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# The Ostrich and the Arbitrator: The Use of Precedent in Arbitration of Labor-Management Disputes

*Alvin B. Rubin\** and *Elven E. Ponder†*

The ostrich has often been accused of hiding his head in the sand when frightened. Presumably he thus avoids seeing the cause of his fright. Presumably he also avoids seeing what the other ostriches are doing.

This practice has been recommended to the beginning arbitrator in the field of labor-management. Some commentators advise against looking around to see what other arbitrators are doing. Arbitration awards, they say, should not be published, and, if published, should not be used.

There is general, even if not universal, agreement that arbitrators in the management-labor field should prepare written awards, stating their reasons for decision.<sup>1</sup> The written award makes the decision less ambiguous. At least, most arbitrators hope that comprehension will follow, although losers in arbitration cases, no less than losers of law suits, are apt to find no solace in the reasons advanced for their loss.<sup>2</sup> More frequently they appear to find in the reasons advanced greater proof of the arbitrators' unreasonableness, ignorance or unfairness.

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1. However, the written opinion is to be preferred and in most labor cases this is done. The written opinion, an absolute necessity in complex cases, permits careful study by both parties and is available for future reference as a guide in subsequent employee-employer negotiations for later and similar grievance." 5 CCH Lab. Law Rep. ¶ 54,005 (1952). Cf. American Arbitration Association, Code of Ethics and Procedural Standards for Arbitrators, 5 CCH Lab. Law Rep. ¶ 54,100, § 5d. "The award should be personally signed by the arbitrator. . . ."

2. Updegraff & McCoy, *The Arbitration of Labor Disputes* 115 (1946), suggests that "After a lapse of a week or two when the parties, as well as the arbitrator, have had a chance to reflect on the evidence, the losing party will realize that he deserved to lose, and the decision will come as no surprise, particularly if it is sound and convincing as an oral opinion cannot be."

But arbitrators will continue to try to explain the decision and to try to make the parties understand it.<sup>3</sup> This being true, the first question is whether their awards should be published in some fashion so that others may read them. There are at least a few loud "No's."

The opponents of the publication of awards argue that each case is unique, each award is unique, and that the sole standard of the arbitrator is justice. The atmosphere of the court and the use of precedent can do untold harm. "The fact of publication itself creates the atmosphere of precedent."<sup>4</sup> Therefore, let the company, the union, and the arbitrator each carefully file the award in some secret place where it can do no further damage.

Despite the fear that arbitration awards may be misused, if published, there nevertheless exists a strong enough demand for knowledge of awards to justify commercial publication. Arbitrators, management, and unions subscribe to the services which publish these awards. Presumably they use them. But publication is justified also by a growing opinion that publication is wise.<sup>5</sup>

Such opinion recognizes that the publication of awards is beneficial in at least four phases of the collective bargaining relationship:

- (1) Negotiation of new or renewal contracts;
- (2) Drafting of appropriate clauses;
- (3) Handling disputes in the grievance procedure;
- (4) Preparation and presentation of cases before an arbitrator.<sup>6</sup>

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3. Procedural Standards for Arbitrators, 5 CCH Lab. Law Rep. ¶ 54,100, § 5a: ". . . The award should be definite, certain and final, and should dispose of all matters submitted."

Cf. (e): "It is discretionary with the arbitrator to state reasons for his decision or to accompany the award with an opinion. Opinions should not contain gratuitous advice or comments not related or necessary to the determination of the issues. If either party requests the arbitrator to prepare an opinion, such request should be followed."

4. Cherne, Should Arbitration Awards Be Published? 1 (N.S.) *The Arbitration Journal* 75 (1946).

5. See Levenstein, Some Obstacles To Reporting Labor Arbitration, 1 (N.S.) *The Arbitration Journal* 425 (1946); Taylor, Reporting of Labor Arbitration: Pro and Con, 1 (N.S.) *The Arbitration Journal* 420 (1946); Simkin & Kennedy, Arbitration of Grievances, U.S. Dept. of Labor Bull. No. 82 (1946); Updegraff and McCoy, Arbitration of Labor Disputes (1946); Kellor, Arbitration in Action (1941).

