

CHAPTER I

THE PRESIDENTIAL ADDRESS: MANAGEMENT RIGHTS REVISITED

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I. Introduction

Past practice seems to decree that the annual Presidential Address at the National Academy of Arbitrators should be statesman-like and noncontroversial. It is permissible to praise the virtues of arbitration and the Academy and to defend them against poorly informed or malicious critics, but usually the light touch is preferred. My address today departs from that tradition. It undertakes a reexamination of the long-smoldering controversy about management's reserved rights versus implied obligations under a collective bargaining agreement. Perhaps my comments will prove the wisdom of past practice. In any event, I'm sure that some Academy members—and perhaps some of our guests as well—will regard my remarks as a rehash of stale issues that have already been settled. And I'm equally sure that others here today will find heresy in at least some of what I have to say.

To the first group I say that this controversy—although by now well-aged and repeatedly debated in Academy programs—is still far from settled. The “reserved rights of management” theory of contract interpretation, in its pristine form, is still alive and influential, if not entirely well. Let me remind you that at last year's Academy meeting our good friend, Owen Fairweather, attributed a major part of the great efficiency of American industry to “the doctrine of reserved rights,” which he defined as follows: ¹

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¹ Owen Fairweather, “A Comparison of British and American Grievance Handling,” in *Developments in American and Foreign Arbitration*, Proceedings of the Twenty-First Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 1-18, at 16.

It is the simple and understandable view that management, which must have the right to manage, has reserved its right to manage unless it has limited its right by some *specific* provision of the labor agreement. [Emphasis added.]

Owen also said that this doctrine "has been enunciated by arbitrators in this country for over 30 years and has been accepted by union leadership and employees." With all respect to Owen, I must say that I was surprised by these statements, because my own experience over the last 25 years had led me to quite different conclusions. But an examination of recent literature on this subject turned up considerable support for Owen's view. Let me cite three examples. A committee of the American Bar Association filed a report in 1967 which quoted with approval a recent arbitration decision that included the following statement: ²

. . . there are countless hundreds of arbitration decisions, as well as many arbitrators, who follow and accept the residual rights theory of management's rights, even where there is no management-rights clause incorporated into the agreement.

Another substantial piece of evidence is an updated version of a volume entitled *Management's Right to Manage*, by George W. Torrence, which was issued in July 1968.³ That volume quotes at length from scores of arbitration decisions, some ancient and some quite recent, that do indeed embrace the pristine version of the reserved rights doctrine.

Finally, Russell Smith and Dallas Jones recently reported the findings of an extensive survey that they had made of reactions to recent Supreme Court decisions concerning arbitration and arbitrability.⁴ They found much concern among the representatives of medium- and small-size firms, especially attorneys representing such firms, and the typical complaint appeared to be that these court decisions might encourage arbitrators to give more emphasis to the "implied obligations" doctrine than to the reserved rights doctrine. Presumably, they had considered the latter doctrine essentially unchallenged up to that time.

² *Daily Labor Report*, August 8, 1967, D-1.

³ G. W. Torrence, *Management's Right to Manage* (Washington: BNA Books, 1968).

⁴ Russell A. Smith and Dallas L. Jones, "The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties," 52 *Va. L. Rev.* 831, esp. 888-889.

One more preliminary comment, this one addressed to those who will find heresy in my remarks. I speak only for myself, not for the National Academy of Arbitrators. I cannot guess what proportion of Academy members will agree with my position, but I am quite confident that there will be some who will strongly disagree. I do not seek to articulate a consensus. Rather, I proceed in the belief that one of the highest functions of the National Academy of Arbitrators is to provide a free market place for ideas, not excluding ideas about conceptual problems that continue to trouble us in this evolving field of industrial jurisprudence.

