background in both labor unions and business management, experienced in collective bargaining and mediation.[25] When labor unions or employers want to change the provisions of a collective bargaining agreement, or when a new collective bargaining agreement is negotiated for the first time, the parties must formally notify the FMCS well in advance.[26] The FMCS then determines whether the case is likely to turn into a collective dispute that will significantly disrupt commerce, and if so, it offers the parties the assistance of an FMCS mediator. In other cases, the case may be referred to a local or national labor agency.[27]

In its first 25 years, the FMCS conducted mediation according to a controversial negotiation model. According to that model, negotiations were "zero-sum games" focused solely on the gains of one party, with winners and losers. This was the historical model of labor negotiations, for which the FMCS was trained and in which it was experienced, and the parties were familiar with that model. FMCS mediators provided mediation assistance to both sides in an attempt to peacefully finish agreement negotiations, and also offered training to improve the parties' negotiation skills. For the most part, the FMCS's actions were successful, with the vast majority of collective disputes being resolved without the initiation of strikes or other forms

---

[23] C. Brommer, G. Buckingham, S. Loeffle, *Cooperative Bargaining Styles at FMCS: A Movement Towards Choices,* "Pepperrdine Dispute Resolution Law Journal" 2002, p. 465.

[24] J. Barrett, *supra,* p. 3.

[25] Cf., among others: D.E. Ray, W.R. Corbett, C.D. Ruiz Cameron*, Labor-Management Relations: Strikes, Lockouts and Boycotts,* par. 1:18 (Sept. 2017).

[26] Ibidem, quoting: 29 U.S.C. par. 158(d)(3).

[27] Ibidem.

of labor unrest. As a result of their experience, FMCS mediators developed dispute resolution skills as well as earned a good reputation.[28]

During this period, mediation was successfully used as a procedure to prevent strikes and help parties determine the content of new or revised collective bargaining agreements. However, unions and employers developed increasingly sophisticated dispute resolution systems that were provided for during the term of the existing collective bargaining agreement.

The procedure for handling of grievances provided for in the agreement became the traditional way of resolving such disputes. Under the terms of a collective bargaining agreement, if any party had a doubt about the interpretation and implementation of its provisions, it had to file a grievance. The grievance may be oral or written, depending on the requirements of the collective bargaining agreement, but in any case it should specify the substance of the dispute and the specific provisions of the contract that were allegedly violated. Most often, the process of handling grievances is carried out in stages. At each stage, a manager of increasingly senior level discusses the dispute with a labor union representative. At the initial stage, a *steward* represents the interests of the trade union. At later stages, a senior labor union representative joins the procedure.[29]

Although employers can theoretically file grievances, in reality most grievances are filed by a labor union against the employer. Individual employees often report violations of a bargaining agreement by the employer (for example, an employee is improperly disciplined or leave was improperly granted or denied, etc.), but it is the labor union that has control over the grievance process and ultimately decides whether to file a grievance in the first place or to resolve the dispute amicably or otherwise. This is justified by the fact that it is the labor union that is a party to the collective bargaining agreement, not the individual employee.[30]

[28] C. Brommer, G. Buckingham, S. Loeffle, *Cooperative Bargaining…*, op. cit., pp. 455–456.
[29] A.M. Lofaso, *Deflategate: What's the Steelworkers Trilogy Got to Do with It*?, "Berkeley Journal of Entertainment and Sports Law" 2017, vol. 6, pp. 48, 60–61; M.E. Zelek, *Labor Grievance Arbitration in the United States*, "The University of Miami Inter-American Law Review" 1989, vol. 21, pp. 197, 202.
[30] M.E. Zelek, *Labor Grievance…*, op. cit., pp. 202–203.

The grievance procedure usually does not involve mediation.[31] This is a structured process for directly negotiating solutions to disputes over potential violations of the collective bargaining agreement. The goal is to find a peaceful solution to a dispute in the course of the grievance process. Of course, not every grievance is handled in accordance with such a procedure. The parties sometimes disagree on the facts or meaning of a particular provision of the collective bargaining agreement and the employer denies the validity of the grievance. To resolve such disputes, labor unions and employers place arbitration clauses in collective bargaining agreements. According to an arbitration clause, the parties agree to refer any unresolved grievances to final and binding labor arbitration if a party requests so. As a *quid pro quo* for an employer agreeing to arbitration, the labor union agrees not to go on strike for the reasons for which the grievance was filed, during the term of the collective bargaining agreement.[32]

