THE USES OF THE PAST IN ARBITRATION

[by Benjamin Aaron]

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Since all human relationships are conditioned in some degree by what has occurred in times gone by, it is not surprising that the concept of past practice exercises such a profound influence upon the determination of labor disputes submitted to arbitration. Moreover, because arbitration is, at least in part, an adversary proceeding, it is to be expected that the disputants' attitudes toward past practice will depend in large measure upon the bearing it has on the outcome of a given controversy. Thus, it is not uncommon for an employer or union to elevate an argument based on past practice to the level of constitutional authority in one case and to dismiss the same argument, made by its opponent in another case, as the maundering of an addled mind. Sometimes the same two disputants will reverse their respective positions on this question in succeeding cases, thereby demonstrating that even an arbitrator's life has its occasional amusements.

The parties to an arbitration have, of course, a great advantage over the arbitrator in this respect. No one really expects them to be consistent, and anyone so temerarious as to point out contradictions in their positions with respect to past practice will almost certainly be beaten over the head with Emerson's well-worn aphorism that a foolish consistency is the hobgoblin of little minds. If, as seems increasingly to be the case, the disputants are represented by attorneys, or by laymen who behave in the way they think attorneys would behave under the circumstances, any suggested impairment of the right to make alternative-inconsistent arguments will be regarded as something akin to treason.

The arbitrator, however, is given no such latitude. On the contrary, he is expected to demonstrate some consistency in his evaluation of the importance of past practice in disputes submitted to him for adjudication. That expectation, eminently reasonable though it may be, is sometimes difficult to satisfy, because the arbitrator's emphasis or de-emphasis of past practice frequently is based on factors or feelings which are not clearly articulated in his opinions. It is obviously impossible within the scope of this paper to attempt anything like a comprehensive analysis of the concept of past practice in arbitration. The task I have set for myself, therefore, is to illustrate and to discuss in detail just a few of the uses and abuses of past practice in arbitration. Let me hasten to add that these observations are based almost exclusively on my own experience and do not purport to represent the weight of authority among arbitrators.

II

Custom, declared Montaigne,[1] ought to be followed simply because it is custom, and not because it is reasonable or just. This dubious principle has achieved its highest exemplification in the Historical Differential, that sacred cow of wage arbitration. In its purest form this differential has no justification other than that it is a custom whereof the memory of man runneth not back to the contrary. If Widget Builders have always been paid five cents per hour more than Gismo Makers in a particular locality or industry, then woe betide the arbitrator who upsets that established relationship. In such cases the arbitrator must operate within the limits fixed by past practice, even though the

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1. Essays, Book I, Ch. XXII.

submission agreement may not specifically forbid him to modify or eliminate the differential. Unless the parties agree that the issue of the differential should be disposed of on its merits by the arbitrator, he would be well advised, I think, to let it alone. Quite apart from the truth or falsity of Montaigne's assertion, one must accept the fact that conditions so firmly imbedded in the cake of custom, if they are going to be altered, are better changed by the parties themselves than by some outsider.

Equally controlling in grievance arbitration, it seems to me, is a consistent past practice, when the collective agreement is silent with respect to the issue in dispute. Such a situation represents the happy coincidence of custom and common sense, and few would disagree that the past actions of the parties have bespoken their intent as clearly as if they had spelled it out in their written agreement. Unhappily, the arbitrator seldom encounters so clear-cut a case; more often he finds it complicated by a variety of considerations, several of which merit further discussion.

One of the most interesting and difficult situations which arbitrators frequently encounter is that in which a consistent past practice is at variance with the plain meaning of the pertinent language in the collective agreement. Let us take as an example an extreme case in which the seniority provision of a collective agreement provides as follows:

> Where skill and physical capacity are substantially equal, seniority shall govern in the following situations only: promotions, downgrading, layoffs, and transfers.

Suppose that the consistent practice for the five years immediately preceding the grievance has been to treat seniority as the controlling consideration in the assignment of overtime work, and that the dispute

has arisen out of the employer's sudden abandonment of that practice. As a final complication, let us assume that the parties have expressly forbidden the arbitrator to add to, subtract from, or modify any provision of the agreement.