6. See Justin, An Arbitrator Speaks on the Use of Reported Awards, *Labor Relations Reporter* for Dec. 29, 1947. See also, the discussion in Reporting of Labor Arbitration: Pro and Con, 1 (N.S.) *The Arbitration Journal* 420 (1946).

By reference to the interpretations given clauses contained in other agreements, union and management can determine an appropriate form into which to put their own agreement in order to achieve their true intention. In handling disputes in the grievance procedure, an award made elsewhere may be of influence in assisting management and labor to dispose of the grievance by agreement. If a dispute does proceed to arbitration, prior awards can be used to strengthen the presentation of the case.<sup>7</sup>

Publication, right or wrong, is now a fact. The best use of published awards is the next field of battle. The general statement that "*stare decisis* has no part in arbitration" is obviously true.<sup>8</sup> *Stare decisis* is a doctrine formulated by the courts of the common law to meet the needs of that particular legal system. As such, it should be no more transplanted bodily into the arbitration system than should technical rules of courtroom procedure.

Does it necessarily follow, however, that there is no value to arbitration awards as precedents?

Various arguments have been advanced for using arbitration awards as precedents; some see an advantage in making use of accumulated experience, now that published awards are available.<sup>9</sup> Others point to the relative inexperience of many arbitrators, and to the waste of time and effort incident to ignoring the reasoning of prior awards. In addition it is urged that by the use of precedent awards become more predictable and the number of cases arbitrated will thereby be reduced.

Those who oppose the use of awards as precedent emphasize the danger of formalization of the arbitration process. They fear that the arbitration process will shift to a question of the diligence of counsel in ferreting out all the precedents. Contract negotiations will in their opinion suffer from a "legalistic" atmosphere thus created. Arbitration might degenerate from a method for maintaining good relations between parties that must con-

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7. *Ibid.*

8. Procedural Standards for Arbitrators, 5 CCH Lab. Law Rep. ¶ 54,100, § 4(f): "The arbitrator is expected to exercise his own best judgment. He is not required except by specific agreement of the parties to follow precedent. He should not, however, prevent the parties from presenting the decisions of other arbitrators, in support of their positions. When the parties have selected a continuing arbitrator, it is generally recognized that he may establish or follow precedents for the same parties."

9. One set of arbitration reports alone now has run through 18 volumes, with an estimated 250 cases per volume.

tinue the relationship to a means for obtaining a ruling on the right and wrong between two antagonists.<sup>10</sup>

It will perhaps assist in evaluating the force of these arguments if we examine the situations in which the use of precedent might be urged:

1. An arbitration between two parties who have had a prior arbitration on the same subject arising under the same working agreement or under a prior working agreement which has been renewed without change.
2. An arbitration between two parties under either of the situations presented above, when the prior decision, while not on the precise point in controversy, is relevant in some fashion.
3. An arbitration between two parties who have had no prior determination of the issue but who seek to influence the arbitrator by citation of published awards in cases arising between other parties.

In the first situation, where the question of the effect of a prior decision between the same parties has been presented, most arbitrators seem inclined to follow the prior award. Some consider it binding.<sup>11</sup> Others say it is "persuasive."<sup>12</sup> In a few

10. See McPherson, *Should Labor Arbitrators Play Follow-The-Leader*, IV (N.S.) *The Arbitration Journal* 163 (1949).

11. In re Pan American Refining Corp., 9 L.A. 731 (1948), Whitley P. McCoy; In re Tennessee Coal, Iron and R.R. Co., 6 L.A. 426 (1945), Blumer, Maurice and Kelly; In re Warren City Mfg. Co., 7 L.A. 202 (1947), Byron R. Abernathy.

See also the following cases dealing with an intervening new agreement containing the same clause involved in a prior arbitration, and applying the earlier interpretation as binding: In re Swift & Co., 11 L.A. 259 (1948), James J. Healy; In re Atlantic & Gulf Coast Shippers, 9 L.A. 632 (1948), Fredrick R. Livingston. Contra: In re North American Aviation, Inc., 15 L.A. 626 (1950), Michael I. Komaroff.