II. The Pristine Version of Reserved Rights

I have spoken of the “pristine” version of the management’s reserved rights doctrine. The dictionary says “pristine” means “in the original version,” “uncorrupted.” The importance of the adjective will shortly be apparent. The best statement of this pristine version is found in a paper which Jim Phelps, then of Bethlehem Steel, presented at an Academy meeting in 1956.⁵ Here are the key passages from Jim’s paper:

When we speak of the term “management rights” . . . we are referring to the residue of management’s pre-existing functions which remains after the negotiation of a collective bargaining agreement. In the absence of such an agreement, management has absolute discretion in the hiring, firing, and the organization and direction of the working forces, subject only to such limitations as may be imposed by law. . . . Except as management has agreed to restrict the exercise of its usual functions, it retains the same rights which it possessed before engaging in collective bargaining . . . [T]his view is . . . the only one that gives full recognition to the realities of the collective bargaining relationship. In general, the process of collective bargaining involves an attempt by a labor union to persuade an employer to accept limitations upon the exercise of certain of his previously unrestricted managerial rights. To the extent that the union is unsuccessful in persuading an employer to agree to a particular demand, management’s rights remain unlimited.

⁵ James C. Phelps, “Management’s Reserved Rights: An Industry View,” in *Management Rights and the Arbitration Process*, Proceedings of the Ninth Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1956), 102-117. This session also included a valuable paper by Arthur J. Goldberg, “Management’s Reserved Rights: A Labor View,” and comments by Sidney A. Wolff and Neil W. Chamberlain.

Jim went on to make it clear that he emphatically rejected the notion that there could be any "implied obligations" on management in a labor agreement. He was highly critical of a passage in an arbitration decision that he had recently received, which included the following dictum:

Conceivably, in rare and unusual situations, local or departmental management might be guilty of such extreme abuse of managerial authority that its action could be reviewed in arbitration.

Jim denounced this view as "heresy." The essence of his position simply was that, as to all matters not governed by the *specific* terms of the agreement, management retains sole, unlimited discretion, and arbitrators have no jurisdiction whatever to review management's exercise of that discretion.

Some of my arbitrator colleagues have subsequently expressed doubts to me that Jim really said what the printed record shows he said, and others have questioned whether his views were really typical of management representatives generally. My answer to these arbitrators is always that I have heard the doctrine of management's reserved rights expounded in identical terms by many other advocates. Let me add two brief reminders for emphasis: Owen Fairweather's statement of the doctrine at last year's meeting was that management retains those rights not limited "by some *specific* provision of the labor agreement." It would be an injustice to Owen to assume that his choice of the phrase "specific provision" was inadvertent. Moreover, Russ Smith and Dallas Jones found evidence in their survey of rather widespread management efforts to strengthen the management's rights clause of their labor agreements, most generally by writing in the pristine version of the reserved rights concept—in other words, attempts to prevent the arbitrator from relying in any way on the implied obligations doctrine.

III. Weaknesses of Pristine Reserved Rights

In my opinion, the pristine reserved rights concept has two fundamental weaknesses. In the first place, it rests on a highly unrealistic view of the employer's situation in the absence of a labor agreement but with a union representing his employees. In the

second place, I believe that the Supreme Court has, in effect, rejected the concept.

The reserved rights concept necessarily rests on the view (in Jim Phelps's words) that, in the absence of a labor agreement, "management has absolute discretion in the hiring, firing, and the organization and direction of the working forces, subject only to such limitations as may be imposed by law." Now there may be some basis in legal doctrine for arguing that the employer has the "right"—for example—to abolish a long-established incentive system, or to cut wages by 25 percent, in the absence of any contractual obligation to maintain either.⁶ As a nonlawyer, I would not quarrel with the many distinguished lawyers who have defended that proposition. But as a labor economist, I would insist that having the legal "right" to do something is not necessarily the same thing as having "absolute discretion" to do it. When we speak of "absolute discretion," we refer to a situation in which there are absolutely no external constraints on choice. The basic fallacy of the reserved rights doctrine lies in its equating a putative "right" to take action with "absolute discretion" to take action. What this doctrine relies upon is the fact that the law does not constrain the employer's discretion. What the doctrine ignores is the existence of an important countervailing right—the right of the employees to go on strike. This right, which has been protected by federal law since 1935, quite frequently and powerfully constrains the employer's discretion.

Let's consider a concrete example. In the automobile industry, certain subjects, such as production standards, are specifically excluded from both the arbitration clause and the no-strike clause of the typical agreements. In other words, the rights of each party with regard to production standards are essentially what they would be in the absence of any labor agreement.⁷ Management unquestionably has the legal right to set production standards on any basis that it wishes. But surely no one in this sophisticated audience would argue that auto management has "absolute dis-

⁶ The national labor law (as interpreted) places certain constraints on the employer where a union is the accredited bargaining agent; but for the sake of simplicity in exposition, I ignore such statutory constraints.

