I recognize the difficulties of substituting a new interpretation. The agreement must mean *something,* and something which carries clear implications and consequences to the parties. What I am approaching is an agreement which specifies fairly broad intentions, subject to an application in particular situations but not so specific as to past situations that it cannot be modified as need dictates, and modified in the interests not just of one but of both parties, and relying on an arbitrator to assist in the determination of how that broad intent can best be carried out, whether according to previous practice or fresh experiment.

In any event, I feel reasonably sure that the legalistic view of the collective agreement is now a social liability, and the more willing we are to adapt bargaining instruments to the dynamics of our industrial and economic system, the more effective will it become, and I might add, the more interesting to everyone.

II. Reexamining Traditional Concepts

RALPH T. SEWARD *

Listening to a paper like Neil Chamberlain's is a refreshing experience for those of us who work in the corners and interstices of the collective bargaining and arbitration process. It is like turning from the view of the weather we get from our windows to the weather announcer on television, with his large map showing the "highs," the "lows," the major fronts, etc. Such a map gives one the broad horizon one cannot see from the window, and the ability to look towards the future that comes from such a broad horizon.

To most of us, I am afraid, the weather map of collective bargaining is all too familiar: two large areas of high pressure, separated by an area of dense fog in which arbitration takes place. Fog is the inevitable result of mixing hot air and cold reality. It is good to come out of the fog every once in a while for a different and larger perspective; to see the possibilities that the future may hold for collective bargaining, for arbitration, and for the professional lives and preoccupations of all of us.

* Arbitrator and Attorney, Washington, D.C.; past president (1948-49), National Academy of Arbitrators; impartial umpire, Bethlehem Steel Co. *and* United Steelworkers of America.

Now that we have had a glimpse of Neil Chamberlain's weather map, however, I am afraid that I must take us back into the fog again. For that is where, when we leave here and return to our jobs, we are going to be; back in those crowded hearing rooms with the green table cloths and the ash trays and the piles of briefs and documents and the questions of contract interpretation and application which cannot wait for the future but have to be answered now.

I do not think that in most of those hearing rooms we will see much evidence of continuous collective bargaining. We know that this new approach exists and is increasing in importance. It is being given a lift and an urge forward, as we learned today, by the American Arbitration Association, by the Federal Mediation and Conciliation Service, by conferences such as this, by discussions in the universities, by conversations among informed people all over the country, and by the obvious failures of crisis bargaining.

We are not going to see signs of much continuous bargaining, however, in the hearing rooms we are heading for. We are going to have to start from where we are, and it is only by moving from where we are that we will move into the future that Neil is talking about.

One aspect of the "where we are" that Neil referred to is the tension which presently exists between management's need for flexibility in a changing and competitive economy and the union's need for the security and stability provided by the labor agreement. That was not formerly the main tension we felt in the hearing rooms. All of us will remember the days when it was usually the union that was pressing against the contract, was trying to read into the contract more than was there, was trying—according to the old phrase that we would hear indignantly from management's side of the table—to "get in arbitration what it had failed to get in collective bargaining." It was the union that was pushing, pushing, pushing.

Gentlemen, the push is beginning to come from the other side now. More and more, it seems to be management that is pushing against the agreement. The pressure from management may not be to "read into the agreement what it failed to get in collective

bargaining." But I suspect that we have all wondered whether, under the competitive pressures for flexibility, management is not sometimes trying to read *out* of the agreement what was put there in collective bargaining. In the hearing rooms, these days, we are finding a far more dynamic and less defensive management; a management whose main concern is no longer "what the arbitrator might take away from it" and whose main endeavor is no longer merely to "hold its own"; a management which, under competitive pressure, has been actively using its initiative to improve efficiency and lower costs and which is affirmatively contending in arbitration for interpretations of the labor agreement that would justify and support its action.

