

CHAPTER 2

PAST PRACTICE AND THE ADMINISTRATION OF COLLECTIVE BARGAINING AGREEMENTS

RICHARD MITTENTHAL *

At the National Academy meeting in Detroit two years ago, Archibald Cox suggested that before "a rationale of grievance arbitration" can be developed, more work must be done in identifying and analyzing the standards which serve to shape arbitral opinions.¹ This paper is a product of Cox's suggestion. Its purpose is to examine in depth one of the more important standards upon which so many of our decisions are based—past practice.

Custom and practice profoundly influence every area of human activity. Protocol guides the relations between states; etiquette affects an individual's social behavior; habit governs most of our daily actions; and mores help to determine our laws. It is hardly surprising, therefore, to find that past practice in an industrial plant plays a significant role in the administration of the collective agreement. Justice Douglas of the United States Supreme Court recently stated that "the labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the past practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it."²

Past practice is one of the most useful and hence one of the most commonly used aids in resolving grievance disputes. It can help the arbitrator in a variety of ways in interpreting the agreement. It may be used to clarify what is ambiguous, to give substance to

* Attorney and counselor, Detroit, Michigan.

¹ "Reflections upon Labor Arbitration in the Light of the Lincoln Mills Case," *Arbitration and the Law* (Washington: BNA Incorporated, 1959), p. 46.

² *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582, 34 LA 561, 564 (1960).

what is general, and perhaps even to modify or amend what is seemingly unambiguous. It may also, apart from any basis in the agreement, be used to establish a separate, enforceable condition of employment. I will explore each of these functions of past practice in some detail. And I will seek to describe the nature of a practice as well—that is, its principal characteristics, its duration, and so on.

The Nature of a Practice

The facts in a case may be readily ascertainable but the arbitrator then must determine what their significance is, whether they add up to a practice, and if so, what that practice is. These questions confront us whenever the parties base their argument on a claimed practice. They cannot be answered by generalization. For a practice is ordinarily the unique product of a particular plant's history and tradition, of a particular group of employees and supervisors, and of a particular set of circumstances which made it viable in the first place. Thus, in deciding the threshold question of whether a practice exists, we must look to the plant-setting rather than to theories of contract administration.

Although the conception of what constitutes a practice differs from one employer to another and from one union to another, there are certain characteristics which typify most practices. These characteristics have been noted in many arbitration decisions.³ For example, in the steel industry, Sylvester Garrett has lucidly defined a practice in these words:

A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the men involved as the *normal* and *proper* response to the underlying circumstances presented.⁴

³ See, e.g., *Curtis Companies, Inc.*, 29 LA 434 (1957); *Celanese Corp. of America*, 24 LA 168 (1954); *Sheller Mfg. Corp.*, 10 LA 617 (1948).

⁴ Sylvester Garrett, Chairman, Board of Arbitration, U.S. Steel—Steelworkers, Grievance No. NL-453, Docket No. N-146, Jan. 31, 1953. Reported at 2 *Steelworkers Arbitration Bulletin* 1187.

In short, something qualifies as a practice if it is shown to be the understood and accepted way of doing things over an extended period of time.

What qualities must a course of conduct have before it can legitimately be regarded as a practice?

First, there should be *clarity* and *consistency*. A course of conduct which is vague and ambiguous or which has been contradicted as often as it has been followed can hardly qualify as a practice. But where those in the plant invariably respond in the same way to a particular set of conditions, their conduct may very well ripen into a practice.

Second, there should be *longevity* and *repetition*. A period of time has to elapse during which a consistent pattern of behavior emerges. Hence, one or two isolated instances of a certain conduct do not establish a practice. Just how frequently and over how long a period something must be done before it can be characterized as a practice is a matter of good judgment for which no formula can be devised.

Third, there should be *acceptability*. The employees and the supervisors alike must have knowledge of the particular conduct and must regard it as the correct and customary means of handling a situation. Such acceptability may frequently be implied from long acquiescence in a known course of conduct. Where this acquiescence does not exist, that is, where employees have constantly protested a particular course of action through complaints and grievances, it is doubtful that any practice has been created.

One must consider, too, the *underlying circumstances* which give a practice its true dimensions. A practice is no broader than the circumstances out of which it has arisen, although its scope can always be enlarged in the day-to-day administration of the

A similar definition can be found in some judicial opinions.

In *Jarecki Mfg. Co. v. Merriam*, 104 Kan. 646, 180 p. 224 (1919), the court stated:

"Persons are presumed to contract with reference to a custom or usage which pertains to the subject of the contract. To constitute a custom which tacitly attends the obligation of a contract, the habit, mode, or course of dealing in the particular trade, business, or locality must be definite and certain; must be well settled and established; must be uniformly and universally prevalent and observed; must be of general notoriety; and must have been acquiesced in without contention or dispute so long and so continuously that contracting parties either had it in mind or ought to have had in mind, and consequently contracted, or presumptively contracted, with reference to it. . . ."

See also *McComb v. C. A. Swanson & Sons*, 77 Fed. Supp. 716, 734 (1948).

agreement. No meaningful description of a practice can be made without mention of these circumstances. For instance, a work assignment practice which develops on the afternoon and midnight shifts and which is responsive to the peculiar needs of night work cannot be automatically extended to the day shift. The point is that every practice must be carefully related to its origin and purpose.

And, finally, the significance to be attributed to a practice may possibly be affected by whether or not it is supported by *mutuality*. Some practices are the product, either in their inception or in their application, of a joint understanding; others develop from choices made by the employer in the exercise of its managerial discretion without any intention of a future commitment.

Subject Matter

Practices usually relate to some phase of the contractual relationship between the employer and his employees. They may concern such subjects as scheduling, overtime, promotions, and the uses of seniority, all of which are covered to some extent in the typical collective agreement. But practices may also involve extra-contractual considerations—from the giving of Thanksgiving turkeys and Christmas bonuses to the availability of free parking.

Still other practices, although this characterization may be arguable, have more to do with managerial discretion in operating a plant than with the employment relationship. For example, the long-time use of inter-departmental hand trucks for moving material might be regarded as a practice, and the truckers who do this work certainly have an interest in preserving this method of operation. But could it be seriously argued that this practice would prohibit the employer from introducing a conveyor belt to replace the hand trucks? Most agreements provide, usually in a management-rights clause, that methods of manufacture are solely within the employer's discretion.

There may even be practices which have nothing whatever to do with the employment relationship. The long-time assignment of a certain number of foremen to a given department might be viewed by some as a practice, but it could hardly preclude the employer from using fewer foremen. What I am suggesting here

is that the mere existence of a practice, without more, has no real significance. Only if the practice clarifies an imperfectly expressed contractual obligation or lends substance to an indefinitely expressed obligation or creates a completely independent obligation will it have some effect on the parties' relationship.

Because practices may relate to any phase of an employer's business, some parties have seen fit to spell out limitations on the kind of subject matter a practice may cover. In the steel industry, for instance, a practice is referred to as a "local working condition" and it is binding only if it provides "*benefits . . . in excess of or in addition to*" those provided in the agreement.⁵ And in determining what constitutes a "benefit," steel arbitrators have applied an objective rather than a subjective test. Hence, whether the aggrieved employees like or dislike the practice in dispute is irrelevant. The decisive question, instead, is whether an ordinary employee in the same situation would reasonably regard the practice as a substantial benefit in relation to his job. If so, the practice may be an enforceable "local working condition."

The wide variety of possible subjects may make it difficult to decide the exact nature of a practice. Suppose that certain extra work which periodically arises in department X has, as a matter of practice, been performed by X's employees at overtime rates, but that this has always occurred when the entire plant was on a 40-hour week. Suppose too that this kind of practice is enforceable under the agreement. One day this extra work is made available when the plant is on a 32-hour week, and the employer gives the work to employees from other departments as well as from X so as to provide the maximum number of men with 36 hours' work. How is the practice to be described? The union says it is a *work assignment* practice, giving X's employees an exclusive claim to the disputed work whenever it is performed. The employer says it is an *overtime* practice, giving X's employees the disputed work only when it is to be performed at overtime rates.

The problem—the proper scope of the practice—is manifest. Was it intended that the practice apply without limitation to all levels of operation or was it intended that the practice be restricted to the precise situation in which it had previously been applied? Some help in formulating an answer may be found in the *purpose*

⁵ Section 2 B-3 of the *U.S. Steel and United Steelworkers Agreement*.

behind the practice. Hence, if it could be shown that the purpose was to have the work done in department X alone and that it was mere coincidence that the practice had always been applied when the employees were on a 40-hour schedule, the broad interpretation urged by the union would seem to be correct. Absent such a showing, I would think the narrow interpretation would have to be adopted.

