PART II. THE EVER-PRESENT PAST

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Thank you for considering my "past practice" article,[1] now some 33 years old, as a "classic." The extent to which that article has proved useful to labor, management, and arbitrators has been extremely gratifying. Awards have a limited audience and fade from view quickly. But articles, particularly those that touch some fundamental root, can have a longer life. I believe this article has survived and flourished because it concerns one of the more important standards in contract interpretation and because it attempts a conceptual analysis of past practice. Perhaps the article's success can also be attributed to the fact that there is something in it for everyone. I have heard past practice disputes where the union cites one part of the article, management refers to another, and then I, to the parties' consternation, rely on still another.

Before discussing the article, however, a few brief comments on the literature of arbitration seem appropriate. The literature is based largely on the awards themselves. They are the mother lode. But the awards seldom dig as deep as they might into the collective bargaining agreement or the parties' history or the relationship between the two. The reason, I believe, is that arbitrators are conservative by nature. Our decisions focus carefully on the particular facts of the case. We typically choose the narrowest rationale. We avoid expressing the value judgments that may be the real basis for our decisions. We avoid exploring first principles lest we say more than the parties wish us to say or perhaps more than we are comfortable in saying. Instead, we pronounce a general rule or an exception and support it with arbitration precedent, but make no attempt to explain how the rule came to be or why it makes sense in relation to the agreement we are called upon to interpret.

I do not criticize this approach to opinion writing. This is simply how arbitrators behave. My point is that the awards give us only bits and pieces of the larger puzzle. They do not provide the kind of analytic framework likely to lead to a more complete

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[1]Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Pollard (BNA Books 1961), 30.

understanding of a subject. Yet, most of the literature involves essentially an attempt to digest this mountain of awards and to extract from them a series of related rules and exceptions. All the hornbooks function in this manner. Elkouri and Elkouri[2] cover the entire world of arbitration in one blockbuster volume. Hill and Sinicropi[3] take a chapter from the Elkouris and construct a volume with far more background and detail. Bornstein and Gosline[4] do much the same thing through a large number of individual contributors. Let me emphasize that these volumes have high value. They offer a quick fix, some easy reference points from which to begin the study of a given case. But because they are for the most part derived from awards, they suffer from the same deficiency as the awards.

All of this supports my conviction that it is the Academy's Annual Proceedings that contain the most enlightening work for the practicing arbitrator. True, the *Proceedings* are uneven in content. Many of the papers are descriptive or anecdotal or simply reach for a principle by digesting cases in much the same way as hornbooks do. But there are other papers that are truly insightful—Garrett on contract interpretation,[5] Killingsworth on management rights,[6] Mickey McDermott on the rules of evidence,[7] Stockman on arbitral discretion,[8] Crawford on contracting out,[9] Seward, Wallen, Aaron, Alexander, Platt, Dunsford, Murphy, and countless others. These papers reach for some essence beyond the written opinions, beyond the terms of the agreement. At their best they deal with the fundamental principles upon which so much of our work rests.

Let me turn now to the article on past practice. It seemed obvious back in 1960 that practice was one of the most commonly

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[2]Elkouri & Elkouri, How Arbitration Works, 4th ed. (BNA Books 1985).

[3]Hill & Sinicropi, Management Rights: A Legal and Arbitral Analysis (BNA Books 1986).

[4]Bornstein & Gosline, eds., Labor and Employment Arbitration (Matthew Bender 1988).

[5]Garrett, *The Interpretive Process: Myths and Reality*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), 121. (BNA Books 1964), 114.

[6]Killingsworth, *Presidential Address: Management Rights Revisited*, in Arbitration and Social Change, Proceedings of the 22nd Annual Meeting, National Academy of Arbitrators, eds. Somers & Dennis (BNA Books 1970), 1.

[7]McDermott, *The Presidential Address: An Exercise in Dialectic: Should Arbitration Behave as Does Litigation?* in Decisional Thinking of Arbitrators and Judges, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1981), 1.

[8]Stockman, *Discretion in Arbitration*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Somers & Dennis (BNA Books 1971), 103.

