CHAPTER V

THE SILENT CONTRACT vs. EXPRESS PROVISIONS: THE ARBITRATION OF LOCAL WORKING CONDITIONS

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I.

Not long ago I met a friend whose outlook on life has much to commend it to industrial relations practitioners. After an exchange of greetings, I asked him "How's your wife?" His reply was, "Compared to what?".

Implicit in his query was the recognition that the degree of toleration of one's present state can be measured only in relation to realistic alternatives and not in relation to unattainable panaceas.

Undoubtedly this concept was implicit in the thoughts of the framers of this program when they asked me to make comparisons of arbitration awards under contracts without a clause guaranteeing past practices or local working conditions with awards under contracts containing such a clause, and when, in a giddy moment, I accepted.

I was asked to compare the restrictions imposed upon management under present practices subsumed or implied as part of a contract guaranteeing the continuation of existing work practices with those prevailing under contracts silent on the subject in such a specific area as crew sizes, contracting out of work, paid-lunch time, wash-up time privileges, spell or relief arrangements and the like. Put in language more likely to be encountered at the collective bargaining table, the problem for investigation may be stated thus: does it make a lot of difference whether or not an express provision dealing with the maintenance of past practices or local working conditions is inserted in a contract?

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In the heat of battle, a conflict over the inclusion or elimination of a clause guaranteeing existing work practices is likely to be made into an all-or-none proposition. The impression given by management is that the excision or non-inclusion of such a guarantee will create a managerial Valhalla in which industry planners will be free to pursue the goal of efficiency without the inhibitions of the past. Of course, the vow is made that in so doing, the best interests of the stockholders, the employees, the management, and the public will be considered with instantaneous justice for all. The possibility that the weight of the past may still be borne by parties under a contract silent on the subject of work practices scarcely enters the calculations.

The other side of the shield reflects the impression created by unions that noninclusion or reformation of clauses guaranteeing work practices are designed to eliminate any past practice, custom, or even local agreement and that the past, with its benefits and burdens, will no longer stand between the shivering employee and the rampaging employer.

The hard facts of life reveal, however, that under the silent contract the past nonetheless imposes restrictions on managerial prerogative, and that under the contract with the express provision there remains a considerable latitude for change where change is due. It is true that this is not uniform in all areas of contract administration and that, overall, the express provision places greater restraints on managerial prerogative than does the silent contract. But the picture is not nearly as black or white as it has been portrayed.

I shall present an analysis of three subjects under silent contracts and compare them with decisions on the same subjects rendered under contracts with express provisions governing the continuation of local working conditions.

The subjects I have chosen are wash-up time and paid-lunch periods, contracting out of work, and crew sizes. A noteworthy omission is the subject of assignment of work. It was omitted not because it is unimportant but only because the limitations of time impelled me to leave that welter of confusion to someone with more scholarly inclinations.

II.

The so-called "silent" contract is one in which no reference is made to the continuance of past practices or to the guarantee of local working conditions not specifically covered by the agreement.

The contract with express provisions is one which contains a clause specifically requiring the continuance of working conditions or practices in effect at the time of signing. While these provisions vary, the most common one imposes a requirement that practices be continued during the agreement's term but allows management to change or eliminate a practice on the occurrence of certain stated contingencies.[1]

For the purpose of this paper I have chiefly considered cases involving this latter type of clause. I have done so because it is probably more prevalent in collective bargaining agreements than other types and because it virtually blankets the basic steel industry. However, in a few instances I have found cases arising under contracts with an all-embracing pledge to continue past practices or under contracts with a pledge which applied only to enumerated practices.

The now-famous Section 2B of the United States Steel contract is typical of the local working conditions clauses found in the contracts of the greater part of the basic steel industry and of some steel fabricators. In summary it provides as follows:

The term "local working conditions" is defined as meaning "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." It has been interpreted to mean that while a firm understanding, expressed in writing or verbally, may create a local working condition, an accepted course of conduct characteristically repeated in response to a given set of underlying circumstances may also evidence the existence of a local working condition.

The clause specifically recognizes the practical inability of the parties to deal fully and conclusively with all aspects of local working conditions. It sets forth "*general principles* and *proce-*

[1] Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," *Arbitration and Public Policy* (Washington: BNA Incorporated, 1961), p. 45.

dures which explain the status of these matters and furnish necessary *guideposts* to the parties" and the board of arbitration.

The first guidepost is in the form of recognition that an employee does not have the right to have a working condition established where it has not previously existed or to have an existing condition changed or eliminated except to the extent that the existence of the local working condition thwarts application of a specific agreement provision.

The second guidepost is that no local working condition shall be effective to deprive any employee of rights under the agreement.

The third guidepost is that local working conditions providing benefits "in excess of or in addition to" those in the agreement are to remain in effect for its term except as changed or eliminated by mutual agreement or in accordance with the fourth guidepost.

The fourth guidepost confers on the company the right to change or eliminate a local working condition if management's actions under the management clause change or eliminate the basis for the existence of the local working condition, thereby making its continuance unnecessary. But it has been held that in the exercise of its management rights, the company must observe the provisions of the contract, including the local working conditions section. Hence an action of management taken pursuant to the management clause which does not change or eliminate the basis for the existence of the local working condition cannot result in its change or elimination.

The fifth guidepost bars the establishment of or agreement on any local working condition hereafter which changes or modifies any provisions of the agreement except to the extent approved by top management and union officials.

III.

The uses of past practice in the interpretation and application of contracts containing no specific past practice clause are well known. Richard Mittenthal in his excellent contribution to the analysis of this subject presented at these meetings a year ago summarized the function of past practice in contract administration and interpretation as follows:

> "Past practice 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." [2]

The use of past practice to clarify what is ambiguous and to give substance to a contract's generalities is too commonplace to require discussion. The norms of conduct laid down by the parties themselves are employed to establish their intent under contract language that can be read several ways or that is vague or unclear because it is broadly written. The presence or absence of a past practice clause would scarcely serve to alter the use of past practice for this purpose.

The proposition that past practice can be used "to modify or amend what is seemingly unambiguous" rests on a more dubious foundation. Those who argue that it is often permissible, when an arbitrator is confronted with a conflict between an established practice and a seemingly clear and unambiguous contract provision, to regard the practice as an amendment to the agreement [3] rest their argument on the legal theory of reformation.[4] They maintain that the parties' day-to-day actions, when they run counter to the plain meaning of the contract's words, evidence an intent to substitute that which they actually do for that which they said in writing they would do. Williston is usually quoted in support of this "reformation" doctrine.

But this approach, it seems to me, is in derogation of an important function of the collective bargaining agreement. The labor agreement, while sharing some of the characteristics of a commercial contract, is something more. Harry Shulman saw the collective agreement as "In part . . . a dictated statement of rules, particularized and clear; in part . . . a constitution for future governance requiring all the capacity for adaptation to future needs that a constitution for governance implies; . . ." [5]

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[2] *Ibid.*, at pp. 30-31.