The US Supreme Court in its 1960 rulings in the *Steelworker Trilogy*[33] cases affirmed the possibility of adoption of a contractual arbitration system by labor unions and employers. The Supreme Court pointed out the court's limited ability to overturn an arbitration ruling in labor cases and established a strong presumption that a dispute in which a grievance is filed can be resolved by an arbitrator.[34]

In summary, by the end of the 1960s, the resolution of collective disputes had acquired a certain form: disputes over the conclusion of new or amended collective bargaining agreements were largely resolved through mediation with the help of professional mediators from the FMCS; disputes over alleged violations of existing collective bargaining agreements were first handled through a multi-stage grievance procedure that involved direct negotiations between the labor union and representatives of the management, and then, if the grievance was not resolved satisfactorily, the party filing the grievance could resort to binding arbitration before a neutral labor arbitrator (jointly selected by the parties). This model of labor dispute resolution has essentially continued to the present day.

31 D.A. Schmedemann, *Reconciling Differences: The Theory and Law of Mediating Labor Grievances*, "Industrial Relations Law Journal" 1987, vol. 9, pp. 523, 528.

32 M.H. Malin, M.W. Finkin, *Are Collective Bargaining Agreements Still Special?,* "American Bar Association Journal of Labor & Employment Law" 2023, vol. 37, pp. 125, 129–130.

33 *United Steelworks of America v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co*., 363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Co.,* 363 U.S. 593 (1960).

34 Ibidem.

## 4. Mediation in collective disputes in the public sector

Until the late 1960s, the development of mediation in labor disputes in the US was limited to the private sector. Employees in the public sector, as well as people not hired under employment contracts, managers, and agricultural workers, were explicitly excluded from the scope of application of the NLRA.[35]

Public sector employees (working for local, state, or federal governments) were sometimes covered by special civil service regulations, giving them protection in their employment. For example, employees covered by the civil service act could not be dismissed from their jobs without just cause. In addition, public sector employees often received additional entitlements as part of health and pension programs, which were sometimes more favorable than those offered to private sector employees. In most cases, state and federal laws did not grant public sector employees the right to labor union membership, collective bargaining, and strikes.[36]

The situation changed in the late 1960s and early 1970s. Wages in the private sector begun to significantly outpace those in the public sector. Public sector employees, especially teachers, sought union support by engaging in the organization of illegal strikes and actions in the form of slowdowns to implement demands. In the light of the instability caused by such work stoppages, laws were passed at the state and federal levels granting many public employees the right to collective bargaining. Some states granted selected categories of public sector employees a limited right to strike, but most were not given this right. Therefore, public sector employees and their labor unions were unable to exert direct pressure on employers in the event of disagreements on the implementation of labor unions' demands in negotiations.[37]

In the event of disputes involving public sector employees, the regulations provided for greater use of mediation, the fact finding procedure, and arbitration in the collective bargaining process as alternatives to strikes. The new government labor agencies

[35] Cf. 29 USC. par. 151 and others.

[36] J.E. Slater, *Lessons from the Public Sector: Suggestions and a Caution,* "Marquette Law Review" 2011, vol. 94 pp., 917, 924.

[37] *III. Collective Bargaining in the Public Sector*, "Harvard Law Review" 1984, vol. 97, p. 1676; J. Slater, *The Teachers' Strike of 2018 in Historical Perspective*, "Marquette Benefits and Social Welfare Law Review" 2019, vol. 20, pp. 191, 198–203.

hired labor dispute mediators to help the parties conclude collective bargaining agreements. In some cases, fact finders produced reports on the dispute, particularly with regard to information on whether the public entity had the financial resources to pay the higher wages demanded by the union, and what wages other comparable public sector employees were paid. The reports were not binding decisions, but they could influence the parties' negotiating positions and, if made public, put pressure on one party or the other to reconsider the offer.[38]

In services such as the police and fire departments, where even a brief illegal strike could not be tolerated, an interest arbitration process was introduced.[39] If the dispute was not resolved through mediation or the fact finding procedure, it would be referred to an interest arbitrator for final resolution. This type of arbitration was a separate process from arbitration at the grievance handling stage. In an arbitration procedure regarding a grievance, the arbitrator issues a ruling on the application of a specific provision of the collective bargaining agreement and whether it has been violated. In an interest arbitration procedure, on the other hand, the arbitrator is responsible for determining what the collective bargaining agreement should be, i.e., he or she creates the collective bargaining agreement, and does not interpret it. Often the most contentious issue in the dispute was the question of wages. In such a dispute, the interest arbitrator would decide on the appropriate wage, looking at the employer's ability to pay, the difficulty of the job, and how similarly situated individuals were paid by other employers.[40]

To the extent that interest arbitration became the final stage in collective bargaining, as opposed to a strike or the absence of formal alternatives, the previous stage of mediation gained a different dynamic.[41] Through arbitration, the parties achieve a result without going on strike or the uncertainty of leaving negotiations in limbo. This makes the mediator's ability to get concessions from both sides more problematic. This illustrates the differences in the use of mediation in the public and private sectors.

