the best presentation rules; the proper course is more important than which party makes the better argument.

Successful collective bargaining is vital to our way of life. Effective arbitration is vital to successful collective bargaining. I am sure some unions, some companies, and some industries get along very well without arbitration. But in the massive widespread basic industries, where integration of operations, policies, and procedures is essential, where a wide variety of operations, conditions, localities, and problems is inevitable, there must be arbitration of disputes under the contract. The role of such arbitration is of enormous importance. It affects the whole course of enterprise and the bargaining history. I know arbitrators say they are the creatures of the parties, confined to the role prescribed by the parties. But this is far too modest, because within those limits there are extremely important decisions to be made.

Let me conclude by saying that it is well that so many able men with so great an understanding have become part of this relatively new profession of artibration. You have already made great contributions, not only as arbitrators but in government service, in administering wartime regulations, in mediation, and in helping to promote better understanding between labor and management. We in steel are especially grateful for the services of exceptionally able and fair-minded men, both as permanent umpires and in ad hoc roles. Their presence and their counsel have given us greater understanding and confidence in the future.

Discussion—

SIDNEY A. WOLFF
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I

The question of management's reserved rights always focuses attention on one of the most troublesome phases in labor-management relations.

At the grass roots level, whenever management seeks to do something that does not sit well with the employees, immediate recourse is had to the collective bargaining agreement. Surprising as it may seem, the agreement, usually printed and distributed at the company's expense, is a well-fingered document and has become in many a plant the workers' Bible.

Unless there is a specific provision which gives the company the right to do that which is questioned, a grievance can be expected.

Naturally, if the agreement is specific on the particular point involved, there will be no problem—I speak theoretically of course. But what of the situation where there is no specific clause?

Are we, as arbitrators, only to look to the document of the parties? May we go outside its four corners to ascertain the rights of management?

Unless its rights are specifically spelled out, does it mean that management has voluntarily surrendered those rights?

I agree with Mr. Phelps when he points out the advantages of a management's rights clause in a collective bargaining agreement. In situation after situation I have seen its very presence satisfy the most Philadelphian of lawyers that the company had the right to lay down certain ground rules.

But to repeat—what of the situation where the contract does not contain a management's rights clause?

Has management given up the right to manage, supervise, and operate its business except as permitted by the agreement?

Although there is strong opinion to the contrary, I am satisfied that the great weight of authority, not only among arbitrators, but also among labor-management people, is that, except as limited by the collective bargaining agreement, management retains all of the normal and customary rights of management in the operation of its business and the direction of the working force.

Possibly Mr. Goldberg will accept this principle since it is limited to the normal and customary rights of management.

It is not as broad as the one he finds distasteful that "all rights revert to management except those which specifically are wrested away by means of contractual clauses."

Complaint has been voiced that, even where management has reserved its right in a specific situation, arbitrators have taken it on to themselves to reverse management and determine the propriety of management's conduct.

I do not know of the particular instances to which reference is made, but I could well inquire, How did the issue get to the arbitrator in the first plase? Was it really an arbitrable issue?

But be that as it may, while management has the right to manage subject to the contractual limitations, is there not implied—if not expressed—the requirement that management will exercise that right in good faith. This, I think, is the nub of the problem as posed by Mr. Phelps.

Management may subcontract, for example, but is it not to do so in good faith depending on the needs of its business rather than from an intent merely to take work away from its unionized employees, to cause them to lose their jobs, to demoralize them—all to the end of destroying the union?

Now this doctrine of good faith is not novel. You will recall the classic language used by Judge Cardozo:[1] "A promise may be lacking and yet the whole writing may be 'instinct with an obligation.' "

Surely an obligation of good faith and fair dealing is instinct in every contract, as is the understanding that neither party will do anything that has the effect "of destroying or injuring the right of the other to receive the fruits of the contract."[2]

All will agree that it is an obligation of a party to a contract not to enter upon a course of conduct the effect of which is to avoid performance under that contract and to render it null and void. This is well settled in ordinary contract law. How much more applicable is it to a labor contract intended to

[1] *Wood v. Duff-Gordon*, 222 N.Y. 88, 91
[2] Kirke, La Shelle Co. v. Armstrong, 263 N.Y. 79, 87

maintain a proper stable working relationship between a company, its employees, and the union!

