

Mr. HERRICK. Well, about all we have in the way of files and records relate either to the internal administration of the Mediation Service or to actual disputes. That is, that certainly is, there's no getting away from it, a broad statement.

Mr. MONAGAN. Even in the traditional privileges that are generally accepted there are certain limitations such as that the communication has to be made for the purpose for which the privilege was created, and that the relationship must exist, and so forth.

Mr. HERRICK. This really has two parts, of course. Obviously, the classic common law privilege would not extend to a statement made by the union in the presence of a company.

Mr. MONAGAN. Yes.

Mr. HERRICK. So that you cannot really call that a privilege.

Mr. MONAGAN. It has to be confidential, to begin with.

Mr. HERRICK. That is correct.

Mr. MONAGAN. That is, it is intended to be.

Mr. HERRICK. Yes; but the problem that we have also involves this problem of maintaining our impartiality, so that if the mediator has to come in—well, let me give you an example.

Frequently in an unfair labor practice proceeding there is a dispute between the charging party and the respondent as to who said what during a particular stage of the negotiations. How was a certain offer phrased, and so on.

If the mediator can be subpoenaed and brought in to testify about that, the chances are he is going to support one side or the other. It is hard to see where there is a conflict in testimony, how a mediator, testifying honestly, could avoid supporting one side or the other in this.

So that it is more than just a privilege. It is a need to keep the mediator and to keep the Mediation Service away from any semblance of having taken sides as to the merits of a dispute of that sort.

We try very hard to strike a fine balance between being impartial but, at the same time, getting these very candid appraisals of what is going on in the negotiation, predictions as to what is going to happen, and so on.

Mr. MONAGAN. You have indicated that there is a balancing of the interests involved in arriving at your judgment. Would you say that the extent of the privilege might depend upon the degree of public interest that in a particular situation was involved in whatever the statement was? It is a little hard for me to think up specific instances where this might be true. But let us say in a criminal case with a subpoena, you referred to subpoenas, let us say there might be a declaration that an individual was a member of the Communist Party or something like that, where that might be relevant to the criminal prosecution.

It would seem to me that you would have same difficulty in persuading a court not to permit evidence of that sort to be admitted.

Mr. HERRICK. I agree. I think we probably would have some difficulty. I think we would try—I am happy to say that all of the cases that I am familiar with have not involved anything quite of that nature.

Mr. MONAGAN. I am trying to think of an extreme case just to test the extent of your position.