In the foregoing hypothetical case it is probable that both parties will treat the problem as one of applying the agreement according to their original intention. This approach assumes, of course, that there was such an original intention with respect to the subject of the arbitration, a somewhat questionable proposition to which I shall presently return. Adopting their premise for the moment, however, we must ask how one does determine original intent. Many arbitrators take the position that, according to the law of contracts, the parties' intent must be determined by the "plain meaning" of the pertinent language of the agreement, and that where the language is unambiguous, the past practice under the agreement is irrelevant. There are two reasons, however, which argue against so rigid a treatment of the problem. In the first place, a collective agreement is something quite different from a life insurance contract or an agreement for the purchase and sale of goods. It is but a means to an end and, as Harry Shulman has so aptly observed,

> The object of collective bargaining is not the creation of a perfectly meaningful agreement--a thing of beauty to please the eye of the most exacting legal draftsman. Its object is to promote the parties' present and future collaboration in the enterprise upon which they are dependent.[2]

In the second place, even the construction of commercial contracts is not as inflexible as is commonly supposed. Referring to the familiar

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2. "The Role of Arbitration in the Collective Bargaining Process," Collective Bargaining and Arbitration (Los Angeles: Institute of Industrial Relations, UCLA, 1949), p. 23.

statement that "usage is admissible to explain what is doubtful but never to contradict what is plain," Williston makes the following comment:

> If this statement means that usage is not admitted to contradict a meaning apparently plain if proof of the usage were excluded,... it is inconsistent with many decisions and wrong in principle.[3]

Similarly, the inflexible "plain-meaning" rule is sometimes ignored in the construction of wills, in what may be called the Whimsical Testatrix type of case. A typical case of this kind is one in which the testatrix leaves "$10,000 to my cousin, Richard Norton." It turns out that the old lady has a cousin, Richard Norton, whom she didn't know. She also has another cousin, James Norton, whom she did know and whom she whimsically called "Richard." Since Richard Norton is exactly described in the will, and since the language of the bequest is, in lawyers' lingo, "sensible with reference to extrinsic circumstances," he would take the money under the "plain-meaning" rule. But such a result would obviously defeat the intent of the testatrix, and so courts have developed legal rationalizations for ignoring the rule in such circumstances.[4]

Our hypothetical case presents special difficulties, however, because of the last word in the phrase, "seniority shall govern in the following situations only." There is something so definite, so exclusionary, about that one short word, "only." What could the parties possibly have meant, if not that seniority should apply only in the four situations mentioned--promotions, downgrading, layoffs, and transfers--and that it should not apply in any other situation? Of course, the arbitrator

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3. 3 Williston, Contracts (rev. ed., 1936), §650.
4. See Norton v. Jordan, 360 Ill. 419 (1935).

can always ask them what they originally had in mind, but in 99 cases out of 100 the answers will be conflicting and inconclusive. Nevertheless, those answers provide clues. They frequently suggest that the parties, succumbing to a delusion common among inexperienced draftsmen, thought they were covering every possible contingency that might arise in the application of the seniority principle, and that they simply overlooked the problem of assignment of overtime.

Another possibility is that the parties merely intended to cover in the agreement those situations which they had already experienced, and that the trouble-making word, "only," was added at the last moment by an over-zealous draftsman. Anyone familiar with collective bargaining agreements knows how poorly written they are on the average, and that one of the most troublesome features of those agreements is the inartistic and inconsistent use of words that have a precise and commonly accepted meaning in law.

A third explanation might be that the parties simply adopted, with minimal changes, an agreement negotiated by the union with another employer, or by the employer with another union, or by some other parties altogether. Under any of these circumstances there would be a definite likelihood that the problem presented by the hypothetical case was never discussed at any time during negotiations.

It seems to me, therefore, that even so formidable a word as "only" in our hypothetical case should not be allowed to preclude a consideration of the employer's consistent past practice. The same may be said about the parties' failure to amend the agreement in any of the

annual reopenings during the five-year period. Attempts to modify contract language in a formal manner are not undertaken lightly; the toleration by both employers and unions of inaccurate and ambiguous language and obsolete provisions is notorious. The failure to amend the agreement so as to make it conform to actual practice may imply no more than that both sides thought the dangers of reopening the agreement exceeded any good that might result.

And so I conclude that in this hypothetical case the employer's consistent past practice is not only relevant but controlling. Many will at once protest, however, that this conclusion completely ignores the prohibition against adding to, subtracting from, or modifying any provision of the agreement. I have no doubt that some, perhaps most, courts would so hold if they were called upon to pass upon the question. Nevertheless, the conclusion can be defended on the ground that it does not alter the agreement but merely takes note of a modification that has already been made, either by the parties jointly or by the employer unilaterally. To hold otherwise would, it seems to me, give a truly destructive literalness to the prohibition.