12. In re General Electric Company, 9 L.A. 757 (1948), Saul Wallen; In re Gorton-Pew Fisheries Co., 16 L.A. 365 (1951), Saul Wallen; In re Roberts Numbering Machine Co., 9 L.A. 861 (1948), I. Robert Feinberg.

In re Armour & Co., 11 L.A. 186 (1948), Harold M. Gilden. A dispute had arisen under a prior contract concerning the interpretation of a clause in that contract. The dispute was submitted to arbitration. Thereafter the same clause was adopted in a new contract. On the issue of interpretation of the clause in the new contract, the arbitrator said, "There is no question that on appeal, or in appropriate resubmission, the arbitrator does have the power to supersede or modify his own award or the award of some other arbitrator. The arbitrator is free to make such a determination as he deems proper, and may either affirm, reverse, or modify the previous ruling. *The prior award alone, although possibly of some persuasive value, would not be binding on him.* The Kern decision has importance in the instant case, not because it is a precedent, or because it is right or wrong, or because this arbitrator would have ruled the same way, *but because it is obvious that the*

reported awards, arbitrators have refused to follow the prior award.<sup>13</sup>

In such a situation, if the prior award is of no value, then the parties can, in the hope of ultimate success, rearbitrate each recurrence of the very same dispute endlessly during the term of a single agreement. While arbitration is a part of the science of jurisprudence,<sup>14</sup> it is also a part of the administration of working agreements. From the standpoint of either justice or of sound administration, a decision, once reached, should be operative at least until the parties affected change their agreement,<sup>15</sup> which usually occurs at least every two years, if for no other reason than to meet the requirements of the National Labor Relations Board.<sup>16</sup> There is ample and recurring opportunity to rewrite the agreement and thus to change the law between the parties.

Mr. Whitley P. McCoy's remarks in one award<sup>17</sup> seem to sum up fairly the position that, as between the immediate parties, a decision in one case should bind the parties in a later case. He

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*parties have contracted on the basis of the meaning which that decision gives to one of the contract terms.*" (Italics supplied.)

See also, *In re O & S Bearing Co.*, 12 L.A. 132 (1949), Russell A. Smith. Interpretation of seniority provisions was involved. The company argued that the arbitrator was not "bound" by a prior award because different employees were involved. Mr. Smith said, "While I am not technically bound . . . a proper regard for the arbitration process and for stability in collective bargaining relations would, in my opinion, require me to accept and apply in this case any interpretation of the parties' contractual relations which was presented to the arbitrator for decision and decided by him, even though I might independently disagree with his decision."

13. *In re North American Aviation, Inc.*, 15 L.A. 626 (1950), Michael I. Komaroff; *In re Witton Woolen Co.*, 8 L.A. 355 (1947), James J. Healy.

14. Fundamentally, arbitration is a part of the science of jurisprudence. Whatever its differences from the traditional courtroom process, it nonetheless involves the problems incident to judging the merits of a case in which there are at least two sides. Every system of jurisprudence has started without precedents; arbitration of labor-management disputes was no exception. But in every known system of jurisprudence, as the system matured and precedents accumulated, they were used. However, in arbitration, a newcomer in American jurisprudence, the argument is presented that precedents should not be permitted to accumulate and, if accumulated, they should not be used, and finally, if used, they should be given minimal effect.

15. It has been urged that courts overrule themselves, and therefore arbitrators should be free to do so. (See discussion in *Below, Arbitration of Labor Disputes—Some Practical Aspects*, 14 *Brooklyn L. Rev.* 28 [1947]; *Cherne, Should Arbitration Awards Be Published*, 1 [N.S.] *The Arbitration Journal* 75 [1946]; *Syme, The Function of Arbitrators' Opinions*, 6 *The Arbitration Journal* 103 [1951]; *Note*, 1949 *Wash. U.L.Q.* 71 [1949].) But courts seldom, if ever, have the opportunity to overrule themselves as to the same parties. On the other hand, a court decision in a case involving one group of parties may become a precedent for other parties in the unforeseeable future.

