

entials, a page of history is, in Holmes' familiar phrase, worth a volume of logic. I doubt that arbitrators can or should do much about this situation, and my advice would be to relax and enjoy it.

*Second*, in grievance arbitration, there is frequently only an illusory safety in basing a decision upon the "plain meaning" of contract language, without regard to past practice. Collective bargaining agreements, as I have endeavored to show, are not susceptible of the same type of textual exegesis as is commonly indulged in with highly technical legal instruments; but even in the case of the latter, courts frequently adopt more flexible constructions than is commonly supposed.

*Third*, there is an obvious and not entirely reconcilable conflict between the theory that a rule, to be enforced, must have been consistently applied in the past and the view that if the rule is clearly stated, the employer should have considerable flexibility in applying it to individual cases. What I have tried to show is that both approaches have some validity, and that, especially in disciplinary cases, the conflict can be at least partially avoided if arbitrators will direct their attention to consistency of purpose rather than to uniformity of results.

In conclusion let me say that while the foregoing discussion has been based largely on my own experiences, I am not unmindful of Oscar Wilde's bitter epigram that experience is the name everyone gives to his mistakes. Reject, if you will, the arguments that I have advanced; but do not doubt that past practices have great value for the arbitrator who knows how to use them.

*Discussion—*

PEARCE DAVIS

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I think we can all agree that Ben Aaron has given us an interesting and informative outline of the problems of the past practice criterion in arbitration.

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Fortunately for me, but perhaps less fortunately for purposes of our discussion I do not find myself in basic disagreement with most of the major themes of Mr. Aaron's paper. However, all is not unanimity between us. There are a number of matters on which I would take issue. There are also others on which some further comments seem appropriate.

### Grievance Arbitration

At the outset, let us look at the sections of the paper dealing with grievance arbitration.

As I reflect on Mr. Aaron's words on this subject, it seems to me that he has offered a rather beautifully symmetrical picture of the alternatives in past practice arbitration problems. At the same time, it appears that much emphasis is upon (1) the extreme, or outer limit, alternatives and (2) a particular middle ground case.

He sets forth, first of all, the boundary line situation where the labor-management agreement is mercifully and completely silent on the issue at arbitration and, at the same time, a definitive past practice of the parties has been fully established. Here, generally, the criterion of past practice will be determinative of the difference between the parties.

Then there is the opposite extreme boundary line circumstance. This, Mr. Aaron points out, occurs when the words of the contract yield a "plain and obvious"—and I would emphasize, *truly* plain and obvious—intent of the parties to the agreement and, moreover, no past practice has been seriously alleged or successfully established. In this case, the award would certainly reflect the fact that there is here no role whatsoever for past practice, nor any need for its consideration.

At these two extreme boundary lines—which we might describe as the "luxury fringes" in arbitration—the course the arbitrator should take is very clear and his task relatively easy.

I think we would all recognize, however, that arbitrators can derive little comfort from the knowledge that these clean-cut extreme

situations exist, for the simple reason that they occur in “real life arbitration” so infrequently. At least this is what my own experience indicates and I strongly suspect yours does, too.

As with other issues in life, things are not packaged in neat boxes that are either wholly black or wholly white—rather, boxes come roughly put together and in varying shades of gray.

It follows that arbitrators must regularly expect to encounter most past practice problems in these inconvenient but commonly occurring “gray” cases, that is, under circumstances which Mr. Aaron describes as “confused factual situations”.

What I call the “gray” cases are confused by a wide range of complications, all of which I am sure are familiar to each of you. There are many opportunities for complication of the past practice situation.

For example:

1. Past practice may be argued by one or both of the parties but prove to be only one element to be considered along with other aspects of the case at hand; here, a problem arises as to what weight is to be given to the past practice aspect of the case, and what weight to the other factors.

2. Past practice may be argued by one party or the other or both but turn out to be uncertainly demonstrated because of insufficient records, or other insufficiencies in the evidence; nevertheless, it is there in the background.

3. Past practice may be cited as pertinent and be conceded to be so by both parties but it may develop that practice has varied under consecutive contracts; further, the pattern of variation may not be consistent in any direction.

4. Instances of past practice may be established but the union may protest their validity because the failure of affected employees to file grievances did not bring the company’s course of action to the union’s attention. How evaluate past practice under these circumstances?

5. Neither party may argue past practice though the evidence suggests practice existed. How active a role should the arbitrator take in searching out the circumstances that actually existed?

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I would suggest that it is primarily this arduous but fertile "gray" field of decision that we need to analyze if we are to discover the actual present status of past practice as a criterion in arbitration. It is a difficult field in which to work. As Mr. Aaron says, it is confused, complex, and annoyingly specific. For these reasons it will prove difficult to distill basic principles out of it. It seems, nonetheless, that this is the path to be taken.

In addition to the boundary line cases Mr. Aaron has suggested, he has given us a past practice example in which the plain meaning of contract terms and established past practice are precisely balanced in contradiction of one another. Perhaps we can look upon this case as the perfect middle-point between the two limiting cases. In any event his seniority-overtime example seems eminently designed to wring the last ounce of torture from the souls of arbitrators.

