Fordham Law Review

Volume 55 | Issue 5 Article 1

1987

Contract Interpretation: The Plain Meaning in Labor Arbitration

Carlton J. Snow

CONTRACT INTERPRETATION: THE PLAIN MEANING RULE IN LABOR ARBITRATION

*CARLTON J. SNOW**

> The purpose of interpretation as justice requires is always the discovery of actual intention:—the intentions of both parties if they are the same,—the actual intention of one party if the other knew or had reason to know what it was,—but absolutely never to give effect to a meaning of words that neither party in fact gave them, however many other people might have given them that meaning.[1]

INTRODUCTION

ARBITRATION decisions often turn on the interpretation of contract language, and numerous arbitrators base their awards on the plain meaning of collective bargaining agreements.[2] Application of what has been characterized as the plain meaning rule[3] as a standard of contract interpretation requires that the meaning of contractual language be determined solely by attaching the plain or usual meaning to words that appear clear and unambiguous on the face of an agreement.[4] Conse-

* Professor of Law and Executive Director, Center for Dispute Resolution, Willamette University Law School; B.A. 1962, Taylor University; M. Div. 1965, Fuller Theological Seminary; M.A. 1966, University of Wisconsin; J.D. 1969, University of Wisconsin. The author acknowledges with gratitude a research grant from the Atkinson Fund of Willamette University which was an invaluable aid in the development of this Article.

1. 3 A. Corbin, Corbin on Contracts, Preface (rev. ed. 1960).

2. The number of arbitration decisions decided either expressly or impliedly under the plain meaning rule is overwhelming. *See, e.g.*, Harbison-Walker Refractories v. United Steelworkers Local 531, 81-1 Lab. Arb. Awards (CCH) 4354, 4356 (1981) (Byars, Arb.) ("As the company points out, past practice is a standard for contract interpretation only when the contract is ambiguous. The clear language of a contract has been enforced even where the results are harsh and inequitable."); Controls for Radiation, Inc. v. United Plant Guard Workers Local 1, 46 Lab. Arb. (BNA) 578, 583 (1966) (Stouffer, Arb.) ("The history of bargaining, parol evidence, and past practices should not in the opinion of this arbitrator be used to give meaning to, overrule, or evade contractual provisions which are clear and unambiguous."); *see generally* F. Elkouri & E. Elkouri, How Arbitration Works 348-50 (4th ed. 1985).

3. The plain meaning rule should not be confused with the "four corners" rule, which is relevant to the issue of contract integration. According to the "four corners" rule, when an instrument is "complete on its face," the determination of whether it is a total integration must be made from the instrument itself. *See* J. Calamari & J. Perillo, The Law of Contracts § 3-3, at 103 n.29 (2d ed. 1977).

4. For other statements of this rule, see 3 A. Corbin, Corbin on Contracts §§ 535, 542 (rev. ed. 1960 & Supp. 1984); 9 J. Wigmore, Wigmore on Evidence § 2461, at 196 (rev. ed. 1981); 4 S. Williston, A Treatise on the Law of Contracts § 609 (3d ed. 1961 & Supp. 1986).

The plain meaning rule is inapplicable when contract language is ambiguous; terms deemed to have a plain meaning are unconscionable and, therefore, unenforceable; terms have several meanings listed in the dictionary and the "appropriate" meaning must be selected; and "local trade or special usage" gives a term a meaning that varies from its

quently, the plain meaning rule often operates to exclude extrinsic evidence[5] offered to explain the intentions of the contracting parties.[6] In many cases, evidence of a past practice[7] of the contracting parties at variance with express provisions of their agreement is disregarded when an arbitrator invokes the plain meaning rule. As a result, the rule has produced arbitral opinions based on interpretations of collective bargaining agreements contrary to the intentions of either party.

Although favored a century ago, the plain meaning rule has been rejected by the Uniform Commercial Code (the U.C.C. or the Code)[8] and the Restatement (Second) of Contracts (the Restatement),[9] and condemned by treatise writers.[10] In addition, the rule has been discredited by an increasing number of courts.[11] Significantly, recent court decisions recognize that labor arbitrators have broad authority to consider extrinsic evidence in addition to the actual language of the agreement.[12] Nev-

---

plain meaning. *See* Patterson, *The Interpretation and Construction of Contracts*, 64 Colum. L. Rev. 833, 839 (1964).

As applied in the field of statutory construction, the rule theoretically operates to exclude extrinsic evidence, such as legislative history, in the interpretation of statutes. *See generally*, Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 Wash. U.L.Q. 2, 25-26 (1939) (despite theoretical restriction of plain meaning rule, courts interpret statutes using extrinsic aids, which contribute to an intelligent comprehension of meaning and purpose of statute).

5. Extrinsic evidence is a broad category of evidence offered to prove the meaning of a written instrument. Parol evidence, evidence of prior and contemporaneous agreements and negotiation, is one type of extrinsic evidence. For examples of extrinsic evidence in collective bargaining agreements, *see* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597-98 (1960) (relevant legislation); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960) (practice of industry); Humble Oil and Refining Co. v. International Bhd. of Teamsters, Local 866, 447 F.2d 229, 232 (2d Cir. 1971) (bargaining history).

6. The exclusionary effect of the plain meaning rule is the primary reason the rule is considered to be closely related to the parol evidence rule. Like the plain meaning rule, the parol evidence rule generally is regarded as a rule of substantive contract law and not a rule of evidence. "The so-called parol evidence rule is not a rule of evidence and has no application in the process of interpretation of a written instrument." Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L.Q. 161, 189 (1965).

7. For the definition of a past practice, see *infra* text accompanying notes 116-17.

8. U.C.C. § 2-202 comment 1(b) (1978).

9. Restatement (Second) of Contracts § 212 comment b (1981).

10. *See* 3 A. Corbin, *supra* note 4, § 543; C. McCormick, McCormick on Evidence § 219 (1954) (this section is omitted in later editions); J. Murray, Grismore on Contracts § 110 (rev. ed. 1965); A. Thayer, A Preliminary Treatise on Evidence at the Common Law, ch. 10 (1898); 9 J. Wigmore, *supra* note 4, §§ 2461-62; 4 S. Williston, *supra* note 4, § 629.

11. *See infra* notes 56-80 and accompanying text. *But see* International Ass'n of Machinists v. Teter Tool & Die, Inc., 630 F. Supp. 732 (N.D. Ind. 1986) (arbitrators should not interpret unambiguous language differently from its plain meaning because that amends or alters the agreement).

12. *See, e.g.*, Loveless v. Eastern Air Lines, 681 F.2d 1272, 1280 (11th Cir. 1982) (arbitrator can rely on several extrinsic aids to construe intent of parties); Norfolk Shipbuilding & Drydock Corp. v. Local No. 684, 671 F.2d 797, 799-800 (4th Cir. 1982) (arbitrator can rely on customs and practices of particular plant and industry); Ludwig Honold Mfg. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1969) ("labor arbitrator's award

ertheless, arbitrators continue to make frequent use of the plain meaning rule.[13]

This Article analyzes the application of the plain meaning rule in labor arbitration awards in an attempt to reconcile the anomaly that exists: while courts are progressing toward rejection of the rule, arbitrators continue to rely on it. Part I discusses the anatomy of the plain meaning rule. Part II addresses its rejection by the courts. Part III analyzes arbitration decisions in which the plain meaning rule has been invoked. Part IV examines alternatives to the plain meaning approach. Because the general aim of contractual interpretation is to effectuate the intention of the parties, this Article concludes with a formulation of an approach that embodies this objective.[14]

I. ANATOMY OF THE PLAIN MEANING RULE

One court has described the application of the plain meaning rule as a process by which "words of the parties [are run] through a judicial sieve whose meshes [are] incapable of retaining anything but the common meaning of the words, and which permit[s] the meaning which the parties had placed upon them to run away as waste material."[15] The rule is commonly understood to bar consideration of extrinsic evidence to interpret a writing, if that writing is characterized as plain or clear.[16]

The plain meaning rule, accordingly, raises a preliminary issue of admissibility. Extrinsic evidence is irrelevant unless the interpreting court or arbitrator first concludes that the contractual language is ambiguous. Courts disagree over whether extrinsic evidence may be admitted to prove the existence of ambiguity. Some judges adopt a plain meaning

. . . 'draw[s] its essence from the collective bargaining agreement' if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention"); *see also* P. Prasow & E. Peters, Arbitration and Collective Bargaining: Conflict Resolution in Labor Relations (2d ed. 1983). "An examination of many reported arbitration decisions suggests there is widespread, although not unanimous, agreement among arbitrators as to some basic standards for interpreting contract language. Foremost among these criteria are: (1)specific language is controlling over general language, (2)clear and unambiguous language generally prevails over past practice." *Id.* at 104-05.

13. An effort to make arbitrators aware of the progress made in rejecting the plain meaning rule previously has been urged. *See* Goetz, Comment to Mueller, in Mueller, *The Law of Contracts—A Changing Legal Environment*, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators 218, 222 (BNA 1979) ("To my mind, this coup de grâce to the plain-meaning rule represents a development in the law of which arbitrators ought to be aware.").

14. This objective of contract interpretation assumes that the parties had the same meaning in mind and it is possible to discover what that meaning was. A more realistic aim of interpretation, stated by Murray, is "to approximate as closely as we may, consistently with proper precautionary safeguards, that meaning . . . [of] manifestations in question should reasonably have anticipated would be attributed to them by the other party, in the light of all the surrounding circumstances known to both parties." J. Murray, *supra* note 10, § 95, at 151.

15. Hurst v. W.J. Lake & Co., 141 Or. 306, 314, 16 P.2d 627, 630 (1932).

16. *See supra* notes 4-6 and accompanying text.

approach and determine from their own point of view whether the written words are ambiguous.[17] Other courts hold that a judge must consider alternative meanings advocated by the parties and the nature of the objective evidence offered in support of a meaning.[18] Under the latter approach, the linguistic reference point of the parties, instead of the judge, determines whether a contractual provision is reasonably susceptible to different meanings.