[38] M.H. Malin, *Public Employees' Right to Strike: Law and Experience*, "University of Michigan Journal of Law Reform" 1993, vol. 26, pp. 313, 325–329.
[39] Ibidem, p. 329.
[40] Ibidem, pp. 330–335; J. Slater, *Interest Arbitration as Alternative Dispute Resolution: The History from 1919 to 2011*, "Ohio State Journal on Dispute Resolution" 2013, vol. 28, p. 387.
[41] I. Lobel, *What Mediation Can and Cannot Do,* "Dispute Resolution Journal" 1998, vol. 53, 44, 47.

The granting of the right to collective bargaining for public sector employees and the inclusion of mediation as part of the process of such bargaining have greatly expanded the scope of mediation in the US. Mediators have thus had more opportunities for action, finding employment in various government employment agencies. This was particularly important, given the expansion of government and the proportional increase in the unionization of public sector employees, combined with the diminished importance of trade unions in the private sector since the early 1980s. The relationship between mediation of collective disputes in the private and public sectors was also symbiotic, as parties to collective relations in the public sector initially benefited from the vast knowledge and experience of FMCS mediators in the private sector. This contributed to the smooth unionization and organization of collective bargaining in state and local administrations.[42]

## 5. Conclusion: the historical development of mediation in the US and its popularization in other countries

The history of mediation in the US shows that success in the development of mediation must be considered from a broader perspective. Also, it is necessary to look at the dispute resolution procedure in question in a historical context. Mediation in labor disputes has been successful in the US and has led to the overall success of mediation in that country for a number of key reasons. These include the subject matter of the dispute being mediated; the timing of the institution's development; state interventions; and the preparation of qualified mediators. Each of these factors was of significant importance.

**Firstly, certain types of disputes have the potential to be resolved through mediation.** Mediation has effectively begun to be introduced in the US as a means of resolving collective disputes due to the nature of these disputes and the parties involved. Employment has traditionally been a long-term, sometimes even lifelong, relationship between employees and employers. For an employee, it is the source of income to support himself and his family, as well as the experience necessary for advancement to a higher position. Losing one's job and wages involves a huge cost. For employers,

[42] J. Barrett, *The FMCS Contribution to Nonlabor Dispute Resolution*, https://www.bls.gov/opub/mlr/1985/08/art4full.pdf (date of access: 8.02.2024).

stability in the workforce usually leads to higher productivity and profits. Firing and then hiring and training new employees involves additional transaction costs. As a result, both sides are interested in resolving issues peacefully without interrupting their relations and pursuing their disputed claims in courts.

What is also important is that mediation in the US began with the resolution of collective disputes between labor unions and employers, not individual employee disputes. The very idea of a labor union is that they allow workers to gain stronger bargaining power through collective action. To some extent, this restores the power balance between economically powerful corporations and individual workers. As a result, although the parties are not equal in terms of resources, there is usually no extreme disparity between them. This in itself increases the chances of successful conflict resolution through mediation.

**Secondly, the long-term development of mediation institutionalizes it and leads to social acceptance as part of the culture of dispute resolution.** The public's lack of familiarity with mediation as a means of dispute resolution hinders or slows down its introduction in many other legal systems.

In the United States, mediation actually took about 100 years to develop before it became firmly entrenched in labor law. During that period, labor unions, employees and employers saw what mediation was, how it worked, what shortcomings it had, and, more often, what its positive sides were. Mediation became part of the labor relations lexicon. Moreover, this familiarity with the procedure, which grew over time, led to widespread acceptance of mediation in other areas. Employees do not just work, they have family problems, get divorced, and are consumers who may have disputes with banks, retailers, and service providers. When involved in mediation in family and consumer cases, due to their prior familiarity with mediation in labor disputes, the parties see it as a natural and beneficial way to resolve disputes, rather than a strange, untested procedure. Similarly, employers who are well versed in mediation in labor disputes are more open to its use in other business disputes.