In general, I lean to the decision that Mr. Aaron indicates in the seniority-overtime case. I subscribe, on the whole, to the principle that the way the parties make their agreements effective is more significant than the bare bones of contract terms. A labor-management agreement is, after all, a living document as well as a document for living. It is certainly properly subject to continuous interpretation of its meaning by the parties that drew it.

However, if I had this case before me for decision I would certainly want to ask, as Mr. Aaron apparently did not, how it originally came about that seniority was applied to overtime work in disregard of the clear restriction in the contract itself.

Now, if it developed that the practice had been initiated by actual discussion and agreement of both parties (even if that agreement were quite informal) I am sure I would have few misgivings in deciding the case, as Mr. Aaron did, on the basis of prevailing practice.

On the other hand, if inquiry showed that the employer had unilaterally applied seniority to overtime assignment—the union standing silent, unconsulted and inactive—I would feel that there would be substantial grounds for reasoning that the employer was well within his rights in terminating such unilateral action, it being in

direct conflict with the clear and specific written agreement of the parties.

Further, I do not believe I could look away from the stark contract term "only" with equanimity for the reasons Mr. Aaron suggests in his paper:

1. If the parties had in fact merely copied the seniority provision of their contract from another contract, I do not see that they could be thereby excused from the obvious consequences of the terms they agreed to.

2. It is the same with the over-zealous or inept contract draftsman argument. We cannot excuse away contract terminology so blithely. If we could, no part of a contract would be safe from this sort of demolition.

3. I am also unmoved, decision-wise, by the suggestion that the crucial word "only" found its place in the contract solely because, in Mr. Aaron's words, "the parties . . . thought they were covering every possible contingency that might arise in the application of the seniority principle, and . . . simply overlooked the problem of assignment of overtime." To me, "only" must be presumed to imply that the parties themselves had visualized circumstances in which the principle of seniority would not be applied, as it was to be applied in promotions, downgrading, layoffs, and transfers.

#### **Duration of an Established Past Practice**

Now a word on the question of the duration of past practice.

If there has been an award supporting past practice as established under a contract, *it seems to me that such an award cannot generally be held to be effective beyond the termination date of the existing contract if one party or the other gives notice of desire to alter the practice.* It appears reasonable to conclude that established past practice, like any contract provision, is potentially terminable when the period of the general agreement runs its course.

Of course, the parties may then find themselves in dispute over the future of the old practice. This merely means, however, that there

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is one additional item of negotiation to be settled before a new industrial relations constitution is ratified.

I may remark parenthetically that I have sometimes asked myself whether an arbitrator, rendering an award based on past practice, is not obligated to comment on the issue of duration of the practice found to be effective. I should be interested in Mr. Aaron's reaction, and your reactions to this question.

### The Wallen Discharge Case

On the principles raised in the Wallen discharge case, I have no disagreement with the author of our paper. Certainly consistency in the application of a principle does not require uniformity of action in all instances. Indeed, uniform treatment in unlike situations would actually imply inconsistency in principle.

As to the crucial issue of the actual fate of employee Wallen, unhappily threatened with at least temporary loss of his economic life, my reaction would be quick, sure and unequivocal. Award—Reinstatement. But I am not quite so certain about full back pay.

### Incidental Observations

In conclusion, a few incidental observations.

It is certainly true that past practice exercises an important influence on arbitration decisions. It makes its appearance in all types of disputes.

For the purpose of this session I looked back through the files of arbitration cases in which I have recently been involved. Judging from this rather quick survey, I would estimate roughly that the issue of past practice is raised, rightly or wrongly, pertinently or impertinently, in one way or another, in about one-third of all cases.

I have the general impression that past practice is appealed to rather more frequently in discipline and discharge cases than in other types.

I also have the impression that past practice is cited least frequently in so-called technical cases, that is in cases dealing with job evaluation, wage incentives and related matters. I have a special

interest in these technical cases since it happens that because of my particular background I encounter them rather frequently.

One might say past practice is most rarely involved in job evaluation decisions. Yet, in a certain sense, it is possible to argue that many job evaluation cases are decided solely on the basis of what amounts to past practice. At least one can make this contention where the arbitrator is required to evaluate jobs, or factors in a job, in accordance with established formal or informal job descriptions, fact definitions, prior evaluations by the parties of other jobs or identical evaluation factors in other jobs.

Past practice may likewise be involved in another type of technical dispute. I recall a case of my own in which the central issue was the proper method of pricing, for purposes of incentive compensation, the cutting of a certain style of women's shoes. Both parties developed their arguments by reference to a collection of shoe part patterns and associated piece prices. The question was, which side was right or more nearly right in light of the past history of pattern-pricing in the plant; that is to say, right according to our old friend "past practice."

*Discussion—*

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In company with Professor Davis, I find little in Mr. Aaron's paper with which to quarrel. I am inclined to share the misgivings just expressed on the facility with which that troublesome word "only" was disposed of in the seniority example. But in general it would appear that Mr. Aaron has displayed the admirable caution of a true arbitrator. He has stated a number of general propositions. He then declares there are exceptions to these rules. His position is thus reasonably well defended.

This characteristic, if I have correctly detected it in Mr. Aaron's remarks, is not a defect, however, since most rules have exceptions, and it is the special case which is most often found in disputes reaching the arbitration stage. It is all very well to declare that the contract

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