The plain meaning rule is a vestige of an earlier, formalistic period of contract interpretation.[19] The troublesome nature of legal interpretation[20] has prompted various attempts to establish rules that may be uniformly applied to interpret writings.[21] The plain meaning rule survives, despite its criticism from many quarters.[22]

---

17. *See, e.g.*, Lee v. Flintkote Co., 593 F.2d 1275, 1285 (D.C. Cir. 1979) (test for ambiguity is to look solely at writing to determine if it is susceptible to multiple interpretations); Kass v. William Norwitz Co., 509 F. Supp. 618, 625 (D.D.C. 1980) (court determines whether contract unambiguous, and if so, plain meaning rule applies).

18. *See, e.g.*, Griesmann v. Chemical Leaman Tank Lines, Inc., 776 F.2d 66, 72 (3d Cir. 1985) (extrinsic evidence admissible to show parties attached special meaning to wording of contract); Haeberle v. Texas Int'l Airlines, 738 F.2d 1434, 1439 (5th Cir. 1984) (ambiguity of document cannot be assessed merely by looking within its four corners); Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1011 (3d Cir. 1980) (linguistic reference points of parties should be examined to determine if ambiguity exists); Keene Corp. v. Insurance Co. of N. Am., 597 F. Supp. 946, 950 (D.D.C. 1985) (court should consider reasonable alternative meanings set forth by parties); Mayer v. Development Corp. of Am., 541 F. Supp. 828, 857 (D.N.J. 1981) (same), *aff'd mem.*, 688 F.2d 822 (3d Cir. 1982); Z & L Lumber Co. of Atlasburg v. Nordquist, 348 Pa. Super. 580, 583, 502 A.2d 697, 700 (1985) (same).

19. "The formalist theory of adjudication asserts that legal disputes can be, should be, and are resolved by recourse to legal rules and principles, and the facts of each particular dispute." Moore, *The Semantics of Judging*, 54 S. Cal. L. Rev. 151, 155 (1981).

20. For a discussion of the earlier view, see generally 9 J. Wigmore, *supra* note 4, § 2461, at 193 ("history of the law of interpretation is the history of a progress from a stiff and superstitious formalism to a flexible rationalism"); McBaine, *The Rule Against Disturbing Plain Meaning of Writings*, 31 Calif. L. Rev. 145 (1943); Williams, *Language and the Law-I*, 61 Law Q. Rev. 71 (1945).

For the purposes of this Article, legal interpretation is defined to encompass the process by which arbitrators or the courts attach meaning to contract language. A number of writers distinguish "interpretation" from "construction." *See* 4 S. Williston, *supra* note 4, § 600A; *see also* Restatement (Second) of Contracts § 200 comment c (1981) (listing commentators and cases that distinguish between "interpretation" and "construction"). Corbin defines "interpretation" as it relates to contracts as the "process whereby one person gives a meaning to the symbols of expression used by another person." 3 A. Corbin, *supra* note 4, § 532, at 2. In contrast, "construction" is the determination of a contract's "legal operation—its effect upon the action of courts and administrative officials." *Id.*, § 534, at 9.

For a discussion of interpretation theory, see generally J. Cueto-Rua, Judicial Methods of Interpretation of the Law (1981); Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417 (1899); Pound, *Introduction to A. Silveira, The Political and Social Factor in Legal Interpretation*, 45 Mich. L. Rev. 599 (1947).

21. One such rule, attributed to Sir Francis Bacon, was that oral evidence is admissible to aid in the interpretation of a writing if there is a latent ambiguity, but not to resolve a patent ambiguity. *See* McBaine, *supra* note 20, at 147.

22. Legal interpretation is a process probably incapable of being reduced to a definite formula. *See* Moore, *supra* note 19, at 167.

The rule reflects the formalistic judicial belief that words are symbols with fixed meanings, and parties to a writing should be held to that meaning, regardless of whether it coincides with their intention.[23] The belief in the possibility of perfect verbal expression is thought to have originated from "primitive" legal systems in which individuals placed faith in the "inherent potency" of words rather than the intention of the parties.[24]

Writings on law and language amply demonstrate that a theoretical weakness inherent in the rule is its assumption that words are capable of having unambiguous meaning. Application of the plain meaning rule requires the preliminary step of characterizing contractual language as either plain or ambiguous. Because the rule does not give the courts guidance on how to make this determination, decision-makers are left with the difficult task of determining, as a matter of law, whether a written agreement is clear or ambiguous.[25]

Semanticists and philosophers have long been concerned with the concept of ambiguity to explain the elusiveness of language.[26] In addition, courts have struggled with defining language judicially determined am-

---

23. *See* 9 J. Wigmore, *supra* note 4, § 2461.

24. The court in Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968) recognized this inherent weakness of the plain meaning rule. The court quoted S. Ullman, The Principles of Semantics 43 (1959):

> The elaborate system of taboo and verbal prohibitions in primitive groups; the ancient Egyptian myth of Khern, the apotheosis of the word, and of Thoth, the Scribe of Truth, the Giver of Words and Script, the Master of Incantations; the avoidance of the name of God in Brahmanism, Judaism and Islam; totemistic and protective names in mediaeval Turkish and Finno-Ugrian languages; the misplaced verbal scruples of the 'Precieuses'; the Swedish peasant custom of curing sick cattle smitten by witchcraft, by making them swallow a page torn out of the psalter and put in dough . . . .

Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 35, 442 P.2d 641, 643 n.2, 69 Cal. Rptr. 561, 562 n.2 (1968).

25. *See, e.g.*, Lee v. Hunt, 631 F.2d 1171, 1180 (5th Cir. Unit A 1981) (determining whether a contract is ambiguous is a legal question), *cert. denied*, 454 U.S. 834 (1981); Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 871 (9th Cir.) (same), *cert. denied*, 444 U.S. 981 (1979).

The theory of the plain meaning doctrine suggests that the ambiguity must be discoverable on a bare or literal reading of the text without resorting to the context and surrounding circumstances that the extrinsic sources provide. Jones, *supra* note 4, at 11; *see also* Appalachian Power Co. v. Federal Power Comm'n, 529 F.2d 342, 348 (D.C. Cir.) (party to unambiguous contract cannot reach outside the agreement for an argument seeking to impart uncertainty), *cert. denied*, 429 U.S. 816 (1976). Many courts that find words unambiguous, however, do so only after an examination of extrinsic evidence of surrounding circumstances. *See, e.g.*, Humble Oil & Ref. Co. v. Local 866, Int'l Bhd. of Teamsters, 447 F.2d 229, 231-32 (2d Cir. 1971) (arbitration board acted within its scope in considering parties' previous practices and bargaining history of the contract to construe provisions of contract); Airborne Freight Corp. v. McPherson, 427 F.2d 1283, 1285-86 (9th Cir. 1970) (district court judge correctly concluded that corporate merger agreement was unambiguous after receiving affidavits, prior drafts of the merger agreement, information sent to stockholders, and other extrinsic evidence).

26. *See generally* Moore, *supra* note 19.

biguous. Generally, courts agree that ambiguity in a contractual provision is not established merely because the contracting parties disagree about the meaning of a provision.[27] The prevailing view is that courts should consider objective rather than subjective manifestations of contractual intent.[28] Courts generally have concluded that a contractual provision is ambiguous if it is "reasonably susceptible" to more than one construction or interpretation.[29]

If language is ambiguous to the extent that it is capable of assuming different "meanings," defining ambiguity ultimately turns on a formulation of a concept of "meaning." Semanticists Ogden and Richards contend that "meaning" is a function of thought, symbolized by a word that refers to an object.[30] In their view, words have no inherent meaning unless a speaker or writer makes use of them.[31] Words are symbols that stimulate mental references to objects. This analysis of "word" and "object"—that the relation of the word to the object is indirect by virtue of the intervention of thought—underlies the idea that there is not a fixed and inevitable connection between "word" and "object."[32] The meaning that a speaker or writer intends the words to convey may vary significantly from the meaning that the words actually convey to others.[33]

27. *See* Harrison Western Corp. v. Gulf Oil Co., 662 F.2d 690, 695 (10th Cir. 1981); Boudreau v. Borg-Warner Acceptance Corp., 616 F.2d 1077, 1079 (9th Cir. 1980); Blake Constr. Co. v. United States, 597 F.2d 1357, 1359 n.16 (Ct. Cl. 1979); Associated Students v. Arizona Bd. of Regents, 120 Ariz. 100, 104, 584 P.2d 564, 568 (Ariz. Ct. App. 1978), *cert. denied*, 440 U.S. 913 (1979); Vickers v. North Am. Land Devs., 94 N.M. 65, 68, 607 P.2d 603, 606 (1980).

Arbitrators operate under a similar agreement. "Not infrequently, both parties will argue that the contract language unambiguously supports their respective claims, and the arbitrator will not only disagree with them both but will even declare a third meaning to be unambiguously expressed by the language!" P. Prasow & E. Peters, *supra* note 12, at 91.

28. The objective theory of contract interpretation sets up a standard of "reasonable expectation" based on what one party reasonably believes the other party is referring to. The subjective theory takes into account the parties' actual expectations. *See* Farnsworth, *"Meaning" in the Law of Contracts*, 76 Yale L.J. 939, 946-52 (1967).

29. *See, e.g.*, Castaneda v. Dura-Vent Corp., 648 F.2d 612, 619 (9th Cir. 1981); Universal Towing Co. v. United Barge Co., 579 F.2d 1098, 1101 (8th Cir. 1978); *see also supra* note 7. This definition suggests that the meanings need not be contradictory. The provision merely may cover two alternative meanings.

30. C. Ogden & I. Richards, The Meaning of Meaning 8-23 (8th ed. 1948). The authors diagram their theory by a triangle. The word and the object (the term "referent" is coined) are at the two base angles, and thought is at the apex. The object either causes a thought in the mind of the speaker, and he or she uses a word to express a thought, or, the word provokes a thought which refers to the object. *Id.* at 10-12.

31. *Id.* at 10.