[3] As did Mittenthal, *supra* note 1, at p. 40; also Benjamin Aaron, "The Uses of the Past in Arbitration," *Arbitration Today* (Washington: BNA Incorporated, 1955), pp. 1-12.

[4] See, for example, *General Controls Co.*, Jones, 31 LA 240.

[5] Harry Shulman, "The Role of Arbitration in the Collective Bargaining Process."

To these attributes I would add one that is, I think, frequently overlooked. The collective agreement is also a tool of in-plant administration, an instrument of control, employed both by management and union administrators. In a fair-sized enterprise the men who drafted the agreement are usually far from the scene of its day-to-day administration. The gap between making and execution of policy is often wide and may lead to far different results at the bench than was intended at the bargaining table.

Where this happens, there is much to be said for the idea that the collective agreement's clear language should be considered as the lode-star that enables the top management of the company or the union to correct the deviations from course introduced by subordinates during their day-to-day operations. If the deviations are regarded as evidence of an intent to modify the clear terms of the agreement, the agreement's value as an instrument of control is thereby diminished. At best, this reformation theory must be approached warily and, if invoked at all, applied only where the course of conduct that runs counter to the language was known to and approved by those with the power to contract.

It is worthy of note that, whereas under a so-called silent contract a past practice might be invoked to modify or amend what is seemingly unambiguous if the arbitrator were of a mind to adopt that approach, under Steel's 2B-type clause an arbitrator is barred from doing so (at least insofar as new practices are concerned) by Section 2B's terms.

The use of past practice to establish a separate enforceable condition of employment apart from any stated basis in the agreement embodies the real subject matter of this paper. Some students of the subject state that the "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." [6] Others hold that pre-existing practices not specifically referred to in the agreement are enforceable only insofar as they reflect inferences to be drawn from some specific contract provision or are the outgrowth of a degree of mutuality of intent tantamount to an agreement. Do the cases show a difference in treatment by arbitrators of the same subjects under contracts silent on the continuation of past practices as compared with their treatment

[6] Mittenthal, *supra* note 1, at p. 50.

under contracts containing an express clause providing for their continuance?

IV.

A check of the reported cases on wash-up time and on changes in paid-lunch periods arbitrated under contracts guaranteeing to some degree the continuance of past practices reveal that the arbitrators have applied the following principles:

First, the practice is protected and may not be discontinued unilaterally where conditions have not changed. Thus, in a case in basic steel, it was held that a practice of washing up immediately upon completion of the tasks of stowing tools and making out reports beginning at ten minutes before shift end, followed with the knowledge and toleration of the foreman over a long period of time, cannot be discontinued unilaterally where conditions have not changed.[7]

In another steel case, the Umpire enforced as a local working condition a three-year practice to permit certain spellmen to observe the same hours on their straight day turns as they did on their spell turns. This gave them a ½ hour paid-lunch period.[8] In still another case it was held that where supervisors instituted and approved a long-standing practice of permitting two departments to wash up and change clothing on company time, its unilateral discontinuance violated a clause stating "All present benefits shall continue. . . ." [9]

In another case employees received a paid-lunch period between 1942 and 1954, not only while on three-shift operations but while on two-shift operations as well. When in 1954 there was a permanent return to two-shift scheduling due to a business decline, the paid-lunch period practice was discontinued. The Umpire found this violated the local working conditions clause saying that "by company action, or perhaps inaction, this plant practice had itself become unconditional. . . ." [10]

Second, where the underlying conditions have changed, the practice may be modified or discontinued. This is specifically sanctioned by Section 2B, but the available evidence indicates

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[7] *Reserve Mining Co.*, Decision RV-7, Valtin, *Basic Steel Arbitrations*, p. 4939.
[8] *Geneva Steel*, Case No. G-8, Seward, *Basic Steel Arbitrations*.
[9] *Namm's Inc.*, Cahn, 7 LA 18.
[10] *Republic Steel Corp.*, Umpire Case 1, Platt, 4 *Basic Steel Arbitrations*, p. 2807.

that the same principle is applied by arbitrators under contracts with more sweeping guarantees of the continuance of past practices.[11]

Thus it was held that a change in the production rate which caused the presence of the men to be needed until shift end in order to avoid a production delay would have justified the discontinuance of an old ten minute early quit practice.[12] However, when supervision thereafter for an extended period contented itself with a pledge that the men would arrive on time and clear the tables before leaving to wash up, and on that basis allowed the practice to continue, the revised practice thus established could not be rescinded unilaterally some years later.[13]

An arbitrator in a steel plant found justification for the discontinuance of a paid-lunch period where it was instituted as a result of combining plants and instituting three-turn operations. When business later called for a one-turn operation, the basis for the existence of the prior local working condition changed.[14]

Third, a practice under a contract with an express provision need not be the outgrowth of a direct authorization or order. Thus at a steel plant the Umpire found that "straight through" employees had regularly taken a 20-minute lunch period as a matter of long and consistent practice and ruled against its discontinuance. The lunch period, while not ordered, was known to, tolerated by, and acquiesced in by the supervisory force under circumstances where there was no basis for finding that the time was taken covertly.[15]

Finally, attempts to thwart the development of a practice, even if unsuccessful, may prevent it from attaining the status of a local working condition. As an example, it was held that persistent, though largely unsuccessful, efforts by supervision to prevent employees from taking wash-up time prior to shift end did not establish a viable practice protected by a local working condition clause. "Laxity in enforcing a reasonable rule is not

[11] I could find only one case in which it was held that the pledge to continue past practices was so unconditional that a change in underlying conditions that prompted the institution of wash-up time would not permit a change in practice. See *Western Insulated Wire Co.*, Jones, 27 LA 701.

[12] *Bethlehem Steel Co.*, Decision 628, Seward, *Basic Steel Arbitrations*, p. 6307.

[13] *Ibid.*

[14] *Republic Steel Corp.*, Platt, 5 *Basic Steel Arbitrations*, p. 3471.