16. *Reed Roller Bit*, 72 *NLRB* 927 (1947).

17. *In re Pan American Refining Corp.*, 9 L.A. 731 (1948).

states that another arbitrator's decision of a dispute involving another company and union should not be binding but at most persuasive. But he says that when the same parties are involved in a dispute concerning the identical contractual provision, "every principle of common sense, policy, and labor relations demands that . . . [the arbitrator's decision] stand until the parties annul it by a newly worded contract provision." Otherwise, "every week or two the parties would find themselves arbitrating the same question, each time with a new arbitrator."<sup>18</sup>

Where a prior award between the same parties is relevant, but not precisely in point, obviously the prior award is in no sense "binding." Should it be cited, however, sound administration would dictate that it be given consideration. Arbitration is usually part of a continuing process of labor relations. It serves its function in this regard only if it assists in just and harmonious adjustment of differences. Some consistency seems desirable in any administrative process. Therefore, in principle, the prior award under these circumstances should be considered persuasive. However, if impelling reasons for disregarding it exist, it should not be followed. An "impelling reason" would be any reason strong enough to overcome the undesirable effects of inconsistency indicated above.

The third situation suggested presents the nub of the problem which appears to bother most arbitrators when they discuss the use of precedent in arbitration.

An arbitrator is presented with a case between A Union and B Corporation. One of the parties cites an award by Blinkey Smith in a case arising in Podunk. Of course, the arbitrator, if he does not wish to follow the cited decision, can either ignore it completely or point out that Smith is an idiot. Only the first alternative is available if the party has been astute enough to find a prior award which seems in point, made not by Blinkey Smith, but the self-same arbitrator now serving, unless he is bold enough to say in effect that he *was* an idiot but not an irretrievable one.

A middle ground on the subject has been stated by Aaron Levenstein:<sup>19</sup>

"Arbitrators must concentrate on the particular facts and

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18. *Ibid.*

19. Levenstein, *Some Obstacles to Reporting Labor Arbitration*, 1 (N.S.) *The Arbitration Journal* 425, 427 (1946).

all the surrounding circumstances of the case before them. Any attempt to divert them to an emphasis on how other arbitrators decided when confronted with like situations would defeat the very objective of arbitration. It would prevent the arbitrator from finding an "out" which may be necessary in order to enable the parties to live together under the contract for the balance of the term. *To be sure, the arbitrator will be interested in the decisions of others, but his interest will lie in the process of decision, not the result. He will be concerned with the reasoning of other arbitrators, with their approach. He may guide his own mental processes on that basis, but he will not read the awards of others for the purpose of duplicating them in the situations presented to him.*

*"In other words, the arbitrator may want the texts of other arbitrators' decisions as part of his general, professional culture. He will not lean on them as instruments for the making of his own awards. . . ." (Italics supplied.)*

Mr. Levenstein's analysis presupposes that arbitrators will consider what others have done, not as a matter of following blindly in the path, but as a matter of determining the general area of travel. Such an analysis would also make proper the consideration of prior awards cited by the parties.<sup>20</sup>

Most of the writers on the use of arbitration awards as precedent have emphasized the differences between the common law, with its doctrine of stare decisis, and the arbitration process. If there is still another view, perhaps it can find its root in another system of law.

The civil law long ago rejected the doctrine of stare decisis. With a codal text as the basic law, and the judicial decision

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20. Those who urge complete disregard of what arbitrators have done in other cases between other parties say usually that no two contracts are precisely alike. This is obviously true in some industries, although in others the growth of well-organized national unions has led to nationwide use of virtually identical contract clauses. Any competent arbitrator should be able to distinguish the case which is not relevant because the contract is different.

This same school points out that the informality and the search for justice alone—basic virtues of the arbitration process—may fall if awards by arbitrators in other cases are used as precedent. These virtues admittedly are of the essence of the arbitration process. But some arbitrators have felt that, if the arbitrator's award is to be successful in stabilizing labor relations, it must fall within the "area of expectancy of the parties." This area of expectancy may well be bounded north, south, east and west by what other arbitrators have done in other published awards.

merely an application of that basic law to a given set of facts, the civilian jurists accepted as a basic tenet the idea that no single prior judicial decision had binding force. Justice was to be sought anew in each case, although here justice usually meant the proper interpretation of the code rather than a matter of conscience.