There must be implicit in the collective bargaining agreement the requirement that neither party, by unilateral act, direct or indirect, will do anything the effect of which is to nullify its provisions if the agreement is to serve the purpose usually found stated in the preamble in language along these lines:

> To promote and maintain orderly and peaceful relations with the employees, to achieve uninterrupted operations in the plant and the highest level of employee performance, to promote and improve industrial and economic relationships between the employer, its employees and the union.

Clearly the exercise of management's rights may not be used, as Mr. Goldberg so aptly states, "as the basis for diminishing labor's rights."

Let us take a case I had some time ago. There the contract provided:

> The management reserves the right in its discretion to grant a leave of absence to any employee presenting a good reason for same.

The company involved did light manufacturing, employing married women. For years, and without question, the company had granted maternity leave without any loss of seniority. Suddenly it announced a new policy—no more maternity leaves, that those who left to give birth would readily be re-employed, but only as new employees with, of course, loss of seniority on vacations, sick leave, furlough, etc.

At the hearing, the employer offered no reason whatsoever for the change in policy. It stood fast on management's reserved right to grant or deny a leave of absence.

It was my determination that, while the company had the right to grant or deny a leave of absence, still that right had to be exercised in good faith and not arbitrarily or capriciously. I said:

> It is my judgment that the Company, upon receipt of a request for a leave of absence, must weigh each request and

> exercise its discretion fairly and equitably to the end that justice is done not only so far as its own interests are concerned, but also with due regard to the interests of the employee involved. Concededly that was not done here.[3]

Incidentally, for a short time I was hailed as "mother's little helper," but in my next case I was hailed somewhat differently when I sustained management's right to determine an employee's qualifications for promotion.

Here is another area where an arbitrator might end up scrutinizing management's judgment—in determining whether a promotion should be granted. Will it be denied—again, of course, depending on the contract language—that, where a grievance is filed charging that an employee was wrongfully passed over for promotion, the arbitrator may not review the case and determine if there was bad faith or even an evil motive that caused the employee to be denied the promotion?

You must have heard of the case of the man whose foreman refused to approve him for promotion simply because the man's wife was not responding to the foreman's advances. Would Mr. Phelps argue that in such a situation the arbitrator must blindly accept management's determination as to the qualifications of the man who had a steadfast wife? I am confident that the priority rights enjoyed by the lord of the manor in feudal times —"droit du seigneur"—were never intended to apply to industrial labor relations.

I just finished a case in the television industry where the contract specifically provided that the exercise of opinion or discretion by a party was not subject to review. Yet there management conceded that an arbitrator could review a management's decision but, so long as its discretion or opinion was exercised in good faith, the arbitrator could not reverse.

The customary grievance clause provides that an employee will not be discharged except for just cause. But the contract does not state what is "just cause." Instead, unable themselves

[3] Gem Electric Mfg. Co., 11 LA 684.

to define "just cause," the parties ask for the decision of a reasonably fair-minded impartial person as to what constitutes "just cause." They should then not be shocked if a decision is made that does not come within what Mr. Phelps describes as "the area of predictability." I might suggest that, if the parties have developed their own standards as to what is just cause, some reference thereto ought to be made in the agreement. An arbitrator will then find it difficult not "to subordinate his own views to the pattern of the conduct which the parties have followed."

It must be remembered that no matter how impartial we might be, there is always the personal element. We must always be on guard not to have our judgment colored by personal feelings. This, of course, is just as difficult for an arbitrator as it is for a court. We must stick to the facts of each case. However, the growth of this organization and the stature of its members make me confident that, in great measure, we have acted impartially and judiciously in the multitude of matters that have come before us.

