

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

WEAVEXX, LLC

Case No. 15-CA-119783

Respondent,

and

TEAMSTERS LOCAL UNION 984,

Charging Party.

BRIEF IN SUPPORT OF EXCEPTIONS OF RESPONDENT WEAVEXX, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

QUESTIONS PRESENTED 3

BACKGROUND FACTS 4

BOARD PROCEEDINGS 5

ARGUMENT 6

 I. DEFERRAL TO THE ARBITRATION OPINION IS WARRANTED BECAUSE
 IT IS SUSCEPTIBLE TO AN INTERPRETATION CONSISTENT WITH THE
 ACT 6

 A. The Legal Framework: The Standard for Deferral 6

 B. The ALJD Eschews Any Analysis of the Existence of Another Interpretation
 of the Opinion That Is Consistent With the Act 7

 C. Consideration of the Entire Opinion and the Positions of the Parties Exposes
 a More Complete Interpretation of the Opinion 8

 D. The Opinion is Susceptible to an Interpretation That It Rested on the
 Contract’s Express Reserved Rights Clause 15

 E. An Interpretation of the Opinion That Finds Reliance on an Express
 Contractual Reservation of Rights Clause Is Consistent with the Act ... 16

 II. THE ARBITRATOR DID NOT RELY ON EXTRA-CONTRACTUAL
 RIGHTS 18

 A. Neither the Opinion Nor the Arbitration Record Contain Any Reference to
 Extra-Contractual Inherent Rights 18

 B. The ALJD Improperly Confuses Extra-Contractual Considerations with
 Extra- Contractual Rights 19

 III. THE UNION’S WILLFULL WITHHOLDING OF THE PAYDAY CHANGE
 FROM ARBITRATION DOES NOT JUSTIFY DENIAL OF DEFERRAL
 NOR A FINDING THAT WEAVEXX VIOLATED THE ACT 20

 A. The Union Deliberately Avoided Arbitrating the Payday Change 20

CONCLUSION 24

APPENDIX A *Elkouri & Elkouri, HOW ARBITRATION WORKS (6th Ed. 2003)*

TABLE OF AUTHORITIES

CASES

| | |
|---|-------------------------|
| <i>Andersen Sand & Gravel Co.</i> , 277 NLRB 1204 (1985) | 18, 22 |
| <i>Babcock & Wilcox Constr. Co.</i> , 361 NLRB No. 132 (2014)..... | 11, 22 |
| <i>Ciba-Geicy Pharmaceutical Div.</i> , 264 NLRB 1013 (1982), enfd. 722 F.2d 1120 (3 rd Cir. 1983) | 18 |
| <i>Columbia Chemicals Co.</i> , 307 NLRB 592 (1992), enfd. mem. 993 F.2d 1536 (4 th Cir. 1992) | 2, 16, 18, 19 |
| <i>Dennison National Co.</i> , 296 NLRB 169 (1989) | 16, 17 |
| <i>Doerfer Engineering</i> , 315 NLRB 1137 (1994) | 8 |
| <i>Martin Redi-Mix, Inc.</i> , 274 NLRB 559 (1985) | 22 |
| <i>Motor Convoy, Inc.</i> , 303 NLRB 135 (1991) | 17 |
| <i>Oak Cliff-Golman Baking Co.</i> , 202 NLRB 614 (1973) | 9 |
| <i>Olin Corp.</i> , 268 NLRB 573 (1984) | 3, 7, 17, 22 |
| <i>Professional Porter & Window Cleaning Co.</i> , 263 NLRB 136 (1982), enfd. 742 F.2d 1438 (2 nd Cir. 1983) | 3, 22, 23 |
| <i>Republic Steel v. Maddox</i> , 379 U.S. 650 (1965) | 7, 21 |
| <i>Smurfit-Stone Container Corp.</i> , 344 NLRB 658 (2005) | 1, 2, 7, 14, 15, 16, 17 |
| <i>Southern California Edison Co.</i> , 310 NLRB 1229 (1993) | 16 |
| <i>Specialized Distribution Mgmt., Inc.</i> , 318 NLRB 158 (1995) | 17 |
| <i>Spielberg Mfg. Co.</i> , 112 NLRB 1080 (1955) | 7, 17 |
| <i>Steelworkers v. American Mfg. Co.</i> , 363 U.S. 564 (1960) | 6 |
| <i>Steelworkers v. Enterprise Corp.</i> , 363 U.S. 593 (1960) | 6, 20 |

Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960) 6

PUBLICATIONS

Elkouri & Elkouri, HOW ARBITRATION WORKS (6th Ed. 2003) 11

NLRB Casehandling Manual, Part I, Unfair Labor Practice Proceedings 22

STATEMENT OF THE CASE

This case involves Weavexx, LLC's ("Weavexx") implementation of adjustments to the pay periods and paydays of employees, represented by Teamsters Local Union 984 ("the Union") at its Starkville, Mississippi facility. The Administrative Law Judge ("ALJ") found that Weavexx violated Sections 8(a)(5) and (1) of the Act by making such changes without first bargaining with the Union and that the General Counsel satisfied his burden of proving that the arbitration decision denying the grievance challenging these changes did not meet the Board's standards for deferral.

The record compiled during the hearing in June 2015 demonstrates that none of the findings or conclusions of law have merit:

First: The ALJD¹ fails to undertake the analysis required by Board precedent. Having found one interpretation of the opinion² deemed repugnant, Board law mandates an evaluation of whether the opinion is susceptible to another interpretation that would be consistent with the Act. *Smurfit-Stone Container Corp.*, 344 NLRB 658, 659-660 (2005). The ALJD avoids any such analysis, even failing to explain, if possible, why the opinion was not susceptible to the interpretation offered by Weavexx.

Second: The ALJD finds the opinion repugnant to the Act based on reading of a single part in a vacuum. Board law compels consideration of the entire opinion to gain a fair understanding of its meaning. A reading of the full opinion, including the arbitrator's

¹ Weavexx abbreviates references to the August 6, 2015 decision (the administrative law judge's decision or "ALJD") as (page:line). Weavexx abbreviates references to our accompanying Brief in Support of Exceptions of Weavexx, LLC as "Exceptions."

² Weavexx abbreviates references to the July 8, 2014 Award and Opinion of Arbitrator Samuel J. Nicholas, Jr. ("the opinion" or "the arbitrator's decision") and to Mr. Nicholas ("the arbitrator").

identification of the contractual provisions at issue, exposes its meaning more accurately than the citation of phrases cherry-picked from only one part. When read as a whole, the opinion is reasonably understood to address each of the parties' contractual arguments as well as the Union's past practice claim and is consistent with the Act.

Third: The ALJ engages in circular reasoning in an unsuccessful attempt to distinguish *Smurfit-Stone*, finding that because he had already determined the opinion repugnant to the Act, *Smurfit-Stone* did not apply because the Board in that case found the arbitrator's opinion consistent with the Act. This erroneous conclusion appears without a shred of analysis of the factors justifying deferral in that case that were equally present in the opinion. An actual comparison of the pertinent facts unearths a compelling basis for deferral, exceeding that deemed sufficient in *Smurfit-Stone*.

Fourth: The ALJD improperly expands the application of *Columbian Chemicals, Co.*, 307 NLRB 592 (1992), enfd. mem. 993 F.2d 1536 (4th Cir. 1992). That decision considered whether an arbitrator's reliance on extra-contractual residual rights to justify an employer's unilateral changes offended the Act. Not a single word in that ruling relates to an arbitrator's use of extra-contractual evidence in construing a collective bargaining agreement. Yet the ALJD recites repeated examples of the arbitrator's allusions to such "extra-contractual considerations" to conclude that the decision was repugnant to the Act, citing only *Columbia Chemicals* as authority. Since such considerations are proper, weighed only on conclusions regarding the Union's contractual and past practice arguments - not as the source of Weavexx's right to act - and since that case did not address an arbitrator's citation to extra-contractual considerations, *Columbia Chemicals* is unavailing.

Fifth: The ALJD's misinterpretation of the phrases "managerial decision" and "managerial discretion" as referencing inherent rights is not supported by the record. [ALJD 8:37-41]. The former phrase appears as merely an assertion of fact – that Weavexx decided to make the changes - with no connotation as to their propriety and in the context of whether the changes negatively impacted employee finances. The latter parrots Weavexx's description of the collective bargaining agreement's ("CBA") reserved rights provision, repeating a phrase appearing nowhere else in the record. The ALJD necessarily, and inaccurately, assumes that the arbitrator's use of Weavexx's precise language was mere happenstance and the arbitrator intended it to refer to extra-contractual rights otherwise unmentioned in the entire arbitration record.

Sixth: The ALJD rejects deferral because the payday change was not considered by the arbitrator due to the Union's willing avoidance. The Union chose to process the Mitchell Jones grievance challenging only the pay period change, and not the payday change, *after* filing the instant charge attacking both, seeking to achieve through this sleight-of-hand what it could not in arbitration. This strategy runs afoul of the strong preference for the resolution of labor disputes through arbitration and the denial of deferral in these circumstances would be unjust to Weavexx and contrary to the General Counsel's own procedures. *Olin Corp.*, 268 NLRB 573 (1984), severely restricted the reasoning of *Professional Porter & Window Cleaning Co.*, 263 NLRB 136 (1982), on which the ALJD relies, and it has never been applied in a unilateral change case post-*Olin* because, unlike statutory discrimination issues, the analysis in a Section 8(a)(5) case encompasses the contractual issues.

QUESTIONS PRESENTED

1. Whether the ALJD erred in determining that the arbitrator's opinion was not susceptible to an interpretation consistent with the Act? See Exceptions 2, 6-28, 31, 39.
2. Whether the ALJD erred in determining that the arbitrator improperly relied upon extra-contractual considerations and that such reliance warranted denial of deferral? See Exceptions 25-30.
3. Whether the ALJD erred in determining that the failure of the arbitrator to consider the change in paydays warranted denial of deferral? See Exceptions 31-37, 39.

BACKGROUND FACTS

Weavexx employs roughly 200 bargaining unit employees at its facility in Starkville, Mississippi where it manufactures felts used in the production of paper products. [Tr. 32:20-25³; 33:1; GC Exh. 16, at ¶2]. In 2013, Xerium Technologies, Inc., Weavexx's parent company, changed its HR and payroll systems. [GC Exh. 11, at 32:21-25]. Concomitant with the implementation of the new system at the start of 2014, Xerium opted to standardize pay cycles across its North American facilities, including at Weavexx's Starkville plant, by paying all hourly employees biweekly on Fridays. [GC Exh. 11, at 33:8-18]. Bargaining unit employees had previously been paid every Thursday. [GC Exh. 16, at ¶5].

