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

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

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

Discussion—

LLOYD H. BAILER
New York City

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

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

controls where the pertinent clause is clear and unambiguous; and that where the contract is either silent or ambiguous but a consistent past practice exists, said practice should be held as controlling. But the average arbitrator is seldom so fortunate as to be confronted with cases falling into either of these clear-cut categories. Such disputes are more likely to be settled by the parties themselves. At least, they should be disposed of in this fashion.

As Mr. Aaron has indicated, the typical case in arbitration involving the factor of past practice is considerably more challenging. Thus the contract is silent and past practice is either conflicting or nonexistent; the contract is clear but the practice has not only been consistently in conflict therewith, but has been continued over a period of several years during which successive contracts have been negotiated; or while there is no contract clause bearing specifically upon the matter in dispute there are a number of clauses dealing with related matters which, taken together, produce an interpretation directly contrary to a consistent past practice. Undoubtedly there are other permutations and combinations which none of us here on the platform has thought of thus far.

Any consideration of this entire problem would lead the average student of labor relations to conclude, I fear, that the rules of contract interpretation are at best only a general guide in considering the weight to be given past practice. The difficulties encountered in this particular area of arbitration activity only lend support to the old saw: "Any award can be justified but never an opinion".

Turning more specifically to Mr. Aaron's presentation, a few additional comments may be in order. You will recall his reference to past practice as applied to wage differentials. Relationships within wage structures, and the reasons therefor, represent a complex field of investigation and quite obviously Mr. Aaron did not have time to treat this subject exhaustively. Nevertheless I am not sure I would agree with his thesis that an arbitrator charged with the responsibility of deciding a wage case would be quite ill-advised to disturb the wage differential pattern unless specifically authorized to do so.

Mr. Aaron's remarks apparently were made with reference to a differential existing since time immemorial but this situation is seldom encountered in practice.

While wage and salary differentials are traditional in the American economy, it is almost equally traditional that these differentials have been changing, whether they be intra-plant, inter-plant, inter-industry or geographic. Viewed over any significant period of time, it is clear—I think—that the pattern of wage relationships is in a state of flux. I would imagine that even though he has not been specifically authorized to deal with the differential question, the arbitrator is at least generally aware that the pertinent differential has followed a particular trend. If, for example, the differential in question is inter-plant and has been diminishing in recent years, the arbitrator may be inclined to permit some continuation of this trend, assuming no special considerations are involved in the case. He may be less inclined to do so, of course, if the dispute is a wage reopening rather than a new contract situation.

On the other hand, if the arbitrator is confronted with a case in which the union's principal or sole justification for a given wage increase is that a pre-existing inter-plant differential should be restored, while the employer has conclusively established it is financially unable to afford said increase, I rather think the arbitrator will not feel compelled to restore the differential solely because it represents a "consistent past practice."

I like very much Mr. Aaron's exposition of the thesis that consistency of policy in discipline matters need not produce uniform results; or, differently expressed, consistency of policy may properly result in dissimilar actions. An arbitrator can do considerable damage to a fair and successfully functioning system of discipline by failing to recognize this fact. Apparent leniency in assessing discipline upon a particular employee is not always synonymous with favoritism, nor (conversely) does it necessarily indicate discrimination against other employees who have committed the same infraction with more severe discipline resulting.

The insistence by arbitrators that the penalty for a given offense must always be the same for all employees can only result in inducing the employer who is motivated by considerations of fairness to introduce standards of discipline more severe than otherwise he would be inclined to administer. Thus an award rendered in favor of an aggrieved employee on the basis of the improper rationale just cited may well result in a revised discipline policy far more adverse to the interests of the workers in general than the employer's pre-award policy.

Mr. Aaron has briefly touched upon another problem that I have found an extremely thorny one—namely, the distinction between an enforceable past practice and a gratuity which, by definition, the employer may withdraw at will. Perhaps there is no simple answer to this question. It seems to me that at this relatively advanced stage of industrial relations the prudent employer should be aware that gestures which in earlier times were considered merely largesse are now, when continued over a period of several years—and particularly if extended over the life of several agreements—deemed by the employees to be a part of the established working conditions of the firm, and thus enforceable under the contract. The area of "gratuities" of any considerable duration is consequently diminishing. I am therefore inclined to agree with Mr. Aaron's apparent approval of the doctrine enunciated by the War Labor Board in the bonus case which he cited.

I would like to advert for a moment to the relationship between past practice and technological change. The average arbitrator frequently encounters cases involving this problem. Take, for example, a typical case in which the employer does not have a set of detailed job descriptions, whether unilaterally adopted or negotiated. Either there are brief job descriptions merely indicating the nature of the various operations, or there are no descriptions whatsoever. In either event, the arbitrator normally finds that the content of various jobs really amounts to a set of past practices. The dispute arises because a change in materials or methods has occurred, or new machinery has

been introduced, thus producing an alteration in job content. In the absence of a contract provision specifically dealing with this type of problem, to what extent should the arbitrator permit such "past practice"—no matter how consistent and ancient—to bar technological change?

In some cases the union's real objective is a higher rate for the revised job duties. In other instances, however, the employees flatly oppose the change, with or without a wage adjustment. Underlying this attitude is usually the fear of technological displacement. In all of these situations the doctrine customarily advanced by the union is that once a wage rate has been negotiated for a given job the characteristics of said job become as fixed for the duration of the agreement as the rate itself and therefore cannot be changed unilaterally. While incentive wage rate systems have their own special complications, the problem here under discussion is usually less serious since contracts providing for piece rates nearly always contain a clause stipulating that in the event of a "significant (or substantial) change in methods, materials and/or equipment" jobs may be restudied and new rates set. The agreement thus contemplates that job content, and therefore past practice, may be changed. Contracts of this type almost always contain other provisions, however, that protect the rights of the employees under the new job content conditions.

A similar problem concerns the relation of past practice to a change in economic circumstances. Let us suppose the employer experiences a sudden decline in the market for its product, or that the state of business generally is declining. Faced with such a situation, the average firm seeks to tighten up its operations in order to reduce costs. In pursuit of this policy management may combine some job assignments, with the result that the union grieves that a host of past practices have been violated. To highlight the problem, let us again assume there is no specific contract clause bearing upon the essential question in dispute. Where the contract is silent, should past practice be deemed to control? Should the arbitrator ignore the economic climate which has created the dispute? Is it always a sufficient answer

to conclude that since the parties have been unable to settle the dispute, past practice must be protected until the agreement expires?

There is no simple answer to the question concerning what role past practice should play in labor arbitration. We should not be surprised, I suppose, because the subject of our discussion at this session is really only a small facet of the age-old issue of the proper weight to be given tradition. In the field of industrial disputes the circumstances of each case are different; and relations between the parties also vary. To add more complications to the arbitrator's task, it is not unknown for the parties to agree that the accepted rule of contract interpretation should be ignored in a particular case, although still disagreeing as to the "proper" construction of the clause.

On other occasions, during the course of the proceeding the parties have been known to reach agreement upon a particular solution which happens to be in direct conflict with both contract terminology and past practice, and then to request the arbitrator to frame an award with a supporting opinion. The arbitrator is normally reluctant to question such joint wisdom although his success in securing guidance from the parties on how to fashion a logical opinion in these circumstances usually leaves much to be desired. No doubt it is difficulties such as this which lend support to the school of thought holding that opinions should be avoided whenever possible.