We must also be careful to distinguish between a practice and the results of a practice. Assume that a plant has two separate electrical crews, one for existing equipment and the other for new installations, and that overtime on a particular job has always been given to the crew which was actually working that job. Assume too that in implementing this practice over the years there has been a relatively equal distribution of overtime between the crews. From these facts, it cannot be said that equalization of overtime thereby became a practice. The equalization was simply one of the consequences, probably unintended, of applying the overtime assignment practice. If a practice were defined in terms not only of its subject matter but of its consequences as well, it would surely develop a breadth far beyond what was originally intended.

Proof

To allege the existence of a practice is one thing; to prove it is quite another. The allegation is a common one. But my experience indicates that where past practice is disputed, the party relying upon the practice is often unable to establish it. This is not surprising. For the arbitrator in such a dispute is likely to find himself confronted by irreconcilable claims, sharply conflicting testimony, and incomplete information. Harry Shulman expressed our dilemma in these words:

The Union's witnesses remember only the occasions on which the work was done in the manner they urge. Supervision remembers the occasions on which the work was done otherwise. Each remembers details the other does not; each is surprised at the other's perversity; and both forget or omit important circumstances. Rarely is alleged practice clear, detailed, and undisputed; commonly, inquiry into past practice . . . produces immersion in a bog of contradictions, fragments, doubts, and one-sided views. . . .⁶

⁶H. Shulman, *Umpire, Ford Motor Co.-United Automobile Workers*, Opinion A-278, Sept. 4, 1952. Reported at 19 LA 237 (1952).

The arbitrator, abandoned in this kind of maze, is almost certain to decide the grievance on some basis other than past practice. The only means of resolving the confusion, short of credibility findings, is through written records of the disputed events. Such records may be the best possible evidence of what took place in the past. Unfortunately, records of scheduling, work assignments, etc. are seldom maintained for any length of time. And even when available, they may be incomplete or it may be difficult and costly to reduce them to some meaningful form. Considering these problems, it is understandable that practices are most often held to exist where the parties are in substantial agreement as to what the established course of conduct has been.

Functions of Past Practice

Clarifying Ambiguous Language

The danger of ambiguity arises not only from the English language with its immense vocabulary, flexible grammar and loose syntax but also from the nature of the collective bargaining agreement. The agreement is a means of governing "complex, many-sided relations between large numbers of people in a going concern for very substantial periods of time."⁷ It is seldom written with the kind of precision and detail which characterize other legal instruments. Although it covers a great variety of subjects, many of which are quite complicated, it must be simply written so that its terms can be understood by the employees and their supervisors. It is sometimes composed by persons inexperienced in the art of written expression. Issues are often settled by a general formula because the negotiators recognize they could not possibly foresee or provide for the many contingencies which are bound to occur during the life of the agreement.

Indeed, any attempt to anticipate and dispose of problems before they arise would, I suspect, create new areas of disagreement and thus obstruct negotiations. Sooner or later the employer and the union must reach agreement if they wish to avoid the economic waste of a strike or lockout. Because of this pressure, the parties often defer the resolution of their differences—either by

⁷ Cox, "The Legal Nature of Collective Bargaining Agreements," 57 *Mich. L. Rev.*, 1, 22 (1958).

ignoring them or by writing a provision which is so vague and uncertain as to leave the underlying issue open.

These characteristics inevitably cause portions of the agreement to be expressed in ambiguous and general terms. With the passage of time, however, this language may be given a clear and practical construction, either through managerial action which is acquiesced in by the employees (or, conceivably, employee action which is acquiesced in by management) or through the resolution of disputes on a case-by-case basis. This accumulation of plant experience results in the development of practices and procedures of varying degrees of consistency and force.

Those responsible for the administration of the agreement can no more overlook these practices than they can the express provisions of the agreement. For the established way of doing things is usually the contractually correct way of doing things. And what has become a mutually acceptable interpretation of the agreement is likely to remain so. Hence, the full meaning of the agreement may frequently depend upon how it has been applied in the past.

Consider, for example, an agreement which provides for premium pay for "any work over eight hours in a day." An employee works his regular 8 a.m. to 4 p.m. shift on Monday but works from 6 a.m. to 2 p.m. on Tuesday pursuant to a request by supervision. He asks for overtime for his first two hours (6 a.m. to 8 a.m.) on Tuesday. Whether his claim has merit depends upon how you construe the term "day." Did the parties mean a "calendar day" as the employer argues, or did they mean a "work day," that is, a 24-hour period beginning with the time an employee regularly starts work, as the union argues?

It may be possible to resolve this ambiguity through resort to practice. How the parties act under an agreement may be just as important as what they say in it. To borrow a well-known adage, "actions speak louder than words." From the conflict and accommodation which are daily occurrences in plant life, there arises "a context of practices, usages, and rule-of-the-thumb interpretations" which gradually give substance to the ambiguous language of the agreement.⁸ A practice, once developed, is the best evidence of what the language meant to those who wrote it.

⁸ *Eastern Stainless Steel Corp.*, 12 LA 709, 713 (1949).

By relying upon practice, the burden of the decision may be shifted from the arbitrator back to the parties. For to the extent to which the arbitrator adopts the interpretation given by the parties themselves as shown by their acts, he minimizes his own role in the construction process. The real significance of practice as an interpretive aid lies in the fact that the arbitrator is responsive to the values and standards of the parties. A decision based on past practice emphasizes not the personal viewpoint of the arbitrator but rather the parties' own history, what they have found to be proper and agreeable over the years. Because such a decision is bound to reflect the parties' concept of rightness, it is more likely to resolve the underlying dispute and more likely to be acceptable. A solution created from within is always preferable to one which is imposed from without.⁹

Implementing General Contract Language

Practice is also a means of implementing general contract language. In areas which cannot be made specific, the parties are often satisfied to state a general rule and to allow the precise meaning of the rule to develop through the day-to-day administration of the agreement.

For instance, the right to discipline and discharge is usually conditioned upon the existence of "just cause." Similarly, the right to deviate from a contract requirement may be conditioned upon the existence of "circumstances beyond the employer's control." General expressions of this kind are rarely defined. For no definition, however detailed, could anticipate all the possibilities which might take place during the term of the agreement.

But, in time, this kind of general language does tend to become more concrete. As the parties respond to the many different situations confronting them—approving certain principles and procedures, disputing others, and resolving their disputes in the grievance procedure—they find mutually acceptable ways of doing things which serve to guide them in future cases. Instead of re-arguing every matter without regard to their earlier experiences, acceptable principles and procedures are applied again and again.

And thus, practices arise which represent the reasonable expect-

⁹ See Ralph Seward, "Arbitration in the World Today," *The Profession of Labor Arbitration* (Washington: BNA Incorporated, 1957), pp. 72-73.

tations of the parties. These practices provide a sound basis for interpreting and applying general contract language. They can be used to help determine whether a particular condition was actually "beyond the employer's control" or whether a particular employee's behavior was "just cause" for discipline.

Suppose, for example, that tardiness of less than five minutes has always been overlooked but that after it becomes extremely widespread, management disciplines a few employees without any advance notice of its change in policy. In view of this long toleration of tardiness, it is doubtful that there would be "just cause" for discipline. Plant practice thus injects something tangible into the "just cause" provision, giving employees a clear notion of what is acceptable and unacceptable in plant behavior. Of course, once the men are notified that tardiness will no longer be ignored the employer would be free to take reasonable disciplinary action.

Although, as I have just shown, discipline which is completely inconsistent with past practice is likely to lack "just cause," it does not follow that discipline must be perfectly consistent with past practice in order to establish "just cause."

Suppose that fighting in the plant has in the past resulted in disciplinary suspensions of two to five weeks and that those who have been so disciplined were all men with considerable seniority. Then, a recently hired employee starts a fight with no justification whatever and is discharged. The union may argue that because others had received suspensions, the discharge was too severe a penalty. But one must remember that there are degrees of culpability and that discharge is hardly the same penalty when applied to an employee with one year's seniority and to another with twenty years' seniority. The employer should not be precluded from discharging this man merely because on earlier occasions it had good reason to be lenient.

