CHAPTER VIII

MANAGEMENT'S RESERVED RIGHTS: AN INDUSTRY VIEW

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By way of a preface to my remarks on the subject of "Management's Reserved Rights" I should like not only to express my warm appreciation of your invitation to participate in the proceedings of this convention, but to endorse the decision of your program committee to permit representatives of labor and management to take part in these discussions. The National Academy of Arbitrators is the only major organization devoted to the professional study of arbitration between labor and management. While arbitrators as a group certainly have many problems that are peculiar to them alone, any well-rounded study of the arbitration process must also consider the viewpoints of both of the parties; and, unfortunately, impartial arbitrators are seldom qualified to express those viewpoints because, almost by definition, they have been denied the opportunity to acquire the same type of background and experience that is possessed by those who practice before them. How many times have I heard arbitrators express the wish that they knew what was really behind a case or what was the aftermath of their decision?

The arbitration process is, naturally, of peculiar interest to arbitrators. But unions and managements have a sizeable stake in it too. Although the arbitrator bears the major responsibility for the outcome of a proceeding, it is the parties themselves who are the creators of the process and who are sometimes astonished by the results of their creation. Each of the three interests represented in an arbitration proceeding—the arbitra-

tor, the union, and the management—is equipped by individual experience, aims, and position to make contributions to the development and improvement of the arbitration process which could hardly be made by either of the other interests. Unfortunately, there seem to be few opportunities for representatives of all three of such interests to express their viewpoints when they are not preoccupied by particular pending cases which cannot help but color their thinking. The National Academy of Arbitrators offers a unique setting for the expression of the views of all of the parties to the arbitration process, without regard to any pending dispute, in the furtherance of their mutual interests in improving arbitration as an industrial relations tool.

The subject of management's reserved rights is a particularly happy choice for such a discussion. We all know that, where a labor agreement contains provision for final and binding arbitration of grievances, the contract is not necessarily what the parties agreed to but what the arbitrator says they agreed to. Those of us who participate in the negotiation of collective bargaining contracts are sometimes surprised to learn months later that what we had agreed to was not what we thought we had agreed to. Surprises of that nature occur when the arbitrator's decision is outside what I shall call the area of predictability. By that term I mean the area within which a party may reasonably predict that the decision will be rendered. That is not to say that a party should expect to be able to predict whether a decision will go against him or be in his favor, but an objective litigant should be able to foretell within reasonable limits what the rationale of the decision may be, regardless of which side is the winner.

In terms of the frequency with which decisions may surprise the parties by being outside the area of predictability, issues of contract interpretation and application can be divided generally into three groups. Of course, in this connection, I am speaking only of issues concerning the construction of the con-

tract and I am ignoring issues of fact which, naturally, turn on other points.

The first group of issues consists mainly of matters relating to the routine administration of the contract. It would include disputes such as how vacation pay should be computed or how overtime pay is to be calculated. While such issues are often complex and difficult to resolve, it is relatively easy to predict the possible lines of thought that will lead to a decision, and the decision seldom reflects lines of thinking which the parties have not already considered.

The second group of issues are those on which the parties have expressed their agreement in terms of generalized standards rather than attempting precise definitions. For example, a contract may provide that discharge shall be only for "just cause." What do the parties mean by "just cause?" Of course, they have left the phrase undefined because it is incapable of definition in view of the variety of situations that may arise. Over a period of time the parties develop their own standards of what is "just cause." They expect arbitrators to apply those standards, but they are sometimes surprised because this group of disputes enters a field in which the arbitrator may have his own deep-rooted convictions as to what is fair and just, and an arbitrator will sometimes be unable or unwilling to subordinate his own views to the pattern of conduct which the parties have followed. In this group of issues an unknown factor in the form of the arbitrator's predilections is introduced into the arbitration process, and that unknown may lead to decisions that are outside the area of predictability and surprise both parties.

