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PAST PRACTICE AND THE ADMINISTRATION OF COLLECTIVE BARGAINING AGREEMENTS†

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In a recent United States Supreme Court decision, Mr. Justice Douglas, speaking for the majority, 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 practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it."[1] When compared to actual management-union experiences in contract administration, this dictum seems unduly broad. It may be premature as well, for no coherent "rationale of grievance arbitration" has yet been developed.[2] If such a rationale is to be achieved far more work must be done in identifying and analyzing the standards which serve to shape arbitral opinions. The purpose of this paper 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.

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 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 have explored each of these functions of past practice in some detail. And I have sought to describe the nature of a practice as well—that is, its principal characteristics, its duration, and so on.

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1 United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).

2 See Cox, *Reflections Upon Labor Arbitration in the Light of the Lincoln Mills Case*, National Academy of Arbitrators, Arbitration and the Law 24, 26 (BNA 1959).

I. 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, a particular group of employees and supervisors, and 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 Lab. Arb. 434 (1957); Celanese Corp. of America, 24 Lab. Arb. 168 (1954); Sheller Mfg. Corp., 10 Lab. Arb. 617 (1948).

[4] Sylvester Garrett, Chairman, Board of Arbitration, U. S. Steelworkers, Grievance No. NL-453, Docket No. N-146, Jan. 31, 1953. Reported at 2 Steelworkers Arbitration Bull. 1187. A similar definition can be found in some judicial opinions.

In Jarecki Mfg. Co. v. Merriam, 104 Kan. 646, 649, 180 P. 224, 225 (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 F. Supp. 716, 734 (1948).

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 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 certain conduct do not ordinarily 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 constantly protest a particular course of action through complaints and grievances, it is doubtful that any practice will be 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 arose, although its scope can always be enlarged in the day-to-day administration of the 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 as well. 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.

A. *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-department 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 prac-

[5] Section 2 B-3 of the U. S. Steel-Steelworkers Agreement.

tice 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 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* 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 of not only its subject matter but its consequences as well, it would surely develop a breadth far beyond what was originally intended.

B. *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 past practice clear, detailed, and undisputed; commonly, inquiry into past practice . . . produces immersion in a bog of contradictions, fragments, doubts, and one-sided views. . . ."[6]

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.

II. FUNCTIONS OF PAST PRACTICE

A. *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

[6] H. Shulman, Umpire, Ford Motor Co.-United Automobile Workers, Opinion A-278, Sept. 4, 1952. Reported at 19 Lab. Arb. 237, 242 (1952).

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 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

[7] Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 22 (1958).

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-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.

By relying upon practice, the onus for 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 interpretative 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]

B. *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

[8] Eastern Stainless Steel Corp., 12 Lab. Arb. 709, 713 (1949).
[9] See Seward, *Arbitration in the World Today*, NATIONAL ACADEMY OF ARBITRATORS, THE PROFESSION OF LABOR ARBITRATION 66, 72-73 (BNA 1957).

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

C. *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 of Arbitrators' 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.

[10] Aaron, *The Uses of the Past in Arbitration*, NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION TODAY, 6, 11 (BNA 1955). Also found in Reprint No. 50 (Los Angeles: Institute of Industrial Relations, UCLA, 1955).

[11] *Ibid.*

[12] Derber, Chalmers & Stagner, *The Labor Contract: Provision and Practice*, PERSONNEL MAGAZINE (American Management Ass'n, 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., 228 Lab. Arb. 362, 368 (1957); Price-Pfister Brass Mfg. Co., 25 Lab. Arb. 398, 404 (1955); Bethlehem Steel Co., 21 Lab. Arb. 579, 582 (1953); Tide Water Oil Co., 17 Lab. Arb. 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 (1949).

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

The conventional analysis of the problem begins with the proposition that the contract should be construed according to the 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 interpretative 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. Anyone familiar with collective bargaining knows this sort of thing does happen. And the contract itself is not usually written by people trained in semantics.

[15] See the following excerpt from 55 Am. Jur. *Usages and Customs* § 31 (1946): "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 and 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."

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 unambiguous. 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 agreement* to the modification.[20] The parties must, to use the words in one decision, "have evinced a positive acceptance or endorsement" of

[16] Aaron, *supra* note 10, at 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 6.

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

[20] See, *e.g.*, National Lead Co., 28 Lab. Arb. 470, 474 (1957); Gibson Refrigerator Co., 17 Lab. Arb. 313, 318 (1951); Texas-New Mexico Pipe Line Co., 17 Lab. Arb. 90, 91 (1951); Merrill-Stevens Dry Dock & Repair Co., 10 Lab. Arb. 562, 563 (1948); Pittsburgh Plate Glass Co., 8 Lab. Arb. 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 15.