The point is that "it is not the fact of seeming inconsistency in past practice, but the cause of it, that ought to engage the arbitrator's attention."¹⁰ Hence, what seems on the surface to be capricious administration of a disciplinary rule "may prove on closer

¹⁰ Benjamin Aaron, "The Uses of the Past in Arbitration." *Arbitration Today* (Washington: BNA Incorporated, 1955), p. 11. Also found in Reprint No. 50 (Los Angeles: Institute of Industrial Relations, USLA, 1955).

inspection to be a flexible and humane application of a sound principle to essentially different situations." ¹¹

Modifying or Amending Apparently Unambiguous Language

What an agreement says is one thing; how it is carried out may be quite another. A recent study at the University of Illinois revealed that differences between contract provisions and actual practice are not at all unusual.¹² Thus, an arbitrator occasionally finds himself confronted with a situation where an established practice conflicts with a seemingly clear and unambiguous contract provision. Which is to prevail? The answer in many cases has been to disregard the practice and affirm the plain meaning of the contract language.¹³

At the National Academy meeting in 1955, Ben Aaron forcefully argued that sometimes practice should prevail.¹⁴ He posed a hypothetical situation which was based upon this contract provision:

Where skill and physical capacity are substantially equal, seniority shall govern in the following situations only: promotions, downgrading, layoffs, and transfers.

He assumed that the consistent practice for five years immediately preceding the dispute has been to treat seniority as the controlling consideration in the assignment of overtime work and that a grievance has arisen out of the employer's sudden abandonment of that practice. He assumed further that the agreement vests in management the right to direct the working forces, subject only to qualifications or restrictions set forth elsewhere in the agreement, and that the parties have expressly forbidden the arbitrator to add to, subtract from, or modify any provision of the agreement.

The conventional analysis of the problem begins with the proposition that the contract should be construed according to the

¹¹ *Ibid.*

¹² M. Derber, W. E. Chalmers, and R. Stagner, "The Labor Contract: Provision and Practice," *Personnel Magazine* (American Management Assn., Jan-Feb. 1958). Also found in Reprint No. 58 (Institute of Labor & Industrial Relations, Univ. of Illinois, 1958).

¹³ See, e.g., *Sun Rubber Co.*, 28 LA 362, 368 (1957); *Price-Pfister Brass Mfg. Co.*, 25 LA 398, 404 (1955); *Bethlehem Steel Co.*, 21 LA 579, 582 (1953); *Tide Water Oil Co.*, 17 LA 829, 833 (1952). See also the celebrated case of *Western Union Telegraph Co. v. American Communications Assn.*, 299 N. Y. 177, 86 N. E. 2d 162, 12 LA 516 (1949).

¹⁴ Aaron, *supra* note 10, at pp. 3-7.

parties' original intention. And the best evidence of their intention is generally found in the contract itself, that is, in the words which the parties themselves employed to express their intent. If these words are free from ambiguity and if their meaning is plain, there is no need to resort to interpretive aids such as past practice. This reasoning is well established in the law of contracts.¹⁵

In the hypothetical case, the contract asserts that seniority is controlling "in the following situations only: promotions, downgrading, layoffs, and transfers." On its face, this language contains no ambiguity whatever. By using the word "only," a more exclusive term would be hard to imagine, the parties evidently intended seniority to apply in the four situations mentioned but in no others. Hence, pursuant to the plain meaning of this clause, seniority would not govern overtime assignments and any practice to the contrary would have to be ignored.

Aaron, however, says this may be too rigid an approach to the problem because it borrows principles from the law of contracts without giving adequate consideration to the unique characteristics of the collective bargaining contract and the relative flexibility with which even commercial contracts are construed today. He argues persuasively that no matter how clear the language of the collective bargaining contract seems to be, it does not always tell the full story of the parties' intentions.

Suppose, in our hypothetical case, the testimony reveals that the matter of overtime assignments was never considered during the negotiation of the seniority clause—either because the parties overlooked it under the mistaken impression that they had covered all possible contingencies or because the parties concerned themselves only with those situations they had previously experienced. Or suppose the parties simply found this seniority clause in some other agreement and adopted it without discussion. Any-

¹⁵ See the following excerpt from 55 *Am. Jur.* § 31:

"Perhaps the most fundamental of the rules which limit the introduction of a custom or usage . . . is that which denies the admissibility of such evidence where its purpose or effect is to contradict the plain, unambiguous terms . . . expressed in the contract itself or to vary or qualify terms which are free from ambiguity. . . . It [custom or usage] may explain what is ambiguous but it cannot vary or contradict what is manifest or plain. . . . An express written contract embodying in clear and positive terms the intention of the parties cannot be varied by evidence of usage or custom which either expressly or by necessary implication contradicts the terms of such contract."

one familiar with collective bargaining knows this sort of thing does happen. And the contract itself is not usually written by people trained in semantics. It is hardly surprising therefore to find in the typical contract an "inartistic and inaccurate use of words that have a precise and commonly accepted meaning in law."¹⁶ The word "only" in the hypothetical case may merely be attributable to an inexperienced or over-eager draftsman.

Under these assumed circumstances, it cannot confidently be said that the parties intended to exclude overtime assignments from the scope of the seniority clause. Absent any original intention with respect to this problem, Aaron concludes that the long-standing practice of making overtime assignments by seniority should be controlling.

This conclusion appears to be supported by two different rationales. First, the argument seems to be that contract language is no clearer than the underlying intention of the parties.¹⁷ Hence, where it is shown that their intention was uncertain or incomplete, the language cannot be considered truly ambiguous. It follows that past practice is being used not to contradict what is plain but rather to add to what is already a part of the agreement.

Second, the argument is that to adopt the overtime assignment practice "does not alter the agreement but merely takes note of a modification that has already been made either by the parties jointly or by the unilateral action of the employer tacitly approved by the union."¹⁸ The practice, in short, amounts to an amendment of the agreement.

I find much merit in what Aaron says. And there are several reported decisions which indicate his views are shared by others as well.¹⁹ The real question, however, is whether as serious a matter as the modification of clear contract language can be based on practice alone. Some arbitrators have held, I think with good reason, that practice should prevail only if the proofs are sufficiently strong to warrant saying there was in effect *mutual*

¹⁶ Aaron, *supra* note 10, at p. 5.

¹⁷ As Judge Cardozo put it, "few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension."

¹⁸ Aaron, *supra* note 10, at p. 6.

¹⁹ See, e.g., *Metropolitan Coach Lines*, 27 LA 376, 383 (1956); *Smith Display Service*, 17 LA 524, 526 (1951).

agreement to the modification.²⁰ The parties must, to use the words in one decision, "have evinced a positive acceptance or endorsement" of the practice.²¹ Thus, I believe that the modification is justified not by practice but rather by the parties' agreement, the existence of which may possibly be inferred from a clear and consistent practice.

None of this reasoning is radical. The notion that the collective bargaining contract is a "living document" has already won wide acceptance. Those responsible for a contract are free to change it at any time by adding an entirely new provision, by rewriting an existing clause, or by reinterpreting some section to give it a meaning other than that which was originally intended. Grievance settlements often result in "understandings that are as durable, or more so, than the actual terms of the labor contract. . . ."²²

If a contract is susceptible to change in these ways, why shouldn't it be equally susceptible to change by reason of practice, at least where the practice represents the joint understanding of the parties? After all, the only ground for recognizing the modification or amendment of a contract is some mutual agreement. And it can be strongly argued that the *form* the agreement takes is not important. Whether it be a formal writing, an oral understanding, or a long-standing practice, so long as each is supported by mutuality, the parties have indeed chosen to change their contract.

It is also worth emphasizing that Aaron's hypothetical case just illustrates a situation where practice conflicts with the apparent meaning of a seemingly unambiguous provision. But what of a situation where practice conflicts with the real meaning of a truly unambiguous provision?

Suppose, for instance, that a contract says "seniority shall not govern the assignment of overtime work," that the parties meant

²⁰ See, e.g., *National Lead Co.*, 28 LA 470, 474 (1957); *Gibson Refrigerator Co.*, 17 LA 313, 318 (1951); *Texas-New Mexico Pipe Line Co.*, 17 LA 90, 91 (1951); *Merrill-Stevens Dry Dock & Repair Co.*, 10 LA 562, 563 (1948); *Pittsburgh Plate Glass Co.*, 8 LA 317, 332 (1947). For still another viewpoint, see Pearce Davis' comments on Aaron's hypothetical case. He stated he too would consider the overtime assignment practice to be enforceable but only if it were established "that the practice had been initiated by actual discussion and agreement of both parties." *Supra* note 10, at p. 15.

²¹ *Bethlehem Steel Co.*, 13 LA 556, 560 (1949).

²² George Taylor, "Effectuating the Labor Contract through Arbitration," *The Profession of Labor Arbitration* (Washington: BNA Incorporated, 1957), pp. 20-21.

to restrict the application of seniority, that a practice of distributing overtime according to seniority later developed, and that this practice was not initiated until the union had stated in discussions with the employer that it approved of this means of distributing overtime. On these facts, would the employer's unilateral discontinuance of the practice constitute a contract violation?