The third group of issues in which the occurrence of surprises is the most frequent are those which involve basic contract policies and collective bargaining philosophies. Questions involving management's rights are in this field. An example of when trouble may occur is when the arbitrator is convinced that a management action, not specifically inconsistent with the agreement, is arbitrary, unfair, or causes unreasonable hard-

ship to employees. It is then that arbitrators seem to have the greatest difficulty in keeping their own hands off the reins of management. In this field the personal views of the arbitrator rather than what the parties wrote into their contract are often decisive. Because of this, I am sure that many managements feel, at times when new arbitrators are substituted for old ones, that they can cross out the landmarks on the map of management rights and set out afresh to explore a terra incognita.

Generalizing upon the subject of management rights is difficult. The development, the organization, and the needs of different industries are so dissimilar that what is regarded as an essential management right in one industry may be willingly bargained away in another. For example, in some industries it is essential that management retain the right to determine standards of production without review in the grievance procedure or arbitration, while in other industries such a vital function as the establishment of piece rates may be delegated to the union.

Therefore, my comments must of necessity relate to my own experience, which has been principally in the steel industry. There whatever problems may arise in the field of management rights occur in the day-to-day administration of collective bargaining agreements rather than in clashes of fundamental philosophy. The Steelworkers Union has been aggressive in seeking to enlarge the gains which it has won for its members and it has been alert to protect those gains through frequent use of the grievance and arbitration machinery. However, the Steelworkers recognize that it is the function of management to manage.

When we speak of the term "management's rights" in this context, we are referring to the residue of management's preexisting functions which remains after the negotiation of a collective bargaining agreement. In the absence of such an agreement, management has absolute discretion in the hiring, firing, and the organization and direction of the working forces, subject only to such limitations as may be imposed by law. How

does the execution of a collective bargaining agreement affect the exercise by management of its customary functions which are not surrendered in the agreement? I believe that, in over 15 years of intensive experience in representing management in grievance arbitration, I have found among arbitrators less consistency in their approach to that question than I have found in the consideration of any other subject.

For example, there is sometimes encountered the extreme view that an agreement containing the usual union recognition clause is an undertaking not to make any changes whatever relating to wages, hours, and other conditions of employment without first engaging in the processes of negotiation and bargaining. Under that view, the rights which the contract recognized as belonging to management were regarded as concessions made by the union.[1] Under that view, management would retain little more than a right of initiative on matters specifically covered by the agreement; on all other matters involving the subject of wages, hours, and other conditions of employment (whatever that may ultimately be interpreted to mean), management must be a joint enterprise in which both the management and the union would share.

Another point of view that has been expressed is that, after the collective bargaining contract has been reached, management can continue to exercise the rights which it had customarily exercised before the agreement was made but that it no longer is free to act along lines which it had not pursued in the past.[2] The danger of these views is that they deny to management the most important right of all. That is the right of initiative. Technology, markets, and the economy in general are not static but changing. Where management is denied the right to take whatever action may be necessary to adapt the enterprise to new developments at the time when action must be taken, the business must inevitably suffer.

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1 See, for example, Postal Telegraph Co. and The American Communications Association (8 LRRM 1287), Shulman and Chamberlain, *Cases on Labor Relations*, (1941) page 271.

2 "Management Rights and the Collective Agreement," by Douglass V. Brown. Industrial Relations Research Association, *Proceedings of First Annual Meeting* (1948), page 145.

The more generally accepted view is that, except as management has agreed to restrict the exercise of its usual functions, it retains the same rights which it possessed before engaging in collective bargaining.[3] I submit that this view is correct for it is the only one that gives full recognition to the realities of the collective bargaining relationship. In general, the process of collective bargaining involves an attempt by a labor union to persuade an employer to accept limitations upon the exercise of certain of his previously unrestricted managerial rights. To the extent that the union is unsuccessful in persuading an employer to agree to a particular demand, management's rights remain unlimited. It should equally follow that management possesses comparable freedom with respect to rights which the union has not even sought to limit.