Another question that immediately arises is, for how long should the past practice be considered controlling? Is the employer bound to adhere to it for the life of the agreement, absent the union's consent to its abandonment?[5] The answer to that question depends upon the nature

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5. For purposes of this analysis, I am making the improbable assumption that the arbitrator would be charged with deciding the question of future practice under the agreement, as well as the instant grievance.

of the effect attributed to the past practice. On the one hand, it may be considered as evidence of a tacit agreement or understanding of the parties; on the other, it may simply be treated as a course of conduct, unilaterally embarked upon by the employer, which he cannot abandon without due notice.

This type of situation calls to mind a certain class of bonus cases in which the facts are typically as follows: the employer has, on a purely voluntary basis, paid a Christmas bonus each year for the last five or ten years. In the current year he announces discontinuance of the bonus, and the union contests his right to do so. A number of such cases arose during World War II, when discontinuance of the bonus was challenged on the ground that it constituted an illegal wage decrease. The analogy between this type of bonus problem and our hypothetical case is, of course, far from a perfect one; but the following excerpt from a National War Labor Board opinion in a bonus case may be applicable to both situations:

> For the employee's conception of his wage or salary quite naturally and properly arises not only from the obligatory practice of the employer, but from the latter's voluntary acts as well. The employee's expectations are strengthened by repetition of the voluntary act and...[t]o the extent that the employer by repeated voluntary action has raised the reasonable expectations of his employee he has fettered his own discretion.[6]

In some respects the quoted language would seem to apply with even stronger force to working conditions than to bonuses, since the latter may be affected by a greater number of factors, such as profits, business outlook, and the like. Certainly a continuous practice over a five-year period of granting overtime assignments on the basis of seniority

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6. Nineteen-Hundred Corporation, 12 W.L.R. 417, 418 (1943).

could be said to create the resonable expectation that the practice would continue until changed by mutual agreement of the parties. If, on the other hand, the arbitrator were to conclude that the past practice of assigning overtime, regardless of its consistency and duration, was unilaterally instituted by the employer without consultation with the union, he would be justified, it seems to me, in ruling that the employer's attempted abandonment of past practice, while not allowable in this particular case, should be recognized as sufficient notice of a change in future practice.

I have devoted considerable attention to the problems raised by my hypothetical case because it seems to me that it represents one of the few instances in which the use of the concept of past practice is uncomplicated by a confused factual situation. In most cases in which the question arises, the critical problem is to determine the effect of a seemingly inconsistent past practice upon an ambiguous or inconclusive provision in the agreement.

Let us, then, briefly explore this more usual type of problem, again using a hypothetical case to point up the issues. Suppose that a company has a list of plant rules, incorporated by reference in the collective agreement or actually appended to it, which specifies a variety of offenses for which employees may be either disciplined or discharged. Suppose further that one of those offenses is "repeated and unexcused absence." Finally, suppose that the company discharges employee Wallen for repeated and unexcused absences and that he challenges the action on two grounds: first, that the charge is untrue; and second, that even if true, the penalty is too severe. For the purposes of this

discussion, we may assume that the arbitrator finds the charge to be true. Suppose he also finds, however, that during the last year, under the same rule, the company has taken only mild disciplinary action, or none at all, against employees Warren, Simkin, Dash, Guthrie, and Platt, but has terminated employees Cole, Seward, and Alexander. And just to make things a little more difficult for the arbitrator, let us suppose he finds that the union did not appeal the cases of the three discharged employees to arbitration.

Now the arbitrator will naturally be interested to learn the differences, if any, between Wallen's case and the eight others cited for comparison. If his luck holds true to form, the unfortunate man will be forced to conclude from the evidence, first, that the absenteeism of two of the three discharged employees was less aggravated than that of three of the five employees who received little or no discipline, and second, that Wallen's employment record is neither the best nor the worst of the group, but somewhere in between. Moreover, he will find no indication of bad faith on either side.

Confronted by such a situation, the arbitrator must make one of those decisions which he will probably fret about for some time afterward, wondering whether his judgment was sound. In effect, he must choose between two conflicting arguments or philosophies, each of which carries some persuasive force. The union will probably contend that the plant rule is not conclusive, since it provides for either discipline or dismissal; that the company has been arbitrary and capricious in its administration of the rule; and that termination in this case would constitute a gross form of discrimination against Wallen. The company's argument would in all likelihood stress the value of individual appraisal,

as opposed to an inflexible and uniform treatment of all violations of plant rules. It would defend its right to assess varying forms of discipline in apparently similar cases, so long as any differences in treatment were based on its informed judgment and not upon invidious or irrelevant considerations. Doubtless, it would vigorously oppose the contention that it now be prevented from taking justifiable punitive action simply because of past leniency.