Starkville Plant Manager Ross Johnstone informed Union President Terry Lovan of the pay changes on October 22, 2013 and he and Human Resource Specialist Jennifer Lanier met with Lovan and Union stewards on November 6, 2013 to review them. [GC Exh. 11, at 35:7, 15-18, 36:6-8; Tr. 32:6; GC Exh. 16, at ¶¶8-11]. Rank and file employees received notice in four

³ References to the transcript of the June 4, 2015 hearing before Administrative Law Judge William N. Cates appear as [Tr. Page:line].

separate shift meetings conducted the following week as well as a memorandum describing the changes. [GC Exh. 16, at ¶19; Tr. 40:17-20; see GC Exh. 3]. Weavexx subsequently distributed written responses to employee questions raised at the shift meetings. [Tr. 43:1-4; see GC Exh. 4.] Bargaining unit employees, including Mitchell Jones, filed grievances beginning on November 18, 2013. [GC Exh. 5; GC Exh. 16, at ¶¶20, 21].

The Union took the Mitchell Jones grievance to arbitration where it was heard by Arbitrator Samuel J. Nicholas, Jr. [GC Exh. 16, at ¶28]. Both parties offered evidence at the arbitration hearing and submitted post-hearing briefs. [See GC Exh. 11; see GC Exh. 14; see Co. Exh. 1.] Weavexx argued, *inter alia*, that the rights specifically reserved to management in Section 4 of the contract granted it the managerial discretion to make the pay changes. [Co. Exh. 1, at p. 4]. Arbitrator Nicholas denied the grievance, finding that neither contract language nor binding past practice prohibited the changes and concluding that “the Company’s use of managerial discretion was proper” and that Weavexx had the right to act unilaterally. [GC Exh. 9, at pp. 7-9].

BOARD PROCEEDINGS

The Union filed an unfair labor practice charge on November 21, 2013 alleged that Weavexx violated Sections 8(a)(5) and 8(a)(1) of the Act by “its plans to unilaterally change a 30 year past practice regarding pay process and pay periods.” [See Case No. 15-CA- 117654]. The Union filed a second unfair labor practice charge on December 30, 2013 alleging that Weavexx had violated the same provisions of the Act by unilaterally changing the pay cycles and paydays. The General Counsel deferred processing the December 30 charge, currently the subject of this litigation, to the parties’ grievance/arbitration process on March 31, 2014. [GC Exh. 10]. Following the issuance of the arbitrator’s decision denying the grievance, the General Counsel

revoked the prior deferral on November 26, 2014. [GC Exh. 8]. The Union filed a First Amended Charge on March 19, 2015 and Complaint issued on March 30, 2015. Weavexx submitted its Answer and Affirmative Defenses on April 11, 2015. A Second Amended Charge was filed by the Union on May 20, 2015. Weavexx submitted its First Amended Answer and Affirmative Defenses on May 28, 2015. [GC Exh. 1].

The instant case was tried before the Honorable William N. Cates on June 4, 2015. Following the hearing, Weavexx and the General Counsel submitted post-hearing briefs. On August 6, 2015, Judge Cates issued his decision, finding that deferral to the arbitration opinion was not warranted and that Weavexx had violated Sections 8(a)(5) and (1) of the Act by unilaterally changing the paydays and pay cycles without first giving notice to the Union and an opportunity to bargain and ordering certain remedies.

ARGUMENT

I. DEFERRAL TO THE ARBITRATION OPINION IS WARRANTED BECAUSE IT IS SUSCEPTIBLE TO AN INTERPRETATION CONSISTENT WITH THE ACT.

The ALJ's rejection of deferral relies upon the conclusion that his interpretation of the opinion offends the Act. A reading of the opinion incorporating all of its parts produces a different interpretation that meets the Board's deferral standards. The ALJD's failure to consider the entire opinion and to undertake the full analysis required or to even address key arguments proffered by Weavexx, as well as its misreading of Board precedent, compel its reversal.

A. The Legal Framework: The Standard for Deferral

Grievance and arbitrations procedures, freely negotiated by the parties to collective bargaining agreements, constitute the preferred mechanism for resolving contractual disputes

between employers and unions. *Republic Steel v. Maddox*, 379 U.S. 650, 653 (1965).

Accordingly, national labor policy strongly favors deferral to arbitration awards issued pursuant to these agreed upon processes. See *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960). For this reason, the burden rests on any party seeking to avoid deferral to “demonstrate that there are deficiencies in the arbitral process requiring the Board to ignore the determination of the arbitrator and subject the case to de novo review.” *Olin Corp.*, 268 NLRB at 575, 579.

The standards for deferral in Section 8(a)(5) unilateral change cases are well-established. The Board will defer when the proceedings have been fair and regular, all parties have agreed to be bound, and the arbitrator’s decision is not clearly repugnant to the purposes and policies of the Act. See *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). The arbitrator must have also considered the unfair labor practice issue but need not specifically determine whether a violation of the Act occurred. Rather, an arbitration decision satisfies this test if (1) the contractual issue is factually parallel to the unfair labor practice issue, (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and (3) the decision is susceptible to an interpretation consistent with the Act. *Olin*, 268 NLRB at 574. Even if an award is susceptible to an interpretation repugnant to the Act, deferral is warranted if there is another interpretation that is consistent with it. *Smurfit-Stone*, 344 NLRB at 659-660.

B. The ALJD Eschews Any Analysis of the Existence of Another Interpretation of the Opinion That Is Consistent With the Act.

Relying solely on the arbitrator’s use of isolated words or phrases in a single portion of the opinion, the ALJ discovers an interpretation deemed repugnant to the Act and ends his

examination there.⁴ The ALJD wants for any assessment of another possible interpretation, including that offered and argued by Weavexx. In so doing, the ALJD ignores the existence of four of the five parts of the opinion and, more importantly, their obvious relevance in understanding the arbitrator's meaning. This approach contravenes clear Board law: "Even if there is one interpretation that would be inconsistent with the Act, the award passes muster if there is another interpretation that would be consistent with the act." *Id.* In forgoing any attempt to consider other possible readings of the opinion, the ALJD warrants reversal on this basis alone.⁵

C. Consideration of the Entire Opinion and the Positions of the Parties Exposes a More Complete Interpretation of the Opinion.

A proper assessment would have uncovered an interpretation of the opinion with the virtue of accounting for all parts of the opinion as well as the positions adopted by the parties, a trait totally absent from the ALJD, and that is susceptible to an interpretation consistent with the Act. Instead of piecemeal word-parsing offered as a substitute for actual analysis, as in the ALJD, a full understanding requires consideration of the opinion as a whole with due weight given to all of its parts, thereby giving context to the arbitrator's discussion. See *Doerfer Engineering*, 315 NLRB 1137, 1139 (1994) ("the arbitrator's decision must be read in its entirety to fairly determine its meaning.")

⁴ The ALJD's statement of the arbitrator's conclusion merely compiles a list of purportedly objectionable phrases extracted out of context from different parts of the opinion, rather than focusing on what the arbitrator actually wrote. [See ALJD 8:37-40].

⁵ In a curious divergence from customary practice, the ALJD fails to address, or even acknowledge, a single contention raised in Weavexx's brief, including its discussion of an alternative interpretation of the decision.

The arbitrator starts with a review of the parties' positions, imperative to any understanding of the opinion.⁶ Weavexx pressed two arguments based on Section 4 of the CBA: (1) that the express reserved rights language permitted Weavexx to act unilaterally given the CBA's silence as to pay periods, and (2) that, to the extent the CBA addressed them, the changes constituted new work rules or policies and, under Section 4, Weavexx satisfied the prerequisites to their implementation.⁷ [GC Exh. 9, at pp. 2, 5]. The Union countered by citing various provisions of the CBA that allegedly barred the changes and that, even in their absence, Weavexx's actions violated past practice.⁸ [GC Exh. 9, at pp. 1, 4]. All of what follows in Part V of the opinion can reasonably be read as responding to these contentions, including all of the language quoted in the ALJD.

1. Weavexx's Reserved Rights

While ignored in the ALJD, Part II of the opinion sets the stage for what ensues. The arbitrator begins by identifying the provisions of the CBA that he deemed "relevant to the instant dispute." [GC Exh. 9, at p. 3]. Critically, he selected only two sentences from the management-rights clause – the reserved rights provision and the new work rules or policies sentence. In citing this specific language, the arbitrator did not simply repeat the contractual provisions cited by the parties. Weavexx's brief pointed to Section 3 and all of Section 4, not just the two sentences chosen by the arbitrator. [Co. Exh. 1, at p. 2]. The decision to focus on this specific language explains the analysis that follows, clearly reflecting the arbitrator's recognition that they were ultimately determinative of the outcome. Since the ALJD references only Part V of the opinion,

⁶ The arbitrator reasserts the parties' arguments in Part IV of the opinion, evidencing his recognition of the issues to be decided. [GC 9, at pp. 4-6].

⁷ Weavexx based its defense on an interpretation of Section 4 of the CBA, in contrast to the authority cited in the ALJD as precedent for its denial of deferral. [ALJD 9:4-7]; see *Oak Cliff-Golman Baking Co.*, 202 NLRB 614, 616-617 (1973).

⁸ Since the arbitrator addressed and rejected the Union's contractual claims under Section 7 and Article XIII of the CBA and they are not at issue in this proceeding, no further discussion regarding them is necessary.

the obvious significance of the arbitrator's selection evades it completely. The ALJD instead offers the palpably false assertion that "[t]he arbitrator here did not look to any particular language in the management-rights clause that might support the Company's position." [ALJD 9:7-9]. This blatant misrepresentation of the opinion shines a glaring light on the ALJ's blindness to everything in the opinion preceding Part V, in clear contravention of his duty to consider the entire ruling, and necessarily reflects a misunderstanding of the arbitrator's meaning. *Id.*

2. Section 58

Part V is best understood in the context of the contractual arguments pressed by the parties and the arbitrator's explicit recognition of their importance – the arbitrator's discussion of the CBA's Section 58 offering a prime example. Weavexx argued that it precluded any consideration of the Union's past practice claim because grievances must be based on express contract terms. [GC Exh. 2, at p. 21]. The Union countered that Section 58 prohibited Weavexx from amending or supplementing the CBA without written mutual agreement. [GC Exh. 2, at p. 7]. The arbitrator rejected the Union's theory, stating that since no written agreement regarding pay periods existed, and Weavexx's actions had not changed the CBA, Section 58 did not bar the challenged action. The words upon which the ALJ relies must be understood in the context of the full sentence: "Therefore, the fact that the previous pay period was never memorialized by written word, in turn, allowed the Company to make an institutional change⁹ that did not affect the Agreement or any supplement thereto." [GC Exh. 9, at p. 8]. The ALJ, reading only the sentence's second half, misconstrues it as having a connotation beyond its obvious meaning. [ALJD 9:12-14]. The arbitrator is responding to the Union's argument that Section 58 prohibited

⁹ The ALJD repeatedly cites this term, in the mistaken belief that its usage bared the arbitrator's extra-contractual mindset. Weavexx implemented the changes throughout its North American facilities, a fact relevant to the arbitrator's application of the CBA's reasonableness test. See discussion at Part I.C., *infra*.

the changes, rejecting that claim because no written agreement regarding pay periods existed. The words “allowed the Company,” which the ALJD finds revelatory,¹⁰ are employed solely in the sense that nothing in Section 58 precluded the changes. The arbitrator unquestionably limited the scope of this paragraph to Section 58 and to the argument actually presented by the Union. The ALJD, in contrast, expands it to a conclusion that would shock the parties, neither of which ever suggested that Section 58 authorized the changes.¹¹ This theme repeats itself throughout the ALJD – the reading of words and phrases completely outside the context in which they appear or devoid of any reference to the rest of the opinion.