That point can be illustrated by a hypothetical case. Suppose, for example, an agreement which describes the working day as consisting of eight consecutive hours but is silent on the time when the working day begins. Suppose, further, that the work day had customarily begun at 8 o'clock but that rumors began to spread in the plant to the effect that management was considering changing the schedules to commence work at 9 o'clock. In anticipation of such a change, the union presented a demand in contract negotiations that the working day should begin at 8 o'clock. Suppose, finally, that such demand was fully discussed and rejected by the employer and an agreement was executed without changing the scheduling provisions of the preceding contract. If, under those circumstances, the management should change the starting time of the shift to 9 o'clock and the union protested such change through the grievance procedure to arbitration, there would seem to be little likelihood of the union's success. On the other hand, if the matter had not been presented in collective bargaining negotiations and disposed of there, some arbitrators might have found the problem

[3] Frank Elkouri, *How Arbitration Works* (1952), pages 205-206.

much less clear than it was in the case where the union presented an unsuccessful demand in negotiations.

In the case supposed, the union itself furnished corroboration of the management's conception of its rights. Why should the absence of such corroboration be important? The obvious answer is that it should not. In each case the management is exercising a reserved right that has not been surrendered or limited in its collective bargaining agreement. If, as was supposed, that right was not limited or bargained away, it remained with the management which had complete discretion over its exercise.

In general, I believe that arbitrators subscribe to the principle that management continues to have the rights which it customarily possessed and which it did not surrender in the collective bargaining agreement, but many arbitrators are reluctant to follow the principle to its logical conclusion.

Let me illustrate my point by referring to a specific case which typifies an approach used too commonly by arbitrators in deciding issues involving challenges of management's exercise of its rights. Several years ago, under the agreement between Bethlehem and the Steelworkers Union, we arbitrated an issue concerning the fundamental philosophy of the management rights provisions of the agreement. Although the issue in arbitration was a complex one and included the interpretation of several other provisions of the agreement in addition to the management's rights section, the portion of the opinion which I propose to quote here dealt only with the question of whether the exercise by the management of functions which were indisputably reserved to its exclusive discretion could be reviewed in arbitration. Article XIII of the Bethlehem agreement contains the management rights provisions and reads as follows:

> The management of the Plants and the direction of the working forces and the operations at the Plants, including the hiring, promoting and retiring of Employees, the suspending, discharging or otherwise disciplining of Em-

> ployees, the laying off and calling to work of Employees in connection with any reduction or increase in the working forces, the scheduling of work and the control and regulation of the use of all equipment and other property of the Company, are the exclusive functions of the Management; provided, however, that in the exercise of such functions the Management shall observe the provisions of this Agreement and shall not discriminate against any Employee or applicant for employment because of his membership in or lawful activity on behalf of the Union.

Article XI, Section 2, contains the arbitration procedure and provides for the arbitration of any grievance which shall not have been satisfactorily settled in the negotiation steps of the grievance procedure "if such grievance shall involve the meaning and application of the provisions of this Agreement." With that introduction, let me quote briefly from the opinion:

> * * * The Union's insistence that this Article XIII (the management rights article) alone among the provisions of the Agreement cannot be entirely removed from the right of union protest and arbitral review emerges as a completely valid claim, and yet one also fully consonant with the affirmed meaning of Article XI, Section 2 (the arbitration section). In the same way, it may be seen that the Company's concrete arguments for a narrow, literal construction of Article XIII, for all their apparent effort to establish an area of unchallengeable, inherent managerial decisions, do not actually deny the essence of what the Union seeks to affirm. The exercise of the managerial functions reserved by the terms of Article XIII are subject to union scrutiny and arbitral review.