[9]Crawford, *Arbitration of Disputes Over Subcontracting*, in Challenges to Arbitration, Proceedings of the 13th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1960), 57.

used and most important aids in contract interpretation. That is no longer true in my opinion. Dramatic changes have taken place in the content of collective bargaining agreements. Those changes tended to reduce substantially the opportunity for the parties to rely on past practice.

There have been two parallel developments. First, as parties grew more sophisticated, they took steps to make sure all obligations were expressed in writing. Agreements grew from 30 pages to 100, from 50 pages to 200. In the process many practices were reduced to writing in order to simplify contract administration and to avoid disputes as to how matters were handled in the past. For example, in 1960 we were confronted by some general overtime language that could not be confidently applied without reference to practice. The determination of what the practice had been was the crux of the arbitration hearing. Today that overtime clause has been expanded to include all of the rules and subrules that were once mere practices. The overtime dispute is now more likely to involve a straight reading of contract language and less likely to turn on evidence of practice.[10]

Second, as employers became more sophisticated and their lawyers more aware of the arbitrator's penchant for transforming a practice, by implication, into a separate, enforceable condition of employment, a counterattack began. Employers sought to prevent these implications. They sometimes succeeded by negotiating highly restrictive arbitrability clauses, an example of which is found in the General Electric-Electrical Workers (IUE) contract:

> This Agreement sets out expressly all the restrictions and obligations assumed by the respective parties, and no implied restrictions or obligations inhere in this Agreement or were assumed by the parties in entering into this Agreement.

The practice of a 10-minute paid washup period at the end of the shift, nowhere mentioned in the agreement, may have been a separate, enforceable condition of employment in 1960. But surely that practice could not be enforced under the clause I have just quoted. Other clauses go much further by completely eliminating practice as an interpretive tool. Consider the following language from the contract of an autoparts maker and the United Automobile Workers:

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[10]To the extent that the language of the overtime clause is ambiguous, evidence of practice continues critical.

> It is agreed that all past practices and customs not specifically spelled out in the Agreement will hereby be abolished, null and void.

The content of my 1960 paper can be briefly summarized. A practice is defined as "the understood and accepted way of doing things over an extended period of time." Its elements are identified and discussed, namely, clarity, consistency, longevity, repetition, and acceptability. The true dimensions of a practice are determined by the circumstances out of which it arose. The heart of the paper explores the four uses of past practice: (1) to clarify ambiguous contract language; (2) to implement general language; (3) to modify or amend apparently unambiguous language; and (4) to create a separate, enforceable condition of employment. The final section deals with the duration and the termination of a practice.

There would be no point now in repeating all that I said in the article. You can find it in the 14th Annual Proceedings of the Academy or in a modified form in Volume 59 of the University of Michigan Law Review. I would like instead to share some of the thoughts I had in revisiting the paper.

To begin with, I want to emphasize the reason why practice is a significant interpretive aid. By relying upon practice, arbitrators minimize their own role in the interpretive process. A decision based on practice stresses not the personal viewpoint of the arbitrator but rather the parties' own history, what they have found to be proper and acceptable over the years. Such a decision is more likely to resolve the underlying dispute, more likely to be accepted. A solution created from within is always preferable to one imposed from without.

What this suggests to me is that any interpretive aid having its roots in the parties' behavior is superior to any external aid. Assume, for instance, that the appropriate result in a given case is supported both by the purpose of the contract clause and by some well known rule of construction derived from the law. In this situation, I would prefer the purpose argument. For purpose, like past practice, draws its strength from the apparent values and standards of the parties. These interpretive aids are bound to have greater legitimacy. Arbitration is, after all, much more closely related to collective bargaining than it is to the law.

Let me move on to one of the more difficult conceptual problems. Most agreements say nothing about management having to maintain existing conditions. They ordinarily do not even men-

tion past practice. The question then is whether, apart from any express 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?"[11]

Arbitrators are far too cautious to answer Shulman's question in the broad terms in which it is expressed. We compromise instead. We say, first, that the agreement is *not* necessarily an "exclusive statement of rights and privileges" and, second, that the agreement does *not* "subsume continuation" of *all* "existing conditions." Translated, this means that most arbitrators find that a practice may *in appropriate circumstances* become a binding condition of employment even though the subject matter of the practice is nowhere mentioned in the agreement. The theoretical basis for these observations is discussed at length in the article.