3. Past Practice

The arbitrator next turns to his assessment of the past practice claim by quoting the preeminent resource on the subject for the proposition that the pecuniary value attached to a claimed past practice bears relevance in determining whether it is binding, a well-recognized standard in labor arbitrations.¹² In finding no negative financial impact upon unit employees, the arbitrator did not grant any extra-contractual right to Weavexx. He merely found one element of the Union’s past practice claim, an extra-contractual argument, wanting. Indeed, by the ALJD’s reasoning, no arbitration award involving a past practice claim would ever warrant deferral since the arbitrator’s analysis must always encompass considerations outside of the express contractual terms. See Appendix A. The ALJD offers no Board precedent for this approach.

¹⁰ To the extent that this phrase is understood by the ALJ as a finding of inherent rights, it can be equally understood as referencing the rights reserved to Weavexx in Section 4 of the CBA and expressly cited by the arbitrator in Parts I, II, and IV of his opinion.

¹¹ The ALJ further errs in stating that the arbitrator “note[d] that section 58 of the contract limited the Union’s position.” [ALJD 9:9]. Although Weavexx argued that the Union could not grieve on the basis of an alleged past practice, the arbitrator made no such finding. [GC Exh. 9, at pp. 6-8].

¹² See Elkouri & Elkouri, *How Arbitration Works* (6th Ed. 2003), pp. 605-613, attached hereto at Appendix A. See *Babcock & Wilcox Constr. Co.*, 361 NLRB No. 132, fn. 11 (2014)(citing Elkouri & Elkouri as “the leading treatise on labor arbitration.”).

4. Excessive or Unnecessary

The opinion then addresses the Union's claim that the changes were unreasonable, relying on the express language of Section 4 of the CBA requiring that new work rules or policies be reasonable, language expressly relied upon by both parties and cited by the arbitrator as a relevant provision and again in his discussion of the parties' positions. [GC Exh. 2, at pp. 1-2, 4-5]. While the arbitrator utilizes different "excessive or unnecessary" terminology, his application here would be nonsensical without reference to the contractual language. The ALJD elects the irrational interpretation and, as it does throughout, ignores the context.

The contractual language at issue merits consideration: "During the term of this agreement, the Company will not implement new work rules or policies relating to terms and conditions of employment without notice to the Union and the opportunity for the Union to raise concerns and to grieve any change it deems unreasonable." The Union's challenge focused solely on whether the changes were unreasonable.¹³ The arbitrator evaluated the following: (1) biweekly pay is a common practice; (2) the changes were made nationwide, and (3) the changes were to improve efficiency.¹⁴ [GC Exh. 9, at p. 9]. Along with the prior conclusion that the changes bore no negative financial consequences for unit employees, these factors justified the arbitrator's conclusion that the changes were not unreasonable or, in his words, "excessive or unnecessary."

This assessment did not authorize Weavexx's actions, as the ALJ's reading implies. Instead, the arbitrator undertook the necessary task of determining what would be

¹³ The Union received notice of the changes on October 22 and had the opportunity to raise concerns at a meeting on November 6. [See GC Exh. 11, 35:15-18; GC Exh. 16, at ¶¶9-11; GC Exh. 9, at p. 4].

¹⁴ While the opinion couches this as a "presumption," the arbitration record evidenced that improved efficiency motivated the changes. [GC Exh. 11 12:17; GC Exh. 16, at ¶19; GC Exh. 6].

“unreasonable,” a term not defined in the contract. The ALJD suggests that the arbitrator somehow strayed from his appointed task by importing these “extra-contractual considerations”¹⁵ into his contractual interpretation yet it is far from obvious what other conceivable path existed.

The ALJD apparently deemed the arbitrator’s final words on this subject most objectionable: “. . . and did not require the approval of the Union.” [ALJD 9:38-41]. Absent lack of notice or opportunity to express concerns, not at issue here, Section 4 of the CBA expressly authorized Weavexx to act without bargaining or Union approval. This is precisely what the last sentence of Section 4 states. While the ALJD cites this phrase as damning evidence of the arbitrator’s reliance on extra-contractual rights, it actually reflects an accurate reading of the express contractual terms negotiated and agreed upon by the parties and identified by the arbitrator as central to his opinion. The ALJD’s interpretation only makes sense by ignoring Parts I, II and IV and by reading the arbitrator’s language without reference to the CBA itself.

5. Managerial Discretion

The final paragraph summarizing his holding best evidences the arbitrator’s reliance on the express contract terms. Here, the opinion recounts the lack of a binding past practice absent mutual assent or negative financial consequences. This analysis conformed to well-accepted and widely-used arbitration norms. See Appendix A. Given the want of any contractual language relating to pay changes or a binding past practice, the arbitrator concluded that Weavexx properly exercised its “managerial discretion” to make the changes. The ALJD seizes upon this verbiage, attributing it to some unexplained (and unreferenced in the arbitration record) inherent rights. Instead, the arbitrator simply alluded to the precise contract language he circled as

¹⁵ See discussion of extra-contractual considerations at Part II.B., *infra*.

relevant and upon which Weavexx relied. Section 4 states, in pertinent part, that Weavexx “retains all authority not specifically abridged, delegated or modified by the Agreement” [GC Exh. 2, at p. 5]. Weavexx described these rights as “managerial discretion” in its arbitration brief and it is not sheer coincidence, as the ALJ necessarily assumed, that the arbitrator coopted this shorthand in his conclusion.¹⁶ [See Co. Exh. 1, at p. 4].

The arbitrator addressed each of this issues presented to him by the Union:

1. Did the contract refer to pay periods?
2. Was there a binding past practice that barred the changes?
3. Were the changes unreasonable?

Having negatively responded to each, the contract allows no other interpretation than that Section 4 reserved rights, and Weavexx’s discretion described therein, applied and so the arbitrator properly found. The ALJD posits that the arbitrator ignored this obvious rationale and instead discovered and applied rights outside the contract that neither party recognized or asserted and that he neglected to mention.

The opinion’s evident lack of clarity does not justify the revocation of deferral. *See Smurfit-Stone*, 344 NLRB at 660. When read in its entirety and with due weight given to all of its parts, as opposed to the piecemeal selection of phrases approach adopted in the ALJD, the

¹⁶ Weavexx’s brief states:

Weavexx retains the right to make this decision because its authority in this context has not been “specifically abridged, delegated or modified by the Agreement.” The contractual silence as to pay periods freed Weavexx to exercise its *managerial discretion* in setting the periods that best suited its business needs, as it did here. The first sentence of Section 4 makes this explicit and beyond reasonable challenge. Where, as here, the meaning of the words chosen by the parties is plain and clear, they must be given effect without interpretation. (Emphasis added).

[Co. Exh. 1, at p. 4]

opinion addressed and responded to the pertinent contractual arguments raised by the parties and concluded that Weavexx properly exercised the managerial discretion granted in Section 4.

D. The Opinion is Susceptible to an Interpretation That It Rested on the Contract's Express Reserved Rights Clause.

Only the forgoing interpretation explains all of the opinion's parts, remembering that Weavexx need not prove the absence of an alternate one. Even if the opinion was also susceptible to the ALJD's construction, deferral would still be warranted. *Id.* at 659-660.

Had the ALJ shouldered the necessary task of considering the entire opinion and possible alternate readings, he may have understood *Smurfit-Stone* differently. Instead, he employs circular reasoning and omits any actual analysis of the factors found relevant in that case, finding it distinguishable because, as he had previously concluded, the opinion was not susceptible to an interpretation consistent with the Act.

The ALJD disdains any mention of the following factual similarities considered important by the *Smurfit-Stone* Board in finding that the arbitration opinion in that case satisfied deferral standards: (1) the employer argued to the arbitrator that the management-rights clause privileged its unilateral act; (2) the arbitrator's reference (in this case repeatedly) to the employer's argument; (3) the arbitrator's prominent quotation of the relevant language in the management-rights clause; and, (4) in language that the ALJ found objectionable here, the arbitrator stated that the employer had the right to make work rules. *Id.* at 661 [ALJD 8:37-40]. In both cases, the arbitrators' conclusions omitted specific mention of the management-rights clause.

Smurfit-Stone does differ from the instant case in two critical respects, both of which render the opinion more worthy of deferral. First, the arbitrator's adoption of the "managerial

discretion” terminology, lifted straight from Weavexx’s brief,¹⁷ cannot reasonably be read as anything other than a direct reference to the reserved rights language in Section 4 of the CBA. Second, the arbitrator in *Smurfit-Stone* stated that the employer had “the inherent right to make rules.” *Id.* at 662. Nothing in the opinion here, or in the entire arbitration record, alludes to inherent management rights in any way. The ALJD cannot justifiably dismiss the obvious relevance of *Smurfit-Stone* without any consideration of these factors.

E. An Interpretation of the Opinion That Finds Reliance on an Express Contractual Reservation of Rights Clause Is Consistent with the Act.

The finding that the opinion offends the Act ignores clear and unequivocal Board precedent to the contrary. See e.g., *Southern California Edison Co.*, 310 NLRB 1229, 1231 (1993)(Board defers to arbitration decisions upholding unilateral changes based on general management-rights clauses). The Board’s unilateral change cases display a consistent pattern of deferral to such decisions when, as here, the arbitrator relied on contractual rights, beginning with its seminal ruling in *Dennison National Co.*, 296 NLRB 169 (1989).

In *Dennison National*, the arbitrator found that no contract provision permitted or prohibited the unilateral action at issue and concluded that the employer’s actions fell within the rights reserved to it under the management-rights clause, a provision equivalent to the CBA’s Section 4. [Compare *Dennison National*, 296 NLRB at 170, fn. 5 with GC Exhibit 2, at p. 5, Section 4]. These so-called “reserved rights” clauses differ from the “residual rights” at issue in *Columbia Chemicals*, which are extra-contractual by their very nature. Conversely, reserved rights flow from free and open negotiation between the parties. They manifest a piece of the

¹⁷ See footnote 13, *supra*.

bargain struck between the employer and the union in the give and take of collective bargaining and merit the same treatment as any other contractual provision.