32. Farnsworth points out, however, that the contribution of semantics to the search for the meaning of contract language is limited. He maintains that semanticists are concerned with language as it is used in science to describe experience, and, consequently, with the truth. Because the objective of contract language is to control behavior, interpreters of contract language are concerned primarily with the expectation that the language incites in the contracting parties, and with truth only secondarily. *See* Farnsworth, *supra* note 28, at 941-42.

33. Imprecision in the use of language is explained by Skinner as a consequence of the

Meaning also has been analyzed by some philosophers in terms of the reference or extension of a word, and its sense or intention.[34] Ogden and Richards, among others, have rejected this definition.[35] They have identified sixteen primary definitions of "meaning," as the word has been used by philosophers.[36] At least eight possible definitions of "meaning" relevant to contractual interpretation have been formulated by Judge Kenneth O'Connell, a former member of the Oregon Supreme Court.[37] Other concepts of "meaning" have been adopted by the Restatement[38] and discussed by commentators.[39] The controversy surrounding the meaning of "meaning," therefore, frustrates the search for the plain meaning of contractual language.

The elusiveness of the English language is a primary source of difficulty in attaching a fixed or absolute meaning to written or spoken words.[40] Case law provides a vast number of examples of the imprecision

---

conditioning process, which precedes the learning of the use of a word. B.F. Skinner, Verbal Behavior 29-30 (1957). "The responses given to a list of stimulus words naturally depend on the verbal history of the speaker." Id. at 75.

34. *See* Moore, *supra* note 19, at 167 (referring to G. Frege, On Sense and Reference in Translations from the Philosophical Writings of Gottlob Frege (P. Geach & M. Black eds. 1970)).

35. C. Ogden & I. Richards, *supra* note 30, at 189-91.

36. *Id.* at 186-87.

37. (1) that which the promisor believed the promisee understood the promisor was referring to; . . . (2) that which the promisor should reasonably expect the promisee to understand the promisor was referring to; . . . (3) that which the promisor intends the promisee to understand; . . . (4) that to which the promisor ought to be referring ("common usage"); (5) that to which the promisor refers; (6) that to which the promisee refers; (7) that to which the promisee believes himself to be referring; . . . (8) that to which the promisee believes the promisor to be referring . . . .

K. O'Connell, Comments on the Judicial Decision Making Process 51-52 (1982) (printed by Willamette University School of Law, Salem, Oregon).

38. *See* Restatement (Second) of Contracts §§ 202(3)(a) & (b) (1981) (language should be interpreted with its "generally prevailing meaning. . . . Technical terms and words of art are given their technical meaning.").

39. *See* Farnsworth, *supra* note 28, at 951, states that

'[m]eaning' for the purpose of contract interpretation should therefore be defined as: (1) that to which either party refers, where it can be determined and where it can be established that it is the same as that to which the other party refers, or believes or has reason to believe the first party to be referring; and, only failing this, (2) that to which either party has reason to believe the other to be referring.

See also Moore, *supra* note 19, at 167-80 (discussing three theories of "meaning" relevant to legal formalism: the referential, the logical positivist, and the subjectivist alternative to the logical positivists); Williams, *Language and the Law-IV*, 61 Law Q. Rev. 384, 392 (1945) (setting forth three varieties of meaning: intended, comprehended, and ordinary meaning).

40. *See generally* Young, *Equivocation in the Making of Agreements*, 64 Colum. L. Rev. 619 (1964). Semanticists and philosophers use the concepts of ambiguity and vagueness to describe the imprecision of language. The terms are distinguishable: "The idea of a central norm is useful in explaining the concept of vagueness, for a word is vague to the extent that it can apply to stimuli that depart from its central norm. . . . [A] word may also have two entirely different connotations. . . . Such a word is ambiguous." Farnsworth, *supra* note 28, at 953 (discussing Quine's definition of those terms in Quine, Word

of language. In one celebrated passage, Justice Holmes observed that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[41] Similarly, Judge Learned Hand stated that, "[w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used."[42] These views recognize the extent to which the text of a contractual provision can merge with the context of its formation, and how the meaning of a word is conditioned by the factual circumstances that surround its use.

II. THE DEMISE OF THE RULE

The basic premise of the plain meaning rule, that words are capable of plain and unambiguous meaning, finds little support today in semantics, philosophy or legal commentaries. Consequently, an increasing number of courts, following the U.C.C.[43] and the Restatement[44] reject the rule. In general, the Code expresses a policy favoring admission of extrinsic evidence to show the contractual intent of the parties.[45] Specifically, the Code recognizes three sources of extrinsic evidence admissible to explain the meaning of contract terms:[46] course of performance, course of dealing, and trade usage.[47]

The Code departs from the plain meaning rule by providing that con-

---

and Object 85 (1960)). *See also* Christie, *Vagueness and Legal Language*, 48 Minn. L. Rev. 885, 911 (1964) ("Vagueness is an inescapable aspect of our language. . . . [It] is sometimes an indispensable tool for the achievement of accuracy and precision in language."); Moore, *supra* note 18, at 181-83, 193-95 (grouping ambiguity into semantic and syntactic categories and identifying three senses in which a word may be vague).

41. Towne v. Eisner, 245 U.S. 418, 425 (1918).

42. NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941).

43. *See* U.C.C. § 2-202 (1978) (course of dealing, usage of trade, course of performance, and sometimes consistent additional terms can explain or supplement writing).

44. Restatement (Second) of Contracts § 212 (1981) (integrated agreement interpreted according to meaning of terms of writing in "light of the circumstances").

45. Levie, *The Interpretation of Contracts In New York Under the Uniform Commercial Code*, 10 N.Y.L.F. 350, 350-51 (1964).

46. U.C.C. § 2-202 (1978) provides in relevant part that:

Terms with respect to which the confirmatory accident should be made on the basis of a calendar week or a work week. Both parties agreed that the consistent past practice with respect to industrial injury pay had been to use the work week, with the result that employees received more money than they would have if wages were calculated on a calendar week basis. The arbitrator decided that the contract memoranda of the parties agree or which are otherwise set forth in a writing intended by the pareties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (section 1-205) or by course of performance (section 2-208).

47. *See* U.C.C. § 1-205 (1978) (defining course of dealing and usage of trade), § 2-208 (defining course of performance).

sideration of evidence of these three sources is not contingent on an initial determination that the contractual language is ambiguous.[48] Extrinsic evidence is always relevant to determine the meaning of an agreement.[49] Moreover, the Code rejects "the premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commerical context in which it was used."[50]

White and Summers suggest that the Code also rejects the notion, implicit in the plain meaning rule, that once the language is determined to be unambiguous, it cannot be altered by extrinsic evidence.[51] Moreover, course of dealing, usage of trade, and course of performance may themselves constitute contract terms or even override express terms.[52]

The parol evidence rule, as set forth in the Restatement, is in accordance with section 2-202 of the Code in its rejection of the plain meaning rule.[53] The Restatement provides that although "[i]t is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, . . . meaning can almost never be plain except in context."[54] The Restatement does not condition the admissibility of extrinsic evidence on an initial finding of ambiguity.[55]

A steady stream of cases has sharply criticized the plain meaning rule.[56] In *United States v. Lennox Metal Manufacturing Co.*,[57] a case that ultimately did not turn on the interpretation of contractual language, the Second Circuit warned about dangers of the exclusionary impact of the plain meaning rule. As the court observed, "To shut out the light furnished by the parties themselves—to read their words not as they meant them but as they appear when denuded of that meaning—is to

48. U.C.C. § 2-202 official comment 1(c) (1978), rejects "[t]he requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous."

49. Further, an official comment to U.C.C. § 2-202 provides that "[u]nless carefully negated they have become an element of the meaning of the words used." U.C.C. § 2-202 official comment 2 (1978).

50. U.C.C. § 2-202 official comment 1(b) (1978).

51. *See* J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 3-3 (2d ed. 1980).

52. *See id.*

53. *See* Restatement (Second) of Contracts § 212(1) (1981). The drafters of the Restatement expressed their intent to be guided by the parol evidence section of the Uniform Commercial Code. *See* American Law Institute Proceedings, Forty-eighth Annual Meeting 442 (1971).

54. Restatement (Second) of Contracts § 212 comment b (1981).

55. *Id.* ("[T]he rule stated in Subsection (1) is not limited to cases where it is determined that the language used is ambiguous.").

56. *See infra* notes 57-80 and accompanying text. In an early case, the Supreme Court stated that "a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties." Reed v. Insurance Co., 95 U.S. 23, 30 (1877); *see also* Hamilton v. Wosepka, 261 Iowa 299, 312, 154 N.W.2d 164, 171 (1967) ("Proof of the circumstances may make a meaning plain and clear when in absence of such proof some other meaning may also have seemed plain and clear.").

57. 225 F.2d 302 (2d Cir. 1955).

decide an unreal, fictitious, hypothetical case."[58] The court concluded that application of the rule allowed an interpreter of contractual language to "artificialize the facts."[59]

It was not until *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.*[60] that courts forged a frontal attack on the plain meaning rule. The California Supreme Court opinion by Justice Traynor rejected the trial court's application of the rule.[61] The defendant had offered admissions of the plaintiff's agents, the defendant's conduct under similar contracts with the plaintiff, and other evidence, to prove that the parties intended the indemnity clause to cover damage to property of third parties only, and not to the plaintiff's property.[62] The trial court had refused to consider this extrinsic evidence,[63] maintaining that the "plain language" of the clause required the defendant to indemnify the plaintiff.[64]

The California Supreme Court reversed the decision, holding that exclusion of extrinsic evidence on this basis, in effect, attaches meaning to disputed contractual language in accordance with the judge's own "linguistic education and experience."[65] Maintaining that words do not have absolute and constant referents, the court therefore stated that the rule "presuppose[s] a degree of verbal precision and stability our language has not attained."[66] The court held that the proper test of admissibility of extrinsic evidence to aid in contractual interpretation is not whether the instrument appears to be plain or unambiguous, "but whether the offered evidence is relevant to prove a meaning to which the language is reasonably susceptible."[67]

The *Thomas Drayage* court held that extrinsic evidence is always admissible, both to prove the existence of ambiguous contractual language and to resolve the ambiguity. This approach to the plain meaning rule has been cited approvingly by many courts.[68] The position of the

58. *Id.* at 313.