⁷ I am again oversimplifying for expository purposes; the typical auto agreements do prescribe certain procedures that must be followed in order to make a strike "legal."

cretion" with regard to production standards. Management certainly has the right of initiative, but management's determination is often modified in response to the pressure of an actual or threatened strike.

What we have here, I suggest, is a basic difference between legal analysis and economic analysis. At the risk of considerable oversimplification, one might say that a major concern of the law is the analysis of rights and duties under given circumstances, while a major concern of economics is the analysis of human behavior under given circumstances. In particular, economics is concerned with the behavior that is induced by the rational pursuit of self-interest. The law may tell me that I have a "right" to offer my new house for sale at a price three times what I just paid for it; but economics tells me that I am not likely to sell it for any more than is currently being paid for comparable houses in the neighborhood. I have complete control over the asking price, but the prospective buyer has complete control over his offer; and the selling price may be different from either the asking price or the first offer. My legal right to determine the asking price does not give me a right to compel the buyer to agree to pay it. Each of us—the buyer and seller—has only an uncertain and contingent control over the selling price. If a sale is to take place, then, in the typical case, the actual selling price must represent an accommodation of conflicting interests rather than a unilateral determination. The law may tell the employer that he has the unlimited right to direct the workforce in the absence of a labor agreement, but the labor economist tells him that this unlimited right is worthless if he cannot recruit or retain a workforce on the terms that he is offering. In a free market, the right of either party to a proposed transaction to say "no deal" imposes real constraints on the discretion of the other party.

Collective bargaining is a process that cuts across the domains of both law and economics. Trying to explain the bargaining process or its product, the labor agreement, in exclusively legal or exclusively economic terms is a prolific source of error. In a later section of this address I will undertake an analysis of the bargaining process and the labor agreement which attempts to encompass economic reality as well as legal theory. The point of emphasis here simply is that the "reserved rights" scenario is highly unrealistic when it portrays the employer coming to the bargaining

table with a monopoly of power, and with absolute discretion over every aspect of employment conditions. There are, in reality, many constraints on the employer's discretion with regard to employment conditions, and not the least of these is the employees' right to strike. In the absence of a labor agreement with a no-strike clause, everything that an employer might seek to do about employment conditions is subject to a strike to compel him not to do it, or to undo whatever he has done. In most situations, the employees' right to strike makes the employer's actual control over employment conditions only partial and contingent, and, by the same token, the employees and their union have an uncertain and contingent control over the terms of employment. In modern collective bargaining, some managements do possess absolute discretion over certain subjects, but where they do, the real source of that absolute discretion is not the absence of a labor agreement but the presence of one which includes a no-strike clause.

This point brings us to the second fundamental weakness of the pristine reserved rights doctrine. I think it is reasonably clear that the U.S. Supreme Court has definitely rejected this doctrine in the now-famous *Warrior and Gulf* case.⁸ You will recall the circumstances of that case. The union had filed a grievance against subcontracting. There was no specific provision in the agreement limiting subcontracting. There was a fairly broad arbitration clause, but it was qualified by the following language: "Matters which are strictly a function of management shall not be subject to arbitration under this section." Relying on this language, the company refused to arbitrate the subcontracting grievance. The union sued to compel arbitration. Both the district court and the court of appeals refused to order arbitration. Their rationale was a straightforward application of the reserved rights concept: since the agreement was silent with regard to subcontracting, that made the matter "strictly a function of management" and, therefore, it was excluded from the coverage of the arbitration clause.⁹ The

⁸ *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

⁹ Consider the following passages from the district court's opinion (168 F.Supp. 702 [1958]): "The Court has read the labor contract carefully and is unable to find in it any provision which could be interpreted to mean that the defendant has surrendered its managerial right to contract out work. . . . On the other hand, the labor contract expressly recognizes the existence of, and reserves to the sole judgment of the defendant, matters which are strictly a function of management; and the labor contract expressly prohibits arbitration of matters which are strictly a

Supreme Court, as you all know, reversed and the company was compelled to arbitrate.