The Board recognized in *Dennison National* that the arbitrator's reliance upon reserved rights might not be consistent with its precedent but concluded that it was not repugnant to the Act. *Id.*; see also, *Specialized Distribution Mgmt., Inc.*, 318 NLRB 158 (1995) (arbitrator's decision need not be totally consistent with Board precedent provided it is not 'palpably wrong.'). Where, as here, the arbitrator ruled that the contract's management-rights clause reserved for the employer the right to act unilaterally, "such a finding is conclusive of the statutory issue" *Dennison National*, 296 NLRB at 170, fn. 6. The Board clearly articulated its view in *Motor Convoy, Inc.*, 303 NLRB 135, 136 (1991):

if an arbitrator upholds an employer's argument that its actions were justified by a contractual management-rights clause, the Board in an 8(a)(5) unilateral change case, would defer to the award, even if neither the award nor the clause read in terms of the statutory standard of clear and unmistakable waiver. The award is susceptible to the interpretation that there was such a waiver, even though the contract and the award do not read in those terms.¹⁸

Since adoption of the *Spielberg/Olin* deferral standard, the Board has consistently distinguished between reserved rights and residual rights cases on the grounds that the latter are not part of the bargain reached by the parties. *Id.* at 137 ("Because waiver of the right to bargain is bottomed on party consent, the arbitral award based on something other than a contract clause or party conduct was repugnant."); see also *Smurfit-Stone*, 344 NLRB 658. The opinion is clearly susceptible to an interpretation that he relied on Section's 4 reserved rights. *Dennison National*, in accordance with national labor policy and particularly when viewed through the lens

¹⁸ The ALJD mistakenly implies that the opinion must apply the Board's clear and unmistakable waiver standard to warrant deferral. [ALJD 8:41-44].

of *Smurfit-Stone*, dictates that the charge must be deferred to that decision.¹⁹ See *Andersen Sand & Gravel Co.*, 277 NLRB 1204, 1205 (1985).

II. THE ARBITRATOR DID NOT RELY ON EXTRA-CONTRACTUAL RIGHTS.

A. Neither the Opinion Nor the Arbitration Record Contain Any Reference to Extra-Contractual Inherent Rights.

The ALJ firmly rests his finding that the opinion was not susceptible to an interpretation consistent with the Act on *Columbia Chemicals*.

The gravamen of the arbitration opinion's failing in *Columbia Chemicals* lay in its finding that the employer possessed an inherent right outside the contract to take the challenged action.²⁰ The critical ruling was that "the arbitrator adopted an approach to resolution of this case which depended upon what both parties refer to on brief as a 'residual rights of management' theory . . ." *Id.*, at 594-595. Here, the arbitrator made no reference to any such right and neither party endorsed such an approach. The arbitration award in *Columbia Chemicals* allowed no other interpretation but that it relied upon extra-contractual residual rights in part, importantly, because both parties pressed that position. In contrast, no party to the instant case even suggested the existence of such rights and the words "residual rights" or "inherent rights" appear nowhere in the arbitrator's opinion.

The ALJD heavily weights the opinion's use of the terms "management decision" and "managerial discretion" as implicit evidence of the arbitrator's extra-contractual focus in seeming disregard of the existence of management-rights clauses in virtually all collective bargaining agreements. These clauses routinely grant employers the right to take certain actions

¹⁹ For the same reason, the opinion is not palpably wrong. [See ALJD 9:33].

²⁰ The same holds true for *Ciba-Geigy Pharmaceutical Div.*, 264 NLRB 1013 (1982), *enfd.* 722 F.2d 1120 (3rd Cir. 1983), also cited in the ALJD.

without first bargaining with the employees' collective bargaining representative. Thus, a reference to an employer's exercise of a "management decision" or "managerial discretion" reveals nothing, in itself, about the statutory or contractual propriety of any action until both the action and the terms of the contract, including the management-rights clause, are examined. But the ALJD finds, based on reference to these two phrases, that the opinion is not susceptible to an interpretation consistent with the Act. [ALJD 8:37-41].

The arbitrator's adoption of Weavexx's "managerial discretion" phrase describing Section 4's reserved rights clause eliminates the necessity of further analysis of his meaning. The ALJD necessarily dismisses the arbitrator's parroting of this key term as total coincidence and attributes a meaning to it entirely different from that used by the parties. No rationale or reasoning appears in the ALJD to demystify this spurious interpretation. Another construction consistent with the parties' arguments and all of the preceding parts of the opinion, is that, in the absence of a binding past practice, contrary contract language, or any unreasonable action by Weavexx, Section 4 privileged the challenged changes.²¹ After disposing of the contractual and past practice claims relied upon by the Union, the arbitrator simply recognized what the CBA unequivocally states and the arbitrator had noted in Parts I, II and IV of his opinion - that Weavexx had the contractual right to act. Had the arbitrator simply stated that "the Company's use of its reserved rights was proper" instead of substituting the phrase "managerial discretion," any suggestion that deferral should be denied under *Columbia Chemicals* would be deemed ludicrous. Deferral cannot reasonably be denied on the slim reed of the arbitrator's word choice.

B. The ALJD Improperly Confuses Extra-Contractual Considerations with Extra-Contractual Rights.

²¹ See discussion at Part I.D., *supra*.

The ALJD fatally conflates extra-contractual considerations with extra-contractual rights. *Columbia Chemicals*, upon which the ALJD rests, says nothing about an arbitrator's use of extra-contractual evidence in resolving contract disputes. Arbitrators would have no resource for addressing past practice claims without resort to extra-contractual factors and they routinely examine the conduct of the parties, as occurred here.²² See Appendix A.

Not a single alleged "extra-contractual consideration" cited in the ALJD granted Weavexx the contractual right to take actions outside of the contract, based on a fair reading of the entire opinion. The arbitrator's review of financial impact, increased efficiency, the nationwide rollout, and the compensation of hourly workers, all cited in the ALJD as evidence of the opinion's extra-contractual considerations, bore no relevance to the issue of Weavexx's reserved Section 4 rights. The introduction of these topics served solely to respond to the Union's arguments that the changes violated past practice or were unreasonable under the final sentence of Section 4 and not as an affirmative finding of management rights.

The ALJD offers no authority for the proposition that an arbitrator's citation of extra-contractual considerations bars deferral and none exists. To the contrary, the U.S. Supreme Court has affirmatively recognized that an arbitrator properly brings his informed judgment to the task and may look for guidance from many sources, including those outside the contract. *Enterprise Corp.*, 363 U.S. at 597.

III. THE UNION'S WILLFULL WITHHOLDING OF THE PAYDAY CHANGE FROM ARBITRATION DOES NOT JUSTIFY DENIAL OF DEFERRAL NOR A FINDING THAT WEAVEXX VIOLATED THE ACT.

A. The Union Deliberately Avoided Arbitrating the Payday Change.

²² The arbitrator's sole reference to facts outside the conduct of the parties was his presumption regarding the manner in which hourly workers are paid, which was both dicta and not central to his conclusion.

In denying deferral because the arbitrator did not consider the pay date change, the ALJD ignores the Union's decision not to arbitrate this issue. The grievance submitted to arbitration by the Union, filed by Mitchell Jones, makes no mention of the change in paydays.²³ [GC Exh. 5]. The grievance placed before the arbitrator only related to the change in pay periods. This represented a deliberate choice by the Union.

The Union filed its initial charge on November 21, 2013 in Case No. 15-CA-117654, three days after the Jones grievance. Like the grievance, this charge ignored the change in paydays, instead limiting its scope to the change in pay periods and in the "pay process," a purported reference to an alteration in the delivery of pay stubs. [See GC Exh. 3]. On December 30, 2013, the Union submitted the instant charge encompassing both the payday and pay period changes, on the basis of which the General Counsel deferred to the arbitration process. [GC Exh. 10]. The Union clearly had knowledge at the arbitration hearing that the arbitration would not address both issues. Since Weavexx had previously agreed to waive any procedural defenses, the Union faced no impediment to raising the payday change issue before the arbitrator, but abstained. [See GC Exh. 10].

The ALJD rejected deferral, in part, because the arbitrator did not decide an issue that the Union intentionally withheld from his consideration. [ALJD 8:25-34]. Not only would a denial of deferral on this basis unjustly punish Weavexx for the Union's malfeasance, it would run afoul of the strong preference for the peaceful resolution of such disputes through arbitration. See *Republic Steel*, 379 U.S., at 653. The General Counsel routinely dismisses charges where a

²³ The Board should rely on the wording of the actual grievance, and not the parties' erroneous stipulation, on this point. [Compare GC Exh. 5 with GC Exh. 16, at ¶20].

union does not pursue a grievance through arbitration. [See NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings, §10118.1; GC Exh. 10]. Rather than rely on the Union's mischief, as is the case here, the payday aspect of the charge should be dismissed.

The ALJD's reliance on *Professional Porter* is misplaced and ignores that its application has been severely restricted by the Board. See *Olin*, 268 NLRB at 574. Indeed, the Board has never applied the reasoning of *Professional Porter* in a Section 8(a)(5) unilateral change case post-*Olin*, limiting its references to Section 8(a)(3) cases where clear divergences between the statutory and contractual standards often exist. In a unilateral change case, the same evidence dictates both the contractual and the statutory issue.²⁴ See *Andersen Sand*, 277 NLRB at 1205 (absent contrary evidence, reasonable to conclude that arbitrator's resolution of contractual issue required same evidence relevant to resolving unilateral change unfair labor practice issue).

No contractual distinction exists between the pay period and payday changes and the ALJD suggests none. Each of the Union's arguments and Weavexx's defenses applied to the payday change in the same manner as to pay periods. The ALJD does not claim that the General Counsel proved that facts generally relevant to the payday change, as opposed to the precise change itself, were withheld from the arbitrator. See *Martin Redi-Mix, Inc.*, 274 NLRB 559, 560 (1985) (party seeking to avoid deferral must establish that generally relevant facts not presented to arbitrator). Given that the claims were contractually indistinct, the ALJD erred in rejecting

²⁴ The Board recently adopted a distinct deferral standard in Section 8(a)(3) cases precisely because of the differences between the statutory standard and the contract issues, a gap absent from unilateral change cases. See *Babcock & Wilcox*, 361 NLRB No. 132.

deferral of the payday charge and in bootstrapping it into a justification for nixing deferral of the pay period allegation.

Even assuming, *arguendo*, that deferral revocation represented a just response to the Union's trickery as to the payday change, and not an abuse of the General Counsel's discretion, no justification exists for torpedoing deferral on the issue indisputably considered by the arbitrator. The ALJD presumes that the payday change represents a separate and distinct statutory violation from the pay period change. ALJD 8:25. If they are two sides of the same coin, analytically and contractually indistinct, then deferral as to pay periods would reasonably lead to deferral as to paydays. If, on the other hand, they are distinguishable, the Union's election should not taint analysis of the pay period change which, as argued *supra*, satisfies Board deferral standards.

A determination that the opinion as to pay periods justified deferral leads to several possible scenarios regarding the payday claim: (1) deferral to the opinion on the grounds that the issues are contractual twins; (2) dismissal of the payday charge for the Union's avoidance of arbitration²⁵; or, (3) a finding that Weavexx violated Sections 8(a)(5) and (1) of the Act with regard to the payday change only. Only the first two options deny the Union the benefits of its misbehavior.