Applying the rationale stated in Aaron's paper, I would find no violation on the ground that practice can be decisive only if there is some uncertainty, however slight, with respect to the parties' original intention. My hypothetical case contains no such uncertainty, the parties' intention being perfectly obvious. Yet, if the "living document" notion is carried to its logical conclusion, a violation may exist on the ground that the practice, being a product of joint determination, amounts to an amendment of the contract and that thereafter the practice could only be changed by mutual agreement.

Some may complain that the contract is so clear and compelling here that no room is left for consideration of past practice. However, as Williston has explained in his famous treatise on contracts, "if the meaning of the contract is plain, the acts of the parties cannot prove an interpretation contrary to the plain meaning" but nevertheless "such conduct of the parties . . . may be evidence of a subsequent modification of their contract."²³

As a Separate, Enforceable Condition of Employment

Past practice may serve to clarify, implement, and even amend contract language. But these are not its only functions. Sometimes an established practice is regarded as a distinct and binding condition of employment, one which cannot be changed without the mutual consent of the parties. Its binding quality may arise either from a contract provision which specifically requires the continuance of existing practices or, absent such a provision, from the theory that long-standing practices which have been accepted by the parties become an integral part of the agreement with just as much force as any of its written provisions.

There are different kinds of contract provisions regarding past practice. Some merely state that practices shall govern one small

²³ 3 Williston, *Contracts* (rev. ed., 1936), § 623.

phase of the employment relationship. For instance, "bidding on job vacancies shall be in accordance with past practice." Others broadly embrace practices with little or no qualification. For instance, "all practices and conditions not specified in this contract shall remain the same for the duration of the contract."²⁴ Still others require that practices be continued during the term of the agreement but allow management to change or eliminate a practice upon the occurrence of certain stated conditions.

No discussion of this subject would be complete without some mention of the experiences of the basic steel industry. The typical steel agreement provides that "any local working conditions in effect which have existed regularly over a period of time under the applicable circumstances . . . shall remain in effect for the term of this Agreement. . . ."²⁵ In this way, there has been incorporated into the steel agreements a wide variety of practices affecting wages, crew sizes, relief time, work assignments, and many other matters.²⁶

The "local working conditions" clause is thus the source of important rights and obligations, many of which are somewhat obscured by the bustle of daily plant operations. It is this uncertainty as to the nature and extent of the commitment which seems most disturbing to steel management. However, a "local working condition" is not by nature unalterable. It may be changed or eliminated *either* by mutual agreement *or* by the employer if it can establish (1) that it has through the exercise of managerial discretion changed or eliminated "the basis for the existence of the local working condition" and (2) that a reasonable causal relationship exists between the change in the basis for the working condition and the change in the working condition itself.

The steel agreements thus seek to balance the employee's interest in preserving benefits which derive from established prac-

²⁴ See Gerard Reilly, "Labor Law for Practitioners," *Labor Law Journal*, p. 23, (CCH, Jan. 1957) for the attitude of many management attorneys to clauses of this kind.

²⁵ The contract language quoted in this paragraph and in the following footnote can be found in Section 2B of the *U.S. Steel and United Steelworkers Agreement* and Article One, Section 3 of the *Republic Steel and United Steelworkers Agreement*.

²⁶ "Local working conditions" are defined in the steel agreements as "specific practices or customs which reflect detailed application of the subject matter within the scope of wages, hours of work, or other conditions of employment and includes local agreements, written or oral, on such matters."

tices and the manager's interest in being able to alter practices to suit changing industrial circumstances and thereby enhance efficiency. The "local working conditions" clause is, in short, a compromise between stability on the one hand and flexibility on the other.

I would like to illustrate the application of this clause with a hypothetical case. Suppose that certain mill equipment has been run by five men for many years, that this arrangement was originally based upon supervision's evaluation of the amount of work involved, and that the five-man crew has come to be recognized as a "local working condition." If technological improvements are made in the equipment and if these improvements substantially decrease the crew's workload, it has been held that the employer will have changed "the basis for the existence of the local working condition." Hence, it will be free to change the "local working condition" itself, that is, to reduce the crew size. The only proviso is that a reasonable "cause-effect" relationship exist between the change in the basis for the practice and the change in the practice itself.

However, even without technological improvements, the employer may be confident that the operation can be adequately performed with four men instead of five by reassigning duties among the crew members or by eliminating some of their idle time. Or the employer may belatedly discover that the original supervisory estimates of the work involved were completely wrong and that the crew should never have been larger than four men. But these circumstances, it has been held, do not change "the basis for the existence of the local working condition" and hence do not justify a reduction in crew sizes. Such a reduction must almost be based upon some technological advance, either in equipment or in manufacturing processes.

A "local working condition," in other words, need not yield to greater efficiency alone. Furthermore, the "local working conditions" clause places a premium on prompt and careful judgment in any area affecting conditions of employment. Where, for instance, an improved manufacturing process warrants a crew reduction but management fails to take any action, its failure may ultimately result in a new "local working condition" which will saddle the operation with the old crew. Thus, an employer is

forced to live with an error or a mistake in judgment once it becomes embedded in a "local working condition."

To this extent, the clause may prevent management from realizing optimum efficiency, but management must bear some of the responsibility for this result. This hypothetical case indicates the kind of problems which may arise in the administration of a past practice provision.

Most agreements, however, say nothing about management having to maintain existing conditions. They ordinarily do not even mention the subject of past practice. The question then is whether, apart from any basis in the agreement, an established practice can nevertheless be considered a binding condition of employment. The answer, I think, depends upon one's conception of the collective bargaining agreement. To use Harry Shulman's words, "is the agreement an exclusive statement of rights and privileges or does it subsume continuation of existing conditions?"²⁷

Employers tend to argue that the only restrictions placed upon management are those contained in the agreement and that in all other respects management is free to act in whatever way it sees fit. Or to put the argument in the more familiar "reserved rights" terminology, management continues to have the rights it customarily possessed and which it has not surrendered through collective bargaining. If an agreement does not require the continuance of existing conditions, a practice, being merely an extra-contractual consideration, would have no binding force regardless of how well-established it may be. It follows that management may change or eliminate the practice without the union's consent.

Unions take an entirely different view of the problem. They emphasize the unique qualities of the collective bargaining agreement and the background against which the agreement was negotiated, particularly those practices which have come to be accepted by employees and supervisors alike and have thus become an important part of the working environment. The agreement is executed in the light of this working environment and on the assumption that existing practices will remain in effect. There-

²⁷ "Reason, Contract and Law in Labor Relations," 68 *Harv. L. Rev.* 999, 1011 (1955). Reprinted in *Management Rights and the Arbitration Process* (Washington: BNA Incorporated, 1956), p. 169.

fore, to the extent that these practices are unchallenged during negotiations, the parties must be held to have adopted them and made them a part of their agreement.²⁸

Many arbitrators have, at some time in their careers, been confronted by these arguments. Some have held that the agreement is the exclusive source of rights and privileges;²⁹ others have held that the agreement may subsume continuation of existing conditions.³⁰ The latter is the more prevalent view. Those who follow it have prohibited employers from unilaterally changing or eliminating practices with regard to efficiency bonus plans,³¹ paid lunch periods,³² wash-up periods on company time,³³ maternity leaves of absence,³⁴ free milk,³⁵ and home electricity at nominal rates.³⁶

The reasoning behind these decisions begins with the proposition that the parties have not set down on paper the whole of their agreement. "One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages."³⁷

Thus, the union-management contract includes not just the written provisions stated therein but also the understandings and mutually acceptable practices which have developed over the years. Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain. Hence, if a particular practice is not repudiated during negotiations, it may fairly be said that the contract was

²⁸ See "Management's Reserved Rights: A Labor View," *Management Rights and the Arbitration Process* (Washington: BNA Incorporated, 1956), pp. 118, 126.

²⁹ See, e.g., *National Distillers Products Corp.*, 24 LA 500 (1953); *Donaldson Co., Inc.*, 20 LA 826 (1953); *New York Trap Rock Corp.*, 19 LA 421 (1952); *Byerlite Corp.*, 12 LA 641 (1949); *M. T. Stevens & Sons Co.*, 7 LA 585 (1947).

³⁰ See, e.g., *Fruehauf Trailer Co.*, 29 LA 372 (1957); *Morris P. Kirk & Son, Inc.*, 27 LA 6 (1956); *E. W. Bliss Co.*, 24 LA 614 (1955); *Phillips Petroleum Co.*, 24 LA 191 (1955); *Northland Greyhound Lines, Inc.*, 23 LA 277 (1954); *International Harvester Co.*, 20 LA 276 (1953); *American Seating Co.*, 16 LA 115 (1951); *California Cotton Mills Co.*, 14 LA 377 (1950); *Franklin Assn. of Chicago*, 7 LA 614 (1947).