I do not aspire to add to the already voluminous literature commenting on and interpreting this and related Supreme Court decisions about labor arbitration. But I do wish to emphasize one aspect of the *Warrior and Gulf* decision that appears to have been rather neglected. Remember that the Court had before it two lower court decisions that rested largely upon the pristine reserved rights concept. The opinion by Justice Douglas did not reject the concept in so many words; but it clearly stated a view of the employer's discretion, both without and with a collective bargaining agreement, that is fundamentally different from the view on which the reserved rights concept is based. Consider the following passage from the opinion:

Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law *and by the willingness of employees to work under the particular unilaterally imposed conditions*. A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management *but subject to the possibility of work stoppages*. When, however, an absolute no-strike clause is included in the agreement, *then in a very real sense everything that management does is subject to the agreement*, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes. This comprehensive reach of the collective bargaining agreement does not mean, however, that the language, "strictly a function of management," has no meaning. . . .

Accordingly, "strictly a function of management" *must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion*. . . . In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, *the exclusion clause is vague* and the arbitration clause quite broad. [Emphasis added.]

function of management. . . . The right to contract out work is an inherent, traditional right of management which may not be questioned or subjected to arbitration in the absence of agreement on the part of the defendant or an express limitation thereof set forth in the labor contract."

I would not propose the *Warrior and Gulf* opinion as a model of clarity. Nevertheless, I do not believe that either the foregoing language or the result can be interpreted as anything other than a rejection of the pristine reserved rights doctrine. The Court clearly does not accept the reserved rights view that, in the absence of an agreement, the employer has unfettered discretion (except for the provisions of general law); the Court specifically recognizes that the employer's discretion is limited "by the willingness of employees to work under the particular unilaterally imposed conditions," which the reserved rights doctrine fails to recognize as a constraint. And under an agreement with limited coverage but without a no-strike clause, whatever management does is "subject to the possibility of work stoppages"—again a rejection of the "absolute discretion" theory. I must admit to some puzzlement concerning the comments about the effect of the inclusion of "an absolute no-strike clause" in the agreement. Perhaps the Court was only saying what I said earlier—that the real source of "unfettered discretion" for management in modern collective bargaining is not the absence of an agreement, but rather the presence of an agreement with a no-strike clause. And possibly the Court was harking back to an observation earlier in the opinion that the labor agreement must be regarded as a comprehensive code governing the total relationship between the parties, and adding the thought that "strictly" management functions thereby become entirely the creation of the agreement—i.e., "that over which the Contract gives Management complete control and unfettered discretion."

Whatever may be the difficulties with the detailed language of the *Warrior and Gulf* opinion, we are surely entitled to draw some conclusions from the result reached. The necessary implication of the order to arbitrate is that the Court rejected the view that the lack of any explicit provision in the agreement covering subcontracting necessarily gave management complete control over that matter. That *was* the view of the lower courts, and their judgment was reversed. I do not think that it is reading too much into the case to say that the Court held, in effect, that to find out what the functions of management are, you have to interpret the agreement, and you have to interpret its silence as well as its language; silence alone cannot automatically be taken to give management unfettered discretion; and since the parties had agreed to arbitrate ques-

tions of interpretation, the courts should not undertake the job of the arbitrator.

The pristine reserved rights doctrine holds that silence in a labor agreement can have only one meaning, and this view was accepted by the lower courts in the *Warrior and Gulf* case. By reversing the lower courts, the Supreme Court was necessarily holding that silence in a labor contract may have more than one meaning.

IV. The Semantic Resolution

Before I consider the practical implications of what I have said up to now, let me digress briefly. A great many arbitrators have undertaken what I must respectfully call a purely semantic resolution of the conflict between the reserved rights doctrine and the implied obligations doctrine. That semantic resolution runs as follows: Obviously, where the contract does not limit management, management is not contractually limited; but this truism only brings us to the really basic question, which is: What *are* the limitations that the contract places on management? And to determine that, this rationale runs, you must consider the limitations that are implied in one way or another as well as those that are specifically stated.

This is obviously not an acceptable formulation of the pristine reserved rights doctrine. I must regretfully label it a corrupted version. The true believers in the reserved rights doctrine will join me, I am sure, in insisting that that doctrine recognizes only specific language in the agreement as a valid basis for a limitation on management rights.