Given the inapplicability of *Professional Porter* to the facts of the instant case and the ALJD's silence as to the Union's culpability, the denial of deferral on the grounds stated lacks any foundation. Fairness and the General Counsel's own procedures dictate that the payday charge either be deferred or dismissed.

²⁵ The General Counsel has never offered any rationale for his decision to litigate the payday claim in light of the Union's failure to present the issue to arbitration.

CONCLUSION

For the reasons states, the ALJD erred in its findings against Weavexx because the unfair labor practice charges should be deferred to the arbitration opinion, and the Complaint should be dismissed in its entirety.

Respectfully submitted,

/s/ Barry J. Rubenstein
Barry J. Rubenstein
Law Office of Barry J. Rubenstein
6 Garvey Road
Framingham, MA 01701
(508)877-6726

Dated: September 3, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of September, 2015 served a copy of this Brief in Support of Exceptions of Weavexx, LLC by electronic mail service upon the following:

Susan Greenberg, Esq,
Counsel for NLRB General Counsel
National Labor Relations Board, Subregion 26
80 Monroe Street, Suite 350
Memphis, TN 38103
Susan.Greenberg@nlrb.gov

Samuel Morris, Esq.
Goodwin, Morris, Laurenzi, Bloomfield P.C.
50 N. Front Street, Suite 80
Memphis, TN 38103
smorris@gmlblaw.com

/s/ Barry J. Rubenstein
Barry J. Rubenstein
Law Office of Barry J. Rubenstein
6 Garvey Road
Framingham, MA 01701
(508)877-6726

APPENDIX A

Elkouri & Elkouri

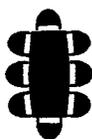
**HOW
ARBITRATION
WORKS**

Sixth Edition

Editor-in-Chief
Alan Miles Ruben

*Emeritus Professor of Law
Cleveland-Marshall College of Law
Cleveland State University
Cleveland, Ohio*

*Advisory Professor of Law
Fudan University
Shanghai, PRC*



Committee on ADR in Labor & Employment Law

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Section of Labor and Employment Law



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Chapter 12

Custom and Past Practice

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| 1. Custom and Practice as a Term of the Contract | 606 |
| 2. Evidence Required to Establish a Binding Past Practice | 607 |
| 3. Mutuality | 609 |
| 4. The Scope of Past Practice | 610 |
| 5. What Matters May Be the Subject of a Binding Past Practice .. | 611 |
| A. Major Condition of Employment | 611 |
| B. Methods of Operation or Direction of the Workforce | 612 |
| C. Practice Involving a Benefit of Personal Value to Employees | 616 |
| 6. Regulation, Modification, or Termination of Practice as Implied Term of Contract | 617 |
| 7. Contract Clauses Regarding Custom | 620 |
| 8. Role of Custom and Practice in Interpretation of Ambiguous Language | 623 |
| 9. Custom and Practice at Variance With Clear Contract Language | 627 |
| 10. Past Practice as Evidencing an Amendment of the Contract ... | 629 |
| 11. Past Practice as a "Gap-Filling" Remedy | 630 |

Unquestionably, the custom and past practice of the parties constitute one of the most significant evidentiary considerations in labor-management arbitration. Proof of custom and past practice may be introduced for any of the following major purposes: (1) to provide the basis of rules governing matters not included in the written contract; (2) to indicate the proper interpretation of contract language; or (3) to support allegations that the "clear language" of the written contract has been amended by mutual agreement to express the intention of the parties to make their written language consistent with what they regularly do in practice in the administration of their labor agreement.

This chapter discusses the use of custom and past practice for each of these purposes.¹

¹For other discussions of custom and practice, see Mittenthal, *Arbitration Classics: Part II. The Ever-Present Past*, in *ARBITRATION 1994: CONTROVERSY AND CONTINUITY, PROCEEDINGS OF THE 47TH ANNUAL MEETING OF NAA 184* (Gruenberg ed., BNA Books 1994). The paper was

1. CUSTOM AND PRACTICE AS A TERM OF THE CONTRACT

Under certain circumstances, custom and past practice may be held enforceable through arbitration as being, in essence, a part of the parties' "whole" agreement. Some of the general statements of arbitrators in this regard may be noted:

It is generally accepted that certain, but not all, clear and long standing practices can establish conditions of employment as binding as any written provision of the agreement.²

In cases where the contract is completely silent with respect to a given activity, the presence of a well established practice, accepted or condoned by both parties, may constitute in effect, an unwritten principle on how a certain type of situation should be treated.³

A union-management contract is far more than words on paper. It is also all the oral understandings, interpretations and mutually acceptable habits of action which have grown up around it over the course of time. Stable and peaceful relations between the parties depend upon the development of a mutually satisfactory superstructure of understanding which gives operating significance and practicality to the purely legal wording of the written contract. Peaceful relations depend, further, upon both parties faithfully living up to their mutual commitments as embodied not only in the actual contract itself but also in the modes of action which have become an integral part of it.⁴

[I]t is well recognized that the contractual relationship between the parties normally consists of more than the written word. Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are not at variance with any written provision negotiated into the contract by the parties and where they are of long standing and were not changed during contract negotiations.⁵

Custom can, under some unusual circumstances, form an implied term of a contract. Where the Company has always done a certain thing, and the matter is so well understood and taken for granted that it may be said that the Contract was entered into upon the assumption that that customary action would continue to be taken, such customary action may be an implied term.⁶

In the light of the [arbitration] decisions, . . . it seems to me that the current of opinion has set strongly in favor of the position that existing practices, in respect to major conditions of employment, are to be regarded as included within a collective bargaining contract, negotiated after the practice has become established and not repudiated or limited by it. This also seems to me the reasonable view, since the negotiators work within the frame of existent practice and must be taken to be conscious of it.⁷

presented at the National Academy of Arbitrator's (NAA's) Continuing Education Conference in Pittsburgh, October 30, 1993. See also BRODA, A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW & PRACTICE ch. 6 (16th ed. 2003); Stanley, *Unambiguous Collective Bargaining Agreement Language Controls Unless Past Practice Is So Widely Acknowledged and Mutually Accepted That It Amends Contract*, 74 U. DET. MERCY L. REV. 389 (1997); McLaughlin, *Custom and Past Practice in Labor Arbitration*, 18 ARB. J. 205 (1963).

²Arbitrator Dallas L. Jones, in *Alpena Gen. Hosp.*, 50 LA 48, 51 (Jones, 1967).

³Arbitrator Thomas J. McDermott, in *Texas Util. Generating Div.*, 92 LA 1308, 1312 (McDermott, 1989).

⁴Arbitrator Arthur T. Jacobs, in *Coca-Cola Bottling Co.*, 9 LA 197, 198 (Jacobs, 1947).

⁵Arbitrator Marlin M. Volz, in *Metal Specialty Co.*, 39 LA 1265, 1269 (Volz, 1962).

⁶Arbitrator Whitley P. McCoy, in *Esso Standard Oil Co.*, 16 LA 73, 74 (McCoy, Reber, & Daniel, 1951). In *Beaunit Fibers*, 49 LA 423, 424 (McCoy, 1967), the arbitrator emphasized the "under some circumstances" words of limitation.

⁷Arbitrator Maurice H. Merrill, in *Phillips Petroleum Co.*, 24 LA 191, 194-95 (Merrill, 1955).

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2. EVIDENCE

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⁸See *Kobe Inc.*, 106 LA 1991; *Michig* 97 LA 314, 31 Dixie Mach. Paper Corp., (Kates, 1967) Corp., 44 LA 1964; *Fruehe* (Prasow, 1951) Lines, 23 LA 1953; *B.F. G* 20 LA 276, 2 *General Anili* 108 (Marsha 16 LA 115, 11

⁹In *Steel* the Court sta The labo tract, as t a part of

Id. at 582, 46

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¹¹*Id.* at 1

¹²*Id.*

¹³E.g., *G1* Police, 97 LA which arises Mfg. Co., 97 matter by th Mittenthal, 'tended perio Mach. Weldi incorporate and thus pla 83 LA 1270 burden of est Hayes Co., 7

Many other arbitrators,⁸ and the U.S. Supreme Court,⁹ have expressed similar thoughts.

Even in the nonunion setting, a past practice was held in one case to constitute a condition of employment.¹⁰ There, the employer had a noncontractual handbook that pledged to treat employees fairly. The arbitrator held that "fairness" required the employer to take into account the way other employees in similar circumstances had been treated in the past.¹¹ So, where employees who had completed a year-long training program had always been promoted, the employer was found to have made an implicit commitment to new trainees to continue the process, and, if the company did not plan to promote them, it had a responsibility to inform the trainees at the outset.¹²

More, however, is required in the decision of specific cases than a consideration of general thoughts. The particular facts, the relevant bargaining history, the relationship between the parties, and the subject matter of the practice or custom and its treatment (if any) in the collective bargaining agreement are the commonly controlling factors.

2. EVIDENCE REQUIRED TO ESTABLISH A BINDING PAST PRACTICE [LA CDI 24.351]

When it is asserted that a past practice constitutes an implied term of a contract, strong proof of its existence ordinarily will be required.¹³ Indeed,

⁸See *Kobelco Stewart Bolling Inc.*, 108 LA 1093, 1096-97 (Curry, Jr., 1997); *Albertson's, Inc.*, 106 LA 897, 900 (Kaufman, 1996); *GTE Hawaiian Tel. Co.*, 98 LA 832, 834-35 (Najita, 1991); *Michigan Dep't of State Police*, 97 LA 721, 722 (Kanner, 1991); *Dahlstrom Mfg. Co.*, 97 LA 314, 318 (Duda, Jr., 1991); *Greyhound Food Mgmt.*, 95 LA 820, 824 (Staudohar, 1990); *Dixie Mach. Welding & Metal Works*, 88 LA 734, 736-37 (Baroni, 1987); *Hudson Pulp & Paper Corp.*, 53 LA 845, 848 (Mills, 1969); *Bangor Punta Operations*, 48 LA 1275, 1276 (Kates, 1967); *Association of Shower Door Indus.*, 47 LA 353, 355 (Koven, 1966); *Formica Corp.*, 44 LA 467, 468 (Schmidt, 1965); *Keystone Lighting Corp.*, 43 LA 145, 148 (Horlacher, 1964); *Fruehauf Trailer Co.*, 29 LA 372, 375 (Jones, Jr., 1957); *Morris P. Kirk & Son*, 27 LA 6, 10 (Prasow, 1956); *E.W. Bliss Co.*, 24 LA 614, 618-19 (Dworkin, 1955); *Northland Greyhound Lines*, 23 LA 277, 280 (Levinson, 1954); *Firestone Tire & Rubber Co.*, 20 LA 880, 883 (Gorder, 1953); *B.F. Goodrich Chem. Co.*, 20 LA 818, 823 (Hale, 1953); *International Harvester Co.*, 20 LA 276, 280 (Wirtz, 1953); *Sioux City Battery Co.*, 20 LA 243, 244 (Updegraff, 1953); *General Aniline & Film Corp.*, 19 LA 628, 629 (Talbot, 1952); *Republic Steel Corp.*, 17 LA 105, 108 (Marshall, 1951); *John Morrell & Co.*, 17 LA 81, 85 (Gilden, 1951); *American Seating Co.*, 16 LA 115, 117 (Whiting, 1951); *Mt. Carmel Pub. Util. Co.*, 16 LA 59, 62 (Hampton, 1951).