Neil tells us that this may be the wave of the future and that part of the job of an arbitrator is to help in accommodating the agreement to management's need for flexibility and change. I suggest, however, that it can only be the wave of the future if there is considerable reexamination of certain ideas about arbitration which management and management lawyers have long been propounding. During the coming years, one of the aspects of arbitration which may give management its greatest concern is how to get around some of the principles of contract interpretation and construction for which it successfully argued in its more defensive days—principles which emphasized language more than life, precedent more than problems, and rigidity rather than flexibility of contract application. For in the hearing rooms, I think, we are going to find that the agreement still controls. The task of the arbitrators is still going to be what it has always been: to mediate; not between management and labor, but between the agreement and the problem, between language and life, between general rules and special needs.

I have listened today and yesterday to some things which gave me considerable concern. These were matters of attitude which, coming after all our years of experience with grievance arbitration, worried me a bit. I should think they would worry you. Let me pause for a moment parenthetically, if I may, and make one or two comments about the discussions yesterday and this morning.

We have heard a great deal about delay in arbitration, about costs in arbitration, and about techniques of speeding up and cheapening arbitration. Not once, in two days of sophisticated

discussion, have we heard the word "quality." Yet—speaking to our guests from labor and management—the quality of an arbitrator's work is necessarily one of your prime concerns. You can take (and have taken) delay, though you complain about it. You can take (and, unfortunately, sometimes have taken) unjustified expense and have rightly complained about it. But the one thing you should not ever have to take from arbitrators is poor quality work—snap judgments, slipshod thinking, careless writing, offhand decisions that raise more problems than they settle. For a time, at least—and possibly for a long time—our decisions will be the binding law in your plants. One thing you should therefore be in a position to insist upon is high quality in those decisions; and high quality comes at a price—in time, at the very least.

I urge you to remember that. And I urge you to remember something else. When we are mediating between language and reality, when we are trying to make sense because you have to live with what we do, I hope you will not ask us—as seemed to be implied this morning—to concern ourselves only with giving you quick and definite answers and to turn our backs on concepts of soundness, fairness, and justice. God help this profession and this enterprise in which we are all engaged if it alone, among all the judicatory systems that mankind has developed, attempts to turn itself into a computing machine and forgets the basic standards which make us men and not machines of justice. God help us if arbitrators do not *want*, sometimes, to go beyond the decision as to what *must* be done, under the contract, and make recommendations as to what *ought* to be done by men of good will, regardless of the contract. We arbitrators are people, too, and we have a normal urge to express those feelings of *oughtness* which are the best part of all of us.

I don't believe in recommended decisions; they rarely do much good. We are your servants. You *do* want answers under the terms of your contracts. If you make mistakes in bargaining, you *should* bear the responsibility for them, and we should *not* take it upon ourselves to try to bail you out. But I hope that all of us will continue to explode sometimes when we see injustice, and let you know how we really feel. And I hope that you will not only pardon us for such explosions but be glad that we are the kind of people that will sometimes explode. End of parenthesis.

We are going back, then, into hearing rooms that are in a state of tension between the forces that make for change and the forces that make for stability as represented by the agreement. In those hearing rooms, if we are to serve you well—if we are intelligently to apply agreement language to dynamic life—we will need your help. As Ben Aaron said, although the program for this session says something about the "Rights of Arbitrators" we really don't have much in the way of rights. But we do have needs, and our greatest need is for your best thinking—your hard, imaginative, constructive thinking—about the problems inherent in reconciling static agreement language with the pressures for industrial change and development.

One thing we do *not* need—if you will pardon another digression—is much more of the sterile, dried-up, and useless argument between the "Management's reserved rights" theory, on the one hand, and the "implied obligations" theory, on the other. *Of course,* what the contract covers it covers and what the contract does not cover it does not cover. *Of course,* where the contract does not limit management, management is not contractually limited. But to say that management reserves all rights which it has not given up in the contract is only to raise the basic question which is before every arbitrator: what rights *has* management given up in the contract? We cannot escape that question. The "reserved rights" doctrine brings us not to the end of any problem, but merely to its threshold.