The practical question remains. What exactly are the appropriate circumstances for finding, by implication, that a given practice is binding? Some proposed that enforceability should depend on whether the practice concerns a major or minor condition of employment. Others thought that enforceability should depend on whether the practice concerns employee benefits or basic management functions. None of this was very persuasive. It took Shulman to clarify the matter and provide a stunning description of what practices should or should not be enforced. In a 1952 award involving Ford Motor Co. and the United Automobile Workers, he made this compelling statement:

> 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.
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> 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

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[11]Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1011 (1955) (emphasis added).

> 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.
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> A contrary holding would place past practice on a par with written agreement and create the anomaly that, while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice.[12]

In short, a practice is enforceable and becomes the "prescribed way of doing things" if it is supported by "mutual agreement." The Shulman formula has great value. The question remains, however, as to what constitutes "mutual agreement." That is the kind of determination arbitrators are commonly called upon to make. The difficulty is that most practices exist without the parties ever having sat down and discussed them. Or if there was discussion, it took place years ago and no one is now available to explain how the practice came to be. Or there is nothing in writing to clarify either the origin of the practice or the reasons for its continuance. Absent evidence of any express joint involvement in the practice, it can be forcefully argued that the requisite mutuality is missing.

But that is not the end of the story. For arbitrators have been willing to find that the requisite mutuality may be *implied* from the parties' actions or from their mere acquiescence in a given course of conduct. I suppose mutuality would be implied in the case of a longstanding paid lunch period. I suppose mutuality would not be implied in the case of a longstanding day shift starting time of 8:00 a.m. And I suppose there would be serious disagreement among us as to whether mutuality could be implied in the case of a longstanding gift of a Thanksgiving turkey. It seems clear that our willingness to find mutuality will be substantially influenced by the subject matter of the practice, by our individual notion as to the difference between basic employee benefits and basic management functions.

How will this theory be affected by new patterns in labor relations? Quality circles and employee involvement programs result in wide-ranging discussions between management and employees. Although these discussions are not supposed to deal

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[12]Shulman, Umpire, Ford Motor Co.-UAW, Opinion A-278 (Sept. 4, 1952), 19 LA 237, 241–42 (1952).

with wages, hours, and working conditions, I would think that practices are bound to surface in these talks. Matters left to managerial discretion in the past will become topics for discussion in the employee involvement program. If these talks lead to a new or changed practice, I am not sure whether that practice could be said to be supported by mutual agreement. If these new programs could produce mutuality, then present ways of doing things might be transformed into prescribed ways. It may be necessary to rethink our ideas about mutual agreement, given the dimensions of new workplace democracy.

An important caveat is in order at this point. My comments have dealt with practice as a separate and binding condition of employment. When practice is used for other purposes, to clarify ambiguity or to implement general language, I do not believe mutuality must be shown. The mere existence of the practice is often enough. For the customary way of doing things is ordinarily the contractually correct way of doing things.

My article overlooked agency issues involved in the determination of mutuality. In a plant of 50 workers, practices are likely to be known by the management and union representatives responsible for administering the agreement. That the parties assented to these practices would be difficult to deny. In a plant of 5,000 workers, however, practices are certain to develop that are largely unknown to those responsible for administering the agreement. Consider, for instance, a department practice that the department steward neither knew nor should necessarily have known. Such a "practice" probably could not be said to be supported by mutual agreement. Even if it were, it could not be honored beyond the confines of that department. And when the claim is that a practice be given plantwide impact, it would have to be shown at the very least that plantwide representatives knew or should have known the existence of that practice.

My point is that mutuality must be coextensive with the breadth of the alleged practice. Department officials cannot bind the plant; plant officials cannot bind other plants. This inquiry adds still another layer of complexity to the practice equation. Yet, to my surprise, the agency issue seldom surfaces in practice cases that turn on the mutuality issue.

Perhaps the most intriguing problem is whether practice, even when supported by mutuality, can serve to modify or amend unambiguous contract language. The answer, I believe, depends on the extent to which the arbitrator is willing to embrace

the concept of the collective bargaining contract as a "living document."