³¹ *Libby, McNeill & Libby*, 5 LA 564 (1946); *Pullman-Standard Car Mfg. Co.*, 2 LA 509 (1945).

³² *E. W. Bliss Co.*, 24 LA 614 (1955).

³³ *International Harvester Co.*, 20 LA 276 (1953).

³⁴ *Northland Greyhound Lines, Inc.*, 23 LA 277 (1954).

³⁵ *Ryan Aeronautical Co.*, 17 LA 395 (1951).

³⁶ *Phillips Petroleum Co.*, 24 LA 191 (1955).

³⁷ Archibald Cox, "Reflections Upon Labor Arbitration," 72 *Harv. L. Rev.* 1482, 1499 (1959).

entered into upon the assumption that this practice would continue in force. By their silence, the parties have given assent to "existing modes of procedure."³⁸ In this way, practices may *by implication* become an integral part of the contract.³⁹

Cox not only agrees with this view but states the argument more strongly. In asserting that the words of the contract cannot be the exclusive source of rights and duties, he emphasizes the following point:

Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.⁴⁰

The common law of the shop would include, at the very least, long-standing practices in the plant.

None of this is incompatible with ordinary contract law. Williston says that a usage, in our jargon a practice, is admissible "for the purpose of adding a new element or term or incident, whichever one is pleased to call it, to the expressed terms of the contract" and that "it may be shown that a matter concerning which

³⁸ In this connection, note the analysis made by Douglass V. Brown in "Management Rights and the Collective Agreement," *Proceedings of the First Annual Meeting of the Industrial Relations Research Association*, pp. 145-155 (IRRA, 1949). Brown expressed his argument in these words:

"But when all of the provisions are written, it will be found that many matters which affect conditions of employment are not specifically referred to. Does this mean that these matters are of no concern to the parties, or that the agreement has no meaning with respect to them? I think not. On some of these matters, the parties are satisfied with existing modes of procedure, consciously or unconsciously. On others, one party or the other may be dissatisfied but may be unable to devise better modes. On still others, one party may have preferred an alternative but may have been unable to secure agreement from the other party, or may have been unwilling to pay the price necessary for acceptance. In any event, the omission of specific reference is significant.

". . . The agreement, no matter how short, does provide a guide to modes of procedure and to the rights of the parties on *all* matters affecting the conditions of employment. Where explicit provisions are made, the question is relatively simple. But even where the agreement is silent, the parties have, by their silence, given assent to a continuation of the existing modes of procedure."

³⁹ This implication of course would not be possible if it conflicted with the express language of the contract. For example, if a contract said "the written provisions constitute the entire agreement of the parties," it would be difficult to imply that the parties meant to make practices a part of their contract.

⁴⁰ Cox, *supra* note 37.

the written contract is silent, is affected by a usage with which both parties are chargeable.”⁴¹

Indeed, some courts have decided that when an employee is hired or an agent appointed, the nature of his duties and his compensation as well may not be stated but may nevertheless be fixed by what is customary and reasonable.⁴² In one case, a practice between railroads and their employees was held admissible to establish an implied agreement to pay time and one-half for overtime work.⁴³

But this theory, insofar as it relates to the collective bargaining agreement, is open to criticism. To repeat, the majority view is that established practices which were in existence when the agreement was negotiated and which were not discussed during negotiations are binding upon the parties and must be continued for the life of the agreement. This is said to be an implied condition of the agreement. In the courts, implications of this kind are “based on morality, common understanding, social policy, and legal duty expressed in tort or quasi-contract.”⁴⁴

These considerations, however, are not much help to arbitrators. If we are the servants of the parties alone and not the public, I doubt that “social policy” would be a sound basis for drawing an implication. If our job is to seek out the parties’ values and not to impose others’ values upon them, I doubt that “morality” would provide the basis for an implication. If our powers arise from the parties’ agreement and not from the labor laws, I doubt that a “legal duty” found in such legislation would be relevant.

Consider, for instance, the legal duty to bargain under the Labor-Management Relations Act. Apart from the question of whether we may enforce that duty, the real issue is “whether the practice may be changed without mutual consent when bargaining has failed to achieve consent.”⁴⁵ Thus, the arbitrator’s power

⁴¹ Williston, *supra* note 23, at § 652.

⁴² See *Venembury v. Duffey*, 177 Ark. 663, 7 S.W. 2d 336 (1928) (broker’s commission fixed by practice); *Voell v. Klein*, 184 Wis. 620, 200 N.W. 364 (1924) (authority of sales agent to accept used car as part payment for new one held established by practice of automobile dealers).

⁴³ *McGuire v. Interurban Ry.*, 99 Ia. 203, 200 N.W. 55 (1924).

⁴⁴ Shulman, *supra* note 27, at pp. 1011-1013. The analysis made in this paragraph is based upon Shulman’s paper.

⁴⁵ *Ibid.*

to establish implied conditions derives not from the superior authority of the law but rather from the parties' will, from their "common understanding." He may find implications which "may reasonably be inferred from some term of the agreement"⁴⁶ or even from the agreement as a whole.

The implication here that existing practices must be continued until changed by mutual consent is drawn from the nature of the agreement itself and from the collective bargaining process. It would be justified, I am sure, wherever there is a real or tacit understanding during negotiations that existing practices would be continued. While such an understanding may exist in some relationships, I think Shulman is probably correct in concluding that:

It is more than doubtful that there is any general understanding among employers and unions as to the viability of existing practices during the term of a collective agreement. . . . I venture to guess that in many enterprises the execution of a collective agreement would be blocked if it were insisted that it contain a broad provision that 'all existing practices, except as modified by this agreement, shall be continued for the life thereof, unless changed by mutual consent.' And I suppose that execution would also be blocked if the converse provision were demanded, namely, that 'the employer shall be free to change any existing practice except as he is restricted by the terms of this agreement.' The reasons for the block would be, of course, the great uncertainty as to the nature and extent of the commitment, and the relentless search for cost-saving changes. . . .⁴⁷

It is one thing to say, as Shulman suggests, that the implication is warranted where the evidence indicates that the parties had a "common understanding" to continue existing practices; it is quite another to say, as the majority suggest, that the implication is warranted because it may be assumed, unless otherwise stated in negotiations, that the parties had such a "common understanding."⁴⁸ The difference in viewpoints is clear. Shulman wants some proof of what the majority ordinarily assumes.

Shulman's approach places a heavy burden on anyone who

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Or to take this one step further, as Cox suggests, it may be assumed, *unless otherwise stated in the agreement*, that the parties had such a "common understanding." Cox, *supra* note 37.

claims that a practice is a binding condition of employment. Think of the difficulty one might encounter in trying to establish that the unstated assumption of the negotiators on both sides of the table was to continue existing practices. The majority approach, on the other hand, comes close to engrafting a "past practice" clause onto the typical collective agreement without regard to the actual assumptions of the negotiators. Their silence at the bargaining table is presumed to constitute assent to existing conditions, whether they thought of this or not.

There are other possibilities too. We may find that the parties had no "common understanding" to continue practices in general but did have a "common understanding" to continue a particular practice. Much of this discussion has related to practices in general. Yet, an arbitration case rarely poses so broad a problem. We are usually asked to decide only whether a specific practice, say, a paid lunch period, must be continued in effect. Where possible, the answer should be as narrow as the question. To the extent to which the answer goes further and seeks to determine whether the agreement subsumes the continuation of existing conditions, the arbitrator risks deciding far more than the parties want him to decide. The dangers are magnified too by the fact that the arbitrator is not likely to elicit a clear picture of the assumptions upon which the agreement was negotiated.

Still another problem exists. Those of us who accept the principle that an agreement may require the continuance of existing practices recognize that this principle cannot be allowed to freeze *all* existing conditions. For instance, the long-time use of hand-controlled grinding machines could hardly be regarded as a practice prohibiting the introduction of automatic grinding machines. Or the long-time use of pastel colors in painting plant interiors could not preclude management from changing to a different color scheme. Plainly, not all practices can be considered binding conditions of employment.

Thus, while we are willing to imply that practices are a part of the agreement, we are apprehensive of the breadth of the implication. What seems correct from a theoretical point of view does not always make sense from a practical point of view. Arbitrators, accordingly, have accepted the implication but sought to limit it to just certain kinds of practices. The difficulty is to

determine what kind of rational line, if any, can be drawn between those practices which may be incorporated into the agreement and those which may not.

Some decisions enforce only those practices concerning "major" conditions of employment as contrasted to "minor" conditions.⁴⁹ But the test seems inadequate for several reasons. To begin with, it is vague and inexact. What is major to one group of employees may be minor to all the others; what is major from the standpoint of morale may be minor from the standpoint of earnings and job security. There is no logical basis for distinguishing between major and minor conditions, unless the arbitrator is to concern himself only with serious violations of the agreement.