⁹In *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960), the Court stated:

The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.

Id. at 582, 46 LRRM at 2419.

¹⁰*Indiana Mich. Power Co.*, 107 LA 1037 (Render, 1997).

¹¹*Id.* at 1042.

¹²*Id.*

¹³*E.g.*, *GTE Hawaiian Tel. Co.*, 98 LA 832, 834-35 (Najita, 1991); *Michigan Dep't of State Police*, 97 LA 721, 722 (Kanner, 1991) ("It is well settled that a condition of employment which arises through long-standing past practice is binding upon the parties."); *Dahlstrom Mfg. Co.*, 97 LA 314, 318 (Duda, Jr., 1991) ("Even in the absence of an agreement on the matter by the Parties a past practice may be binding if, as stated by Arbitrator Richard Mittenenthal, 'it is shown to be the understood and accepted way of doing things over an extended period of time.'"); *Greyhound Food Mgmt.*, 95 LA 820, 824 (Staudohar, 1990); *Dixie Mach. Welding & Metal Works*, 88 LA 734 (Baroni, 1987). Of course, parties may expressly incorporate past practices as a part of their collective bargaining agreement by reference, and thus plainly render them enforceable through arbitration. *Alabama By-Products Corp.*, 83 LA 1270 (Clarke, 1984). The party alleging the existence of a binding practice has the burden of establishing it. See *Ringgold, Pa., Sch. Dist.*, 75 LA 1216, 1219 (Duff, 1980); *Kelsey-Hayes Co.*, 74 LA 50, 53 (Heinsz, 1980); *Columbian Carbon Co.*, 48 LA 919, 922 (Ray, 1967).

many arbitrators have recognized that, "In the absence of a written agreement, 'past practice', to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties."¹⁴

Another commonly used formulation requires "clarity, consistency, and acceptability."¹⁵ The term "clarity" embraces the element of uniformity.¹⁶ The term "consistency" involves the element of repetition,¹⁷ and "acceptability"

¹⁴Celanese Corp. of Am., 24 LA 168, 172 (Justin, 1954). These criteria, or similar ones, have been articulated and accepted in *Lake Erie Screw Corp.*, 108 LA 15, 19 (Feldman, 1997); *Grand Haven Stamped Prods. Co.*, 107 LA 131, 137 (Daniel, 1996); *Kansas City Power & Light Co.*, 105 LA 518, 523 (Berger, 1995); *Crescent Metal Prods.*, 104 LA 724, 726 (Cohen, 1994); *City of York, Pa.*, 103 LA 1111, 1115 (DiLauro, 1994); *Curved Glass Distribs.*, 102 LA 33, 36 (Eischen, 1993); *Fry's Food & Drug of Ariz.*, 101 LA 1179, 1181 (Oberstein, 1993); *Consolidation Coal Co.*, 99 LA 163, 167 (Roberts, 1992); *North Slope Borough Sch. Dist.*, 98 LA 697, 699-700 (Corbett, 1992); *Tennessee Valley Auth.*, 97 LA 73, 80 (Bankston, 1991); *Toledo Edison Co.*, 96 LA 908, 915 (Bressler, 1991); *Aurora Casket Co.*, 96 LA 855, 858 (Gibson, 1991); *Lawrence Paper Co.*, 96 LA 297, 302 (Berger, 1991); *Pierce Co.*, 95 LA 1029, 1031 (Wolff, 1990); *Town of Henrietta, N.Y.*, 95 LA 373, 378 (Pohl, 1990); *Topps Chewing Gum*, 94 LA 356, 359 (DiLauro, 1990); *Texas Util. Generating Div.*, 92 LA 1308, 1312 (McDermott, 1989); *Wyman-Gordon Co.*, 91 LA 225, 230 (Cyrol, 1988); *City of Marion, Ohio*, 91 LA 175, 179 (Bittel, 1988); *Dixie Mach. Welding & Metal Works*, 88 LA 734, 734 (Baroni, 1987); *Super Valu Stores*, 87 LA 453 (Goldman, 1986); *Farrell Lines*, 86 LA 36, 39 (Hockenberry, 1986); *Packaging Corp. of Am.*, 85 LA 700, 705 (Ruben, 1985); *Belleville Shoe Mfg. Co.*, 84 LA 337, 341 (Pratte, 1985); *Fashion Shoe Prods.*, 84 LA 325, 329-30 (Hilgert, 1985); *Washington Metro. Airport Police Branch*, 84 LA 203, 208 (Kaplan, 1985); *Emerson Elec. Co.*, 83 LA 895, 897 (Fitzsimmons, 1984); *Ethyl Corp.*, 83 LA 602, 604 (White, 1984); *Charleston Naval Shipyard*, 82 LA 476 (Groshong, 1984). For other statements of criteria for a binding practice, see *Transportation Enters.*, 75 LA 1226, 1230 (Johnson, 1980); *Logemann Bros. Co.*, 75 LA 615, 621-22 (Bard, 1980); *Charles H. Johnston's Sons Co.*, 75 LA 337, 341 (Chapman, 1980); *Veterans Admin.*, 72 LA 57, 61-62 (Goodman, 1978); *Minnesota Gas Co.*, 71 LA 544, 549 (Bognanno, 1978); *County Line Cheese Co.*, 69 LA 1088, 1092 (Leahy, 1977); *Control Data Corp.*, 69 LA 665, 670 (Hatcher, 1977); *Borough of Rutherford*, 68 LA 229, 231 (Beckerman, 1977). In *Sperry Rand Corp.*, 54 LA 48, 52 (Volz, 1971), the arbitrator stated that: "Leniency by individual supervisors must be distinguished from mutual agreement or acquiescence by the contracting parties in a consistent course of repetitive action." See also *Hanna Mining Co.*, 73 LA 949, 951 (Kahn, 1979). Where national policy of a federal agency employer governed a matter, local departure from that policy could not result in a binding practice. *Dept of Justice, Immigration & Naturalization Serv.*, 77 LA 638, 643 (Weckstein, 1981) (higher management had been unaware of the local departure). Also concerning certain limitations on the binding quality of past practice in the federal sector, see *Utah Army Nat'l Guard*, 74 LA 770, 774-75 (Wiggins, 1980); *U.S. Army*, 70 LA 360, 364-65 (Griffin, 1978).

¹⁵*Harbison-Walker Refractories*, 114 LA 1302, 1305 (Smith, 2000); *Crescent Metal Prods.*, 104 LA 724, 726 (Cohen, 1994); *General Mills*, 101 LA 953, 958 (Wolff, 1993). See *H. Meyer Dairy Co.*, 105 LA 583, 587 (Sugerman, 1995).

¹⁶See *H. Meyer Dairy Co.*, 105 LA at 587.

¹⁷*Monroe County Intermediate Sch. Dist.*, 105 LA 565, 567 (Brodsky, 1995) ("[A] practice can be established if, when one circumstance occurs, it is consistently treated in a certain way. The occurrence need not be daily or weekly, or even yearly, but when it happens, a given response to that occurrence always follows."); *Weyerhaeuser Co.*, 105 LA 273, 276 (Nathan, 1995) ("A 'practice' as that concept is understood in labor relations refers to a pattern of conduct which appears with such frequency that the parties understand that it is the accepted way of doing something."); *Brown-Forman Beverage Co.*, 103 LA 292, 294 (Frocht, 1994) ("[T]he general principle is that a practice exists when a certain result has been utilized in repetitive and identical circumstances."). A practice that is at best "checkered" does not exhibit the requisite repetitiveness to constitute a binding past practice. See *Consolidation Coal Co.*, 104 LA 751, 756 (Frankiewicz, 1995). Mere habit or happenstance does not rise to the requisite level of frequency to create a binding practice. See *Consolidation Coal Co.*, 106 LA 328, 332 (Frankiewicz, 1996). Moreover, one or two occurrences normally does not constitute a past practice. See *Harbison-Walker Refractories*, 114 LA 1302, 1305 (Smith, 2000); *Nature's Best*, 107 LA 769, 772 (Darrow, 1996) (holding that one-time payment of wage differential does not create past practice); *Weyerhaeuser Co.*, 105 LA at 276 (holding that a past practice is not created by one prior experience); *Globe Ticket & Label Co.*, 105 LA 62, 66 (McCurdy, 1995) (holding that one occurrence does not create a practice); *Stevens County*, 104 LA 928, 932 (Daly, 1995) (holding that two occurrences within 4 months does not establish a past practice).

speaks to "mutuality" in the custom or practice.¹⁸ However, the mutual acceptance may be tacit—an implied mutual agreement arising by inference from the circumstances.¹⁹ While another factor sometimes considered is whether the activity was instituted by bilateral action or only by the action of one party,²⁰ the lack of bilateral involvement should not necessarily be given controlling weight.²¹

3. MUTUALITY [LA CDI 24.20]

It has been noted that, where a custom or practice has been enforced, the element of "mutuality" usually has been supplied by implication—that is, there has been "implied mutual agreement." In this regard, existing employee benefits usually affect all or at least sizable groups of employees, and thus are likely to be in the thoughts of union and company negotiators. It reasonably may be assumed, therefore, that the parties in shaping bargaining demands for wages and other employee benefits do so with silent recognition of the existing unwritten benefits and favorable working conditions.

It may be less plausible to assume that bargaining demands are shaped with any comparable silent thought, and hence "implied agreement," as to continuation of practices regarding methods of operation and direction of the workforce—matters falling within the fundamental areas of basic management responsibility.

¹⁸Michigan Hanger Co., 106 LA 377, 380 (Smith, 1996); Service Employees Local 415, 101 LA 483, 486 (Concepcion, 1993).