59. *Id.*

60. 69 Cal. 2d 33, 442 P.2d 641; 69 Cal. Rptr. 561 (1968).

61. *Id.* at 37, 442 P.2d at 644, 69 Cal. Rptr. at 564.

62. *Id.*, 442 P.2d at 643, 69 Cal. Rptr, at 563.

63. *Id.* at 40, 442 P.2d at 646, 69 Cal. Rptr. at 566.

64. *Id.*, 442 P.2d at 643, 69 Cal. Rptr. at 563.

65. *Id.* at 38, 442 P.2d at 644, 69 Cal. Rptr. at 564 (quoting Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L.Q. 161, 187 (1965)); *see also* 3 A. Corbin, *supra* note 4, at 189. "[The Court] is making an interpretation on the sole basis of the extrinsic evidence of its own linguistic experience and education, of which it merely takes judicial notice.").

66. *Thomas Drayage*, 69 Cal. 2d at 37, 442 P.2d at 644, 69 Cal. Rptr. at 564.

67. *Id.*, 442 P.2d at 644, 69 Cal. Rptr. at 564. The "reasonably susceptible" test of *Thomas Drayage*, used to determine the admissibility of extrinsic evidence to explain contract terms, is distinct from ambiguous contract language that some courts define as "reasonably susceptible" to different meanings. *See supra* note 29 and accompanying text.

68. *See* Sherman v. Mutual Benefit Life Ins. Co., 633 F.2d 782, 784 (9th Cir. 1980); Chicago & N.W. Ry. v. Chicago M. St. P. & PR Co., 502 F.2d 193, 195 n.3 (7th Cir. 1974); Kesling v. Bank of Am. Nat'l Trust & Savings Ass'n, 449 F.2d 770, 771 (9th Cir.

Thomas Drayage court was recently confirmed in *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*[69] *Mellon Bank* involved an alleged breach of contract by a permanent lender to purchase a construction loan from a short-term construction lender. The case turned on the interpretation of the word "insolvency" in the buy-sell agreement, because the permanent lender maintained that its obligation to purchase the loan was contingent on the borrowers' solvency.[70] The trial court had considered extrinsic evidence to adopt a definition of "solvency" that departed from the traditional commercial standard of solvency.

The appellate court held that consideration of this evidence was proper.[71] Adopting the same approach as *Thomas Drayage*,[72] the court maintained that a judge must determine from the "linguistic reference point of the parties [whether] the terms of the contract are susceptible of differing meanings."[73] In support of its position, the *Mellon Bank* court disputed that words have fixed meanings, stating that "English is often a difficult and elusive language, and certainly not uniform among all who use it."[74]

The court further held that under its approach, "[i]t is the role of the judge to consider the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning."[75] If the parties suggest a reasonable alternative interpretation, the judge should consider objective evidence in support of that interpretation, even though it may be alien to the judge's linguistic experience.[76] The court made clear that its approach did not relegate the written word to a reduced status and that "the parties remain bound by the appropriate objective definition of the words they use to express their intent."[77]

Thomas Drayage and its progeny, thus have followed the U.C.C. and the Restatement, demonstrating movement toward rejecting the extreme

1971) (per curiam); American Mach. & Tool Co. v. Strite-Anderson Mfg., 353 N.W.2d 592, 597 (Minn. Ct. App. 1984); Anderson v. Uanneier, 262 N.W.2d 360, 370 n.2 (S. Ct. Minn. 1978); Harrigan v. Mason & Winograd, Inc., 121 R.I. 209, 211, 397 A.2d 514, 516 (1979); Simpson v. State Mut. Life Assurance Co. of Am., 382 A.2d 198, 199-200 (Vt. 1977). *But see* Garcia v. Truck Ins. Exch., 36 Cal. 3d 426, 438-39, 682 P.2d 1100, 1107, 204 Cal. Rptr. 435, 442 (1984) (Mosk, J., concurring).

69. 619 F.2d 1001 (3d Cir. 1980).

70. *Id.* at 1008-09.

71. *Id.* at 1013-14. The Court held, however, that the evidence was not sufficient to warrant variation of the commonly used commercial standard of insolvency.

72. 69 Cal. 2d 33, 37, 442 P.2d 641, 644, 69 Cal. Rptr. 561, 564 (1968).

73. *Mellon Bank*, 619 F.2d at 1011.

74. *Id.* at 1010.

75. *Id.* at 1011. The courts in Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 37, 442 P.2d 641, 644, 69 Cal. Rptr. 561, 564 (1968), and Mellon Bank, N.A. v. Aetna Business Credit, 619 F.2d 1001, 1011 (3d Cir. 1980), held that the question of whether the contract language is susceptible to differing meanings should be measured by a reasonableness standard.

76. *Id.* at 1011 (footnote omitted).

77. *Id.* at 1013.

form of the plain meaning rule.[78] Although views of the rule expressed in the Restatement, the Code, and the cases are traceable to the influence of Professor Corbin's criticism of the rule,[79] courts rejecting the rule maintain that criticism of the plain meaning approach has an even more ancient lineage.[80]

The rule has been rejected principally because the basic premise of the rule, that words are capable of unambiguous meaning, is a proposition unsupported in the disciplines of semantics, philosophy, or common law. The exclusionary effect of the rule on the admissibility of extrinsic evidence offered to explain contract terms has been held to undermine the basic aim of contract interpretation, which is to discover the parties' objective intent. Application of the rule invariably has led to the substitution of a judge's perception of the parties' intent, in place of the parties' actual intent. Courts rejecting the rule have striven to adopt an approach to contract interpretation that, at least in theory, permits the parties' intent to be effectuated.

III. THE PLAIN MEANING RULE IN ARBITRATION DECISIONS

A. *The Decision to Invoke the Rule*

The judicial trend to reject the plain meaning rule contrasts with the stricter application of the rule in many labor arbitration decisions. The rule invariably is applied to exclude extrinsic evidence when an arbitrator determines that contract language is clear and unambiguous.[81]

The application of the rule to collective bargaining agreements is an outgrowth of the commercial setting in which the rule was conceived.[82] Thus, an arbitrator's view of the application of contract law to collective bargaining agreements is likely to influence a decision to adopt the plain meaning rule. A number of commentators have offered opposing views regarding the role of principles of contract law in the interpretation of labor agreements.[83] At one extreme is the view that collective bargaining

78. For other cases rejecting the plain meaning rule, *see supra* note 18 and accompanying text.

79. Corbin is cited extensively by courts, *see, e.g.*, Mellon Bank, N.A. v. Aetna Business Credit, 619 F.2d 1001, 1010-11 (3d Cir. 1980); Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 36-39, 442 P.2d 641, 643-45, 69 Cal. Rptr. 561, 563-65 (1968); United States v. Lennox Metal Mfg. Co., 225 F.2d 302, 310-15 (2d Cir. 1955) and was one of the principal architects of the Restatement of Contracts and the U.C.C., thus accounting for their rejection of the plain meaning rule. *See supra* notes 8-9 and accompanying text.

80. *See* United States v. Lennox Metal Mfg. Co., 225 F.2d 302, 311 (2d Cir. 1955) (court cites Ihering, who taught in the nineteenth century, and fourteenth century Italian lawyer Lucas De Penna, in its criticism of the plain meaning approach to contract interpretation).

81. *See infra* note 128.

82. *See* Treece, *Past Practice and its Relationship to Specific Contract Language in the Arbitration of Grievance Disputes*, 40 U. Colo. L. Rev. 358, 372-73 (1968).

83. *See* Summers, *Collective Agreements and the Law of Contracts*, 78 Yale L. J. 525, 525-27 (1969). A relatively recent addition to the literature was in an address by Sylves-

agreements should not be treated as ordinary contracts, and common law contract principles essentially are irrelevant.[84] Others argue that basic principles of contract law, while not strictly applicable, may provide valuable insights into the law of collective bargaining agreements.[85] The Supreme Court has taken the position that a collective bargaining agreement is "more than a contract,"[86] and that applicable law is not confined to the express provisions of the agreement.[87] The prevalent view seems to embrace the notion that the collective bargaining agreement is a special species of contract, and contract law has, at least, some application.[88]

The complicated industrial settings in which labor contracts are adopted, and their unique characteristics, support these views.[89] A labor

---

ter Garrett, past president of the National Academy of Arbitrators, who stated that "some authorities still seek to create an impression that, in interpreting a collective bargaining agreement, the arbitrator primarily must seek to find some appropriate rule for contract interpretation (or set of rules) to be applied as though the parties had negotiated conventional one-shot commercial contract." Garrett, *Contract Interpretation*, Arbitration 1985 Law and Practice, Proceedings of the Thirty-Eighth Annual Meeting of the Nat'l Academy of Arbitrators, 121, 142 (W. Gershenfeld ed. BNA 1986).

84. *See* Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016 (1955) (when terms are ambiguous, arbitrator must rely on his own judgment as to correct interpretation.

Archibald Cox opines that pleas to discard contract law as it applies to the collective agreement would be ignored by the courts. Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 14 (1958) [hereinafter Cox I].

85. *See* Summers, *supra* note 83, at 537-47; *see also* Cox I, *supra* note 84, at 19 ("There are rules applicable to 'common' or 'commercial' contracts which can be helpful in resolving cases arising under collective bargaining agreements because they furnish the conceptual tools of analysis even though the ultimate answer turns less on the concepts than on evaluation of the functional aspects of the agreement.").

86. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

87. *See id.* at 581-82.