But as decisions on a particular well-defined problem multiplied, the doctrine of *jurisprudence constante* was developed.<sup>21</sup> If there was a widely developed and uniform series of decisions interpreting a particular codal provision in its application to a specific factual situation, then that course of decision should be followed by another court considering the same problem. Here there is no theory of the binding force of decision. The basic idea rather is that what has become settled through constant and uniform interpretation should be followed in the absence of impelling contrary reasons in the particular case.

Perhaps *jurisprudence constante* will offer an answer in the field of arbitration as the number of decisions grows and as the contract problems become of more frequent occurrence.<sup>22</sup>

Certainly, isolated awards between other parties are entitled to no greater weight than a competent appraisal of their relevance and logical force justifies. But if a wide and uniform pattern of interpreting particular contract words and clauses develops, then the individual arbitrator may well consider following the pattern. In such event, the parties will doubtless, if well informed, have an idea, in using particular clauses, how the clause in question has been interpreted. Consistent interpretation then would not imply legalism or formality but rather the avoidance of making everyone out of step but Jim—unless, of course, Jim had good reason to start off on his right foot. The arbitration process would afford ample opportunity for Jim to present that good reason if it exists.

The accumulation of published awards has not yet reached the stage where such a suggestion is practicable. Because of the flexibility, individuality and independence of the arbitration process, there may never be any area of labor-management contract interpretation where the course of arbitration awards will be *constant* long enough to apply such a doctrine. One notable

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21. Daggett, Dainow, Hebert and McMahon, A Reappraisal Appraised: A Brief for the Civil Law of Louisiana, 12 Tulane L. Rev. 14 (1937).

22. It has been suggested that this sort of pattern has already evolved in discipline and discharge cases. Note, 62 Harv. L. Rev. 118 (1948).

weakness which occurs immediately is the fact that published awards probably represent only a fraction of the awards actually made. For various reasons, many of those who become parties to arbitration prefer that awards be withheld from publication. And of course no award should be made available for publication unless all the parties consent.<sup>23</sup> One of the authors has served as arbitrator in twenty-one cases in the last two years. Only one of these awards has been published; and in cases in which he has served as counsel for parties to an arbitration proceeding, less than one-fourth of the awards has been published.

Yet, despite the small portion of awards actually published, and notwithstanding all the arguments that have been mustered against the consideration of awards in other cases, a recent survey indicates that most of those concerned in the arbitration process feel that some weight should be given to a consideration of the published awards.<sup>24</sup> In Volume 16 of *Labor Arbitration Reports*,

23. 5 CCH Lab. Law Rep. ¶ 54,100. Code of Ethics for Arbitrators, Rule 18(b): ". . . publication or public disclosures should be only with the parties' consent."

24. Warren and Bernstein, *A Profile of Labor Arbitration*, 4 *Labor Relations Review* No. 2 (January 1951), reprinted in 16 L.A. 970 (1951), report the results of a survey to be as follows:

TABLE IX

Participant	Decisive Weight	Some Weight	No Weight
	%	%	%
Management	7	66	27
Union	19	59	22
Arbitrator	2	77	21
All	7	70	23

John W. Taylor, *Reporting of Labor Arbitration*, 1 (N.S.) *The Arbitration Journal* 420 (1946): "Although it is frequently said that precedents have no place in arbitration, few arbitrators would object to obtaining hints in deciding a doubtful issue from other awards which appeared to be thoughtfully and fairly reasoned"; Smith, *Labor Law, Cases and Materials* 1162 (1950): if the factors are enough alike, "it might be that the prior award will have some and perhaps strong persuasive force"; Updegraff and McCoy, *Arbitration of Labor Disputes* 129 (1946): ". . . Obviously, previous well-considered decisions, if presented, will be persuasive, though not binding." See also Herman A. Gray, *Some Thoughts on the Use of Precedents in Labor Arbitration*, 6 *The Arbitration Journal* 135 (1951).