[15] *Bethlehem Steel Co.*, Decision 565, Valtin and Seward, 8 *Basic Steel Arbitrations*, p. 5393.

tantamount to the establishment of a local working condition." [16]

These same principles are reflected in decisions on the subject of wash-up time and paid-lunch periods decided under silent contracts. The cases seem to stand for the proposition that absent changed conditions an established wash-up time or paid-lunch period practice may not be discontinued. Thus when there was a 17-year practice of allowing employees working with lamp black a 30-minutes early quit to wash up and there was evidence that supervision forced employees who tried to lengthen this time to adhere to the 30-minute rule, a company attempt to cut the time to 20 minutes, on the grounds that nothing in the agreement authorized early quits and it therefore retained the right to promulgate new or changed rules, was struck down.[17]

Whitley McCoy held that, under a contract silent both as to lunch periods and as to continuance of past practices, "plant practices and customs which existed at the time the contract was executed, bearing on working conditions and which the parties did not contemplate changing, are by implication a part of the contract." A practice for each man to get a paid-lunch period was ordered continued.[18]

Arbitrators under silent contracts have held that a practice is not immutable and may be changed with a change in the underlying conditions. Thus Willard Wirtz held that a wash-up time practice not referred to in an agreement silent on the continuation of past practices could not be unilaterally discontinued but observed:

> "A different result would have been required here if it had been proven, as the Company contended, that the establishment of this practice had been wholly voluntary and unilateral, that it had developed by a kind of oversight, that there had been a change in the circumstances originally justifying it. . . ." [19]

The same approach was reflected in a case where wash-up time was originally instituted at the behest of the plant physician because of a health hazard growing out of exposure to toxic substances, but where changes in technology reduced the exposure and enlarged washroom facilities enabled washing up to be com-

[16] *Bethlehem Steel Co.*, Decision AS-45, Stark, *Basic Steel Arbitrations*, p. 4905.
[17] *Goodyear Tire & Rubber Co.*, Killingsworth, 35 LA 929.
[18] *West Pittston Iron Works*, McCoy, 3 LA 137.
[19] *International Harvester Co.*, Wirtz, 20 LA 276.

pleted sooner.[20] In another case, the Company, for administrative convenience, standardized lunch periods after the reasons for the non-standard arrangements had disappeared and was upheld.[21]

Furthermore, arbitrators under silent contracts have applied the same criteria for establishing the existence of a practice as their colleagues arbitrating under contracts with express provisions. In another case arising under a silent contract, it was held that "Custom and practice can make wash-up time a part of the normal work day but the practice must be well-established and consistent and acquiesced in by the employer." He found sufficient evidence of nonacquiescence to disallow the claim of a past practice.[22]

In still another instance it was found to be a past practice for employees to buy their lunch at a stand and in the ensuing 15 minutes to eat it. After a number of years the Company sought to enforce the 15 minutes allowed in the contract as the outside limit, including the buying and eating period. The arbitrator disagreed saying that the other had become a practice and adding "Of course, the mere fact that the Company has carried on its activities in a certain way in the past as a matter of convenience or habit does not make the way of operating a practice. To become a practice, a way of operating must be so frequent and regular in repetition as to establish an understanding that the way of operating will continue in the future." [23]

Similarly it was held that a laxly and only occasionally enforced rule against washing up on company time, coupled with an irregular and nonuniversal practice by men in one department to wash up on company time, was enough to strike down a claim of past practice.[24]

Common threads run through the decisions on these subjects arising under the contracts with an express provision dealing with local working conditions and those which are wholly silent about local working conditions. The former contracts by their terms make proven practices enforceable. The latter do so by inference,

[20] *Bolta Rubber Co. & URWA*, Wallen, unreported (1958).
[21] *Borg-Warner Corp.*, Gregory, 10 LA 471.
[22] *Donaldson & Co.*, Louisell, 20 LA 826.
[23] *Dayton Steel Foundry*, Wagner, 30 LA 35; also see *Byerlite Corp.*, 12 LA 641 at 647; *American Bemberg*, 19 LA 372, in which past practice requiring employees to tend machines of other employees at lunch was enforced.
[24] *American Smelting & Refining Co.*, Kerr, 8 LA 730.

the arbitrators have held. In either case, past practice may be made manifest by the consistent conduct of the parties. Attempts to block that conduct may be evidence of nonconcurrence and hence of absence of mutuality. Lacking mutuality, the practice is not an established one. The practice must continue to be a response to the same underlying conditions. Where there is a change in those conditions, the practice may be changed.

So far as matters of the character of lunch periods and wash-up time are concerned, the case law and the "statute," in the form of the flexible past practice clause exemplified by Section 2B of the steel agreements, appear to have developed along identical lines. The generalized concept of past practice, as applied by arbitrators under contracts where the phrase is not mentioned, was made subject to the same qualifications, exceptions, and conditions that the parties themselves developed under contracts with the Section 2B type-local working conditions clause.

I do not mean to imply that all arbitrators under silent contracts necessarily attribute to past practice the scope indicated by the foregoing cases. Some, for example, rationalize such practices as wash-up time and lunch periods as factors which the parties must have taken into account in their wage bargain and thus find a contractual basis for what others frankly face as a pre-existing, supra-contractual condition of employment. Some, serving under tightly drawn contracts with precise and rigid limitations on the scope of arbitral authority, are impelled to disclaim jurisdiction over claims of violation of practices not directly related to specific contract terms. But I think it fair to conclude that under the run-of-the-mill contract with the usual management and arbitration clauses, the foregoing presents a reasonably accurate analysis of the approach of a majority of arbitrators.

V.

In a contract otherwise silent on the subject, a conflict over the contracting out of work resolves itself into a clash between the reserved rights and the implied obligation theories of the labor agreement. Donald A. Crawford, in his outstanding paper presented at the 13th Annual Meeting of this Academy,[25] found

[25] Donald L. Crawford, "The Arbitration of Disputes over Subcontracting," *Challenges to Arbitration* (Washington: BNA Incorporated, 1960), pp. 51-72.

that the *logic*, though not the dicta of the published awards, is that arbitrators will apply the implied obligation doctrine, though with great caution, where the basis for contracting out is the subcontractor's lower wage rates including fringe benefits rather than other economies of operation or special advantages. He also found that they may invoke that doctrine in the case of contracting out of permanent continuing work not "based on compelling logic or economies of operation that justify such action"; but that otherwise and generally contracting out is a management decision since the status of the bargaining agent is not involved.

Scotty dismissed past practice as sanction for or a bar to the contracting out of work. Mark Kahn, who discussed Scotty's paper, took a different view, as follows:

> "Returning to the merits, I suggest that arbitrators (and parties) should not consign 'past practices' to the limbo of irrelevance proposed by Crawford in relation to contracting out. There is substantial variation among industries and companies and plants with respect to the role played by independent vendors of goods and services. For example, the subcontracting of production work is central to the organization of resources in such industries as construction and apparel. 'Make or buy' decisions on components are standard practice in the manufacture of transportation equipment. In regard to construction and maintenance work in manufacturing—the location of many contracting-out disputes—one will find established practices ranging from the regular contracting out of all such work over to the other extreme of a largely self-sufficient program. I do not argue that past practices necessarily govern where the agreement is silent, or that changing circumstances or opportunities may not warrant even a radical change in practice, but I do suggest that the 'customary modes of procedure' are entitled to careful consideration as part of the evidence concerning the intentions of the parties." [26]

There is a significant difference in the role played by past practice in the arbitration of contracting-out cases under silent contracts and in the arbitration of such matters as wash-up time, paid-lunch periods, or the like. In the latter type of cases, the arbitrators have in the main enforced continuation of these conditions (where circumstances have not changed) on a showing that this was the established and accepted practice, known to and acquiesced in by both parties. Repetition of prior conduct seemed to carry great weight in the cases we have discussed.