88. *See* Summers, *supra* note 83, at 537-47. Thus, arbitrators often apply basic contract law principles. *See In re* Department of Econ. Sec. v. Minnesota Assoc. of Prof. Employees, PERB Case No. 82-PP-92-B, at 8 (June 21, 1982) ("The test of whether the parties have truly formed an agreement, according to principles of contract law, rests on two propositions. The first involves the principle of offer and acceptance, the second principle requires a meeting of minds.") (emphasis omitted); Tim Processing Corp. v. Oil Workers Int'l Union, 20 Lab. Arb. (BNA) 362, 363 (1953) (Johannes, Arb.) ("The arbitrator feels that both the Company and the Union failed to reach a proper meeting of the minds."); Carlile & Doughty, Inc. v. United Electrical Radio and Machine Workers, Local 110, 9 Lab. Arb. (BNA) 239, 241 (1947) (Brandschain, Arb.) ("The Union and the Company each had a different idea as to what was meant by the language used. Their minds did not meet.").

89. *See* Summers, *supra* note 83, at 527-34:

> The multiplicity of parties and complexity of provisions, the incompleteness of terms and the lack of agreement, the compulsory character of the bargaining relationship, and the continuous relationship with successive agreements are aspects of the collective agreement which make it distinguishable from an ordinary contract.

Cox points out that:

> First, it is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific

agreement, as a manifestation of self-government, cannot begin to provide for all the contingencies that may affect its administration.[90] The provisions of collective bargaining agreements inevitably contain some general expressions and ambiguous terms. In some cases, because the parties have implicit agreements and have developed a relationship over the years, the agreements are not intended to have an indisputable meaning.[91]

Strict application of the principles of contract law to collective bargaining agreements, therefore, can lead to an unsatisfactory analysis of issues submitted to a labor arbitrator. Given the complexity of the labor-management relationship, application of the rule to labor agreements might be even less appropriate than in commercial contract cases. Because the rule excludes evidence that may illuminate the relationship of the parties, the duty of an arbitrator to unravel bargaining history and to understand the intent of the parties as expressed in their agreement can be thwarted.

Other factors may influence the decision to apply the rule, such as the arbitrator's attitudes toward a management rights clause,[92] the precedential value of prior arbitration awards,[93] whether the collective bargaining

---

> contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.

Cox, *Reflections upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1498-99 (1959) (footnote omitted) [hereinafter Cox II].

90. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-82 (1960); Anaconda Co. v. Great Falls Mill & Smeltermen's Union No. 16, 402 F.2d 749, 750 (9th Cir. 1968).

91. "The plain meaning of the words may fall far short of expressing agreements implicit in the peculiar collective bargaining relationship evolved by the parties over a period of years; the words may even be inaccurate in light of subsequent events." Cox, *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mtn. L. Rev. 247, 262 (1958) [hereinafter Cox III].

92. Many collective bargaining agreements inclue a management rights clause. The purpose of the clause is to preserve management's unfettered discretion in all areas not specifically granted to the union in the agreement. The clause affects consideration of extrinsic evidence offered to prove contractual intent. For example, when a past practice is inconsistent with contractual language, the significance of the practice may be lessened if the arbitrator views the practice as an exercise of management's bargained-for prerogative. The practice likely will not be accorded contractual status or be considered evidence of contractual intent. *See* ITT Continental Baking Co. v. Bakery, Confectionery and Tobacco Workers Union Local 218, 74 Lab. Arb. (BNA) 92, 95 (1980) (Ross, Arb.) ("Arbitrators are hesitant to permit unwritten past practice to restrict the exercise of legitimate functions of management.").

93. Diverse views exist concerning the precedential value of prior arbitration awards. A survey of arbitrators disclosed that 77% believed other arbitration decisions should be given "some weight," but they should not be regarded as binding. Warren & Bernstein, *A*

agreement should be narrowly or broadly construed, a past practice clause,[94] as well as value judgments of arbitrators.[95] Although such factors are not always disclosed in arbitral opinions, arbitrators often explain that the plain meaning rule is an inevitable means of resolving a particular grievance.[96] Such decisions generally suggest that the rule is considered a settled principle of contract and arbitration law.[97]

Arbitrators also explain application of the plain meaning rule as consistent with contractual limitations on their authority. It is not unusual for arbitrators to contend that arbitration clauses in labor contracts[98]

Profile of Labor Arbitration, 16 Lab. Arb. (BNA) 970, 982 (1951); *see also* Braniff Airways v. International Air Line Pilots Ass'n, 70-1 Lab. Arb. Awards (CCH) ¶ 8214, at 3706-07 (1969) (Platt, Arb.) (prior arbitration decisions have no binding force).

94. *See generally* Fuller, *Collective Bargaining and the Arbitrator*, 1963 Wis. L. Rev. 3, 4-5 (1963) (discussing literal versus liberal construction and interpretation); *see also* Abrams, *The Nature of the Arbitral Process: Substantive Decision-Making in Labor Arbitration*, 14 U.C.D. L. Rev. 551, 561 (1981) (arbitrators follow express language of agreement, but when a situation is not covered by the agreement, established past practices may be referred to).

95. At least one writer argues that ideas about ethics, people, law, private property, and economics provide arbitrators with ultimate standards for judgment. *See* Gross, *Value of Judgments in the Decisions of Labor Arbitrators*, 21 Indus. & Lab. Rel. Rev. 55 (1967); *see also* Seitz, *Communications, Value Judgments in the Decisions of Labor Arbitrators*, 21 Indus. & Lab. Rel. Rev. 427 (1968) (doubting that standards for judgment can be discerned from text of arbitral opinions).

The role of value judgments in arbitration is developed more fully in Landis, *Value Judgments in Arbitration: A Case Study of Saul Wallen*, Cornell University (1977). *See also* Moore Co. v. Directly Affiliated Local Union No. 22804, 79-2 Lab. Arb. Awards (CCH) ¶ 8337, at 4410 (1979) (Bornstein, Arb.) ("The most familiar way to incorporate past practices into a contract by reference is through a so-called 'past practices' clause or a 'freeze' or 'maintenance of benefits' clause.").

An example of such a clause is found in the contract at issue in Sunshine Mining Co. v. United Steelworkers Local No. 5089, 79-2 Lab. Arb. Awards (CCH) ¶ 8537, at 5377 (1979) (O'Neill, Arb.):

> All present local practices, understandings or supplements or working conditions which grant to the employees benefits and protections not otherwise provided by the Agreement, shall remain in effect unless changed by mutual agreement, and in no case shall such local understanding, supplement or condition of employment be effective to deprive any employee of his rights under the Agreement.

96. *See* Kennecott Copper Corp., Ray Mines Division v. International Bhd. of Electrical Workers, Local 314, 70-2 Lab. Arb. Awards (CCH) ¶ 8849, at 5851 (1970) (Abernethy, Arb.) ("the Arbitrator has little choice but to hold that the plain meaning of the Contract language under consideration here must be enforced").

97. *See, e.g.*, Bureau of Engraving, Inc. v. Graphite Arts Int'l Union Local 12B, 80 Lab. Arb. (BNA) 623, 625 (1983) (Reynolds, Arb.) (use of past practice limited to issues in which language of agreement is vague or inconsistent); Amax Coal Co. v. United Mine Workers of America, Local 1216, 77 Lab. Arb. (BNA) 1058, 1063 (1981) (Witney, Arb.) ("When there is a conflict between past practice and unambiguous contractual language, the contractual language supersedes the practice"); Ralph's Grocery Co. v. Retail Clerks Local Union 770, 63 Lab. Arb. (BNA) 845, 848 (1974) (Petrie, Arb.) (custom and past practice not ordinarily used to give meaning to clear and unambiguous provision); F. Elkouri & E. Elkouri, *supra* note 2, at 348-50 (when contract language is clear and unambiguous, arbitrators will apply the plain meaning rule).

98. These clauses commonly provide that the arbitrator shall not "change, alter, modify, or add to any of the terms or provisions of [the] agreement." Kraft Foods Co. v.

place significant restraints on their ability to look beyond the express terms of the collective bargaining agreement.[99] In reality, however, courts, arbitrators, and commentators are in disagreement about the significance of standard "no modification" clauses. *Torrington Co. v. Metal Products Workers Union Local 1645*[100] often has been cited for the proposition that "no modification" clauses in a labor agreement must be carefully scrutinized to determine what restraint has been placed on an arbitrator's authority.[101] Treatise writers in the field of arbitration have supported that viewpoint.[102] Other courts and writers, however, have concluded that such limiting clauses are not necessarily a significant restraint on the arbitrator's authority.[103]

Grobery Warehousemen's Union Local 595, 6 Lab. Arb. (BNA) 962, 964 (1947) (Cheney, Ford, Gustafson, Arbs.).

99. *See, e.g.*, Willamina Educ. Ass'n v. Willamina School District, 5 PECBR 4086, 4103 (1980) (Ellis, Hein, Mosey, Bd. members); Control for Radiation, Inc. v. United Plant Guard Workers of America, Local 1, 46 Lab. Arb. (BNA) 578, 583 (1966) (Stouffer, Arb.). Prasow and Peters contend that if the language of a provision is clear, and its meaning "free of doubt," an arbitrator can go no further. They continue that the arbitrator

> may not go behind the language to probe for an intent other than the one disclosed by a simple reading of the provision. The language, it is said, speaks for itself. In contract law an agreement is not ambiguous if the arbitrator can determine its meaning with no other guide than knowledge of the simple facts on which, from the nature of language in general, its meaning depends.

P. Prasow & E. Peters, *supra* note 12, at 90.

100. 362 F.2d 677 (2d Cir. 1966).

101. *See id.* at 679-80; Loveless v. Eastern Air Lines, 681 F.2d 1272, 1277 n.10 (11th Cir. 1982) (citing *Torrington*).

102. *See* F. Elkouri & E. Elkouri, *supra* note 2, at 412 ("the general denial of power to add to, subtract from, or modify the agreement provides special justification for the observance of the parol evidence rule by arbitrators," without regard for evidence of the true intention of the parties).

103. *See, e.g.*, Lodge No. 12, Int'l ass'n of Mach. v. Cameron Iron Works, Inc., 292 F.2d 112, 118 (5th Cir.) (no modification clause does not prevent arbitrator from finding rights implied though not expressed in collective bargaining agreement), *cert. denied*, 368 U.S. 926 (1961).