That other awards are or should be "advisory only" see Simkin and Kennedy, *Arbitration of Grievances*, U.S. Dept. of Labor Bull. No. 82 (1946); "Use the experience not the result," Kheel, 1 (N.S.) *The Arbitration Journal* 423 (1946); "But it will be a bold arbitrator who will assert that he can derive no assistance from a reading of the opinion of his fellows," Note, 1949 Wash. U.L.Q. Rev. 71 (1949); "Studied and given consideration"; Syme, *The Function of Arbitrator's Opinions*, 6 *The Arbitration Journal* 103 (1951). Of course, those who publish awards think they have value as a guide. See Prentice-Hall *Labor Course* ¶ 13,173 (1948). To the contrary see Abelow, *Arbitration of Labor Disputes—Some Practical Aspects*, 14 *Brooklyn L. Rev.* 28, 30 (1947): ". . . rarely will one arbitrator consider other decisions as precedents to be followed."

"When an arbitrator permits himself to be influenced by consistency

two hundred twenty-four arbitration awards were reported. Of these, sixty-six contained citations of other awards. Apparently, of these, one hundred twelve of the cited awards were considered authority in part for the decisions in which they were cited. Of the awards cited, forty-two were distinguished or not followed. But other awards were, it will be seen, cited in over twenty-five per cent of the awards made.

The authors' own convictions are that the citation of awards between other parties in a pending arbitration is justified<sup>25</sup> and may be effective. The arbitrator should give the cited awards consideration. If the award is not in point, it should be clearly distinguished and the reasons for its inapplicability stated. If the arbitrator feels the award is in point but is incorrect or inapplicable, he should of course not follow it; but the parties should be given some explanation of the reason why the other arbitrator's award is not appropriate for application in the present case.

Should the arbitrator himself seek enlightenment in published reports of awards? At present, the role of precedent in the arbitration process is too unsettled to make this appear advisable to the authors. Where one party or the other has offered citation of authority, there is ample warning that both parties may attack with the same weapon. For the arbitrator, in the absence of such warning, to resort to aid in the ideas of others may be so unsettling to the parties that here at least the ostrich had better keep his head buried until someone insists that it be raised by a whack on the tail feathers.

No system of jurisprudence or of administration has ever developed which has succeeded in disregarding completely all

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rather than by justice, it will be a sad day indeed." Carlston, *Arbitration, An Institutional Procedure*, 4 (N.S.) *The Arbitration Journal* 248, 251 (1949); McPherson, *Should Labor Arbitrators Play Follow-the-Leader?* 4 (N.S.) *The Arbitration Journal* 163 (1949): "Citation, if seriously undertaken by two parties might well develop into an endurance contest."

See *Arbitration Sets Its Standards for Conduct in Labor-Management Arbitration*, 6 *Arbitration Journal* 6 (1951). *Procedural Standards for Arbitrators*, § 4(f), *supra* note 8. See Rule 25, *Standards of Practice for Arbitration*, American Arbitration Association; *Code of Ethics for Arbitrators*, 1 (N.S.) *The Arbitration Journal* 206 (1946).

See Note, 62 *Harv. L. Rev.* 118 (1948).

25. See *Arbitration Sets Its Standards for Conduct in Labor-Management Arbitration*, 6 *The Arbitration Journal* 6 (1951); *Procedural Standards for Arbitrators*, Rule 4(f), *supra* note 8. See Rule 25, *Standards of Practice for Arbitration*, American Arbitration Association, *Code of Ethics for Arbitrators*, 1 (N.S.) *The Arbitration Journal* 206 (1946).

precedent. As a means both of resolving controversy and of administering working agreements, arbitration cannot escape completely by playing a "head in the sand" role. This is not to suggest that the following of precedent should play a fundamental role in the award. The award itself should rest ultimately on the equities of the case. Flexibility is far more to be desired than elaborate consideration of precedent, whether followed or disregarded.<sup>26</sup>

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26. See Note, 62 Harv. L. Rev. 118 (1948).