[26] Mark L. Kahn, "Discussion", *ibid.*, at p. 76.

In the contracting-out cases, by contrast, a history of not contracting certain work out is rarely relied on by arbitrators in determining whether the letting of the contract frustrates the basic aims of the agreement. Rather, the right to send work out appears to be accepted by most arbitrators as a basic right of management and its exercise will be upheld unless there is clear evidence that it is designed to undermine the status of the bargaining agent or frustrate the performance of the contract. This acceptance of contracting out as a basic right of management apparently overcomes any tendency to regard a history of assigning certain work to bargaining unit people as a practice to be enforced in the same way as other practices frequently are. On the other hand, a past practice of contracting out certain work may lend support to a claimed right to continue it.

In short, in the wash-up—lunch-period type of cases, past practice creates a presumption that favors the status quo. In the contracting-out cases, a past practice of doing work in the plant appears to create no such presumption although a practice of sending work out does create one. Contracting out which does not undermine the status of the bargaining agent or frustrate the performance of the contract is barred only where the parties' actions of confining it to the plant in the past strongly bears the character of an *agreement* or express commitment.

Under the steel industry's Section 2B, contracting-out cases have traveled about the same course. The steel umpires have generally adopted the implied-obligations theory with its presumption of validity of contracting out. And, as under the silent contracts, they have barred contracting out under Section 2B only in cases where the element of agreement not to let out certain work was strongly present.

Thus Seward, in his famous Bethlehem Steel "bread and wine" Decision No. 423,[27] found that in the particular case before him the implied-obligations approach indicated a decision for the Company on the grounds that the most efficient performance of the scrap reclamation work involved "seems clearly to call for specialized skills and equipment which the Company has not developed within its own organization." He saw no abuse of the right to contract out nor any substantial frustration of the purposes or performance of the Agreement.

[27] *Bethlehem Steel Co.*, Seward, 30 LA 678.

Nonetheless, the contracting out was barred, he found, by the local working conditions clause. The evidence was that three years earlier "the question of whether this particular scrap reclamation work . . . should all be made available to the Company's own yard department employees was the subject of express consideration and discussion between the local parties." In response to a union protest about proposed contracting out of the work at that time, the Company "without formal agreement with the Union, yet in direct response to its complaint . . . purchased . . . [certain] . . . equipment, assigned Yard Department employees to operate it, and notified the Union of its action. And for three years that followed, Management adhered to the policy thus established. . . ." By way of dicta, Seward stated that "he is in no sense holding that every long continued assignment of work to bargaining unit employees constitutes a local working condition which bars the Company from contracting out such work during the life of the agreement." He relied on a course of action that was tantamount to an express commitment not to contract this work out.

VI.

Thus far we have a neat little package. It appears that it matters little whether or not you have the Steel-type 2B clause when it comes to such matters as wash-up time, lunch periods, and contracting out. The standards for decision and the arbitral results under the silent contracts and those with express provisions appear to have been about the same. But when it comes to crew sizes, any temptation to generalize from what we have learned so far is rudely dispelled. For a review of the available awards confirms one's general observations, namely that under a silent contract arbitrators are not disposed to order continuance of a crew of a certain size if lesser manning will not impose on the remaining crew members more than a fair day's work and will not jeopardize their health or safety. Under the Section 2B-type contract, by contrast, crew sizes are protected to a considerable degree.

Under the local working conditions clauses of the steel agreements, it has been held that a crew size may constitute a local working condition entitled to protection insofar as it provides

benefits to the crew members. Such a local working condition limits the company's power under the management clause to change the complement of personnel absent a showing of a change in the basis for the local working condition and a reasonable causal relationship between the change in underlying conditions and the company's action in modifying the local working condition.

A local working condition on crew size may have been established by a local agreement, by a grievance settlement, or by the existence of a crew of a particular size, or composed of particular jobs, over a period of time. In general, the crew size must be the one prevailing after the operation has become stabilized.

Local working conditions on crew sizes, like those on other matters, may be changed if the basis for their existence has been changed or removed. Changes in equipment, machinery, or technology associated with a job may serve to eliminate the basis for a certain size crew. A change in process or the elimination of unnecessary duties may serve to do likewise. A reduction in crew has been upheld where there was a decrease in workload. However, changes in equipment and methods of operation will not justify a reduction in crew size which was based on a workload which remains unaffected by these equipment and methods changes.

If a time study shows that a crew contains unnecessary employees whose work can be done by the remaining crew members, it will not justify a change in the local working condition as to the crew size if there has been no change in the underlying conditions. Nor is lower cost of operation, standing alone, a proper basis for a reduction in crew size.

On the other hand, Section 2B or its counterparts do not apply to protect a given level of workload. It has been held that nothing in the local working conditions clause required maintenance of a particular relationship between the number of employees and the volume of work done.

I have borrowed the foregoing summary of the leading decisions in the steel industry on the local working conditions section of the steel contracts as it relates to crew sizes from the *Steelworkers Handbook on Arbitration Decisions* prepared by Pike and Fischer, Inc., Washington, D. C. A comparison with available decisions on crew sizes under contracts silent on the

subject of past practices now is in order. The results stand in sharp contrast.

There is no doubt that under a silent contract a reduction in crew size may follow on a technological change.[28] A past practice to maintain a crew of a certain size cannot be invoked to defeat a reduction in crew size prompted by a change in operations any more than it can under Section 2B-4 of the steel contracts.

One arbitrator held that where a local working conditions clause is absent, past practice *might* be a guide were there not other indicators pointing toward an affirmative grant to management of the right to change crew size. Thus Jean McKelvey found, in a case where there was no past practice clause as in the basic steel contracts, that "In the absence of such a clause the Arbitrator might still be guided by past practice in this case were it not for the facts 1) that technological changes have been introduced . . . and 2) that the history of contract negotiations . . . indicates . . . that the Union sought unsuccessfully . . ." to obtain a contractual guarantee against crew size reductions.[29]

However, it cannot be said that Miss McKelvey's possible regard for past practice in this area reflects the majority view of arbitrators deciding crew-size disputes under silent contracts. More typical is the view expressed by Arthur Ross in a television station case [30] where the employer proposed to operate the control room with two engineers rather than the three formerly used to man the audio control, video control, and projector control equipment. He held, in dismissing the grievance:

> "There are no size of crew or manning provisions in the Agreement. Nothing in the agreement can be interpreted as freezing the allocation of duties."