To that point I have no quarrel with the opinion. The management rights article contains a specific proviso that management shall not exercise its exclusive functions in such a way as to discriminate because of union membership or activity and that such functions may be exercised only in a manner consistent with other provisions of the agreement. Arbitral review of charges of discrimination or of violation of other pro-

visions of the agreement was not questioned. However, the next statement in the opinion casts doubt upon the intent of the opinion so to limit arbitral jurisdiction. The opinion continues:

> Conceivably, in rare and unusual situations, local or departmental management might be guilty of such extreme abuse of managerial authority that its action could be reviewed in arbitration. This type of jurisdiction is inherent, as has been recognized from the beginning of contractual relationship between this Company and this Union.

In that passage there appears to be an assumption of arbitral jurisdiction that is extra-contractual. It recognizes the principle of reserved management rights because it states that interferences with such rights by arbitrators must be "rare and unusual." However, despite the specific language of the agreement that, except for the two provisos already mentioned, management rights were reserved exclusively to management, the opinion imposes a third proviso that there should not be any extreme abuse of such rights. What is extreme abuse and who is to determine whether it exists? An element of uncertainty and friction is thus created in the administration of the agreement.

The opinion states that this type of jurisdiction is "inherent." Does that mean that the mere acceptance of arbitration as a procedure to resolve disputes over the meaning and application of an agreement endows the arbitrator with "inherent" jurisdiction to review managerial conduct that is not otherwise regulated by the agreement? I doubt that either party to an agreement would be willing to stipulate that the rights of the parties were to be enjoyed only so long as they were not "extremely abused." The opinion continues:

> * * * We will not attempt to define at this time the particular factual situation which would create such jurisdiction. We hasten to add that a general claim of arbitrability would not suffice. In the usual case, both the challenge and the impartial evaluation of the protested

> decisions must conform to the stated limitations upon Management's exercise of its right which are incorporated into that article of the Agreement itself. The challenge and the evaluation must examine the decision to discover only whether management, in exercise of its 'exclusive' right to decide what has been protested, has observed the other provisions of the Agreement and acted without any discrimination against Union members. Accordingly, the Union must, as part of its protest, indicate clearly the basis of complaint and, particularly in the stage of mutual acceptance which Union and Management have reached in this Company, the specific provision(s) of the Agreement which, in the Union's judgment, Management has failed properly to observe in the protested exercise of one of its exclusive functions.

There, after its brief excursion into heresy, the opinion returned to orthodoxy.

What are the net results of such an approach? First line management is told that, so long as it does not violate the agreement, its actions will be sustained in arbitration. At the same time, it is told that a managerial action will not be sustained if it should be regarded as an abuse of managerial discretion by standards which may not be determined until the arbitrator who will review the particular decision shall subsequently have been identified. It is not unlikely that the arbitrator who would eventually rule on whether or not the managerial authority was abused would be a stranger to the industry. He might be totally unfamiliar with the manufacturing processes and with operating customs and procedures which had long been unquestioned but which, to the uninitiated, might seem unreasonable. A management judgment might well be made by a supervisor who, with his background and experience, would have no reason to suspect that his action might be considered an abuse of his authority.

The purpose of the arbitration process in industrial relations is not only to decide issues in dispute but to lay a foundation for the disposition of disputes by the representatives of the

parties themselves without the need for an arbitrator's services. Arbitration awards which are based upon standards different from those which the parties have adopted in their agreement tend to defeat that purpose. That is particularly true when the arbitrator shows a predisposition to act as a reviewer of managerial actions which are not restricted by the contract.

Not only must there be acceptance of the principle that managerial rights which are not curtailed or surrendered in the collective bargaining agreement are reserved to the management, but that acceptance must be complete. If the parties have not seen fit to write into their agreement a proviso that management may be free to exercise its reserved rights only so long as it does so reasonably and without abuse, it is not for the arbitrator to correct that deficiency unless the parties jointly request him to do so. The temptation to straighten out what may appear to them as the confused thinking of the parties and to do justice as they see it without paying too precise attention to what the parties have agreed to must, at least in certain cases, be difficult for arbitrators to resist. However, arbitrators who succumb to that temptation do a disservice to the parties.