**Legal intervention of the government that introduces or even requires mediation in some disputes is important for the development of mediation.** In the United States, state-level legislation required mediation in collective disputes to prevent

strikes that would be burdensome to the general public. The legislative process was accelerated by both world wars, during which strikes were not only a source of potential inconvenience, but could also harm the production necessary for the war effort. Technological advances in the use of railroads and airplanes to transport people and goods also put pressure on the government to use mediation to avoid strikes that could disrupt travel and transportation. The forced use of mediation in these spheres has created an opportunity for the parties (labor unions and employers) to see its benefits. As a result, when the wars ended, many labor unions and private sector employers preferred to resolve disputes through mediation rather than by going on strike.

**The preparation of professionally trained and highly qualified mediators ensures the continued development and success of mediation.** An important outcome of the obligation to conduct mediation in some collective disputes was the emergence of a group of experienced mediators. Simulated mediations can only help identify good mediators. However, mediation experience should be considered crucial, and obliging parties to conduct mediation caused mediators to gain experience in actually mediating real cases. In addition to experience, professional training is necessary, which the US mediation system has provided. Mediation was required in some collective disputes, during certain periods (war), and in certain sectors, starting with transportation. At that time, the federal government established institutions such as the United States Conciliation Service, the National Mediation Board, and the Federal Mediation and Conciliation Service. These institutions eventually introduced professional standards for mediators, as well as regular training programs. The mediators gained experience, but also received effective training, as a result of which labor unions and employers were genuinely satisfied with their services.

This has had an impact beyond the development of mediation in labor disputes, both collective and individual. Properly trained and qualified labor mediators, often through the FMCS, later practiced in other areas of mediation. Their excellent training and experience in mediation techniques and methods enabled them to apply these skills to successfully resolve community, family, and commercial disputes. This has provided parties in other types of disputes with a professional level of mediation and strengthened confidence in this form of dispute resolution.

## 6. Conclusion

Society should consider it beneficial to reduce the number of disputes resolved through litigation and to satisfactorily resolve these disputes through mediation. However, an uncritical application of the American mediation model does not guarantee that these measures will be immediately successful in a particular case. In anticipation of such expectations, it is important to consider the historical basis for the success of mediation in the US and identify what factors played key roles in achieving it. The development of mediation in the US began with mediation in labor disputes. An analysis of mediation in such disputes in the US clearly demonstrates that its popularity has been achieved due to a number of considerations. These include the specific nature of disputes resolved through mediation and the parties involved (parties with relatively equal bargaining power and linked by long-term relationships); the duration of development (mediation evolved over a period of 100 years); state intervention (the federal government, as well as state governments, made mediation mandatory in some cases); and the provision of qualified, trained, and experienced mediators (in the US, this was done by the FMCS and other related government bodies). It cannot be said in advance that individual countries interested in the development of mediation would have to wait about 100 years to benefit from the widespread use of mediation. However, it is necessary to keep in mind the analysis of the factors that have influenced the development of institutions in the past in order to effectively promote this development.

## References

### Jurisprudence of American Courts

United Steelworks of America v. American Mfg. Co., 363 U.S. 564 (1960).
United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).
United Steelworkers of America v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960).

### Literature

*III. Collective Bargaining in the Public Sector*, “Harvard Law Review” 1984, vol. 97.
Baker Drew, *The Not So Friendly Skies: Pilots’ Attempt to Claim Employer Collusion with Rival Pilots Union During Collective Bargaining Fails in Beckington*, “Journal of Air Law and Commerce” 2020, vol. 85.

Barnes Richard, *FMCS on the Cutting Edge*, "Pepperrdine Dispute Resolution Law Journal" 2002, vol. 2.

Barrett Jerome, *The FMCS contribution to nonlabor dispute resolution*, https://www.bls.gov/opub/mlr/1985/08/art4full.pdf.

Barrett Jerome, *Notes on: Mediation Institutions Adjusting to New Environments: The USCS and FMCS Story*, "Labor Law Journal" 2017, vol. 68, no. 1.

Barrett Jerome, *The Origin of Labor-Management Mediation: United States Conciliation Service in the U.S.*, Department of Labor, "Labor Law Journal" 2016, vol. 67, no. 4.

Brommer Carolyn, Buckingham George, Loeffle Steven, *Cooperative Bargaining Styles at FMCS: A Movement Towards Choices*, "Pepperrdine Dispute Resolution Law Journal" 2002.

Brover J., *Using Mediation to Get NHL Players Back in the Winter Olympics*, "Cardozo Journal of Conflict Resolution" 2020, vol. 22.1.

Davies Ross, *Strike Season: Protecting Labor-Management Conflict in the Age of Terror*, "Georgetown Law Journal" 2005, vol. 93.

Goldman Alvin, *Comparative Analysis of Labor Mediation Using a Bargaining Strength Model*, "Kentucky Law Journal" 1993–1994, vol. 82.