This corrupted version of the reserved rights doctrine not only is found in the papers that arbitrators write for Academy meetings; it also shows up rather often in decisions as well. You find it especially in the subcontracting decisions under so-called "silent" contracts. You all remember Allen Dash's famous study of these cases.¹⁰ He found a substantial number of decisions that seemed to accept the reserved rights doctrine, but, Allen said, after endorsing the doctrine most arbitrators proceeded to abandon it in deciding the

¹⁰ Originally incorporated in his arbitration decision in *Celanese Corporation of America*, 33 LA 925 (1959), and later expanded into an article, "The Arbitration of Subcontracting Disputes," *Ind. and Labor Rel. Rev.* (January 1963), 208-215.

merits of the case. Allen's observations on this point have been independently confirmed by Scotty Crawford,¹¹ Marcia Greenbaum,¹² and Russell Smith.¹³

I do not question the good faith of those arbitrators who say that they accept both the reserved rights doctrine and the implied obligations doctrine. Neither would I question their right to call themselves conservative liberals, or hawkish doves. Such self-contradictory verbalisms may not be wholly meaningless, but surely they are not wholly free from ambiguity.

V. The Meaning of Silence

The pristine reserved rights doctrine has the attractive virtues of neatness and simplicity: Silence in a labor contract has only one meaning, which is that management has unfettered discretion. But the Supreme Court has told us—and thus has adopted the view of a great many experienced arbitrators—that silence may have *more* than one meaning. It does not follow, of course, that silence may have whatever meaning the tastes and value system of a particular arbitrator suggest to him. The most subtle and demanding task of the arbitrator is to find some reasonably objective basis for determining the meaning of silence in a particular contract. I want to consider briefly some of the techniques that are rather widely used by the most experienced arbitrators.

I begin with a striking observation of Judge Learned Hand some years ago:¹⁴

. . . it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

The arbitrator interprets an agreement rather than a statute; but it is essential for him, if he is to perform his task properly, to begin

¹¹ Donald A. Crawford, "The Arbitration of Disputes over Subcontracting," in *Challenges to Arbitration*, Proceedings of the Thirteenth Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1960), 51-72.

¹² Marcia L. Greenbaum, "The Arbitration of Subcontracting Disputes: An Addendum," *Ind. and Labor Rel. Rev.* (January 1963), 221-234.

¹³ Russell A. Smith, "Subcontracting and Union-Management Legal and Contractual Relations," *Western Reserve L. Rev.* (June 1966), 1272-1301.

¹⁴ *Cabell v. Markham*, 148 F.2d 1737 (1945) at 1739.

with an understanding of the nature and the dynamics of collective bargaining. My most fundamental criticism of the reserved rights doctrine is that it presents an unrealistic picture of the bargaining process and, therefore, offers a seriously misleading guide to the interpretation of the collective bargaining agreement; by concluding that silence in the agreement can have only one meaning, the doctrine greatly oversimplifies. The arbitrator must begin with the understanding that the bargaining process involves two parties, each of whom has a somewhat uncertain, contingent control over the terms and conditions of employment. Each party needs the assent of the other in order to make his control over particular terms and conditions fully effective. So bargaining is a process of give-and-take on both sides. Each side gives as much as it thinks it safely can in some areas in order to get the consent of the other side in other areas. The compelling force in this process is that mutual agreement is absolutely essential for the welfare of both parties.

The essence of the matter is that collective bargaining is a process of seeking ways and means to accommodate goals and objectives and values which in some respects and on certain subjects are sharply in conflict.¹⁵ The company, generally speaking, has as its most basic goal the achievement of efficiency, and freedom to change the way things are being done is usually essential to efficiency. The union, generally speaking, has as its most basic goal the achievement of security for employees, and maintenance of the status quo is generally important, if not essential, to employee security. Now obviously the objectives of the company and the union may vary somewhat from one subject to another, but this does not alter the basic analysis. The outcome of the bargaining process normally is that on certain subjects, under certain circumstances, the parties agree that the "efficiency" objective will dominate, and that on other subjects, under other circumstances, the "security" objective will dominate.