More important, this kind of test encourages arbitrators "to commence their thinking with what they consider a desirable decision and then work backward to appropriate premises, devising syllogisms to justify that decision. . . ."⁵⁰ That is, if an arbitrator decides to enforce the practice he calls it a major condition, and if he decides otherwise he calls it a minor condition. To this extent, the test provides us with a rationalization rather than a reason for our ruling.

The Elkouris have suggested a comparable test.⁵¹ They would enforce only those practices which involve "employee benefits"; they would not prohibit changes in practices which involve "basic management functions." This test, however, is no more convincing than the major-minor test. It suffers from the same defects. It too encourages the arbitrator to work backwards from his decision, thus providing him with a rationalization rather than a reason for his ruling. To enforce a practice all he need

⁴⁹ See, e.g., *Pan Am Southern Corp.*, 25 LA 611, 613 (1955); *Phillips Petroleum Co.*, 24 LA 191, 194 (1955); *Continental Baking Co.*, 20 LA 309, 311 (1953); *General Aniline & Film Corp.*, 19 LA 628, 629 (1952). Cox and John Dunlop, in an article dealing with national labor policy, urged that "a collective bargaining agreement should be deemed, unless a contrary intention is manifest, to carry forward for its term the major terms and conditions of employment, not covered by the agreement, which prevailed when the agreement was executed." See "The Duty to Bargain Collectively During the Term of an Existing Agreement," 63 *Harv. L. Rev.* 1097, 1116-1117 (1950).

⁵⁰ Jerome Frank, "Experimental Jurisprudence and the New Deal," 78 *Cong. Rec.* 12412, 12413 (1934).

⁵¹ Elkouri & Elkouri, *How Arbitration Works* (Washington: BNA Incorporated, 1960), pp. 274-275.

say is that it concerns employee benefits. But the fact is that most practices which create such benefits are likely to impinge upon some basic management function.

Consider a situation where the employer wishes to reduce a long-established crew-size based upon a recent engineering survey of his plant. How is the crew-size practice to be characterized? It involves the direction of the working force and the determination of methods of operation, which are customary management functions, but it also involves the job security of one or more members of the crew, a very real employee benefit. In the closer cases, this test provides no satisfactory guidance. Besides, it seems to me that if the parties have in effect agreed to the continuation of a particular practice, it should be binding regardless of its subject matter.

A few decisions enforce the practice if it involves a "working condition" rather than a "gift" or a "gratuity."⁵² This distinction is meaningful only in that class of cases which concern employee bonuses or other extra-contractual employee compensation. Apart from its limited applicability, however, this test does suggest that what is important here is not the subject matter of the practice but rather the extent to which the practice is founded upon the agreement of the parties.

A better test, I think, is suggested by what Shulman said in a decision⁵³ he made as umpire under the Ford-UAW agreement, an agreement which did not require the continuance of existing practices. He urged that the controlling question in this kind of case is whether or not the practice was supported by "mutual agreement." He explained his position in these words:

A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based.

But there are other practices which are not the result of joint

⁵² See *Fawick Airflex Co.*, 11 LA 666, 668-669 (1948).

Bonuses were held to be an integral part of the wage structure in the following cases: *Nazareth Mills, Inc.*, 22 LA 808 (1954); *Felsway Shoe Corp.*, 17 LA 505 (1951). Bonuses were held to be gratuities in the following cases: *American Lava Corp.*, 32 LA 395 (1959); *Rockwell-Standard Corp.*, 32 LA 388 (1959); *Bassick Co.*, 26 LA 627 (1956).

⁵³ Shulman, *supra* note 6.

determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion, such practices are, in the absence of contractual provisions to the contrary, subject to change in the same discretion. . . . But there is no requirement of mutual agreement as a condition precedent to a change of a practice of this character.

A contrary holding would place past practice on a par with written agreement and create the anomaly that, while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice.⁵⁴

Under this test, only a practice which is supported by the mutual agreement of the parties would be enforceable. Such a practice would be binding, regardless of how minor it may be and regardless of the extent to which it may affect a traditional function. Absent this mutuality, however, the practice would be subject to change in management's discretion.

Although this seems a sound way of distinguishing between enforceable and non-enforceable practices, one might understandably ask what constitutes "mutual agreement." Is it necessary to establish an express understanding or is it sufficient to show that the practice is of such long standing that the parties may properly be assumed to have agreed to its continuance? In other words, to what extent may the required "mutuality" be implied from the parties' actions or from their mere acquiescence in a given course of conduct?

Even the Shulman test does not provide us with a complete answer to this extremely vexing problem. I suspect that we would be far more likely to infer "mutuality" in a practice concerning "employee benefits" than in one concerning "basic management functions." To this extent, Shulman and the Elkouris may well have something in common.

⁵⁴ *Ibid.* See also *International Harvester Co.*, 20 LA 276 (1953).

Duration and Termination of a Practice

Once the parties become bound by a practice, they may wonder how long it will be binding and how it can be terminated.

Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For, as I explained earlier in this paper, if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

The inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.

Consider next a well-established practice which serves to clarify some ambiguity in the agreement. Because the practice is essential to an understanding of the ambiguous provision, it becomes in effect a part of that provision. As such, it will be binding for the life of the agreement. And the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant. For the repudiation alone would not change the meaning of the ambiguous provision and hence would not detract from the effectiveness of the practice.

It is a well-settled principle that where past practice has established a meaning for language that is subsequently used in an agreement, the language will be presumed to have the meaning given it by practice. Thus, this kind of practice can only be terminated by mutual agreement, that is, by the parties rewriting the ambiguous provision to supersede the practice, by eliminating the provision entirely, etc.

Consider finally the effect of changing circumstances on the

viability of a practice during the contract term. Where the conditions which gave rise to a practice no longer exist, the employer is not obliged to continue to apply the practice. Suppose, for instance, that crane operators who handle extremely hot materials have for years been given a certain amount of relief time during their shift and that after installing an air-conditioning unit in one of the crane cabs the employer refuses to give any more relief time to the operator of that crane. Whether the employer's action is justifiable depends upon the reason behind the relief time practice.

If relief was given because of the extreme heat alone, there would be good reason for denying any relief to the operator in the air-conditioned cab. The circumstances underlying the practice would no longer be pertinent to this particular crane-man. If, on the other hand, relief was given because of the high degree of concentration and care demanded in running these cranes there would be good reason to continue relief time for this crane-man. The circumstances underlying the practice would still be relevant to his situation, even though he now has the benefit of air-conditioning.

In other words, a practice must be carefully related to the conditions from which it arose. Whenever those conditions substantially change, the practice may be subject to termination.

Conclusion

Through past practice, the arbitrator learns something of the values and standards of the parties and thus gains added insight into the nature of their contractual rights and obligations. Practices tend to disclose the reasonable expectations of the employees and managers alike. And as long as our decision is made within the bounds of these expectations, it has a better chance of being understood and accepted.

The ideas expressed in this paper may be useful as a general guide to the uses of past practice in administering the collective agreement. They do not provide an easy formula for resolving disputes; they are no substitute for a thorough and painstaking analysis of the facts. In the problem areas of past practice, there are so many fine distinctions that the final decision in a case will

rest not on any abstract theorizing but rather on the arbitrator's view of the peculiar circumstances of that case.

No matter how successful we may be in systematizing the standards which shape arbitral opinions, we must recognize that considerable room must be left for "art and intuition,"⁵⁵ for good judgment. Perhaps an IBM computer may someday be able to write this kind of paper, but I doubt that it will ever be able to exhibit the kind of good judgment arbitrators have shown in answering complex grievance disputes.

Discussion——

ALEX ELSON*

Richard Mittenthal's scholarly and well reasoned paper represents a solid contribution to an understanding of the decisional process underlying arbitrators' awards. But for the charge that would certainly be levelled against me of dereliction of duty, I would be strongly tempted to say, "I concur," and spare you hearing from me further. Past practice dictates otherwise and this Academy, as Mittenthal ably demonstrates, respects past practices. Moreover, even if the Academy's past practice were otherwise, the clear and unambiguous direction of Ben Aaron leaves me no alternative. And so I shall add some random thoughts to this important subject, and some questions.

A cursory review of published arbitrators' opinions shows that the past practice concept has been extensively used by arbitrators. It is a concept which has obvious appeal. It lights up the way in the trying hours when we grope for the right answer to a difficult problem. "What is past is prologue," and the actors in the prologue are the parties. Thus, the intrusion of the arbitrator into the delicately balanced relationship of the parties is softened by reliance on the parties' own conduct. The resulting award has presumptive acceptability since it is based on the parties' own standards and values.