¹⁹See T.J. Maxx, 105 LA 470, 474 (Richman, 1995) ("A proposal submitted in negotiations to change a past practice which is then withdrawn, may be evidence of the abandonment of an attempt to change the past practice." (Dixie Container Corp., 47 LA 1072, 1077 [Jaffee, 1966]). "Silence in the face of a statement of position during negotiations can give rise to a contractual obligation under the doctrine of acceptance by silence." (Las Vegas Joint Executive Bd. v. Riverboat Casino, 817 F.2d 524, 125 LRRM 2942 (9th Cir. 1987).); Dixie Mach. Welding & Metal Works, 88 LA 734, 737 (Baroni, 1987); U.S. Indus. Chems. Co., 76 LA 620, 623 (Levy, 1981); Mead Corp., 45 LA 881, 884 (Wood, 1965); Bonanza Air Lines, 44 LA 698, 700 (Jones, Jr., 1965); Formica Corp., 44 LA 467, 468 (Schmidt, 1965); Continental Baking Co., 20 LA 309, 311 (Updegraff, 1953). Awareness of a practice is to be presumed from its long-established and widespread nature. Bethlehem Steel, 33 LA 374, 376 (Valtin, 1959). But see Boulevard Distillers & Importers, 94 LA 657, 660-61 (Heekin, 1990). A few arbitrators require that the consent be specifically acknowledged orally or in writing. National Unif. Serv., 104 LA 901, 907 (Klein, 1995); Atlantic Southeast Airlines, 102 LA 656, 659 (Feigenbaum, 1994); Fry's Food & Drug of Ariz., 101 LA 1179, 1181 (Oberstein, 1993). For a discussion of what a party should do to avoid being bound by a practice commenced by the other party, see *Donaldson Co.*, 20 LA 826, 830-31 (Louisell, 1953).

²⁰See Illinois Power Co., 93 LA 611, 614 (Westbrook, 1989); Country Lane Foods, 88 LA 599, 602 (Strasshofer, 1986); Montgomery Ward & Co., 85 LA 913, 915 (Caraway, 1985); International Paper Co., 85 LA 790, 791-92 (Garnholz, 1985); Department of Def., Dependent Sch., 71 LA 1031, 1033 (Lubic, 1978); Beaunit Fibers, 49 LA 423, 424 (McCoy, 1967); Hillbro Newspaper Printing Co., 48 LA 1166, 1168 (Roberts, 1967); League of N.Y. Theatres, 47 LA 75, 78 (Turkus, 1966); Glamorgan Pipe & Foundry Co., 46 LA 1007, 1008 (Dugan, 1966); Michigan Consol. Gas Co., 42 LA 385, 388 (Howlett, 1964); Columbus Auto Parts Co., 36 LA 166, 170 (Seinsheimer, 1961); International Harvester Co., 20 LA 276, 280 (Wirtz, 1953); General Cable Corp., 17 LA 780, 783 (Cahn, 1952). See also Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *ARBITRATION AND PUBLIC POLICY, PROCEEDINGS OF THE 14TH ANNUAL MEETING OF NAA* 30, 33 (Pollard ed., BNA Books 1961).

²¹See Sterling Furniture Mfrs., 46 LA 705, 706 (Hanlon, 1966); Union Asbestos & Rubber Co., 39 LA 72, 75 (Volz, 1962) (holding a practice as to employee benefits to be binding though unilaterally instituted by the employer). In contrast, in some of the decisions cited elsewhere in this chapter, certain methods of operations unilaterally instituted by management, in the exercise of discretion in the performance of management functions, were held not to constitute binding practices. Thus, the critical consideration may be the subject matter of the practice rather than whether it was established by unilateral or bilateral action.

Management freedom of action in these latter matters may be essential for efficient and progressive operation of the enterprise, and thus serves the long-run interests of all employees.²²

Many arbitrators recognize the "employee benefit"/"basic management function" dichotomy in determining whether a practice has binding effect.²³ In effect, this analysis of the custom and practice issue may be said to give employees the "benefit of the doubt" as to certain matters, and management the benefit of the doubt as to others.

4. THE SCOPE OF PAST PRACTICE

Even when a practice is found to be binding on the parties, questions may arise as to its scope. In this general regard, it appears reasonable that the underlying circumstances must be considered to give a practice its true dimensions: "A practice is no broader than the circumstances out of which it has arisen, although its scope can always be enlarged in the day-to-day administration of the agreement."²⁴

²²Illustrating that good-faith changes by management in methods of operation or in the direction of the workforce may be upheld notwithstanding express recognition that the change would result in a loss of wages or benefits by some employees, see *Fairview Southdale Hosp.*, 96 LA 1129, 1135 (Flagler, 1991); *Hilliard Corp.*, 75 LA 548, 550 (Konvitz, 1980); *Safeway Stores*, 73 LA 207, 215 (Goodman, 1979); *Browning-Ferris Indus. of Ohio*, 68 LA 1347, 1351-52 (Teple, 1977); *George Wiedemann Brewing Co.*, 54 LA 52, 55-56 (Volz, 1971); *Kroger Co.*, 52 LA 440, 443, 445 (Doyle, 1968) (stating that the "fact that the Company's basic motive is economy is not evidence of bad faith"); *St. Regis Paper Co.*, 51 LA 1102, 1107-08 (Solomon, 1968); *Shell Oil Co.*, 44 LA 1219, 1223 (Turkus, 1965). However, where one arbitrator found that the "only reason" for a change in work assignments was to avoid payment of overtime, which by 20-year practice had been a "substantial segment" of employee paychecks, he decided against the employer on the basis that "the economic benefit to the employees outweighs the Company's interest in changing its method of operation." *Liquid Air*, 73 LA 1200, 1203-95 (Weiss, 1979) (in regard to other past practice cases, "often the result can be explained by a weighing of the gravity of the Company's interest in making the change against the gravity of the employees' interest in retaining the traditional practice"). In the latter regard, an arbitrator denied a grievance in *Anheuser-Busch*, 72 LA 594, 597 (Seidman, 1979), where he found that the employer's action in lowering the temperature in the beer storage area "was dictated by marketing conditions"; the change did not adversely affect the health or safety of employees, but "it inconvenienced the employees in requiring them to purchase extra clothing and to work in a less desirable environment"; the change "assured their continued employment during a period that usually resulted in layoffs"; and "[o]n the whole it therefore had a beneficial rather than a deleterious effect on their economy."

²³In some cases, the arbitrators have spoken expressly in terms of this distinction between employee benefits and basic management functions. See *Fairview Southdale Hosp.*, 96 LA 1129, 1135 (Flagler, 1991); *Social Sec. Admin.*, 79 LA 449, 457-59 (Mittleman, 1982); *Servomation Corp.*, 77 LA 545, 551 (Lieberman, 1981); *Saginaw Mining Co.*, 76 LA 911, 914 (Ruben, 1981); *Le Blond Mach. Tool*, 76 LA 827, 833-34 (Keenan, 1981); *State of Alaska*, 74 LA 459, 466-67 (Hauck, 1979); *ITT-Continental Baking Co.*, 74 LA 92, 95 (Ross, 1980); *Union Oil Co. of Cal.*, 73 LA 892, 895-96 (Goldberg, 1979); *Kiowa Corp.*, 73 LA 391, 395 (Maniscalco, 1979); *George Wiedemann Brewing Co.*, 54 LA 52, 55-56 (Volz, 1971); *Studebaker Corp.*, 51 LA 813, 818-19 (Witney, 1968); *Ingalls Shipbuilding Corp.*, 49 LA 654, 657-58 (Eyraud, 1967); *Bangor Punta Operations*, 48 LA 1275, 1276 (Kates, 1967); *Sinclair Ref. Co.*, 66-1 ARB 18039, at 3129 (Warns, 1965); *Standard Bag Corp.*, 45 LA 1149, 1151 (Summers, 1965); *Torrington Co.*, 45 LA 353, 355 (Kennedy, 1965); *Shell Oil Co.*, 44 LA 1219, 1223-24 (Turkus, 1965); *Dayton Precision Corp.*, 44 LA 1217, 1218 (Kates, 1965); *Celotex Corp.*, 43 LA 395, 399-400 (Ray, 1964); *Tenneco Oil Co.*, 42 LA 833, 835-37 (Rubin, 1964); *Honolulu Gas Co.*, 41 LA 1115, 1116-17 (Tsukiyama, 1963); *Harnischfeger Corp.*, 40 LA 1329, 1331-32 (Anrod, 1963); *Borden Co.*, 39 LA 1020, 1023 (Morvant, 1962); *Union Asbestos & Rubber Co.*, 39 LA 72-75 (Volz, 1962).

²⁴*Mittenthal*, NAA 14TH PROCEEDINGS, at 32-33. See also *McCreary Tire & Rubber Co.*, 72 LA 1279, 1284 (Rollo, 1979); *CF Chems.*, 69 LA 217, 221 (Bode, 1977).

5. WHAT MATTERS MAY BE THE SUBJECT OF A BINDING PAST PRACTICE

Examination of many reported decisions suggests that there are no unanimously accepted standards for determining what matters may be the subject of binding practice. However, certain considerations have been stressed.

A. Major Condition of Employment [LA CDI 24.111; 24.351 et seq.]

In determining whether a practice may be treated as an implied term of the agreement, one arbitrator suggested that it is binding if it concerns a "working condition," but may be unilaterally discontinued if it involves a "gratuity."²⁵ Another arbitrator, however, doubted the validity of this test and suggested that perhaps the best test, though admittedly inexact, is that the usage, to achieve contractual status, must concern a "major condition of employment."²⁶

This approach was championed by Archibald Cox and John T. Dunlop, who urged: "A collective bargaining agreement should be deemed, unless a contrary intention is manifest, to carry forward for its term the major terms and conditions of employment, not covered by the agreement, which pre-

²⁵Fawick Airflex Co., 11 LA 666, 668-69 (Cornsweet, 1948). For practices upheld as benefits, see *GTE Hawaiian Tel. Co.*, 98 LA 832, 838 (Najita, 1991) (no evidence that taxi service eliminated by employer was merely gratuity); *Reliance Elec. Co.*, 90 LA 641, 645 (Wolff, 1988) (company nurse was benefit and working condition). Where past practice was not upheld as benefit, see *Kroger Co.*, 99 LA 905, 907 (Wahl, 1992) (giving of pizza parties, pen and pencil sets, and gifts of value for good attendance, longevity, or safe driving constituted "commonplace practice" of providing production incentives and was not a past practice); *Shawnee County, Kan., Sheriff's Dep't*, 97 LA 919, 924 (Berger, 1991) ("There is some indication in arbitration decisions that enforceability is more frequently found where the practice involves a matter central to working conditions, as opposed to a mere gratuity."); *Dahlstrom Mfg. Co.*, 97 LA 314, 319 (Duda, Jr., 1991) (giving gifts such as pizza parties, donuts, and gift certificates at sole discretion of company did not constitute binding past practice); *Hennepin County, Minn.*, 96 LA 685, 687 (Scoville, 1991) (employee wellness program was "purely gratuitous benefit"); *City of Anaheim, Cal.*, 91 LA 579, 583 (Bickner, 1988) (administrative procedures that convey incidental advantages are not binding); *Scott Paper Co.*, 82 LA 755, 757 (Caraway, 1984); *Ohio Precision Castings*, 82 LA 117, 120 (Murphy, 1983). The theory in these cases seems to be not that a "gratuity" is de minimis, but that an unnecessary, commonplace, or mutually beneficial practice does not imply an intent to be bound. Thus, in *State of Minn., Dep't of Labor & Indus.*, 83 LA 621, 625 (Gallagher, 1984), the arbitrator stated: "An agreement to be bound is not implied . . . where the practice is not controversial or when . . . it benefits both parties."

