

As stated earlier, we have no coercive power. Until the passage of the Civil Rights Act, the Mediation Service and the National Mediation Board performed a unique service in a unique way. Since we have no power to compel, the Service issues no rulings or decisions. We "proffer" our services—nothing more. The parties which accept them expect our agents to function with discretion. The parties which reject them conduct their own negotiations without our assistance. We may disagree with their rejection, we may try to persuade them to change their minds, we may let it be known that the offer to help will remain outstanding until the dispute is settled. We do not meet in secret to consider ex parte evidence or investigative reports, and to order somebody to do something on the basis of information which is then classified confidential.

Several weeks ago the committee's staff asked the Service to consider whether the exception set forth in section 161(c) (4) of the proposed bill would protect its confidential records and files. We answered on March 23, 1965, that in our opinion subsection (4) would not give us the protection we need.

Subsection 161(c) (4) of the proposed legislation would except from the public inspection requirement "trade secrets and other information obtained from the public and customarily privileged or confidential." This exception is taken verbatim from S. 1666, which passed the Senate during the last session. On its face, the exception does not apply to the bulk of the information which comes to mediators in the performance of their duties. There are situations in which an employer who does not wish to plead poverty at the bargaining table for fear of having to reveal financial records under current National Labor Relations Board decisions will give the mediator confidential competitive information or financial information to explain an adamant position. Such information might be considered a "trade secret"—but information of this sort is an exception to the general rule, so far as our agency is concerned. The information which we seek to protect concerns bargaining strategy and tactics, proposals and counterproposals, personalities, and methods of the negotiators, and similar matters which do not fit neatly within the category protected by exception (4).

We have studied Senate Report 1219, which accompanied S. 1666 (S. R. 1219, July 22, 1964). According to the report, exception (4)—is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client and other such privileges. To the extent that the information is not covered by this or other exceptions, it would be available to public inspection.

Mediators do not obtain information by "questionnaire or inquiry." Most of the information obtained by mediators is obtained at the bargaining table, or in give-and-take sessions with the parties, separately or together.

The Senate report also shows a congressional intent to protect information normally subject to such traditional privileges as the doctor-patient or lawyer-client privilege.