Because the past practice concept is so attractive it has come to serve as an umbrella for a great variety of problems. As Mittenthal points out, it is used to sanction practices of long standing

⁵⁵ Cox, *supra* note 37, at p. 1500.

* Attorney, Elson, Lassers and Wolff, Chicago, Illinois.

not referred to in the agreement, to implement general contract language, to interpret ambiguous provisions of the agreement, and to modify even unambiguous terms of the agreement. What stands out in arbitrators' awards is that the term "past practice" is in fact a merger of a variety of concepts, all of which have their analogy in the law. These include reliance on custom or usage, the application of at least one facet of the parol evidence rule, that parol evidence is inadmissible to vary the terms of an agreement that are clear and unambiguous but may be availed of when ambiguity exists, and something akin to the doctrines of contemporaneous construction, laches and estoppel.

One comes away from reading the awards with the conviction that past practice sometimes covers loose thinking, and I do not spare my own awards in coming to this conclusion. There are few problems in situations involving straight application of custom or usage. These are the classic cases for the application of past practice—to give to the words of an agreement the special meaning that these words have come to have in a plant or industry over the years, or to give effect to long standing practices not in conflict with any language of the agreement, or to implement general contract language.

Problems do arise from the application of the parol evidence rule that past practice cannot be relied on as an interpretative aid when the language is clear and unambiguous, but that it may be when ambiguity exists. I have serious question whether in most situations the parol evidence rule has any substantial relevance to the collective agreement.

To begin with, the collective agreement, unlike the typical business contract, relates to an ongoing relationship of indefinite duration, which in most cases attempts to cover most problems that are likely to arise, and in no case succeeds in the attempt. Day in and day out, it is subjected to constant testing and interpretation. The parties who daily administer the contract are not necessarily the parties who made or signed the agreement, and in most plants authority to administer is diffused and spread among various persons in the management and union hierarchies. Harry Shulman's apt description of the collective agreement as a treaty comes closest to any legal analogy.

In the typical contract interpretation dispute which gets into court, the parol evidence usually relates to conversations or memoranda relating to the making of the agreement. There is usually no course of conduct antecedent to the making of the agreement involving an ongoing contractual relationship, nothing comparable to what we would usually term past practice.

One reason we may give expression to the parol evidence rule is its obvious ease of application. On the basis of the rule, with relatively few exceptions, we exclude evidence of the parties' own conduct, however long standing, when the agreement is presumably unambiguous. This is the crux of the problem which gives rise to the controversial position advanced by Ben Aaron before this Academy in 1955 and evaluated and discussed by Mittenthal today.

Would the result be different, if instead of thinking in parol evidence terms we relied on the conduct of the parties as their contemporaneous construction of the contract? The fact is that what we refer to as past practice represents the day-to-day interpretation of the agreement by the agents of the parties vested with authority to administer the collective agreement. This type of contemporaneous construction is given great weight by the courts in passing on the interpretation of statutes by administrative agencies. Moreover, in the development of the law of contracts, one discerns a definite trend in the courts to regard the conduct of the parties as determinative. Mittenthal has already quoted a portion of the rule stated by Williston to the effect that the conduct of the parties may be evidence of a subsequent modification of their contract. The entire section reads as follows:

The interpretation given by the parties to the contract as shown by their acts will be adopted by the court and to this end not only the acts but the declarations of the parties may be considered. But if the meaning of the contract is plain, the acts of the parties cannot prove an interpretation contrary to the plain meaning. Such conduct of the parties, however, may be evidence of a subsequent modification of their contract.¹

Section 235 (e) of the *Restatement of the Law of Contracts* restates the same principle, somewhat more strongly, as follows:

If the conduct of the parties subsequent to a manifestation of in-

¹ Williston, *Contracts*, revised edition, 1936, sec. 623.

tion indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation.

There are numerous court decisions which accept this principle. *Matanuska Valley Farmers Coop. Ass'n. v. Monaghan*, 188 F. 2d, 906, C.A. 9 (1951) illustrates the doctrine. There, the contract specifically provided for two methods of payment to producers. Subsequent to the making of the contract and without any written agreement, the cooperative used a completely different method of payment to pay the producers. The Court upheld this third method of payment and stated:

Since the parties to the contract have in fact followed this method of payment from the outset and have made no attempt to conform to the provisions of paragraph 7, they must be deemed to have modified the written contract by mutual agreement. It is well established that parties to a contract can, by mutual agreement, modify or rescind a contract and adopt in its stead a new agreement. An agreement to change the terms of a contract may be shown by the conduct of the parties, as well as by evidence of an explicit agreement to modify.²

If we were to follow the principle so enunciated, it should make little difference whether the provisions of the agreements to be interpreted and applied are unambiguous. I do not presently advocate taking this position, but I believe it deserves serious inquiry and consideration.

There is time only to mention a few of the factors involved which require probing. The collective agreement, insofar as the union members are concerned, is made for and on behalf of not only the union but all persons represented by it for collective bargaining purposes. The union, as the duly authorized collective bargaining representative, enters into the agreement. It acts through its duly authorized officials in accordance with its constitution. Frequently, although not always, there is ratification by the membership as a condition of the making of the agreement. In the face of this structured method of making agreements, can we sanction modifications not so made which are in effect the

² As authority the Court cites *Cf. 3 Williston on Contracts*, sec. 623, n. 6, 1936, ed.; *Restatement Contracts*, sec. 408 (1932); *Whitehurst v. FCX Fruit & Vegetable Service*, 1944, 224 N.C. 628, 32 S.E. 2d 34, 39; *City Messenger & Delivery Co. v. Postal Telegraph Co.*, 1915, 74 Or. 433, 145, p. 657; *Saul v. McIntyre*, 1948, 190 Md. 31. 57 A. 2d 272, 274; *Margolys v. Mollenick*, Sup. Ct. N.Y., 1906, N.Y.S. 849.

results of action or inaction by the union officials charged with administering the agreement?

But here again an inconsistency emerges. We have, in numerous cases, given weight to the conduct of the parties in the interpretation of what we deem to be ambiguous provisions of the agreement. The action, or inaction, of a shop steward may be used as a basis for contract interpretation, although his part in collective bargaining negotiations may be relatively minor, or may be no more than that of any other member of the union. Similarly, on the management side, the action or inaction, of a foreman of a particular department, may be used as a basis for interpreting the agreement, although he may never sit at the bargaining table. Difficult problems of agency are involved which seldom receive attention. And then there is the question of whether mere acquiescence is to be equated with active participation as past practice. All of us have been told by union representatives that the conduct relied upon by the company was the outgrowth of an ineffective union in the earlier years of a collective bargaining relationship or the fear or unwillingness of employees to file grievances or the failure of the shop steward to be aware of the problem involved. On the management side, we have been told that foremen went along with a practice without the authorization or knowledge of their superiors.

In applying past practice, we give great weight to the fact that contracts are renewed periodically without any attempt to modify or change the practice which has developed. What may be overlooked here is the nature of the collective bargaining process. Assume that in a particular department of a plant, the foreman applies the contract in a manner unfavorable to the employees under a provision which, at best, is ambiguous and which can be construed to justify more favorable practice. When the next collective bargaining session comes up, the union officials may or may not be acquainted with the practice which has developed. If they are aware of the practice, they may not seek a change in the agreement for fear that in the collective bargaining process this may require some concession to the company. Assume that the practice involves the application of seniority. In giving effect to the past practice, may we not disregard due process considerations involving individual employees?

We seldom discuss these problems, but in our opinions we show little reluctance to rely on the past conduct of the parties in reaching interpretations in situations in which we determine that a contract provision is ambiguous. Are we consistent in refusing to give similar weight to the conduct of the parties when the provisions of the agreement are explicit and free from doubt? Or should we be slow about giving weight to the conduct of the parties in both situations?

These are questions which I am sure have concerned all of us over many years and which will continue to concern us. What seems clearly to be indicated in this important area of the decisional process is more study, more research and especially more thought.

Discussion——

JOHN A. HOGAN*

We may not all agree with Dick Mittenhal's emphasis on past practice, rather than the contract, as the controlling factor under some of the conditions he sets forth, but we are all indebted to him for having tackled with such broad and thorough coverage almost the entire range of problems arising from the doctrine of usage as faced in arbitration.

Mittenhal identifies as the design for his paper the objective of following out a suggestion of Prof. Archibald Cox that ". . . more work must be done in identifying and analyzing the standards which serve to shape arbitral opinions." Mittenhal has done some of that work in this scholarly paper.

Now I shall speak to you somewhat more informally on some aspects of the "Past Practice Problem" that I have thought about over the years and some that Mittenhal has discussed.