In a similar vein, another arbitrator held that although a company regularly employed four regular cooler men in a kiln area, it was not obligated to replace one who retired and could thereafter man the area with three.[31] He noted that "Nowhere in the parties' agreement is there a provision which established a crew complement of cooler men in this kiln area. . . ."

In another case it was held that the employer had a right to

[28] *Johnson Bronze Co.*, McDermott, 34 LA 365.
[29] *Continental Can Co.*, 35 LA 602.
[30] *Television Station KXTV*, Ross, 33 LA 421.
[31] *Mississippi Lime Co. of Missouri*, Hilpert, 32 LA 1013, at 1018.

cut a crew from five to four even though the equipment was manned by five men at the time the contract was signed where no specific agreement as to crew size was made with the union and the workload imposed does not appear to be unreasonable.[32]

A case in the shipping industry involved a contract clause which obligated management to "only" comply with the law in manning its ships with electricians. The arbitrator upheld the owners' right to reduce the long-standing crew complement that was in excess thereof except where a special agreement to man a particular vessel with a specific number of electricians was shown to exist.[33]

Running through the crew-size awards rendered under contracts without crew-size specifications and without local working conditions clauses is the persistent theme that absent such limitations and absent a change in technology, management is free to reduce crew sizes provided an unreasonble work load is not produced thereby; provided that the work is not given to nonunion people; and provided that no violation of other agreement provisions results.

Under the 2B-type clauses, by contrast, crew sizes cannot be changed when there is a local working condition on the subject the basis for which is not altered by a change in equipment, process, or operation.

The question arises, why have not arbitrators under silent contracts applied the continuation of past practices concept to the maintenance of crew sizes, as they have to the maintenance of lunch periods and wash-up time and, to a degree, to contracting out of work? If an established practice to give employees time to wash up, or time to eat lunch is enforceable, though not mentioned in the agreement, solely because it is the settled way of doing things, why should not an established crew size unaffected by some technological change be equally protected from alteration? Or, conversely, if the employer under a silent contract is free to cut a crew because he can save money thereby, why should he not also be free to cut out other past practices in order to save money?

Dick Mittenthal speculated about this in his paper on past practice and administration of bargaining agreements.[34] While com-

[32] *Standard Oil Company*, Updegraff, 30 LA 115.
[33] *Pacific-American Shipowners Assn.*, Miller, 10 LA 736.
[34] Mittenthal, *supra* note 1, at p. 30.

ing to no firm conclusion, he examined and rejected the "major-minor" thesis developed by some arbitrators and by Cox and Dunlop [35] which would enforce as past practice "major" conditions of employment not mentioned in the agreement but would leave to employer discretion "innovations effecting only minor changes in the employment relationship." I would join him in this rejection. The terms "major" and "minor" are not susceptible to meaningful definition. A crew-size change may be "major" in its scope, in its impact on job security, and in its cost-saving potential. Yet, even if it is an established practice in the sense of having long existed, arbitrators under silent contracts would appear to permit its alteration by unilateral action. Conversely, a wash-up time practice may involve a few employees for a few minutes in one small department. Yet, the cases indicate, it is likely to be protected by past practice.

My theory about the divergence in the line of decisions on this subject under silent contracts and those with express provisions, despite the congruence of decisions on the other subjects discussed, is this: the managerial art commands great respect in our society. The balancing of manpower and work is at its center. The so-called silent contract is silent on the status of past practices but usually contains a management clause recognizing that the attainment of the goal of management—efficiency—is to be restricted only to the extent necessary to enable fulfillment of the contract's commitments. Arbitrators, acutely aware that under the silent contract the parties have not considered (or at least not talked about) the relationship of past practices to the written agreement, have honored past practice as an implied agreement term in matters which are essentially perquisites in the employment relationship. But without a stronger mandate, they have been unwilling to compromise that which goes to the heart of the managerial function—the balancing of men and work.

This differs from arbitral decisions under contracts with an express provision dealing with local working conditions for obvious reasons. In the latter case, and particularly in steel, the subject of past practices was in the forefront of the parties' discussions. They adopted specific language to promote the union's

[35] See *Pan-American Southern Corp.*, Reynard, 25 LA 611; *Phillips Petroleum*, Merrill, 24 LA 191; Cox and Dunlop, "The Duty to Bargain Collectively During the Term of an Existing Agreement," 63 *Harvard Law Review* 1097.

objective—security—without thwarting management's objective —efficiency.

The result was a compromise in which a balance "between the need for stability on the one hand and the need for flexibility and growth, on the other," was achieved. They wrote a broad clause defining local working conditions 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 . . .," an N.L.R.A. phrase. They drafted language spelling out the means by which a local working condition could be changed or eliminated. The entire clause bespoke an intent to balance off efficiency and security to a degree greater than that reflected in a silent contract with a management clause. Given this background and the broad definition of local working conditions embodied in the steel contracts, it is not surprising that the steel arbitrators have reasoned that Section 2B protects crew sizes while their colleagues arbitrating under silent contracts went the other way.

VII.

I return now to the question which prompted this paper: does it make a difference whether or not you insert an express provision on local working conditions into a contract? The answer is that in some matters it does; in others, it does not. Practices in the nature of perquisites are probably treated equally under both types of contracts. The limitations on the right to contract out are probably about the same in either case. But the restriction on managerial freedom in the matter of crew sizes and related matters is probably considerably greater under the contract with a Section 2B than under one without it.

This impels one to speculate. If there were no Section 2B in an industry such as steel, might there not have been an inevitable drive toward the protection of crew sizes by specific contract language as is true in the printing trades, in transportation, and in other fields? One can only surmise, of course, but the nature of the industry, with its many operations that depend on the coordinated effort of interdependent individuals oriented to massive equipment, lends support to the surmise. And the relative stability of operations compared with, say, the automobile industry, where every model change brings a reallocation of tasks

on the assembly line and a shift in crew complement and work load, tends in the steel industry to raise expectations of stability in manning that might well have found expression in some other way had there been no Section 2B.

As to the economic magnitude of this difference, I have no idea. I must rely on the only detached attempt to analyze it that I know of. I refer to E. Robert Livernash's study "Collective Bargaining In the Basic Steel Industry" in which he states:

> "It is a reasonable conclusion that the clause [Section 2B] does not protect widespread inefficiency because such inefficiency does not exist. In the few instances where it is demonstrable that high labor costs make a plant or company noncompetitive, much more than a revision of 2B is required to solve the problem. On the other hand, although it is doubtful that changes in 2B would have the sweeping potential for harm to existing conditions which the union attached to it, it is true that some cost savings would undoubtedly result from an improved basis for adjusting to technological change." [36]

It is probably true that the inclusion of a clause guaranteeing past practices creates some administrative headaches not present under the silent contract. The clause becomes a feature of every grievance. These must be defended on grounds often difficult to support with data. But the burden is on the Union to support the existence of practices it alleges exist and it must sustain that burden. Management at this stage need marshal only negative evidence.