There is no conflict, moreover, between the "reserved rights" doctrine and the use of the rational process of implication in interpreting an agreement. The process of interpreting language is necessarily a process of implication, for words are merely symbols and require the aid of reason if they are to be applied to life. And there is much more to interpreting a contract than just the interpretation of words. Every contract which you present to us is composed not only of language but of silence. A large part of an arbitrator's job is to interpret the silences of an agreement. We cannot escape that task. Counsel for both managements and unions ask it of us every day as a matter of course, resting arguments on the implications of contractual silence. Sometimes, it is argued that contractual silence indicates an absence of agreement on the subject in question or an intent not to deal with that subject

in the contract. But, quite as often, it is argued that the contract is silent because the parties thought that express language was unnecessary; that their intent was so well understood and so obvious as not to require written statement. In each case, the task of the arbitrator is to interpret the agreement soundly, wisely, and realistically; looking at the whole contract with its gaps and ambiguities as well as its clear words; not attempting to find agreement where there is none; but not allowing the absence of express language to blind him to the underlying assumptions of the parties or to their true intent.

A major need of an arbitrator, then, is for the parties' help in this task of interpretation. What are the needs, problems, and objectives that shaped the agreement? What assumptions underlie it? To what framework of customary conduct and expectation is it to be applied? Why does it speak in only general terms as to this subject and in great detail as to that? And what are the basic concepts that lie behind the words of the agreement and shape their meaning?

Understanding the conceptual framework of the agreement presents particular difficulties—and is particularly important—in times of change. In stable situations, where neither management nor union is trying to upset the applecart, where the disputes mainly concern the application of accepted principles, conceptual problems do not give us much trouble any more. Over the last fifteen or twenty years, in the major industries, most concepts have been arbitrated and rearbitrated until they are now pretty well understood.

Established concepts, however, are instruments of stability. Where there is pressure for change, there also tends to be pressure for the reexamination of ideas and of the meaning of words. Four concepts in particular, I think, are facing reexamination today: (1) the nature of a "job"; (2) the reason why a man gets paid; (3) the relationship between seniority rights and work; and (4) the meaning of past practice, custom, and understanding. I want to touch briefly on each of these concepts and tell you why I believe they need the hard thought of all of us.

(1)

Probably no word in industrial relations is used more haphazardly and is given more different meanings than the word "job." We talk about "having a job" (i.e., an employment relationship), or being "given a job" (i.e., a task to perform), or "doing a good job" (i.e., working well and effectively), or "turning out a good job" (i.e., making a good product), or "classifying a job" (i.e., evaluating and rating a set of duties). We speak of an "incentive job" or of a "job assignment" or of "bumping into a job" or of "job security" and we mean different things by the word "job" in each case.

Now there is no harm—and, in the English language, nothing at all unusual—in using one word to mean many different things. There is not even any harm when the same word is used to mean different things in a labor contract, provided that one is clear as to what the different meanings are. Involved in the various meanings of the word "job," however, are certain concepts which—when they are given contractual status—have a crucial bearing on contractual flexibility and the "room" the contract leaves for development and change.

Take, for example, the concept of a "job" as a specific combination of duties; i.e. a man is required to pull this lever, step on this treadle, watch this dial, measure this diameter, put fresh material into the machine, take finished material out of it, and—as the tail end of the job description usually says—"clean up the work area." This is the "job" which the industrial engineers describe, evaluate, and classify; the set of duties which they rate according to various measures of skill, effort, and responsibility. And for the purpose of establishing a satisfactory relationship between work and pay, this concept of a job as consisting of a specific set of duties can be very useful.