The Standards

What are some of the "standards" Mittenhal has identified and analyzed? First, there are the standards which determine whether a "practice" is meaningful for contract interpretation? What is a "past practice" within our frame of reference? For a

* Professor of Economics, University of New Hampshire, Durham.

practice to be meaningful it should be (1) clear, (2) consistently followed, (3) followed over a reasonably long period of time, (4) shown by the record to have been mutually accepted by the parties, and (5) shown to be determinative in its underlying purpose. What is the *why* of the practice?

The criterion that the practice must have been *mutually accepted* by the parties as having, in effect, either modified the contract or added to it seems to me to be the crucial standard. In the disputed cases—the ones we get—the parties do not agree that the practice has modified the contract or added to it. They may agree on the bare facts of past practice but not on the reasons for the practice and not on its contractual implications. It thus becomes difficult to construct generalized standards which are controlling and are valid as generalizations. Practices, to be controlling, depend on so many specific variables special to the case before us that generalized standards are of little help. Probably the most commonly accepted generalizations or standards are the unsophisticated ones. e.g., where the contract is ambiguous, past practice is relevant; where the contract is clear, the contract controls.

Generally speaking, where the standards defining a meaningful practice are met, past practice may determine the decision (a) if the contract language is not clear or (b) if the contract leaves an area of discretion to the arbitrator, as in wage cases or “just cause” disciplinary cases. Even where the language *appears* to be crystal clear, Mittenthal, following Ben Aaron, argues that past practice may still be decisive. But under what conditions? Only where the facts show that the contract language did not reveal all of the intentions of the parties; while clear as far as it went, it was not complete.

Note that there must be some *uncertainty* as to the meaning and intention of the contract even in this special case. Here I suggest the importance of having a record of the negotiations. Did the parties discuss the disputed item during negotiations? Does the evidence show they intended to omit it? Or is the evidence consistent with inadvertent omission? Does the practice amend the agreement in accordance with its underlying intent? I do not believe we should overemphasize the “rare and unusual” case

where practice is held to modify clear language. Where the language is clear, it controls.

The language of the contract may not always have been enforced in practice for a variety of reasons. The company may have chosen not to enforce clear contract rights in the past because it may have felt that under the circumstances enforcement would not further good labor relations. The union may not have pushed enforcement in some instances because of the cost of grievance and arbitration. A degree of flexibility in administering the contract is realistic, and arbitrators should not overemphasize a past practice which is contrary to the contract. If they do so, they will tend to promote a rigid, inflexible application of the agreement which is not in the long-run interests of the parties. The conclusion in most cases where clear contract rights have not been enforced by the company or the union is that the contract right still controls. In the normal case, failure to enforce a right destroys neither the right nor the right to enforce it.

Among the troublesome cases are those where the contract is *silent* on the disputed practice, where the practice is clear and consistent but the contract contains a provision that its terms represent the "complete agreement of the parties." No "past practice clause" or "local working condition" clause is contained in the agreement. When the contract contains a provision that its terms represent the complete agreement of the parties it seems doubtful that Mittenthal's so-called "majority view"—that the agreement may subsume the continuation of existing conditions—would apply. Some of you may question the view that the contract subsumes an existing condition even though it does not say so is a "majority" view as Mittenthal claims. If you read his paper carefully, however, you will find that Mittenthal has usually been careful to use the word "may" rather than the words "must" or "shall." Thus, quoting Williston:

It *may* be shown that a matter concerning which the written contract is silent, is affected by a usage with which both parties are chargeable. (Emphasis added.)

and, writing on the so-called majority view:

... others have held that the agreement *may* subsume continuation of existing conditions. (Emphasis added.)

The courts have emphasized the general framework of the basic

agreement in ruling on questions not completely covered by its terms. In a recent New Hampshire case,¹ for example, Judge Kenison wrote as follows:

The scope of interpretation necessary for a contract to purchase a horse or sell an automobile would be more confined than that of a collective bargaining agreement which involves multiple transactions, many people, and many problems under a continuing arrangement for arbitration and which inevitably will give rise to some unforeseen disputes that must be resolved within the general framework of the basic agreement. It is difficult, if not impossible, to try in advance to tie square knots for all the bundles of rights and privileges of both labor and management that are collected in the collective bargaining package. That is why successful and practical arbitrators in reaching their decisions must implement them with something more than a dictionary and a treatise on contracts. 6 Williston, *Contracts* (rev. ed. 1936) s. 1929. Thus there will be occasions when the arbitrators may consider "the generally accepted practice in industry and the whole agreement between the parties" in reaching their decision. *Franklin Needle Co. v. Labor Union*, 99 N.H. 101, 105. This problem is thoroughly canvassed in a competent manner in Cox, "Reflections Upon Labor Arbitration," 72 *Harv. L. Rev.* 1482, 1490-1500 (1959).

The Virtues of Ambiguity

It is generally agreed that when the contract is ambiguous, past practice is relevant. It should be pointed out that past practice may be ambiguous also. When it is, it is *usually* sounder, in my view, to seek the most reasonable interpretation of the ambiguous language than to rely on ambiguous past practice. Absent a past practice clause, I find *relatively* few cases in which past practice controlled the decision in contract interpretation cases.

It is interesting to contemplate the matter of ambiguity. We arbitrators may seem to be annoyed at times over ambiguous language. "Why couldn't the clause have been spelled out clearly? Why didn't you say what you meant?" Actually, experienced arbitrators and negotiators know that there are many reasons why clauses are sometimes ambiguous. They are not always clear because of the need to reach agreement, because one side or other may have to save face, because the parties want to avoid a strike.

¹ *Southwestern New Hampshire Transportation Co. v. Durham, et al.*, 32 LA 917 (1959).

So rather than hassle further over the exact wording of the agreement, the parties try to agree on its intent, and, in the event of a dispute about application of the language—well, that is what arbitrators are for.

Even if it were possible, would it be desirable to have a contract so tightly written that no clause was subject to more than one interpretation? Can future problems and conditions be so clearly foreseen as to make this desirable? Is life unambiguous? Would the parties be better off if they had wrapped themselves up tightly in an inflexible instrument? Or would they find it necessary to renegotiate various clauses every few weeks to make the contract workable in the face of conditions and needs not foreseen? I hasten to add that I am not worried about the possibility of completely unambiguous contracts being written. But this exercise in assuming such a possibility serves to temper possible annoyance with ambiguity by acceptance of reality and of changing needs and conditions.

It may be argued that the virtue of some ambiguity lies in the necessity for some elasticity. The American Constitution is a case in point. Our Constitution is the oldest written document still governing the affairs of a great nation. It has lasted for 174 years so far. It has lasted partly because it is ambiguous. The Supreme Court as arbitrators have therefore been able to adapt the Constitution to changing conditions. We must be clear, however, that arbitrators should not read language into the contract merely because they think it ought to be there. The point is that some ambiguity is inevitable and is not an unmixed evil.

The Everpresent Past

In conclusion, I am reminded of Marcel Proust's classic work, a 3000 page novel, *Remembrance of Things Past*. Although Proust wrote primarily of the relationship between our past life and aesthetic theory, much that he says is applicable to labor-management relations and to personnel policy in the shop. Proust points out that *we never live in any one moment in time*; we do not leave the past behind us but within us, "an ever accumulating burden growing with the years." And to some personnel administrators and union officials, a "burden" it is, if they happen to be on the wrong side of past practice!

Proust's doctrine of the everpresent past is consistent with modern personnel theory—that time is a flow rather than a point, and decisions must be based on a consideration of the relation of an event to its past, to its "time-frame." To Proust the "time-frame" is past-in-us, and the art of capturing reality is the art of recapturing the past.² This can be accomplished, not by a journey through space, but only by a journey through time, i.e., into our past:

Remembrance of a particular form (place) is but regret for a particular moment and houses, roads, avenues are as fugitive, alas, as the years.

We may disagree as to whether past practice controls under such assumed conditions as (1) silent contract, (2) no discussion in negotiation, and (3) no right to add to the terms of the agreement. But we must agree that the uses of the past can seldom be ignored. They are part of the Whole, the total atmosphere which makes up truth. It is, therefore, important that the parties keep a sharp eye on past practice and try to eliminate inconsistencies between the contract and past practice.

Ambiguities in both practice and contract language will always exist to some degree. We may be annoyed at ambiguities but they are understandable and are not necessarily unmixed evils. Harmony between the contract and practice is a desirable objective. It will never be completely achieved. Where it is not we may take some comfort from the truth expressed in Browning's "higher harmony"—the harmony of discordant strains.

² Hogan, John A. "The Past Recaptured: Marcel Proust's Aesthetic Theory." *International Journal of Ethics*, January 1939.