The clause probably imposes on management another burden which in the end may turn out to be a boon. The omnipresent 2B may serve as an administrative spur to prevent the development of loose practices which might otherwise become converted to local working conditions. As such, Section 2B may spawn improvements in the internal administration of the labor force just as such penalty clauses as reporting pay and overtime have resulted in improvements in production scheduling.

On the whole, I believe we can safely join Livernash in the implicit conclusion that Section 2B may cause management to yearn for a proctologist but that it will scarcely result in the need for a mortician.

To arbitrators, a Section 2B-type clause in a contract appears

[36] E. Robert Livernash, *Collective Bargaining in the Basic Steel Industry,* (Washing: U.S. Department of Labor, January 1961), p. 117.

to imply a stronger intent on the part of the parties to limit the exercise of management's traditional prerogatives than is implied by the silent contract. But under the latter, past practices, it is recognized, have considerable standing nonetheless. Under both types of contracts there is apparent a continued need to perfect and sharpen the tools to be used to distinguish a practice based on mutuality of intent from one that arises from the repetitive use of unshared rights.

Discussion——

LLOYD H. BAILER *

Having read Saul Wallen's paper and being mindful of the limitations of my own personal experience in at least one phase of his major presentation, namely, the arbitration of disputes involving the application of the Section 2B type of clause, I am tempted to resort to the past practice of a certain country doctor. He, too, was aware of his limited knowledge and experience in certain areas in his professional field. So, when he was confronted with a patient whose malady he found to be baffling, this doctor had a standard operating procedure: He threw the patient into a fit, because he knew all about curing fits.

I find little in the Wallen paper with which to quarrel. The central thesis of his analysis is that the contrast commonly made between the silent contract and the express provision dealing with the preservation of past practices and customs is not as black and white as is frequently supposed. As Saul suggested, this is partly because, even under the silent contract, some prior practices are held to be enforceable, while under the express provisions there remains considerable latitude for change when change is due.

His model for express provisions is Section 2B of the United States Steel contract, wherein allowance is made for change under prescribed circumstances. I venture to suggest, however, that the contrast between the silent contract and the express provisions which contain no language allowing for changed circumstances also is not as great as it often is claimed to be. This is not because arbitrators are inclined to assume an express, unlimited past practice clause where none exists.

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In some instances, of course, it is determined by arbitral decision that what is claimed to be an enforceable working condition is, in fact, not such a condition within the meaning of the clause. It may also be determined, however, that under another provision of the contract, specifically dealing with the subject of the case, the employer has the exclusive right to change or eliminate the disputed practice. Or it may be held that circumstances which gave rise to the practice no longer exist due to a change introduced by the employer in a manner not otherwise violative of the contract.

Even where the contract is interpreted to impose a general bar against contracting out of work, it is common to find that exceptions to the rule are recognized by the arbitral authority that enunciates this general rule. Unavailability of necessary equipment which the employer was not reasonably expected to possess, lack of qualified personnel, and emergency conditions are some of the more important exceptions.

In the same vein as Saul has spoken of the comparative effect of Section 2B upon management's freedom, however, I hasten to state what should be obvious, namely, that an unlimited prior benefits clause serves as a greater restriction on management's freedom to take unilateral action than does a silent contract.

It may be asked why arbitrators appear to be disposed to place limitations on what would appear to be an unrestricted past practices clause. I think the answer lies partly in the view that implicit in such a clause is a presumption that the circumstances giving rise to the practice will continue, partly to the application of the rule of construction that the contract must be read as a whole, and partly, no doubt, to recognition of the practicalities of the industrial situation involved.

It would be interesting to learn the extent to which the apparent dissimilarity of arbitral treatment which Saul found under silent contracts for the lunch-period—wash-up time cases, as compared with crew-size cases, would apply to other practices not covered in his examination. In the absence of additional information on the subject, I am inclined to agree with Saul's theory that under silent contracts arbitrators have been willing to honor past practices as an implied agreement term for what he calls the perquisites of the employment relationship, but have been

loath to compromise with the central managerial function of balancing men and work.

I am not sure that this reluctance to enforce prior practice on crew-size has been due to respect for the managerial art if "respect" is used in the sense of awe in the face of management prestige. Rather, I think the arbitrators' view has been that the crew-size question is so closely related to the ability of the enterprise to remain or become competitive that they do not feel the practice itself, in the absence of an express provision, is sufficient support for a finding of enforceability.

Saul's paper has emphasized, nevertheless, the important role which practices play in the interpretation and application of labor agreements. Where the contract is silent, the practice may be held to be controlling. I agree with him that the legal theory of reformation, the extreme case of reliance on practice, should be approached with great caution. Saul points out in this connection that the drafters of the agreement are commonly removed from its day-to-day administration. It is ordinarily at the shop level that practices develop. Even some of the compensation practices followed by the payroll department often are found to have emanated from the shop, the payroll department having acted on the basis of a foreman's practices in filling out the requisite forms.

When shop level supervisors begin following a regular practice and continue to do so over a substantial period of time, it is difficult to see how the employer can fully escape the consequences of their actions on the ground that the practice thus created is contrary to the clear language of the agreement. It may be held that where the practice is fairly general among the plant supervisory force, top management officials with power to contract are chargeable with knowledge of the conduct running counter to the contract language and, therefore, have acquiesced in such conduct.

Nevertheless, I tend to the view that correction for the future is permissible, but the employer is properly burdened with whatever the practice may have created in the past.

The frequency with which problems of this kind arise and the significance given to practices generally in the arbitral determination of disputes emphasize the desirability of careful observance by both unions and employers of developing practices

which may impinge upon the administration and enforcement of the contract.

It is a common misconception that the preservation of practices redounds only in favor of the employee. Practitioners in the field are aware that, depending upon the circumstances of the case, either the employer or the union will urge that past practices prevail.

A rather unusual example of the use of practice against the union's position is represented by a *Great Atlantic & Pacific Tea Company* case (19 AAA 16). The contract there clearly provided that full-time employees, working in excess of eight hours a day, would be paid the time and one-half rate for overtime work. For many years, however, the practice had been to require clerks to perform clean-up operations, commencing at the end of the eight-hour day, and to give them no extra compensation for up to ten minutes of work. If they worked from 11 to 15 minutes, they were paid straight time for a quarter of an hour, and if they worked beyond 15 minutes, they received the contractual premium rate.