It is not always good tactics to spell out what the accommodation is in language that everybody can understand. Sometimes union negotiators will reluctantly accept a principle but will balk at

¹⁵ I have developed this point at greater length in an article, "Cooperative Approaches to Problems of Technological Change," in *Adjusting to Technological Change*, eds. Gerald G. Somers, Edward L. Cushman, and Nat Weinberg (New York: Harper & Row, for Industrial Relations Research Association, 1963), 61-94.

stating it baldly in the agreement; the same is true of company negotiators. After all, the agreement must usually be "sold" both to the executive suite and to the shop, and you can have a degree of clarity on some matters that interferes with the selling process. Furthermore, it is simply impossible to anticipate the detailed circumstances of all future problems; and sometimes the parties are unable to agree at all on a matter and simply decide to ignore it with the hope that it will not come up during the life of the agreement.

The product of this delicate process of finding accommodations is a document that can be fully understood only if the process is understood. Some of the parties' understandings are expressed in deliberately ambiguous language. Sometimes the understandings are only implied by the language of the agreement. Sometimes matters about which the parties clearly have a mutual understanding or shared assumptions are not mentioned at all in the formal agreement. Finally, the difficulties of interpretation may be compounded because the agreement is written by people without training or experience in the art of draftsmanship. How can an outsider like the arbitrator discover the true intent of the parties despite the ambiguities, the gaps, and the silences of the document emerging from this process?

In some arbitration systems, the arbitrator—usually called the "impartial chairman"—may be able to confer informally with the people on each side who actually negotiated and drafted the agreement. In this kind of system, the parties themselves may be persuaded to clarify ambiguities, to fill in gaps, and to give meaning to silences. The arbitrator in this kind of system is more of a mediator and consensus-seeker than a judge. But this is not the typical arbitration system today. More commonly, the arbitrator deals with persons who were not themselves responsible for negotiating questioned language, who would reject efforts at mediation, and who want the arbitrator to act like a judge and tell them what their rights are.¹⁶

¹⁶ Saul Wallen and I have discussed the differences between these two types at length in a paper for an earlier Academy meeting: "Constraint and Variety in Arbitration Systems," in *Labor Arbitration—Perspectives and Problems*, Proceedings of the Seventeenth Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1964), 56-81.

As industrial jurisprudence has developed and matured, arbitrators have developed analytical techniques that enable them to navigate with reasonable assurance on this voyage that Judge Hand calls one of sympathetic and imaginative discovery. Let me cite some illustrative examples, beginning with one that is simple and obvious, and then considering some that are less obvious.

The arbitrator often finds that a phrase or a paragraph that might be hard to interpret in isolation has a reasonably clear meaning when considered in the light of language used and rules laid down in other parts of the same agreement. In short, the *analysis of context* is often a powerful technique of interpretation. One agreement that I'm familiar with has a clause that reads as follows: "The company may install incentives on new jobs or jobs not previously covered by incentives." Now, if that clause stood alone, there might be some basis for argument that the company has to get union consent, or at least has to negotiate with the union, before installing new incentives on new jobs or on jobs that never had them before. This clause, strictly speaking, is silent on this particular point. But in this agreement the context effectively removes all doubt. Other clauses dealing with other aspects of incentives specifically require union consent; and there are still other clauses that require the company to notify the union or to consult with it before acting. In this context, it seems quite clear that an unqualified statement that the company may take a particular action, and silence with regard to limitations, must be interpreted to reflect a mutual understanding that the company has unfettered discretion to act or not to act, and has no duty to notify or consult in this particular circumstance.

Now let us consider an example from a more difficult area: the status of a long-established practice under an agreement which is completely silent both on the status of such a practice and on the specific subject matter. One such case involved a wash-up period on company time. The practice was at least 17 years old. It covered employees on noncontinuous operations in the lampblack area in a tire plant. The wash-up period was said to be 25 to 30 minutes, which of course meant 30 minutes. When the men would try to stretch the period from time to time, department supervision would call them together and lecture them, telling them that the wash-up period was to be no more than 30 minutes. There was a

change in top management in the plant, and the new manager issued an order that the wash-up period was to be cut to 20 minutes. There was no change in any surrounding circumstances. The union grieved and the case went to arbitration. At the hearing the company argued that top management had never known about this 30-minute wash-up period; that it had grown up merely because of the laxity of department supervision; and that the silence of the agreement on this matter should be interpreted to mean that management retained unfettered discretion.