That concept begins with the proposition that those responsible for the contract are free to change it at any time. They can add an entirely new provision; they can rewrite an existing clause; or they can reinterpret a section to give it a meaning other than originally intended. Grievance settlements often result in understandings as durable as the actual terms of the contract. If a contract is susceptible to change in these ways, why shouldn't it be equally susceptible to change by reason of practice, where the practice clearly represents the joint understanding of the parties? After all, the only ground for recognizing the modification or amendment of a contract is mutual agreement. And it can be strongly argued that the form the agreement takes is not important, whether a formal writing, an oral understanding, or a longstanding practice. As long as it is supported by mutuality, the parties have indeed chosen to change their contract.

This concept won wide acceptance in the early years. The collective bargaining model of arbitration, with George Taylor as the chief proponent, was ascendant. That model looked with sympathy on the idea of the contract as a "living document." Today things are different. The legal model of arbitration, as espoused by J. Noble Braden, is dominant. Most arbitrators now would find, citing legal principles, that practice cannot vary the plain meaning of unambiguous contract language. The contract is no longer the "living document" it once was. The clear words of the contract will now ordinarily prevail over a conflicting practice even where that prac-tice is supported by mutuality. When my article was written some 33 years ago, I thought the outcome would be in favor of practice.

Past practice clauses deserve some mention as well. They serve to incorporate miscellaneous unnamed practices into the agreement. For instance, the Teamsters often have a "maintenance of conditions" clause and the Steelworkers often have a "local working conditions" clause. Indeed, the Steelworkers clause was so important to the parties that its very existence provoked an industrywide strike in 1957. What is significant, however, is that these clauses have not spread. Managements elsewhere have resisted these clauses in the fear that a wholesale commitment to honor practices would enshrine present ways of doing things and thus interfere with the kind of operational change that is essential to efficiency.

Even where these clauses do exist, managements have found effective devices for damage control. In steel, for example, practices are binding only as long as the underlying basis for the practice remains in effect. A change in the basis permits a change in the practice. Steel management has become expert in devising the necessary basis-changes. In other industries managements likewise insist that a practice must be narrowly defined in terms of the circumstances out of which it arose. Then they argue that any change in these circumstances makes the original practice inapplicable. Unions resist this kind of analysis. The resultant disputes have been, and will continue to be, part of the arbitrator's menu. Nevertheless, as I explained earlier, practice appears to play an ever smaller role in the arbitrator's world.

My final point, appropriately enough, is how a practice can be terminated. The answer depends on the nature of the practice. Consider, to begin with, a practice that is a separate and binding condition of employment. That practice is binding for the life of the agreement. To escape, the employer must advise the union during contract negotiations that it will no longer consent to the continuation of the practice. The union is then on notice that it must secure a clause making the practice a part of the agreement. Should it fail to do so, the practice will not be binding under the new agreement.

Consider also a practice that merely clarifies an ambiguous provision of the agreement. The employer's rejection of that practice in the course of contract negotiations will not make it any less effective under the new agreement. To escape, the employer must negate the practice by changing the underlying contract provision or by securing the union's consent to amend or eliminate the practice. Should this approach fail, the practice will continue to provide the necessary clarification of the ambiguous clause.

Theoretical considerations aside, the history of the last 10 years shows that employers are indeed negotiating their way out of unwanted practices, often referred to as work rules. Employers have become cost conscious in the extreme. The reasons are known to all of us: increasing competition, technological change, slow growth, and price stability in a mildly inflationary environment. Managements therefore sought concessions. And, more often than not, the concessions have included the elimination of practices or work rules instead of lower wage rates or reduced health benefits. The result has been far fewer enforceable practic-

es. This is another reason why practice today plays a lesser role in the arbitrator's world.

To summarize, the behavior of arbitrators remains fairly fixed in the midst of many turbulent currents. The interpretive aids we use are timeless. My analysis of practice in 1960 remains, for the most part, just as relevant in 1993. What has changed is the labor relations climate, the attitudes of the parties toward the subject of past practice. These changes are bound to affect the way we look at this subject. The theme will be the same but, I suspect, variations on the theme are inevitable. The ever-present past will simply be less present in our awards.