PAST PRACTICE

THE UNWRITTEN CLAUSE IN THE LABOR AGREEMENT[1]

The most basic labor agreement can provide a seemingly never-ending source of disagreement over its interpretation. Arbitrators look for evidence of the true intent of a given provision in:

-the record of the negotiations preceding the agreement,
-prior arbitrations,
-the evolution of the provision in the industry,
-its evolution from previous agreements, AND
-*past practices of the parties*.[2]

The U.S. Supreme Court has held that "the labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law-- the past practice of the industry and the shop--is equally a part of the collective bargaining agreement although not expressed in it."[3]

PAST PRACTICE IS USEFUL IN MANY WAYS AND SITUATIONS.

The examples cited below illustrate the uses of past practice and the types of situations in which past practice has been found controlling:[4]

Clarifying Ambiguous Language

A clause provides for "premium pay for work over eight hours in a day." Is an employee entitled to premium pay when his or her regular shift ends at midnight and the "over-time" occurs on the following day? Is a day defined as a calendar day or as the 24-hour period following the start of a shift?

Implementing General Contract Language

What constitute "just cause" and "proper" discipline under the agreement?

Modifying Apparently Unambiguous Language

A contract may define a work day as eight hours, with an unpaid lunch hour of one-half hour. In one department, however, employees have consistently worked a straight eight hours with a paid, on-call meal break. Can the employer abolish the paid meal break?

As a Separate, Enforceable, Condition of Employment

An Employer has consistently and routinely given a Christmas bonus to his employees, which is not mentioned in the agreement. On the basis of a new and higher wage rate, can the employer unilaterally eliminate the bonus over the union's objections?

BINDING PAST PRACTICES HAVE CERTAIN CHARACTERISTICS.

In order to find a past practice binding, most arbitrators will insist that the practice incorporate the following:

Clarity and Consistency

The course of conduct must be clearly defined. It must also be viewed as the invariable response given a specific set of conditions.

Acceptability

Responsible supervisors and employees alike must have knowledge of the practice and accept it as the correct and customary means of dealing with the situation. It is not, for example, something done when only in the presence of lax supervision or in ignorance of management.

Unchanged Underlying Circumstances

A practice which is established solely as a result of a particular set of underlying circumstances is no broader than those circumstances. It cannot be generalized to other situations nor is it immune from repeal should the underlying conditions be changed. Hourly rest breaks given steel plant crane operators solely on the basis of high temperature in the crane cabs were, in one case, lost once the cabs were air conditioned.

Mutuality

It cannot be the product of a discretionary act specifically reserved to management by the agreement or established as such by the parties through their conduct. It must instead be a product of their joint understanding as a condition of employment.

Longevity/Repetition

There is no absolute standard as to how long a practice must exist or how frequently it must be indulged in, in order to be considered valid. If there are no contrary examples, and the situation in question is rare, a single instance may constitute a valid practice. Repetition and longevity will, of course, more firmly establish a practice.

PAST PRACTICE IS SUBORDINATE TO NEGOTIATING HISTORY.

It is a cardinal rule of arbitrators that a party cannot gain in arbitration what it was unable to gain in negotiations. Parties *can*, however, easily lose at the bargaining table what they have gained through past practice.

A past practice is strengthened when its observance can be shown to have been established under the same contract provisions contained in previous agreements. Having survived negotiations of a new contract, it is commonly viewed by arbitrators as the unwritten basis of which the bargain was made. This strengthening, indeed survival, of a practice is predicated, however, on the absence of a challenge to the practice in negotiations.

Practices which serve to clarify contract language are applicable only in so far as the agreement's language remain constant. If changed in negotiations, the new provision may be deemed to invalidate or amend the previous practice. It will at any rate, necessitate a demonstrable acceptance of the continuation of the previous practice under the new agreement before the practice in question can be said to have the same clarifying effects on the new provision.

Past practices which establish separate conditions of employment are even more susceptible to change during negotiations than those which serve to either clarify ambiguous language or which implement general provisions. Since mutual acceptance is essential to a valid practice, once an objection is raised to its continuance during negotiations, the practice will lose its validity upon the adoption of the contract. Only a withdrawal of the objection or the adoption of controlling language in the agreement will suffice to save the condition or benefit bestowed by the practice.[5]

Given the potential value of the past practices and the ease with which they may be amended or repudiated in negotiations, obvious considerations are raised for bargaining strategy.

1. If a valid and valued past practice exists, do not raise <u>any</u> proposal in negotiations dealing with any of its provisions. If you fail to prevail, that may render it lost or a unilateral prerogative of management.

2. If a past practice has served to satisfactorily interpret ambiguous contract language, resist any attempt to "clean up" or "clarify" the language in bargaining.

3. Review with your stewards and leadership all contract proposals of the union before submission to management and review all management proposals for their implications for established practices.

---

[1]Abridged from an article by James J. Gallagher, Associate Professor, Labor Education and Research Center, University of Oregon.

[2]For an excellent discussion of the arbitration process see, *Arbitration and Collective Bargaining: Conflict Resolution in Labor Relations*, , by Prosow and Peters, McGraw Hill (1979). See also *Contract Administration in Public Sector Collective Bargaining*, James Gallagher, Institute of Industrial Relations, University of California at Los Angeles, California.

[3]*Steelworkers v. Warrior Navigation*, U.S. Supreme Court, June 20, 1960. *Warrior* is one of three cases decided by the Court concerning arbitration processes. The decisions rendered as known as the "Steelworkers' Trilogy."

[4]*Ibid* and <u>supra</u> 1.

[5]*See* "Past Practice and the Administration of Collective Bargaining Agreements" by Richard Mittentback; proceedings of the Fourteenth Annual Meeting, National Academy of Arbitrators, BNA, Washington DC (1961).