Its utility, however, depends upon the existence of fairly stable conditions of work allocation. What happens when, as management strives for greater flexibility and lower costs, work allocation becomes less stable? What happens when management begins to recombine duties not just occasionally, to meet major changes in operating methods, but continually—from day to day or from shift to shift? What happens when an employee is assigned to certain

duties in the morning; to others in the afternoon; and to still others on the following day? What happens when an employee performs certain duties at the start of the week, others in the middle, and still others in the end? Is he being transferred back and forth between different jobs or is he assigned to one combined job? Does each reassignment involve a job "change" within the meaning of the agreement provisions regulating such changes? Does the combination of several jobs into one job create a "new" job under the agreement and call for a new process of description, classification, and rate setting? If so, how about the situation the following week, when an increase in work load leads management to dissolve the combination again and assign different employees to different parts of it?

It may be suggested that under conditions of rapid change, the concept of a "job" must be altered and broadened so as to include, not the specific combination of duties that an employee may be assigned to perform at any one time but the whole range of duties which might potentially be assigned to him. But if this is done, thought must be given to the concept of a "job" as it affects seniority rules. What is the content of the "promotional vacancy" which results when the incumbent of such a broadly defined job retires? Against what requirements does one measure comparative ability? Is the "job," for seniority purposes, the whole classification including all the different assignments within it? Or are there "jobs" within job classifications? In times of rapid change and shifting assignments, must not a distinction be drawn between the concept of a "job" for wage purposes and the concept of a "job" for seniority purposes?

And how about the concept of a "job" which emerges when the unions talk about the need for "job security." What do they really mean? What is it that they want to stabilize and make secure? Are they trying to secure *employment,* the status of "having work," of being an "employee"? Are they trying to secure and perpetuate specific *combinations of duties?* Or the *relations between certain job assignments and certain job classifications?* Or the *relations of individuals to specific work opportunities or earnings levels?* All of these can be reasonable objectives. But there are inconsistencies between them, and great possibilities of confusion unless there is both careful thought and careful drafts-

manship. There is a great risk, when arbitrators are asked to decide a dispute strictly on the basis of the language of the contract, of having a decision based simply on grammar and syntax and having little relation to the real problems in the plant. And if this is to be avoided, the real thinking about the meaning of your agreements as they apply in times of change must come—not from us—but from you.

(2)

Another set of ideas that is being brought into question these days, and about which we will need your hard and constructive thought, concerns the basis of wage payment. In countless hearings, in countless arguments and in countless briefs, you—both management and labor—have educated us in the distinction between the job and the man and have made clear your assumption that in production jobs, at least, the wage rate depends on the nature of the job—its requirements as to training, skill, effort, responsibility, etc.—and not on the nature of the man. Accepting that assumption —along with the concept of a "job" as a set of identifiable and repetitive duties—we have all talked in our opinions about the "job-wage equation"; about how changing one half of the equation can justify a change in the other half; about the effect of freezing wages on the right to change job duties; etc. And while we have recognized that in the maintenance trades and crafts men are typically paid for their skill rather than for their day-to-day performance—for what they might be called upon to do, rather than for what they actually do at any one time—we have regarded this as merely an exception to the general rule which ties wage rates closely to actual job requirements.

Several things are happening, I believe, which tend to narrow the applicability of this general rule and call for fresh thought. One is a broadening of the scope of many production jobs—an increase in the number and variety of the things an employee may be called on to do—with a consequent spread of the craft approach toward wages. As you automate your plants—as you turn repetitive work over to machines—production employees tend to become more and more like maintenance men, not *participating* in the operation as much as *overseeing* it and preventing things from going wrong. As a result, I think we may find in many areas a growing emphasis on personal knowledge and skill as a basis for

wage payment in many production jobs. And this may call for some fresh thinking about the standards which are used in the determination of wage-rate inequities.

Again—and growing out of this same increasing difficulty of relating pay satisfactorily to any particular set of job duties—there seems to be a tendency to find grounds for wage payment simply in a man's participation in the enterprise. This is particularly true in the incentive field, with the spread of various types of group incentives which depend upon the performance of the group rather than the individual; and with the frequent extension of incentive coverage to employees—crane men, truck operators, maintenance men, etc.—who do not participate directly in the productive process but merely service it. And it is reflected in the equipment utilization incentives under which pay essentially derives, not from the effort of the employees, but simply from their success in achieving capacity production.