II

Mr. Phelps' hypothetical case with regard to plant starting time makes me think that he did a little research on me and came across the Robertshaw-Fulton Controls Co. case,[4] where I wrote the majority opinion.

Now that case, I believe, is appropriate on pointing up the dangers of an inadequate management clause. Better there should be no clause than an inadequate one.

In that case the agreement provided for three shifts with the first to start no later than 8 A.M.

The company had been operating with the first shift beginning at 6:30 in the morning.

Then for its own reasons it assigned several of the men on the first shift to starting times different from that of the others on the same first shift.

[4] 21 LA 436

It was our decision that, while the company had the right to change the starting time of the first shift (so long as it did not start beyond 8 A.M.), it did not change the starting time of the first shift as such. Instead, when it gave a few selected employees a starting time different from that of the others on the same shift, it in effect staggered their hours, setting up shifts within a shift, something completely contrary to the whole tenor and purport of the contract providing for a regular working schedule with one, two, or three shifts, as the company decided.

We held that it would be contrary to the generally accepted meaning of a shift to permit the company to set up within one shift different shift schedules for as many individual employees as it wished.

The company relied upon the management rights clause, which said:

> In the interests of progress and the development of the business of the company, it is agreed that there will be no interference with the right of the company to regulate the methods of production or kind of material, supplies, machinery, operators and equipment to be used.

This was the entire clause in the article of the contract headed "Management Rights."

Now it will be noted that, while reserving its rights to regulate methods of production or the kind of material to be used, no mention is made of management's normal right to regulate the working schedule of its force.

We ruled that the fact that this right "is not specifically reserved does not in and of itself mean that it was surrendered but * * * its omission coupled with the language [of the article to which I have referred as to the starting time of the shift] impels the conclusion that the omission was not inadvertent but intentional." We held that it was intended to have the contract govern the working schedule, whereas normally that might have been within the prerogatives of management.

Thus we had a situation where an inadequate management clause[5] was able to be used to support other provisions of the contract which were in contradiction to what normally would be a reserved right to regulate the working schedules of the work force.

III

The recognition clause, as I see it, may not be construed as a guarantee of employment for those falling within its coverage, as seems to be the extreme view to which Mr. Phelps referred. It is fundamental that a collective bargaining agreement is not an employment contract assuring continuity of employment for any specific length of time.[6] It is only an agreement specifying the terms and conditions of employment so long as there is employment within the contract terms. If it is to be construed as a guarantee of employment, provision must be found within its four corners.

IV

Now Mr. Goldberg brings up the most interesting and provocative theory that, once an agreement is made, the company does not bring into it "a backlog of rights and powers"—what we commonly call management rights.

He submits that "a backlog of rights and practices and precedent does develop as the collective bargaining relationship con-

[5] A more complete clause which has avoided many a controversy reads:
The management of the plant, the determination of all matters of management policy and plant operation, the direction of the working force, including without limiting the rights to hire, discipline, suspend or discharge, promote, demote, transfer or lay off employees, or to reduce or increase the size of the working force are within the sole prerogatives of the Company, provided, however, that they will not be used in violation of any specific provisions of this Agreement. The Company shall be the exclusive judge of all matters pertaining to the products that it manufactures, the location of its plants, the methods, processes and means of manufacturing, the schedules and standards of production, methods, processes, means and materials to be used, and except as specifically prohibited in this Agreement, the Company shall have the right to continue and maintain its business and productive operations as in the past, and it is understood that except as expressly limited in this Agreement, the Company shall have all the customary rights and functions of management, and its judgment in these respects shall not be subject to challenge.

[6] *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332 (14 LRRM 501)

tinues, based not on pre-union history, but based on the period of the collective bargaining relationship."

He would limit management's rights to those specified in the contract, leaving to the future an extension of those rights by the development of practices and precedents.