It seems to me that there is no single correct solution of this problem. Indeed, I suspect that many of us have at one time or another decided cases in accordance with each of the theories outlined above. Whichever theory is followed, the decision is apt to have far-reaching effects, for it may determine the future policy of disciplinary action in the enterprise. Whether he wishes it or not, therefore, the arbitrator may find that the uses he makes of the past will have a controlling influence on future events.

There is a strong appeal in the argument frequently advanced by unions that the violation of a company rule which has been frequently overlooked in the past is not in itself a sufficient justification for discipline. Absolute consistency in the handling of rule violatinns is, of course, an impossibility, but that fact should not excuse random and completely inconsistent disciplinary practices. This is particularly true in large plants, where relationships between managers and employees tend to be impersonal and decisions regarding discipline are apt to be made by a relatively large number of supervisors. I recall a grievance in which an employee received a two-day layoff for violating a plant rule

against running in the aisles. The union produced evidence indicating that this rule had in the past been as honored in the breach as in the observance. It was also able to show that on the very day that the grievant had been caught, another employee in a different department had also been caught running in the same aisle and had been let off with a verbal reprimand by his supervisor. In cases of this nature an arbitration decision upholding the disciplinary penalty seems wrong in principle and destructive to the parties' present and future collaboration in the enterprise.

On the other hand, there are many circumstances in which the requirement of a uniform past practice as a necessary condition to the upholding of discipline for violation of a plant rule can do an equal amount of damage to the collective bargaining relationship. Consider those troublesome cases arising out of theft of company property. Some of you, I am sure, have had cases similar to one I recall in which the union challenged the discharge of an employee for stealing some scrap material. The theft was admitted, but the defense was that on three or four past occasions employees caught stealing property of greater value had received only disciplinary layoffs. What the union failed to consider, however, was first, that in the earlier cases referred to the individuals had all been employed for many years and were nearing retirement, and second, that in a number of other cases the offending employees had been discharged. The record showed, in my opinion, that the company had done its best to maintain the principle that thieving employees would be discharged, but had also sought to temper justice with mercy when termination would have resulted in a substantial forfeiture, such as the loss of a pension.

The foregoing examples could be multiplied many times. What they suggest to me is that arbitrators, in considering the effects of past practice, must be careful to avoid confusing uniformity with consistency. A consistency of purpose and of method may well produce a diversity in results, stemming from differences between individual personalities and situations. To put the matter another way, it is not the fact of seeming inconsistency in past practice, but the cause of it, that ought to engage the arbitrator's attention. What appears at first blush to be an arbitrary and capricious administration of a rule may prove on closer inspection to be a flexible and humane application of a sound principle to essentially different situations.

III

As I stated at the outset of my remarks, I cannot within so limited a compass even attempt to deal with all the multitudinous problems associated with the concept of past practice in arbitration. My purpose has been, therefore, to try to present a few meaningful ideas on the subject, based largely upon my own experience. These ideas may be briefly recapitulated, as follows:

First, it would appear that in wage arbitration past practice is a veritable tyrant. When it comes to such things as historical differentials, a page of history is, in Holmes' familiar phrase, worth a volume of logic. I doubt that arbitrators can or should do much about this situation, and my advice would be to relax and enjoy it.

Second, in grievance arbitration, there is frequently only an illusory safety in basing a decision upon the "plain meaning" of contract language, without regard to past practice. Collective bargaining agreements,

as I have endeavored to show, are not susceptible of the same type of textual exegesis as is commonly indulged in with highly technical legal instruments; but even in the case of the latter, courts frequently adopt more flexible constructions than is commonly supposed.

Third, there is an obvious and not entirely reconcilable conflict between the theory that a rule, to be enforced, must have been consistently applied in the past and the view that if the rule is clearly stated, the employer should have considerable flexibility in applying it to individual cases. What I have tried to show is that both approaches have some validity, and that, especially in disciplinary cases, the conflict can be at least partially avoided if arbitrators will direct their attention to consistency of purpose rather than to uniformity of results.

In conclusion let me say that while the foregoing discussion has been based largely on my own experiences, I am not unmindful of Oscar Wilde's bitter epigram that experience is the name everyone gives to his mistakes. Reject, if you will, the arguments that I have advanced; but do not doubt that past practices have great value for the arbitrator who knows how to use them.

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