In 1959 the union grieved that the employees were entitled to time and one-half pay from the first minute of overtime. The arbitrator found that the parties had unmistakably demonstrated how they themselves had read and regarded the meaning and force of the contract language, even though such force was contrary to the normal intendment of the language. It was therefore held that the meaning the parties had given the language, by virtue of their own conduct, should prevail.

What is past is prologue.

Discussion——

HARRY H. PLATT *

One of the difficulties with this subject is that some people, when they discuss it, become emotionally involved. "Past practices" have become for them what Peter Seitz calls "glandular" words: merely to utter them causes the thyroid and adrenal glands to secrete, pulse to throb, and temperatures to rise dangerously. The result is they begin to think with their red blood corpuscles

* Umpire under the Ford-UAW Agreement and a Past President (1958) of the National Academy of Arbitrators; of Detroit, Mich.

instead of their brain cells. Obviously, this is not true of Saul Wallen. The paper he has presented is a highly competent review of arbitral opinion and, indeed, of his own sound thinking on past practice problems. I am certain it will contribute greatly to our knowledge and understanding of this subject. While the paper contains little with which I would disagree, I do have a few comments to make.

From time immemorial and in practically all spheres of activity, it has been common understanding that the natural, spontaneous evolutions of habit determine not merely the bounds of reasonableness but our choice of paths when a choice is available. This conception, indeed, has for many years guided our courts in their exercise of the adjudicative function. It also is a force in directing union and management policies and actions of supervisors and workers in the conduct of their joint enterprise. It should therefore be no surprise that arbitrators, when confronted with an imperfectly expressed or loosely drawn provision of a labor agreement, look to the context in which it was negotiated and to plant customs and practices to determine the extent of the parties' obligations under the agreement and whether there has been adherence or departure from its general standards.

I think it is pertinent to note, since it figures so prominently in Saul Wallen's discussion, that Section 2B was not the first nor only source of authority for enforcing practices and local working conditions in the steel industry. Despite the fact that the early steel agreements failed to mention plant practices and local working conditions, their maintenance has nevertheless been an integral part of the collective bargaining relationship in steel since long before Section 2B was adopted in 1947. In the negotiations of that year, the parties recognized it would be impracticable to deal fully and specifically with the myriad practices and working conditions at the different operations and different plant and mine locations. They therefore agreed upon "general principles" and "guideposts" for dealing with them. It was not their purpose to provide "a conceptually complete and clear treatment of the entire subject matter," as Syl Garrett has pointed out.[1] Rather, Section 2B clarified and amplified the authority which steel arbitrators were already exercising in the interpretation and applica-

[1] *U.S. Steel Corporation, Fairless Works,* 8 *Basic Steel Arbitrations* 5315, Garrett.

tion of conditions of employment in effect in the plants of the steel companies.

That Section, by the way, by no means bestows benefits only on the employees. As a matter of fact, neither they nor the union can establish a practice or effect a change in an undesirable practice or local working condition (except for reasons of safety and health) without management's consent. Management, after all, schedules the work, directs what work should be done when and by whom, transfers, discharges, and relieves employees from duty for lack of work. It is therefore usually supervision's acts that bring about practices and working conditions, many of which are as necessary to the proper functioning of the plant as they are beneficial to the employees. In any event, they are effective only so long as the circumstances which produced them continue to exist. Under the 2B-4 guidepost, if the underlying circumstances change, the practice or condition becomes no longer entitled to protection. Hence it may be said that Section 2B reflects a "mode of accommodation" between the parties. It provides a reasonable measure of stability for the employees' working conditions and flexibility for management to make improvements in operations.

I agree with Saul that it would add little to our present knowledge and understanding to talk about the role of past practice as an aid to interpretation and implementation of agreements. The propriety of referring to past practice for those purposes has not been seriously questioned by anyone and it is indeed traditional both in the courts and in arbitration.

I do not, however, fully share his reservations about looking to a later-established practice to determine whether a seemingly unambiguous provision of the agreement has been modified or amended by it. I think Ben Aaron a few years ago,[2] and Dick Mittenthal last year,[3] presented strong arguments in support of such a proposition. The fear that it would somehow weaken the agreement's value as an instrument of control to interpret subsequent conduct of direct supervision and the affected employees

[2] Benjamin Aaron, "The Uses of the Past in Arbitration," in *Arbitration Today* (Washington: BNA Incorporated, 1955), pp. 1-12.

[3] Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," in *Arbitration and Public Policy* (Washington: BNA Incorporated, 1961), pp. 30-63.

as modifying or amending a provision of the agreement does not seem to me very real. It is precisely because a collective bargaining agreement has "institutional characteristics" that it is important to know, when a dispute arises under it, if it is still in effect as written or if it has been amended.

Saul suggests that if this theory *is* invoked, it should be "applied only where the course of conduct that runs counter to the language was known and approved by those with the power to contract." But if that is the basis for his objection, i.e., that management subordinates, while exercising their administrative function and discretion, may have introduced a practice or local working condition without the knowledge and approval of those who drafted the agreement, then his objection is of a different color. It goes merely to the sufficiency of proof. I would, of course, not quarrel with anyone who says that extreme caution must be exercised in finding a modification or who says that the strongest and best proof would be required to demonstrate that the parties actually intended to effect a modification or amendment of their agreement by the later established practice.

Wallen's case analysis bears out that the binding force of a local working condition or practice derives from either a specific provision requiring its continuance during the term of a contract or from the fact that the parties are presumed to have contracted with reference to it and for its continuance. A "silent" agreement is one which, as Saul says, contains no express obligation to continue in force practices or working conditions which existed at the time the collective agreement was signed. It is in connection with these agreements that the argument is often heard that an established practice or custom is, nevertheless, a condition of employment the continuance of which is implied in the terms of the agreement. Many arbitrators have reached this result in the light of strongly convincing evidence that the claimed practice or condition was rooted in mutual understanding, that it existed for a long time and was well known to both supervision and the employees, and that it remained unchallenged up to and through the contract negotiations. The result is not inconsistent with holdings by the courts that an agreement includes not only the obligations expressly set forth but in addition all such implied obligations as are indispensable to effectuate the intention of the

parties and as arise from the language of the agreement and the circumstances under which it was made.[4]

Still, the implied obligation theory is not to be applied blindly. The crucial question in every case must be whether the inference that the parties tacitly agreed to a continuation of the specifically challenged practice is warranted under the evidence. In a decision involving a paid-lunch period practice at Ford Motor Company, Harry Shulman stated it this way:

> "To imply an obligation is to find that both parties, not just one of them, in fact agreed upon it, even though they did not express their agreement in words, or that their conduct fairly leads to that result whether they thought of it or not. The propriety of the implication depends therefore on the circumstances of the case. Just as silence or certain other conduct may permit the implication, so also other conduct or expression may clearly negate it. If we assume that the execution of successive national agreements may imply, in general as well as by particular language, an obligation to continue local agreements or practices not mentioned in the national agreements, the question arises whether the claimed implication is proper in this case." [5]

In that case he held that because two earlier agreements were negotiated without controversy as to the paid-lunch period, it was proper to infer that the parties agreed to a continuation of the practice. But where the evidence showed that the obligation to continue the practice under a subsequent agreement was determinedly negated by the actions of the company in negotiations, the inference was not proper.