Several arbitrators argue that in accordance with the tenor of United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), evidence of past practice should be considered even when the contract contains restrictive arbitrator authority clauses. *See* Gilman, *Past Practice in the Administration of Collective Bargaining Agreements in Arbitration*, 4 Suffolk U.L. Rev. 689, 709 (1970); *see also* Treece, *supra* note 82, at 369 & n.49 (conclusive effect of no modification clause is inconsistent with tenor of *Warrior*).

The court in Holly Sugar Corp. v. Distillery, Rectifying, Wine & A.W.I.U., 412 F.2d 899 (9th Cir. 1969), criticizes *Torrington* by referring to the modification clause contained therein as "boiler-plate." The *Holly Sugar* court cites Judge Feinberg's dissent in *Torrington* as the proper approach. *Id.* at 904-05. The court held that an arbitrator may look to prior practice, the conduct of the negotiation, and other extrinsic evidence without violating his duty to draw "the essence" from the eollective bargaining agreement. *Id.*

Additionally, the court, in Raybestos-Manhattan, Inc. v. Amalgamated Clothing & Textile Workers, 545 F. Supp. 387 (D. S.C. 1982), found that a modification clause was clear on its face but construed it as ambiguous when considered with the contract as a whole. *Id.* at 392-94. The court further stated that the Second Circuit has limited *Torrington* to situations in which the collective bargaining agreement contains no provisions

In *Loveless v. Eastern Airlines*,[104] the Eleventh Circuit suggested that, even if a labor agreement contains a "no modification" clause, an arbitrator may look beyond the express terms of the agreement on the theory that a latent ambiguity exists.[105] Under this theory, an arbitrator may resort to extrinsic evidence to discern a latent ambiguity.[106] Characterizing a contractual provision as latently ambiguous, therefore, would preclude application of the plain meaning rule by the rule's own terms.[107]

B. *Application of the Plain Meaning Rule in Arbitration Decisions*

Arbitrators often use the plain meaning approach to resolve grievances that require using principles of contract interpretation.[108] A determination that contractual language is ambiguous[109] generally has been viewed by arbitrators as a basis for admitting extrinsic evidence.[110] On the other hand, when contractual language is perceived by the arbitrator as clear and unambiguous, the plain meaning rule generally has been applied to exclude extrinsic evidence.[111]

---

bearing remotely on the dispute, and does not apply where industry practices may be relevant in interpreting ambiguous provisions. *Id.* at 393-94.

104. 681 F.2d 1272 (11th Cir. 1982).

105. *Id.* at 1278-79 n.14.

106. "An arbitrator may be able to discern a latent ambiguity in a contrct based upon his examination of past practice or bargaining history even though no ambiguity appears on the face of the contract." *Id.* at 1279 n.14.

107. "The arbitrator might then be able to resolve the latent ambiguity by resort to permissible sources of extrinsic evidence." *Id.*

108. The rule typically is referred to as an established arbitral rule followed by a description of its operative effect. *See* Gibson Refrigerator Co. v. United Auto., Aircraft & Agric. Implement Workers, Local 137, 17 Lab. Arb. (BNA) 313, 317 (1951) (Platt, Arb.).

109. Contract language that is either general or silent on a matter is equated to ambiguous language under the plain meaning rule. On general contract language, see Braniff Airways, Inc. v. International Air Line Pilots Ass'n, 70-1 Lab. Arb. Awards (CCH) ¶ 824, 3705 (1969) (Platt, Arb.) ("It is doubtless true that reference may be had to past practice to ascertain if the parties by their own conduct in the course of performance have given a particular meaning to their general or indefinite language.").

On silent contract language, see Kiamesha Concord, Inc. v. Hotel & Restaurant Employees' & Bartenders' Int'l Union Local 343, 69-2 Lab. Arb. Awards (CCH) ¶ 8586, 5003 (1969) (Kerrison, Arb.) ("where a contract is either silent on a matter at issue, or ambiguous, . . . past practice carries most weight"); *see generally* Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, Arbitration and Public Policy, Proceedings of the Fourteenth Annual Meeting, Nat'l Academy of Arbitrators, 30, 38 (S. Pollard, ed. 1961) (when language is ambiguous, day-to-day administration of agreement will develop the meaning).

110. *See, e.g.*, Adjutant Gen'l v. Pennsylvania State Council Ass'n of Civilian Technicians, Inc., 80-2 Lab. Arb. Awards (CCH) ¶ 859, 5636 (1980) (Yatsko, Arb.) ("meaning of the operative words 'unit/activity' is not free from doubt and . . . therefore it is necessary to resort to extrinsic evidence").

111. *See* Thunderbird Hotel v. International Alliance of Theatrical Stage Employees, Local 720, 69 Lab. Arb. (BNA) 10, 13 (1977) (Weiss, Arb.); Hi-Ram, Inc. v. United Auto., Aerospace and Agric. Implement Workers, Local 1627, 68 Lab. Arb. (BNA) 54, 55-56 (1977) (Daniel, Arb.); Arkansas Chem., Inc. v. Oil, Chem. & Atomic Workers Int'l Union Local 5-434, 73-1 Lab. Arb. Awards (CCH) ¶ 8175, 3651 (1973) (Holly, Arb.); American Potash & Chem. Corp. v. International Ass'n of Mach., Local Lodge 845, 47

Thus, the nature of contractual language generally is dispositive of whether the plain meaning rule will operate to exclude extrinsic evidence. Arbitrators take a variety of approaches to determine whether contractual language is "plain" or "ambiguous." In a number of cases, arbitrators have concluded that facts of the case dictate the result reached.[112] Other arbitrators have determined whether a particular provision is "plain" or "ambiguous" by examining the manner of a provision's application throughout the agreement to determine whether it has been applied consistently.[113] In other cases, arbitrators have relied heav-

Lab. Arb. (BNA) 661, 665-66 (1966) (Leonard, Arb.). *Arkansas Chemicals* involved a dispute over whether payment of wages to an employee who suffered an accident should be made on the basis of a calendar week or a work week. Both parties agreed that the consistent past practice with respect to industrial injury pay had been to use the work week, with the result that employees received more money than they would have if wages were calculated on a calendar week basis. The arbitrator decided that the contract clearly and unambiguously stated that a calendar week was to be used. *Id.* at 3650-52. He concluded that a practice that is contrary to clear and unambiguous contractual language does not have a binding effect on the parties. The arbitrator reasoned that, pursuant to a provision of the contract delineating his authority, his award had to be drawn from the essence of the agreement. *Id.* at 3651. Referring to the plain neaning rule as arbitral authority, he concluded that this principle of contract construction required him to disregard the past practice of the parties. *Id.* at 3651.

112. *See* Patterson Steel Co. v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Shopmen's Local 620, 45 Lab. Arb. (BNA) 783 (1965) (Autrey, Arb.). *Patterson Steel Co.* involved a terminated employee's entitlement to vacation pay. The employee maintained that he was entitled to a pro-rated amount of two week's vacation, while the company argued that under the contract the grievant was entitled to payment for a portion of one week's vacation. The company further argued that its interpretation of the contract was consistent with past practice. The arbitrator acknowledged that the pertinent contract language was "tangled and involved" because of the phrase "preceding and/or succeeding eligibility date." He nevertheless concluded that the language was not ambiguous when "applied to the facts of the particular case involved." The arbitrator apparently made the determination that the language was not ambiguous by concluding that application of the union's interpretation would produce an unreasonable result. An employee discharged the day before his third anniversary date would receive one week's vacation, while an employee discharged on a third anniversary date would receive two weeks paid vacation. *Id.* at 786.

In American Potash & Chem. Corp. v. International Ass'n of Machinists, Local Lodge 845, 47 Lab. Arb. (BNA) 661 (1966) (Leonard, Lease, McCullough, Arbs.), the employer characterized replacement of a filtering system as "production and maintenance work," paying employees regular production and maintenance wage rates. The union argued that installation of the filter was a "construction project," entitling employees to a higher construction wage. Although the chief arbitrator acknowledged that the relevant contract provision defining a "construction project" could be construed as ambiguous, he concluded that the language was not ambiguous when applied to the facts in the case. *Id.* at 665. By constructing an exaggerated hypothetical, Arbitrator Leonard reasoned that the application of the employer's interpretation would render the contract language "meaningless." *Id.*

113. *See* Community Mental Health Center v. American Fed'n of State, County & Mun. Employees Local 231, 76 Lab. Arb. (BNA) 1236 (1981) (Mueller, Arb.). In *Community Mental Health Center*, the arbitrator examined the application of contractual provisions that granted benefits to part-time employees on a pro-rata basis to other benefit areas in the contract and concluded that the clause was "extremely unclear." *Id.* at 1238-40. In contrast to *American Potash*, 47 Lab. Arb. (BNA) 661 (1966), and *Patterson Steel Co.*, 45 Lab. Arb. (BNA) 783 (1965), the arbitrator maintained that simply applying the

ily on dictionary definitions to determine whether the relevant contractual clause is "plain" or "ambiguous."[114] Even when admissibility of extrinsic evidence apparently is not at issue in a case, arbitrators may struggle to characterize contractual language as "clear" or "ambiguous,"[115] adopting a plain meaning approach to contract interpretation.

C. *The Relationship of the Plain Meaning Rule and the Concept of Past Practice*

In many cases, the extrinsic evidence that is disregarded when an arbitrator applies the plain meaning rule is proof of a consistent prior course of conduct not covered by the agreement,[116] commonly characterized as a past practice. A past practice must be clear and consistent, endure over a reasonable length of time, and be an accepted course of conduct.[117]

---

contract language to the facts of the case would not clear up the ambiguous nature of the contractual provision. *Id.* at 1240.

114. *See* Department of Health, Educ., and Welfare v. American Fed'n of Gov't Employees, Local 1802, 72 Lab. Arb. (BNA) 788, 794 (1979) (Hayes, Arb.); Thunderbird Hotel v. International Alliance of Theatrical Workers, 69 Lab. Arb. (BNA) 10, 13 (1977) (Weiss, Arb.); Pana Refining Co. v. Local 584, International Union of Operating Engineers, 47 Lab. Arb. (BNA) 193 (1966) (Traynor, Arb.). *Pana Refining Co.* involved interpretation of a contractual provision relevant to determining whether a former employee was entitled to pro-rated vacation pay for the portion of the year he worked. The arbitrator determined that the words constituting the contractual provision "under dictionary definitions [were] not uncertain in [their] meaning or ambiguous." *Id.* at 195.