We are beginning to see a "feed back" in the pay concepts that underlie and give direction to the grievances coming before us. We are beginning to find that opinions as to how much a man should be paid for working are being influenced by how much he would otherwise be paid for *not* working under unemployment compensation, SUB, etc. Work is sometimes being found for men as an alternative to SUB, just as work has long been found for them as an alternative to call-in pay. And when this is done, one may reasonably doubt that normal relationships between job duties and wage rates are usually maintained.

(3)

Let us turn to seniority. Whenever there is a major change in manufacturing methods and job assignments, and management reallocates job duties, combines jobs, or decides to transfer work from one group of employees to another, disputes may arise that will force us to inquire into the real nature of seniority as it is conceived of at that plant. We all accept the idea, of course, that seniority is a matter of preference between people. It is a matter of my having a greater right than you to a job or you having a greater right, on grounds of seniority, than I do to a job. But what is the full content of that right? Is it a limitation only on management's discretion in the assignment of employees to available jobs?

Or is it, in the particular plant involved, a limitation on management's discretion in determining the content of those jobs? Or in transferring work from job to job, department to department, or mill to mill? Or in combining or recombining job duties? If management is going to press for flexibility and efficiency and the union for stability and security, no conceptual questions can be more important.

(4)

Finally, there is the old and familiar concept of past practice, the idea that because something has been done in the past it should be done in the future; the idea which, to use Neil Chamberlain's phrase, centers our attention on a time stream running back into the past rather than on one running into the future. It is very easy to say that we should break away from this concentration on the past. It is easy, that is, until one realizes that in the history of human adjudication, the past—in terms of precedents, customs, practices (and even seniority)—has always been given great weight. It seems to be natural that men who are in doubt as to what they should do will take guidance from what they have done successfully in the past. That tendency to look to the past will, I think, inevitably remain with us. The question is in what terms do we look to the past and what effect do we give to it.

I suggest that since our function, as arbitrators, is to interpret and give effect to your agreements, our inquiry into the past must be a search for mutual understandings that can throw light on those agreements. There is a difference between haphazard repetition and repetition which reflects an understanding of the parties that "this is the proper and right thing to do." I suggest that binding weight should not be given to the repetition of acts, each of which was an exercise of a foreman's discretion and represented a choice between equally available alternatives; otherwise foremen and supervisors would have to vary their decisions simply for the sake of varying them, in order to keep loose and free. But I suggest also that when repetition reflects an *understanding*—when the evidence as to custom, usage, conversations, grievance settlements, etc. indicates that the parties normally *expect* the thing to be done and believe it *should* be done—the practice in question properly forms part of the matrix of collective bargaining from which the agreement takes its shape.

It must be remembered that in these days the negotiation of most of the basic labor agreements takes place against a background of local agreements, special agreements, local understandings, grievance settlements, and long-standing practices. In interpreting the agreement, this background cannot be ignored. And so again we return to my basic theme: that in this matter of distinguishing between the practices which reflect understandings and those practices which reflect the mere repetitive exercise of managerial discretion, we need the joint thought and joint help of both management and labor.

* * *

All of this gets us back to where Neil left us. If there is to be a mutual effort of both union and management satisfactorily to adjust to change and the need for change, if there is to be the hard and constructive thinking that there *must* be if the labor agreements are to provide both adequate flexibility and adequate security, this is, I think, where continuous collective bargaining should start.

It does not necessarily need the formal establishment of a Human Relations Committee. It does not necessarily need something like the Kaiser committees. It can go on at grievance meetings, safety meetings, or any other formal or informal meetings between management and union representatives if only they will be willing to concentrate on the long-run problems that lie behind their immediate disputes. It can go on wherever intelligent union and intelligent management representatives are willing to inquire together into the background of grievances and the future of grievance settlements. It can go on even when management and the union cannot agree and decide that they must arbitrate if they will be willing jointly to consider how best to present their problem to us, and how best to aid us in arriving at a sound decision.