²⁶*Phillips Petroleum Co.*, 24 LA 191, 194 (Merrill, 1955). See also *Northeast Ohio Reg'l Sewer Dist.*, 100 LA 742, 747 (Johnson, 1992) (shift-trading practice constituted term or condition of employment); *Dierberg's Mkt.*, 99 LA 521, 527 (O'Grady, 1992) (30-year past practice of including retirees in referrals to fill extra hours); *City of Detroit, Dep't of Transp.*, 99 LA 326, 328 (Kanner, 1992) (parking space considered condition of employment); *Russell Coal, Inc.*, 98 LA 1107, 1111 (Nigro, 1992) (practice of assigning only end-loader operators on idle days); *Food Gallery*, 98 LA 707, 709 (Duff, 1992) (practice of offering senior part-time employees extra hours); *ARCO Marine*, 96 LA 319, 324 (Brisco, 1990) (practice of imposing 30-day suspension plus warning on first offenders of drug and alcohol policy); *Amoco Performance Prods.*, 95 LA 1081, 1084 (Florman, 1990) (practice of keeping wage rate equal for all crafts); *United Exposition Serv. Co.*, 95 LA 951, 960 (Allen, Jr., 1990) (practice of making additional labor requests through union hiring hall); *Purity Baking Co.*, 95 LA 172, 178 (Gordon, 1990) (11-year practice of using date of hire as seniority date); *Basler Elec. Co.*, 94 LA 888, 893 (Canestraight, 1990) (binding practice where employer's long history of permitting smoking established term or condition of employment); *Ferndale Sch. Dist.*, 88 LA 468, 471 (Stoltenberg, 1987); *Airco Carbon*, 86 LA 6, 11 (Dworkin, 1986) (management could not unilaterally amend erroneous incentive pay standard in use for 30 years); *Clinchfield Coal Co.*, 85 LA 382, 385 (Rybolt, 1985) (employees have right to rely on practice they believe in effect); *Hoover Co.*, 85 LA 41, 42 (Shanker, 1985) ("past practice . . . set the context and understanding within which the employees operated"); *Rola*, 84 LA 998, 1000 (Baroni, 1985) (unfair to change practice without contract negotiations); *Johnson Controls*, 84 LA 553, 559-61 (Dworkin, 1985) (employer bound by practice of providing pay for missed overtime

vailed when the agreement was executed."²⁷ However, the "major condition of employment" test leaves many questions unanswered. From whose standpoint is something "major"? Where is the line to be drawn? Cox and Dunlop characterized as major such things as "basic wages, seniority, and pensions," but they apparently were willing to exclude such matters as job content, workloads, and incentive systems.²⁸

B. Methods of Operation or Direction of the Workforce

[LA CDI 24.351 et seq.]

The line between practices that are binding and those that are not may well be drawn on the basis of whether the matter involves methods of operation or direction of the workforce, or whether it involves a "benefit" of peculiar personal value to the employees (though also involving the employer's purse).²⁹

Arbitrators are often hesitant to permit unwritten past practice or methods of doing things to restrict the exercise of traditional and recognized functions of management. As Arbitrator Whitley P. McCoy wrote:

But caution must be exercised in reading into contracts implied terms, lest arbitrators start re-making the contracts which the parties have themselves made. The mere failure of the Company, over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. If a Company had never, in 15 years and under 15 contracts, disciplined an employee for tardiness, could it thereby be contended that the Company could not decide to institute a reasonable system of penalties for tardiness? Mere non-use of a right does not entail a loss of it.³⁰

rather than make-up opportunity); City of Detroit, 84 LA 301, 305-07 (Roumell, Jr., 1985) (employer bound by practice of posting promotional opportunities); Saginaw Mining Co., 82 LA 735, 738 (Feldman, 1984) (employer bound by practice of providing employees monthly printout of excused absences).

²⁷Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097, 1116-17 (1950).

²⁸*Id.* at 1118. When the source of the past practice is found in an employee handbook, arbitrators have disagreed as to its binding nature. See *Indiana Mich. Power Co.*, 107 LA 1037, 1041 (Render, 1997) ("Past practice can serve the parties well even when operating under a non contractual handbook."); *City of Miamisburg, Ohio*, 104 LA 228, 233 (Fullmer, 1995) ("[T]he arbitrator knows of no basis upon which the Employer can be held required [sic] to conform to a past practice in a non-contractual handbook benefit.").

²⁹See *Consolidation Coal Co.*, 106 LA 328, 335 (Frankiewicz, 1996) (practice of granting shift preference by seniority had "meaningful personal value" compared with "relatively minor" impact on management's ability to direct the workforce); *Consolidation Coal Co.*, 105 LA 1110, 1115 (Talarico, 1995) (admitted practice of paying 4-hour minimum for call-back work did not impinge on management's right to direct the workforce); *Sheboygan County, Wis.*, 105 LA 605, 608 (Dichter, 1995) (county may not unilaterally change practice of allowing compensatory time to be used for sick time); *H. Meyer Dairy Co.*, 105 LA 583, 587 (Sugerman, 1995); *Central Aluminum Co.*, 103 LA 190, 197 (Imundo, Jr., 1994); *St. Louis Post-Dispatch*, 99 LA 976, 987 (Mikrut, Jr., 1992) (employer improperly capped reimbursement of Medicare premiums in violation of 25-year practice); *Fruehauf Trailer Corp.*, 97 LA 1025, 1026 (Kalu, 1991) (employer improperly discontinued 2-year practice of allowing employees to clock out 5 minutes prior to end of shift in order to wash up); *Allen Dairy Prods. Co.*, 97 LA 988, 992 (Hoh, 1991) (personal leave practice); *Toledo Edison Co.*, 96 LA 908, 916 (Bressler, 1991) (overtime pay for lunch period); *Weyerhaeuser Co.*, 95 LA 834, 836 (Allen, Jr., 1990) ("past practice . . . generally held binding where it involves a benefit of peculiarly personal value to the employees"—paid lunch period); *City of Miami*, 89 LA 86, 89 (Abrams, 1987) (work schedule is job benefit). Compare *City of Alliance, Ohio*, 98 LA 603, 605 (Hewitt, 1992) (firefighters' past use of room for TV "does not possess the status and is not of the peculiar value to the employees that would permit it to stand against legitimate business use of the City's facility"). But see *Fairview Southdale Hosp.*, 96 LA 1129, 1134-36 (Flagler, 1991) (elimination of 25-year practice of providing free parking for employees).

³⁰*Esso Standard Oil Co.*, 16 LA 73, 74 (McCoy, Reber, & Daniel, 1951). Citing this case with clear approval, see *Greif Bros. Corp.*, 114 LA 554, 561 (Kenis, 2000); *Groendyk Mfg. Co.*,

One of the most cogent and provocative published statements regarding the binding force of custom was that of Umpire Harry Shulman, in a case involving operating methods and direction of the workforce (assignment of work), wherein he urged that past practice not be "enshrined without carefully thought out and articulated limitations":

A practice, whether or not fully stated in writing, may be the result of an agreement or mutual understanding. And in some industries there are contractual provisions requiring the continuance of unnamed practices in existence at the execution of the collective agreement. . . . A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based.

But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion. The law and the policy of collective bargaining may well require that the employer inform the Union and that he be ready to discuss the matter with it on request. But there is no requirement of mutual agreement as a condition precedent to a change of practice of this character.

A contrary holding would place past practice on a par with written agreement and create the anomaly that, while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice. The contrary holding would also raise other questions very difficult to answer. For example, what is properly a subject of a practice? Would the long time use of a wheel barrow become a practice not to be changed by the substitution of four-wheeled buggies drawn by a tow tractor? Or would the long time use of single drill presses be a practice prohibiting the introduction of multiple drill presses? Such restraints on technological change are alien to the automobile industry. Yet such might be the restraints, if past practice were enshrined without carefully thought out and articulated limitations.³¹

113 LA 656, 660 (West, 1999); *Shawnee County, Kan., Sheriff's Dep't*, 97 LA 919, 926 n.16 (Berger, 1991); *Gates Rubber Co.*, 96 LA 445, 448 (Sergent, 1991); *General Mills*, 95 LA 1060, 1063 (Klein, 1990); *A.P. Green Indus.*, 94 LA 73, 78 (Garnholz, 1990); *Red River Army Depot*, 80 LA 267, 269 (Mewhinney, 1983); *W.E. Plechaty Co.*, 78 LA 404, 408 (Abrams, 1982); *Pennwalt Corp.*, 77 LA 626, 632 (Erbs, 1981); *Midland Brick & Tile Co.*, 74 LA 537, 542 (Roberts, 1980); *Town of Niagara, N.Y.*, 74 LA 312, 315 (Babiskin, 1980); *Safeway Stores*, 73 LA 207, 212 (Goodman, 1979); *Anheuser-Busch*, 68 LA 396, 399 (Cohen, 1977); *Colt Indus.*, 52 LA 493, 496 (Turkus, 1969); *Celotex Corp.*, 43 LA 395, 399 (Ray, 1964). Agreeing that mere nonuse of a right does not entail its loss, see *Qwest Communications*, 115 LA 1418 (Reeves, 2001); *City of Auburn, Me., Police Dep't*, 78 LA 537, 540 (Chandler, 1982).

³¹*Ford Motor Co.*, 19 LA 237, 241-42 (Shulman, 1952). Citing this Shulman statement with clear approval, see *New Era Cap Co.*, 114 LA 90, 99 (Eischen, 2000); *Terex/American Crane Corp.*, 114 LA 47, 50 (Nolan, 1999); *Potomac Edison Co. (Allegheny Power)*, 110 LA 420, 424 (Talarico, 1997); *GTE Hawaiian Tel. Co.*, 98 LA 832, 835 (Najita, 1991); *Material Serv. Corp.*, 98 LA 152, 164-65 (Fischbach, 1991); *Anchor Hocking Corp.*, 80 LA 1267, 1273 (Abrams, 1983); *Flint & Walling*, 79 LA 430, 432 (Guenther, 1982); *Total Petroleum*, 78 LA 729, 736 (Roberts, 1982); *May Dept Stores*, 76 LA 254, 256 (Hannan, 1981); *Price Bros. Co.*, 76 LA 10, 12 (Shanker, 1980); *Hilliard Corp.*, 75 LA 548, 550 (Konvitz, 1980); *Safeway Stores*, 73 LA 207, 212 (Goodman, 1979); *Vindicator Printing Co.*, 72 LA 229, 233 (Teple, 1979); *American Petrofina Oil & Refinery*, 71 LA 852, 855 (Mewhinney, 1978); *California Portland Cement Co.*, 70 LA 81, 84 (Anderson, 1978); *Anheuser-Busch*, 68 LA 396, 400 (Cohen, 1977);