The arbitrator ruled against the company and held that the 30-minute wash-up period had to be continued at least until the next contract negotiation. The principal basis for this ruling was a finding that there was a tacit agreement between the parties to let the established practice govern this point. Some kind of wash-up arrangement is virtually universal in the rubber industry for employees who work in a lampblack area, because of the peculiar character of lampblack. It is commonly said in the industry that you can't wash lampblack off your body; soap and water only drive it deeper into the skin and what you must do is take off a layer of skin! So there is almost always a paid wash-up period or some form of money allowance in lieu of time to wash. These parties had repeatedly negotiated concerning the wash-up allowance for employees in the same area who were on continuous operations, and they had frequently changed the provisions covering that group; but the practice which covered these grievants, who were on noncontinuous operations, had never been mentioned in negotiations. One of the union representatives testified that everybody had seemed completely satisfied with the 30-minute wash-up practice for the noncontinuous men, so what was there to negotiate about? The arbitrator concluded that the silence of the agreement regarding a wash-up allowance for the grievants must be considered the result of a tacit agreement between the parties to let the existing practice govern the matter. The universality of some type of wash-up allowance for lampblack employees must be regarded as a response to an environmental necessity. Hence, under the circumstances of this case, it would be quite unreasonable to interpret the silence of the agreement to mean that the union had agreed to give management unfettered discretion in this matter. If the company had truly unfettered discretion, it would have the power not only

to reduce but also to eliminate the wash-up period. If the parties had really intended such a departure from their general pattern of handling this matter, surely they would have recognized the necessity of including specific language to that effect in their agreement.

My third and last example relates to changes in established crew sizes. This example also comes from the rubber industry. A large machine known as a Banner unit had had a crew of six for many years. After an industrial engineering study, the company concluded that it could reduce unutilized time on the operation by cutting the crew size from six to five and by reassigning the duties of the sixth crew member among the remaining five. This operation was covered by a group incentive, and the company also revised this incentive so that none of the remaining crew members would have any earnings loss. The union grieved and the case came to arbitration. The union presented two related arguments. First, it relied on a clause which read as follows: "There shall be no change in established piecework prices or standards unless there is a change in job content which affects the time required to produce a unit of product." There had been no extrinsic change in the operation—that is, a change in equipment, or materials, or specifications, or the like; there had been merely the decision of the company to cut the crew size and reassign duties, the union said, and that was not the kind of change in job content contemplated by the provision just quoted. The union's second argument was that the proper size of this crew was clearly established by past practice, since the crew size had never before been changed on this machine. The company's argument, in essence, was that nothing in the agreement specifically limited management's right to change crew sizes and reassign duties; therefore, management retained unfettered discretion.

The arbitrator upheld management's action in this case. He ruled that the agreement clause cited by the union was clearly intended only to protect incentive rates against change in the absence of any change in job content, and that the clause could not reasonably be construed to prohibit a change in job content in the absence of any extrinsic change affecting the operation. The real issue, the arbitrator said, was whether the fact that the crew size on this machine had never been changed could be construed as

evidence of a tacit agreement or understanding between the parties that the size would not be changed unless extrinsic circumstances made a change unavoidable. On this issue the arbitrator ruled against the union. Again, as in the wash-up case, he placed considerable reliance on the environmental necessities in this industry.

In the rubber industry, change is pervasive. There are frequent changes in product, materials, methods, and level of operations, all of which make most jobs rather short-lived entities. And the highly developed industrial engineering staffs frequently change individual jobs, even in the absence of any extrinsic change in the operation, to achieve more efficient use of manpower. Arbitrators in this company, and in this industry generally, have almost universally upheld the right of management to change job content in this fashion. In the case I'm now discussing, the arbitrator recognized that the matter was less clear with regard to changes in established *crew* sizes, but he reasoned that the parties had tacitly recognized over the years that freedom for management to change job content was a necessary and appropriate response to environmental necessities. If the parties had intended to make an exception to this pattern with regard to crew operations, the arbitrator said, surely they would have recognized the need for an explicit statement of the exception in their agreement. In the absence of any such explicit statement, it was reasonable to presume that the parties did not intend to make an exception to the general pattern of response to this environmental necessity.