I have heard arbitrators say that they felt that they can make enduring contributions to the relationship between management and labor and that the role of an arbitrator offers too few satisfactions unless there is a chance for service beyond the mere calling of balls and strikes. Under appropriate circumstances, an arbitrator may find occasional opportunities to mediate disputes and at such times he may indulge his yearning to help the parties to solve some of their inarbitrable problems. But the arbitrator who decides a grievance according to what he thinks the parties ought to have agreed to instead of what they did agree to may never learn that he has steered the collective bargaining ship into shoal waters without a compass and in a fog. When the pilot, who was hired only for the occasion, leaves the ship, the captain and crew may find themselves in a pretty predicament.

The responsibility for drafting their agreement and determining what goes in and what stays out rests with the negotiators. If their relationship is mature and they are reasonably experienced in the performance of their functions, they should be presumed to know what they want to write into their agreement and what they want to leave out. It cannot be questioned that their knowledge of each other and of the course of conduct which each can expect the other to pursue during the term of the contract is generally greater than is possessed by the most experienced arbitrator who might be requested to decide a dispute between them. Even if the relationship is not a mature one and if the negotiators are not experienced and one or the other makes a mistake in negotiating an agreement, their relationship cannot be improved as much by the assumption of their responsibilities by an arbitrator as it can by holding them to the contract to which they have agreed. The prospect of the next negotiation is a more effective sanction than an arbitrator's decision where either party abuses its rights under a collective bargaining agreement.

If management's residual functions which are neither limited nor surrendered in the collective bargaining agreement are reserved exclusively to management, the question of whether there is any point to the inclusion of the usual type of management rights provision in the contract may well be asked. If we were dealing with a commercial contract which would be interpreted in the same manner as commercial contracts are usually interpreted, such a provision would certainly be superfluous. Technically, it is equally superfluous in the collective bargaining agreement. It should be unnecessary for the contracting party to insist upon including in the instrument language to the effect that, except for the obligations which he has expressly assumed therein, the agreement is not to be interpreted as placing him under any obligation to the other party.

However, there are at least two useful functions that the management rights provisions of the contract serve. First, I

have noticed that even arbitrators who may subscribe to the principle that management continues to possess the residue of rights that have not been bargained away take great comfort in being able to cite or quote explicit language which states what would otherwise be implied. Secondly, and this is closely related to my first point, collective bargaining agreements are working documents to which frequent reference is made in the shop. The people who must interpret them at the shop level may not be acquainted with how contracts are construed and some of them may take strong exceptions to the common law concept of management rights. Language which clearly expresses what otherwise would be left to implication helps to avoid shop frictions and to prevent charges that the management indulges in legalistic hocus-pocus in trying to justify an act which the agreement does not mention. The arbitrator, too, is helped by the management rights language because his opinion is more convincing and obtains readier acceptance if he can support his decision by the language of the management functions section of the contract instead of relying upon the unexpressed principle that the management right which he sustained, although not mentioned in the contract negotiations, was reserved to the management.

There will be those who regard my approach to the subject of management's rights as excessively legalistic. They will ask whether it is desirable to foreclose discussion and arbitration of actions taken by the management within the area of its reserved rights and whether the barring of consideration by an impartial arbitrator of the fairness and reasonableness of management's exercise of such rights may not lead to dangerous disharmony in the shop. They may also ask whether the effect of such a position is merely to stimulate a flood of union demands that will specifically and effectively circumscribe management's freedom of action.

My discussion of this subject has been limited to the field of arbitration. I believe that, where employees seriously question the reasonableness of managerial action, the subject should be

discussed and the management should make a reasonable effort to appreciate the employees' point of view and to explain its own. However, the decision which must be made and acted upon following the conclusion of such discussions is one which management is entitled to make and should make.