I fear that his theory is quite extreme and would not generally be acceptable today though it is accepted in a limited sense in Steel. I suggest that a simple hypothetical case might show Mr. Goldberg the error of his ways.

Assume a laundry has been having its employees do the washing by hand. The plant is then organized and the usual collective bargaining contract signed.

Management then decides to do away with its ancient methods and to install new modern automatic washing machines and tumblers. Let us assume that this decision is reached soon after the union is signed up but before any type of a relationship has had a chance to be established.

In the absence of a provision in the contract to the contrary, would not management, in the exercise of its inherent right to manage and operate its business, be free to make the change?

But how far do we extend the doctrine of the right of management to operate its plant without obligation to consult with and obtain the union's consent?

I am sure all will agree that Mr. Goldberg is on sound ground when he raises the questions resulting from a new method of manufacture.

While the company has the right on its own initiative to develop a new method of manufacture, yet the resulting problems, such as working arrangements, crews, schedules, rates of pay, etc., are still within the application of the provisions of the collective bargaining agreement. Should an issue arise, let us say as to work load, who will deny the union recourse to the grievance procedures of the contract.

Although management has the right to develop new methods, yet, in exercising that right, it may not do violence to other pro-

visions of the agreement, for the union then will have the right to grieve.

V

The difficulty with which we are confronted as arbitrators is best demonstrated by the opposite positions taken by both Mr. Phelps and Mr. Goldberg.

Mr. Phelps cautions us that, once an agreement is made, a different kind of contract should not be imposed by compulsion of an arbitration decision. He says, "If that leads to further union demands to limit management's rights, the subject still remains where it belongs—in the realm of collective bargaining rather than arbitration."

Then Mr. Goldberg in turn cautions us against this type of approach, stating: "It would help to drive labor towards demands which would curb the right of management to manage and * * * could easily lead to conflict, confusion, and instability."

We, as arbitrators, must be expert mariners to be able to chart a course between labor's Scylla and management's Charybdis. Apparently, we have so far been successful. Witness the laudatory remarks of our two guests concerning our "constructive achievements" in this difficult field—a job described by Mr .Goldberg as a "thankless one." May I suggest, however, in my capacity as a Vice-President of this Academy, that, when our guests return to their every-day activities, they resolve to see to it that we are rewarded in a more tangible form so as to make our task just a little less thankless.

Discussion—

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If there is any place where it would be appropriate to feel like a man in the middle—as I do—it would be at an arbitrators' convention.

Here we have two lines of thinking quite opposed to each other, so opposed as to represent virtual extremes. To Mr. Phelps, a management's rights clause is in reality superfluous, useful primarily as a reminder that whatever rights management has not given away in the precise wording of the contract remain reserved to it. To Mr. Goldberg, the past practices clause is actually superfluous, for even in its absence a good arbitrator would treat practices in effect at the time the written agreement was signed as part of an understanding between the parties, whether or not spelled out in the agreement.

I would like to start with Mr. Goldberg's argument because it troubles me most. It troubles me because I agree with him part way, and it is not always easy to determine where my way diverges from his.

Mr. Goldberg argues that in any grievance the union's view is entitled to as much weight as management's view, and management is not to be given preferential treatment simply because it initiated the action. I doubt that any of us would disagree that the union's case is to be given an equal hearing with management's and its facts treated as the same coin as management's facts. But there is a sense in which management must be given preferential treatment because it is the initiator, if we are to have any rationality to organizational life. The man who has not only the power but also the duty of initiating action—management, in our case—must be given the right of reasonable judgment. If, faced with some problem (a discipline case, a promotion, scheduling overtime, etc.), a member of management makes his decision and that decision is reasonable under the circumstances and under the terms of that agreement, that decision must be honored even though the union argues that he should have taken another course of action which might also be viewed as reasonable. That is to say, if there are two or more courses of action which are equally reasonable under the circumstances and management chooses one while the union would choose another, if that matter comes to grievance arbitration, it seems to me that management should be given preferential