Heilman Michael J., *The National Labor Relations Act at Fifty: Roots Revisited*, *Heart Rediscovered*, "Duquesne Law Review", vol. 23.

Kramer Henry, *Alternative Dispute Resolution in the Work Place*, New York 2004.

LeRoy Michael H., *Federal Jurisdiction in Sports Labor Disputes*, "Utah Law Review" 2012.

Lobel Ira, *What Mediation Can and Cannot Do*, "Dispute Resolution Journal" 1998, vol. 53(47).

Lofaso Anne Marie, *Deflategate: What's the Steelworkers Trilogy Got to Do with It?*, "Berkeley Journal of Entertainment and Sports Law" 2017, vol. 6.

Maccini Kristen Sloan, *When is Mediation a Good Choice for Your Client?*, "Rhode Island Bar Journal" 2017, vol. 65, no. 4.

Malin Martin H., Finkin Matthew W., *Are Collective Bargaining Agreements Still Special?*, "American Bar Association Journal of Labor & Employment Law" 2023, vol. 37.

Malin Martin H., *Public Employees' Right to Strike: Law and Experience*, "University of Michigan Journal of Law Reform" 1993, vol. 26.

McManus Jeremy, *A Motion to Compel Changes to Federal Arbitration Law: How to Remedy the Abuses Consumers Face When Arbitrating Disputes*, "Boston College Journal of Law & Social Justice" 2017, vol. 37.

Noakes Adam, *Mandatory Early Mediation: A Vision for Civil Lawsuits Worldwide*, "Ohio State Journal on Dispute Resolution" 2020, vol. 36.

Ray Douglas E., Corbett William R., Ruiz Cameron Christopher David, *Labor-Management Relations: Strikes*, *Lockouts and Boycotts*, par. 1:18 (Sept. 2017).

Ruiz Fernando A., *Labor Law – The Railway Labor Act: The Employee's Right to Minority Union Representation at Company-Level Grievance Hearings*, "Western New England Law Review" 1989, vol. 11.

Schmedemann Debora A., *Reconciling Differences: The Theory and Law of Mediating Labor Grievances*, "Industrial Relations Law Journal" 1987, vol. 9.

Slater Joseph E., *Lessons from the Public Sector: Suggestions and a Caution*, "Marquette Law Review" 2011, vol. 94.

Slater Joseph, *Interest Arbitration as Alternative Dispute Resolution: The History from 1919 to 2011*, "Ohio State Journal on Dispute Resolution" 2013, vol. 28.

Slater Joseph, *The Teachers' Strike of 2018 in Historical Perspective*, "Marquette Benefits and Social Welfare Law Review" 2019, vol. 20.

Smith Todd A., *A Comparative Analysis: The Effect of American and Canadian Labor Laws and Economic Conditions on Union Participation*, "The George Washington Journal of International Law and Economics" 1991, vol. 24.

Weckstein Donald T., *In Praise of Party Empowerment and of Mediator Activism*, "Willamette Law Review 1997", vol. 33, no. 3.

Zelek Mark E., *Labor Grievance Arbitration in the United States*, "The University of Miami Inter-American Law Review" 1989, vol. 21.

## SUMMARY

### Historical Conditions of the Development of the Institution of Mediation in Collective Labor Disputes in the United States

The United States has one of the world's most developed systems of alternative dispute resolution (ADR), particularly mediation. Other countries, including member states of the European Union, following the US model, have taken initiatives to introduce or expand the use of mediation within their legal systems. However, these attempts have yielded inconclusive results. In order to effectively implement a mediation model similar to that in place in the US, it is necessary to first understand the process of its historical development.

This article analyzes the development of mediation over a period of 100 years, from the late 19th century to the early 1980s. The authors pointed out that legislation allowing the use of mediation was first adopted in individual states, and then such regulations were also implemented at the federal level. Support for the institutionalization of mediation and the professionalization of mediators resulted from the actions taken by the federal government and by the Federal Mediation and Conciliation Services. Based on a historical analysis of the process, it was concluded that the success of mediation in the US in collective disputes and then in individual labor disputes has contributed to the popularity of this form of dispute resolution in other areas as well. The success of mediation is based on factors related to its long period of development.

Among these reasons one should mention the nature of labor disputes that is conducive to the use of mediation; the long development and consolidation of the use of this form of dispute resolution; the interventions undertaken by the government to support the development of mediation; and the professionalization of mediators. Each of these factors was of significant importance. Bearing the historical development of this institution in the US in mind, it is important to point out that countries that implement mediation cannot expect immediate success in adopting the American mediation model.