The possibility that this position by management might cause disharmony is a risk that is always present. However, the correction of such a condition is best left to the joint efforts of the parties. In that way, the adjustment of differences, when it occurs, is more apt to be consistent with the pattern already established by the parties than if a solution is forced upon them. Friction at the shop level between management and employees is less often caused by the provisions of the collective bargaining agreement than by unwise administration of its provisions by one or both of the parties. A wise management, administering an agreement reserving to itself the broadest possible functions, will have less difficulty than would be encountered by inequitable administration of a much more restrictive agreement.

However, regardless of the consequences, the management, as one of the contracting parties, is entitled to its view as to what kind of an agreement it wants, and, once it has made its choice and the union has concurred with it, a different kind of a contract should not be imposed upon them by the compulsion of an arbitrator's decision. If that leads to further union demands to limit management rights, the subject still remains where it belongs—in the realm of collective bargaining rather than arbitration.

One of such demands in the steel industry led to the adoption of the so-called local practice and custom provisions which have been included in most of the agreements between the major steel companies and the Steelworkers Union. Of course, such provisions vary as between companies and I feel competent to comment only upon the provision that appears in the Bethlehem agreement.

The Bethlehem local practice and custom section does not freeze the status quo. It provides, in general, that, if the management should change any local practice or custom not covered by the agreement and in effect at any plant at the time when the agreement was executed, a grievance may be filed and carried to arbitration. In the disposition of such grievance, the management must assume the burden of justifying its action. When that provision was first adopted, it appeared to be a substantial limitation upon the exercise of management's rights and, in fact, it was. Like many other parts of collective bargaining contracts it was hardly a masterpiece of precise draftsmanship and disputes arose with respect to its meaning. Some of those disputes reached arbitration and tested the relationship between the local customs and practice provision and the management rights article of the agreement. Its meaning is now well understood by both the Union and the Company.

The provision applies only to local practices and customs although the parties still have difficulty in defining what is a practice or custom. It is usually understood to be a way of doing things with reasonable consistency. It must have existed as of the time when the agreement was executed. If it had been abandoned before the effective date of the agreement or not inaugurated until after that date, it was not protected by the local practice and customs language. The union must sustain the burden of proving the existence of the local practice or custom. Once the union has met that burden, the onus of justifying its action is up to the management. In general, the management's action is sustained if management shows that under all of the circumstances it acted fairly and with reason. If it fails to make such a showing, the local practice or custom is reinstated.

There can be no question but that the local practice and cutsoms section of the Bethlehem agreement is a limitation upon the reserved rights of management, but, as a product of negotiation, its boundaries are ascertainable. This section affords a medium for the presentation in arbitration of a limited group

of disputes involving the exercise of management's rights. Although that group of disputes is limited, it covers the area in which many of the most serious disputes may develop between the employees and management. Generally, the greatest apprehension and suspicion is aroused by the managerial actions which make material changes in the status quo. It is that type of action which is reviewable under the local customs and practice section of the contract, and, as to the other matters that fall within the scope of management's reserved rights, requests for review are seldom brought to arbitration unless one or more of the other provisions of the agreement is directly involved.

The job of management is to manage. The operation of the enterprise at its maximum efficiency is management's responsibility and obligation. If a management believes that, in order to discharge its obligations, it must retain in full measure the so-called prerogative of management, it has the right to refuse to agree in collective bargaining to restrict those rights. If the management should agree to limit its exclusive functions or even to delegate certain of its duties to a union, it can enter into an agreement that will clearly define how far it has agreed to go.

However, this is an area that is peculiarly unsuitable for the development of any theoretical conception of a common law of contract interpretation. To read into the mere act of signing a contract implications that may never have been considered by either party is repugnant to the basic concept of the collective bargaining agreement that it is a voluntary act of the parties. That can be avoided only by interpreting the contract as the parties write it—an instrument containing specific and limited restrictions on the functions that management would otherwise be free to exercise. To the extent that the parties have not seen fit to limit management's sphere of action, management's rights are unimpaired by the contract.