The dictionary approach to contract interpretation has been severely criticized: "[I]t is one of the surest [indices] of a mature and developed jurisprudence not to make a fortress out of the dictionary." Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945). In United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960), Justice Brennan stated in his concurrence that "[t]he meaning of the arbitration promise is not to be found simply by reference to the dictionary definitions of the words the parties use, or by reference to the interpretation of commercial arbitration clauses." 363 U.S. at 570 (Brennan, J., concurring).

115. *See* John Morrell & Co. v. Amalgamated Meat Cutters & Butcher Workmen, Local 304, 65 Lab. Arb. (BNA) 933, 937 (1975) (Davis, Arb.) ("The arbitrator agrees that there is no ambiguity. The arbitrator is presented, however, with a *choice* as to *which* of the allegedly clear and unambiguous interpretations is correct.") (emphasis in original).

116. *See, e.g.*, Byer-Rolnick Corp. v. United Hatters, Cap & Millinery Workers, 45 Lab. Arb. (BNA) 868, 873 (1965) (Ray, Arb.) (evidence of past practice of laying off employees by seniority disregarded in light of clear, unambiguous contractual language that provided that ability of employees to perform work would be primary criterion for layoffs).

117. [T]he party claiming a past practice has the obligation to assume the burden of persuasion that there was a past practice and what its nature and scope of coverage and application may be. That proof should show that the practice is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

Jim Walter Resources, Inc. v. United Mine Workers Dist. 20, Local 6255, 82-2 Lab. Arb. Awards (CCH) ¶ 8518, 5314 (1982) (citing Arbitration Review Board Decision 78-2). Characteristics of a past practice have been noted in numerous arbitration decisions. *See, e.g.*, Jim Walter Resources, Inc. v. United Mine Workers of America, Dist. 20, Local Union No. 6255, 82-2 Lab. Arb. Awards (CCH) ¶ 8518, 5314 (1982) (Clarke, Arb.) (rejected claim of past practice of reimbursing injured employees' transportation expenses

Traditionally, and in accordance with the plain meaning rule, when a practice has been inconsistent with a seemingly clear and unambiguous contractual provision, the practice has been disregarded and the plain meaning of the language in the agreement affirmed.[118]

In *Chicago Educational Television Association*,[119] a company failed to post a temporary employee's name on a seniority list within twenty-four hours of hiring in accordance with contractual seniority list posting provisions.[120] The company argued that names of temporary employees were never posted on the seniority list until permanently employed and that the union had acquiesced in this practice. In resolving whether the past practice or the express provisions of the agreement should prevail, the arbitrator termed the answer "easy and unavoidable."[121] He reasoned that the reference to "all new Technicians employed" in the relevant contractual provision unambiguously meant all classes of employees, including those with temporary status.[122] The arbitrator concluded that the practice could not alter the clear language of the agreement that required posting of the names of all employees within twenty-four hours.[123]

The arbitrator seemingly adopted the extreme form of the plain meaning rule by denying the relevance of the practice at even the initial stage of classifying the contractual language as "clear" or "ambiguous." This characterization of the contractual provision had been made after a surface examination of the agreement, without consideration of the practice or other extrinsic evidence. Even after a summary examination of the provision, however, the relevant language arguably could have been classified as general language.[124] According to the plain meaning rule, general contractual language is considered ambiguous.[125] Even under this theory, therefore, the practice should have been admissible to clarify the

---

for getting medical treatment because of failure to establish unequivocal, clearly enunciated and acted upon practice); Arizona Aluminum Co. v. International Union of Operating Engineers Local 428, 78 Lab. Arb. (BNA) 766, 768-69 (1982) (Sass, Arb.) (rejecting company's assertion that joint discipline by management and union was past practice accepted by union); Caterpillar Tractor Co. v. International Ass'n of Mach. Lodge 851, 78 Lab. Arb. (BNA) 241, 242-43 (1982) (Cohen, Arb.) (rejecting company's assertion of past practice of prohibiting over twelve hour work days); Joy Mfg. Co. v. International Ass'n of Mach. Local 1842, 77 Lab. Arb. (BNA) 683, 683 (1981) (Richard, Arb.) (no binding past practice showing mutual intent of parties to compensate employees deprived of overtime opportunity in violation of overtime provision of agreement).

118. 363 U.S. 574, 580, 589 (1960).

119. 70-2 Lab. Arb. Awards (CCH) ¶ 8516 (1970) (Daughtery, Arb.).

120. *Id.* at 4692.

121. *Id.*

122. "[S]aid agreement sets forth [the seniority-list-posting requirements] with the utmost brevity and clarity—and with no qualifications or exceptions whatsoever . . ." *Id.*

123. *Id.*

124. The specifics of the posting provision could have been left to be hammered out in the administration of the agreement.

125. *See supra* note 108.

meaning of the clause.[126]

Similarly, if the arbitrator had adopted the *Thomas Drayage* test, the practice would have been relevant from the onset to prove whether the provision "reasonably" was susceptible to alternative meanings.[127] On a finding that the provision was susceptible to different meanings, the practice also would have been admissible to clarify the meaning of the provision itself.[128] The evidentiary significance of the practice would have been a further question to be decided by the arbitrator. The arbitrator's use of the plain meaning analysis, however, theoretically precluded assessing the significance of the practice at any stage of the proceeding.

Moreover, Supreme Court precedent should have made clear to arbitrators that the plain meaning rule is an inappropriate standard. In

126. The reading of the clause as clear, or alternatively as general, illustrates a major weakness of the plain meaning rule. An arbitrator can reach the result he or she thinks proper, and then support a holding by characterizing the language one way or another.

127. *See* Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 37, 442 P.2d 641, 644, 69 Cal. Rptr. 561, 564 (1968); *supra* notes 65-69 and accompanying text.

128. For other opinions upholding the view that past practice is not admissible to interpret unambiguous contract language, see Connecticut Ready Mixed Concrete Ass'n v. International Bhd. of Teamsters Local 559, 44 Lab. Arb. (BNA) 251, 254 (1964) (Wallen, Arb.) ("neither practice [nor] unilateral declarations of intent can vary clear agreement terms"); Westinghouse Elec. Corp. v. International Union of Elec., Radio, and Machine Workers Local 410, 43 Lab. Arb. (BNA) 573, 577 (1964) (Howard, Arb.) ("past practice cannot alter clear and unambiguous contract language"); Murphy Oil Co. v. Local 7-482, Oil, Chem. & Atomic Workers Int'l Union, 41 Lab. Arb. (BNA) 206, 209 (1963) (Whitney, Arb.) ("When practice conflicts with unequivocal contractual language, the latter must be given preference, since it is the written language rather than the custom which represents the fundamental and true intent of the parties.").

In the public sector, arbitrators seem to rely on the plain meaning rule to exclude evidence of past practices to the same extent as do their counterparts in the private sector. *See* County of Ulster v. Civil Service Employees Ass'n Local 856, 1982 Lab. Arb. Gov't ¶ 3041, at 6 (1982) (Irsay, Arb.) (longstanding practice of offering option of overtime pay or compensation time cannot overcome clear and unambiguous language of the contract); City of Riverview v. American Fed'n of State, County and Mun. Employees Local 1590, 1981 Lab. Arb. Gov't ¶ 2827, at 5 (1981) (Jones, Arb.) ("if the provision is clear and free from ambiguity, it is generally held that the express terms of the provision govern"); Town of Salem v. Salem Police Relief, 1980 Lab. Arb. Gov't ¶ 2555, at 20 (1980) (Barlow, Arb.) (past practice must "not vary the express written terms of the labor agreement"); Metropolitan Dade County v. International Ass'n of Firefighters, Local 1403, 1980 Lab. Arb. Gov't ¶ 2526, at 7 (1980) (Sherman, Arb.) (since contract language regarding filling of vacancies is unambiguous, the arbitrator was precluded from giving weight to evidence of a contrary intent); City of Middletown v. Middletown Police Benevolent Ass'n, 1980 Lab. Arb. Gov't ¶ 2521, at 8 (1979) (Dennis, Arb.) ("only under extreme circumstances can a practice be raised to modify clear contract language"); *see also* Municipal Lighting Plant Comm'n v. American Fed. of State, County and Mun. Employees Local 1729, 1979 Lab. Arb. Gov't ¶ 2424, at 6 (1979) (Bloodsworth, Arb.) (past practice cannot be used to override clear and unambiguous language); St. Lawrence County v. Civil Service Employees Ass'n, 1977 Lab. Arb. Gov't ¶ 1866, at 6-7 (1977) (Markowitz, Arb.) (Arbitrator Markowitz maintains that "[a]rbitrators, especially in the public sector, have been adjured to obey the clear language of the contract and not legislate substituting language in its stead because of extrinsic considerations of past practice and the like.").

United Steelworkers v. Warrior & Gulf Navigation Co.,[129] the Court held that "industrial common law"—the practices of the industry and the shop—is part of the collective bargaining agreement even if it is not an express provision.[130]

IV. ALTERNATIVE APPROACHES TO PAST PRACTICE CASES

While no direct attack has been launched on the general use of the plain meaning rule in arbitration, the rule has been criticized seriously in connection with its exclusionary effect on the admissibility of evidence of a past practice.[131] As a substitute, Arbitrator Aaron has proposed an approach to past practice cases, which has been referred to as the "inherent ambiguity theory."[132] Professor Aaron would give controlling weight to a past practice inconsistent with a contractual provision that is plain on its face but, in fact, is ambiguous.[133] This approach is based on the theory that giving the practice controlling weight takes note of a modification that already has been made by the contracting parties.[134] The theory, however, applies only when the relevant contractual language is inherently ambiguous. Arbitrator Mittenthal has suggested that past practice can override even unambiguous contractual language when the practice is mutually accepted by the contracting parties.[135] His theory rests on the belief that the collective bargaining agreement governs an ongoing relationship, and the parties should be able to modify the agreement in accordance with the parol modification theory of contract law.[136]

---

129. 363 U.S. 574 (1960).