As already stated, Section 2B-4 of the steel agreements recognizes the company's right to change or eliminate any local working condition where, as a result of action under the management clause, the basis for existence of the practice or local working condition is changed or eliminated. And Saul Wallen concludes that the same result is reached by arbitrators under "silent" contracts. This may be true, but I question whether it's because these arbitrators find that the basis for the practice has changed or because they find that the challenged management action is unrelated to and not subversive of the purpose behind the prior established practice. If the former were the basis, it would trouble me a little because it would logically require drawing not just

[4] E.g., *Sacramento Navigation Company* v. *Salz*, 273 U.S. 326, 329.
[5] *Ford Motor Company*, 10 LA 272, Shulman.

one inference but one inference upon another. The question would arise: assuming the parties impliedly agreed to continue a specific practice which existed at the time the agreement was signed, would there be justification for inferring additionally that the parties could freely make unilateral changes in it or eliminate it during the term of the agreement? I think it is at least arguable that where maintenance of a practice is implied in the terms of an agreement, a change in conditions would justify a change through negotiation and agreement in the usual manner but not through unilateral action. And this is precisely the holding in one of the cases mentioned by Saul.[6]

There is another aspect of the practice issue in which Saul Wallen finds not only a difference in the criteria of decision but in the results reached by arbitrators under silent and express agreements. It relates to enforcement of crew sizes. He says that under a silent contract arbitrators are disposed not to order "continuance of a crew of a certain size if lesser manning will not impose on the remaining crew members more than a fair day's work and will not jeopardize their health or safety." Finding that the decisions are the other way under a 2B type clause, he theorizes that the divergence in arbitral opinion is due to the great respect which the managerial art of balancing manpower and work commands in arbitrators under silent agreements and their awareness that the parties have not talked about "the relationship of past practices to the written agreement." He concludes that because they have no "stronger mandate" these arbitrators are "unwilling to compromise that which goes to the heart of the managerial function—the balancing of men and work."

I must confess I do not find this rationalization very satisfying. In the first place, I'm not quite sure I understand what he means by a "stronger mandate." He can hardly mean that the arbitrator already possesses a strong mandate to imply the continuance of a wash-up and paid-lunch period practice but it requires a stronger mandate to imply the continuance of a fixed crew size. Secondly, I think Saul imputes a too modest, if not a shrinking violet, role to arbitrators when he suggests that they

[6] *Western Insulated Wire Company*, 27 LA 701, Jones, Jr.; also see discussions of Arthur J. Goldberg and Neil W. Chamberlain in "Management's Reserved Rights," *Management Rights and the Arbitration Process* (Washington: BNA Incorporated, 1956), pp. 118, 126, 140.

decide crew-size issues the way they do because they have respect for the managerial art of balancing manpower and work. Of course, arbitrators have great respect for management's artfulness in this as in many other areas; but I have not known that to be a controlling factor in arriving at their decisions. I think the answer lies elsewhere.

The fact of the matter is that protection of a crew size is seldom sought in arbitration by unions in mass production industries. Very likely the reason is that they have their own procedures, both administrative and contractual, for establishing and insuring compliance with fair and equitable standards, including essential manpower and health and safety requirements. Under their procedures, crew size, as such, is not usually a subject of negotiation, except possibly where it is an integral part of an incentive standard. The manpower question thus arises in a different context in those industries than in steel. My own feeling is that a more likely reason for the divergence in arbitral opinion on the crew-size issue is the care and attention that arbitrators give to these factors: the different traditions that exist in steel and in other mass production industries; the character of the collective bargaining relationships; the nature of the operations and skills required to perform them; the frequency or infrequency of changes in product, method, and processes of manufacture; the opportunity or lack of opportunity for fixed crews to become fully established; and the degree of relationship between crew sizes and production and incentive standards.

A recent study by Professor Charles Killingsworth, soon to be published, seems to me to lend support to this conclusion.[7] Killingsworth finds that in the steel industry there has been little change over the years in products, processes, and methods; that its massive, expensive, and highly durable equipment is not often replaced; that practices and customs on such matters as crew size, spell time, and the like have been followed for so long that no one remembers their origin. He compares this with conditions in the automobile and rubber industries which he finds are characterized by a fairly rapid rate of change in equipment,

[7] "Study of Collective Bargaining Approaches to Employee Displacement Problems" (Outside the Railroad Industry), prepared by Charles C. Killingsworth, Michigan State University, August 1961, for the Presidential Railroad Commission. Also see "Work Rules and Practices in Mass Production Industries," a paper by Jack Stieber delivered at IRRA Annual Meeting, December 29, 1961.

processes, products, and methods of manufacture. In the auto industry, for example, he finds that the "customary annual model change is only one aspect, though an important one, of the emphasis on change in production methods. Strong seasonal and cyclical fluctuations in the demand for new cars have a considerable effect on ways of doing things; as production expands or contracts, jobs may be split up, combined, or eliminated and crew sizes increased or decreased." He adds that "under conditions of rapid change like that which has characterized the automobile industry especially in recent years, custom and practice generally have little opportunity to take root." And his findings are quite similar with regard to the rubber industry.

Now, for my final comment. It is in the nature of a caveat. It would be a mistake, as I think Saul will agree, to assume from the cases discussed in his paper that there are not any significant differences between arbitrating under a so-called silent agreement and under one which contains an express maintenance of practice clause. Indeed, there are significant differences. Principally, there is the matter of proving the existence of a practice. It certainly would be easier to establish the existence of a binding practice under Section 2B than it would under a silent contract. The former, in express language, protects not merely working conditions which arise from agreement of the parties but those which are established through custom and practice. Hence, the steel arbitrator may find a binding practice to exist without proof of mutual intent. He need only determine what the objective circumstances are which evoked a uniform and recurring response in dealing with a given problem and whether a change has occurred in the underlying circumstances. On the other hand, the arbitrator under a silent contract must find not only that there has been a recognized course of conduct repeated over an extended period of time, but also that the course of conduct somehow arises out of mutual agreement or joint determination of the parties. Under Section 2B the arbitrator somehow seems to assume the existence of this mutuality. I believe, therefore, that stronger proof would be required to establish a practice in the absence of a 2B clause. This and other differences make it impossible to say that because a practice or local working condition is binding under the steel 2B guidepost, it will be held binding under a silent agreement as well.