The significance of past practice under the so-called "silent" agreement has been discussed a number of times in previous Academy meetings.¹⁷ The results reached in the preceding two cases are generally consistent with the main conclusions presented

¹⁷ The most comprehensive treatment is by Richard Mittenenthal, "Past Practice and the Administration of Collective Bargaining Agreements," in *Arbitration and Public Policy*, Proceedings of the Fourteenth Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 30-58. Other examples are Neil W. Chamberlain, "Job Security, Management Rights and Arbitration," in *Labor Arbitration—Perspectives and Problems*, 224-240; Ralph T. Seward, "Re-examining Traditional Concepts," in *Labor Arbitration—Perspectives and Problems*, 240-251; and Saul Wallen, "The Silent Contract vs. Express Provisions: The Arbitration of Local Working Conditions," in *Collective Bargaining and the Arbitrator's Role*, Proceedings of the Fifteenth Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington, BNA Books, 1962), 117-137.

in earlier papers. I do not believe, however, that the significance of a general pattern of response to a particular environmental necessity has been pointed out before. I suggest that this factor has often been influential in past practice cases, even though not articulated. This factor also helps to explain a distinction which has puzzled earlier commentators: a well-established practice on some matters is usually regarded as binding, while an equally well-established practice on other matters is generally not so regarded. The underlying basis for a finding that the practice is not binding is, I believe, either that it is inconsistent with an established pattern of response to an environmental necessity, or that the subject matter is wholly unrelated to any environmental necessity and cannot reasonably be presumed to be the subject of a tacit agreement between the parties. A practice of giving Christmas turkeys to employees would probably fall under this latter heading.

One more observation is necessary before leaving this subject. In many respects, the comments that I have made regarding the treatment of past practice by arbitrators do not apply to the steel industry. Most notably, steel management is more restricted than is rubber management with regard to changes in established crew sizes, and other examples of such differences could be cited. The reason for these differences is obvious and undoubtedly well known to most of you: the steel contracts generally include a lengthy and fairly explicit set of guidelines setting forth the understandings between the parties regarding the status of past practice.

VI. Conclusion

You will all recognize that my discussion has been illustrative rather than comprehensive. I have not attempted to provide a how-to-do-it manual for beginning arbitrators. There may be a need for such a manual, but it would be a thick volume. My intention has been to illustrate some of the techniques that have evolved as our industrial jurisprudence has developed and matured. Some of these techniques have been drawn from the experience of judges over the centuries of interpreting statutes, contracts, and other written documents. Some are the more specialized products of an understanding of the nature of collective bargaining. More important

than the techniques, however, are the purpose and the spirit which give them life and meaning. The experienced arbitrator of today who sets out on that voyage of sympathetic and imaginative discovery of which Judge Hand wrote is ever mindful that the object of his seeking is not some abstract ideal of justice and fairness, but rather the mutual intent of the parties, as shaped by their purposes and their environmental necessities.

One final word, addressed to those who retain unshaken their belief in the pristine reserved rights of management doctrine. If you wish to insure that silence in your agreement will always be interpreted to mean that management has unfettered discretion, you have a choice of means to that end. You can follow the example already set in a number of agreements in the past few years, as reported by Russell Smith and Dallas Jones.¹⁸ You can—if you can get your collective bargaining partner to agree to it—write that rule of interpretation into your agreement. You can say that management functions are limited only by specific provisions of the agreement, and that no implied obligations are intended. I am confident that any competent arbitrator would follow that rule of interpretation if it were clearly stated in the agreement. There is another avenue open to you. I have already said that I speak only for myself today, and I have assured you that there will be some members of the Academy—and nonmember arbitrators as well—who will disagree with my position. I am sure that you will have no trouble finding them if you look for them. Perhaps at a future Academy meeting, one of them will deliver a rebuttal to this address.

Surely no one should be surprised or distressed by a reminder that arbitrators disagree with each other on some matters. Conformity has never been a membership requirement in the Academy, and, if it had been, the organization would not have survived. In concluding, I return to the mainstream of Presidential Addresses at the Academy by pointing with pride to a significant fact: both the outgoing Democratic Secretary of Labor and the incoming Republican Secretary of Labor are long-time members of the Academy. In such diversity lies our greatest strength.

¹⁸ See reference in note 4 *supra*.