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 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

21 Bethlehem Steel Co., 13 Lab. Arb. 556, 560 (1949).

22 Taylor, *Effectuating the Labor Contract Through Arbitration*, NATIONAL ACADEMY OF ARBITRATORS, THE PROFESSION OF LABOR ARBITRATION 20, 21 (BNA 1957).

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 be changed only 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]

D. *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 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

[23] 3 WILLISTON, CONTRACTS § 623 (rev. ed. 1936).

[24] See Reilly, *Labor Law for Practitioners*, 8 LAB. L.J. 19, 23 (1957) for the attitude of many management attorneys to clauses of this kind.

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 practices 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.

[25] The contract language quoted in this paragraph and in the following footnote can be found in section 2-B of the U.S. Steel-Steelworkers agreement and article one, section 3 of the Republic Steel-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, or such matters."

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 size. Such a reduction must almost always 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 what ever way it sees fit. Or to put the argument in the more familiar "reserved rights" terminology, management continues to have the rights it cus-

[27] *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1011 (1955).

tomarily 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. Therefore, 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 commu-

28 See *Management's Reserved Rights: A Labor View*, NATIONAL ACADEMY OF ARBITRATORS, MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS 118, 126 (BNA 1956).

29 See, e.g., National Distillers Products Corp., 24 Lab. Arb. 500 (1955); Donaldson Co., 20 Lab. Arb. 826 (1953); New York Trap Rock Corp., 19 Lab. Arb. 421 (1952); Byerlite Corp., 12 Lab. Arb. 641 (1949); M. T. Stevens & Sons Co., 7 Lab. Arb. 585 (1947).

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

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

32 E. W. Bliss Co., 24 Lab. Arb. 614 (1955).

33 International Harvester Co., 20 Lab. Arb. 276 (1953).

34 Northland Greyhound Lines, Inc., 23 Lab. Arb. 277 (1954).

35 Ryan Aeronautical Co., 17 Lab. Arb. 395 (1951).

36 Phillips Petroleum Co., 24 Lab. Arb. 191 (1955).

nity 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 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]

Archibald 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]

[37] Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1499 (1959).

[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 145-55 (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 common law of the shop would include, at the very least, longstanding 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 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

41 WILLISTON, CONTRACTS § 652 (rev. ed. 1936).

42 See Vanemburg 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., 199 Iowa 203, 200 N.W. 55 (1924).

44 Shulman, *supra* note 27, at 1012. The analysis made in this paragraph is based upon Shulman's paper.

without mutual consent when bargaining has failed to achieve consent."[45] Thus, the arbitrator's power 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:

> "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 claims that a practice is a

[45] *Ibid.*
[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.

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 backward from his decision, thus providing him with a rationalization rather than a reason for his ruling. To enforce a practice all he need 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, 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

[49] See, *e.g.*, Pan Am Southern Corp., 25 Lab. Arb. 611, 613 (1955); Phillips Petroleum Co., 24 Lab. Arb. 191, 194 (1955); Continental Baking Co., 20 Lab. Arb. 309, 311 (1953); General Aniline & Film Corp., 19 Lab. Arb. 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, 1116-17 (1950).

[50] Frank, *Experimental Jurisprudence and the New Deal*, 78 CONG. REC. 12412, 12413 (1934).

[51] ELKOURI & ELKOURI, HOW ARBITRATION WORKS 274-75 (BNA 1960).

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 decision[53] 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 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 provision 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

[52] See Fawick Airflex Co., 11 Lab. Arb. 666, 668-69 (1948). Bonuses were held to be an integral part of the wage structure in the following cases: Nazareth Mills, Inc., 22 Lab. Arb. 808 (1954); Felsway Shoe Corp., 17 Lab. Arb. 505 (1951). Bonuses were held to be gratuities in the following cases: American Lava Corp., 32 Lab. Arb. 395 (1959); Rockwell-Standard Corp., 32 Lab. Arb. 388 (1959); Bassick Co., 26 Lab. Arb. 627 (1956).

[53] Shulman, *supra* note 6.

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 management 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.

III. 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 many 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

[54] *Id.* at 241-42. See also International Harvester Co., 20 Lab. Arb. 276 (1953).

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 be terminated only 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 give 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 craneman. 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 craneman. 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. In other words, 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.

[55] Cox, *supra* note 37, at 1500.