130. *Id.* at 581-582.

131. *See generally* Aaron, *The Uses of the Past in Arbitration*, Arbitration Today, Proceedings of the Eighth Annual Meeting, National Academy of Arbitrators 1 (1955); Gilman, *supra* note 103; McLaughlin, *Custom and Past Practice in Labor Arbitration*, 18 Arb. J. 205 (1963); Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in Arbitration and Public Policy, Proceedings of the Fourteenth Annual Meeting, National Academy of Arbitrators 30 (S. Pollard ed. 1961); Treece, *supra* note 82; Comment, *The Doctrine of Past Practice in Labor Arbitration*, 38 U. Colo. L. Rev. 229 (1966).

132. *See* Treece, *supra* note 82, at 375.

133. Aaron notes several factors relevant to a finding that a contractual provision is inherently ambiguous. First, the contracting parties thought that they were covering every possible contingency that might arise in the application of a provision when, in fact, they did not; second, the parties adopted the relevant provision from a different contract without discussion of what it meant; and third, the parties merely intended to cover situations that they had already experienced and not thereby to exclude other situations which could arise. Aaron, *supra* note 131, at 5-6.

134. *See id.* at 7. Aaron points out that this rationale justifies giving a practice controlling weight, even when the contract prohibits the arbitrator from adding to, subtracting from, or modifying its provisions.

135. *See* Mittenthal, *supra* note 109, at 42-44.

136. Mittenthal cites the following passage from 3 S. Williston, Contracts § 623 (rev. ed. 1936): " '[I]f the meaning of the contract is plain, the acts of the parties cannot prove an interpretation contrary to the plain meaning' but neverthless 'such conduct of the parties . . . may be evidence of a subsequent modification of their contract.' " *Id.* at 44.

Both of these approaches have been criticized by one commentator to the extent that they embrace the traditional parameters of the plain meaning rule.[137] Arbitrator Treece suggests that the problem of determining the applicable rule of decision in past practices cases should be viewed essentially as an evidentiary matter.[138] An arbitrator's aim is to search for the mutual intent of the parties in any given grievance dispute, and both the collective agreement and past practice are manifestations of the parties' intent. Arbitrator Treece believes that the respective significance of the language or the practice is simply a process of weighing the evidence. The degree of ambiguity of the applicable contractual language and the acceptability of the practice are only relevant to the weight to be accorded to them.[139]

This approach to past practice cases rejects the attempt to characterize contractual language as either clear or ambiguous, and therefore avoids the result that the plain meaning rule dictates. Arbitrator Treece goes as far as maintaining that, in cases where the arbitrator deems the practice and the language to be of equal weight or is in doubt about their relative significance, the practice should prevail.[140]

These approaches to past practice have been adopted by a number of arbitration cases. *Great Lakes Carbon Corp.*[141] involved whether holiday pay included applicable shift differentials. The arbitrator noted the agreement unambiguously provided that shift differential should be added to holiday pay. He concluded, however, that the Union's nine year acquiescence in the computation of holiday pay without adding the shift differentials constituted a practice that, in effect, amended the parties' agreement.[142] He concluded that the contractual provision to the contrary had "lost any significance."[143]

In *Smith Display Service*,[144] the Union claimed that the Company had been making improper payments to a fund, violating the Social Security provision of the agreement with the union. Although the Company deducted an amount representing work related expenses before computing

---

See also Evening News Ass'n v. Newspaper Drivers & Handlers Local 372, 54 Lab. Arb. (BNA) 716 (1970) (Mittenthal, Arb.).

137. Treece states:

> Aaron would reject the past practice, no matter how clearly established and no matter how high the degree of underlying acceptability, if unable to find an inherent ambiguity. Conversely, Mittenthal would reject the practice, no matter how inherently ambiguous the relevant contract language, unless it was supported by a degree of acceptability tantamount to mutual agreement.

Treece, *supra* note 82, at 377.

138. *Id.*

139. *Id.*

140. *Id.* at 378.

141. 43 Lab. Arb. (BNA) 1173 (1964) (Anrod, Arb.).

142. *Id.* at 1176.

143. *Id.* at 1177.

144. Smith Display Serv. v. United Furniture Workers, 17 Lab. Arb. (BNA) 524 (1951) (Sherbow, Arb.).

the payment, the Union maintained that the agreement clearly provided for payment to the Union fund based on gross wages. The arbitrator concluded that the duration of the practice and the acquiescence by the Union in that course of conduct prevailed over even unambiguous contractual language.[145]

Although these cases represent a departure from strict application of the rule and the approach found in most arbitration decisions on the subject, they have received increasing support from commentators[146] and the courts.[147] Arbitrators need to be aware of the progress that has been made in rejecting the plain meaning rule, and in broadening their interpretive authority, so that the rule can be relegated to a less conspicuous role in the interpretation of collective bargaining agreements.

CONCLUSION

Arbitrators' continued invocation of the plain meaning rule is anomalous in light of the trend to reject the rule by the courts, the U.C.C., the Restatement, and treatise writers. The plain meaning rule is a vestige of an earlier, formalistic period of interpretation that has made way for approaches to principles of contract interpretation that are less mechanical and less fictional in their application. The basic premise of the rule that assumes words are capable of unambiguous meanings has been disputed by semanticists, philosophers, legal commentators, and case law. Additionally, because the plain meaning rule requires an initial characteriza-

145. *Id.* at 526. A number of other arbitrators express similar views. Yet, the facts of the particular cases do not support a finding that the alleged practice overrides clear contract language. *See* C. Schmidt Co. v. Allied Indus. Workers, Local 157, 46 Lab. Arb. (BNA) 1208, 1212 (1966) (vol. 2) (Volz, Arb.) ("[I]n a proper case a practice mutually agreed to may constitute a waiver of an express term in the contract and may itself rise to the dignity of an implied provision of the agreement."); Mobil Oil Co. v. Oil, Chem. & Atomic Workers Int'l Union Local 4-243, 46 Lab. Arb. (BNA) 140, 151 (1966) (Hebert, Turner, Williams, Arbs.) ("[U]n the basis of very strong proof it has been held that the language of the contract may be amended as evidenced by past practice. The showing required must be the equivalent to mutual agreement."); Wheland Foundry v. United Steelworkers Local 3967, 44 Lab. Arb. (BNA) 5, 6 (1965) (Williams, Arb.) ("Past violations are not the same as past practices, and numerous breaches of a contract do not amend the instrument.").

146. *See generally* R. A. Gorman, Basic Text on Labor Law, 592-93 (1976) (arbitrator may supplement written contract with past practice); Mittenthal, *supra* note 131, 43-44 (past practice amounts to an amendment of contract, which can "only be changed by mutual agreement"); Treece, *supra* note 82, at 378 ("clearly established prior course of conduct . . . should be given controlling weight over very clear contractual language").

147. It is not altogether unusual for a court to affirm an arbitrator's use of past practice in a "gap-filling" situation when no contractual provision is on point. *See* Anaconda Co. v. Great Falls Mill & Smeltermen's Union No. 16, 402 F.2d 749, 752 (9th Cir. 1968) (affirmed arbitrator's reliance on "common law of the shop" in determining violation of seniority provision of collective bargaining agreement). Furthermore, recent decisions show courts allowing past practice and other extrinsic evidence to override express and unambiguous contract language in order to implement the parties' intent. *See* Loveless v. Eastern Air Lines, 681 F.2d 1272, 1280 (11th Cir. 1982); Norfolk Shipbuilding & Drydock v. Local No. 684, 671 F.2d 797, 799-800 (4th Cir. 1982).

tion of contractual language as "plain" or "ambiguous," an arbitrator may substitute a personal conception of the parties' intent, in accordance with the arbitrator's own linguistic history, rather than in accordance with the actual intent of the parties.

Adherence to the plain meaning rule by arbitrators derives from their belief that the rule is a settled and unquestioned principle of contract law. The use of the rule by arbitrators can be traced to their views on the application of contract law to collective bargaining agreements and to more fundamental value judgments concerning the nature of the collective bargaining process. Such arbitral values may not have been applied consciously but may merely reflect an uncritical application of textbook principles in the field of arbitration.

Because the rule often operates to exclude evidence of past practice inconsistent with contractual language, much of the criticism of the rule has arisen in connection with discussions about the role of past practice in interpreting collective bargaining agreements. Some commentators have urged that an established practice should be capable of overriding contractual provisions. They suggest that apparently clear language, in fact, can be ambiguous and that the collective bargaining agreement governs a continuing relationship that should be capable of modification by a mutually accepted practice. Still another view urges that cases in which past practice contradicts language in the agreement should be treated as essentially an evidentiary problem in which the arbitrator must weigh the relative significance of the practice and the contractual provison.

The effort of some commentators to modify the plain meaning rule in past practice cases clearly has application to the troublesome use of the rule in labor arbitration generally. It probably is never justifiable to refuse to admit relevant evidence as a means of explaining the meaning of a contractual provision in a collective bargaining agreement unless it is reasonable to determine the meaning the parties gave to words in that agreement from the contract alone and without any reference at all to extrinsic evidence. To the extent that such cases exist, the plain meaning rule should be invoked.

In most cases, the plain meaning rule should be applied only in conjunction with a number of modifying rules. For example, consistent with *Thomas Drayage*, the process of characterizing contractual language as "ambiguous" or "unambiguous" pursuant to the plain meaning rule should be discarded in favor of an approach that does not deny the relevance of extrinsic evidence to prove meanings to which a contractual provision is reasonably susceptible. Additionally, extrinsic evidence should be admissible to resolve the contended meanings of a contractual provision. Using this approach, contract interpretation is similar to an evidentiary problem in which the significance of the terms of the agreement and the contended extrinsic evidence must be allocated the appropriate weight. Such an approach to contract interpretation strengthens the chance that the intent of the parties will be effectuated and eliminates

the harsh consequences that can result from an application of the plain meaning rule.