

PAST PRACTICE

The most basic labor agreement can provide a seemingly never-ending source of disagreement over its interpretation. In part this results from the complexities of the employment relationship that the contract seeks to govern. It is further complicated by the less than precise use of the written word, and the often-intentional use of ambiguous language by negotiators who believe more precise language may be counter-productive to reaching agreement on an otherwise acceptable contract.

It is a cardinal rule of arbitration that a party cannot gain in arbitration that which they were unable to gain in negotiations. For this reason, where clear and unambiguous language in an agreement is found wanting, the arbitrator will also look to past practices of the parties themselves as the best evidence of determining the meaning of the issue in dispute. Some arbitrators will even look at past practice when the language is clear.

I. The Nature of the Past Practice

One definition of a past practice is: “*A practice that is a **reasonable uniform** response to a **recurring** situation over a **substantial** period of time which has been recognized by the parties **implicitly** or **explicitly** as the proper response.*” Even though it may ultimately be proven that the parties have consistently followed a particular practice, it should be emphasized that not every practice or way of doing things amounts to a binding past practices.

A custom or past practice is not something which arises because a given course of conduct has been pursued by the union or management on one or more occasions. Rather, it evolves between the parties as a “normal” reaction to a recurring situation. It must be shown to be the accepted course of conduct characteristically repeated in response to a given set of underlying circumstances.

The arbitrator is obliged to determine whether the alleged practice is merely one of the courses of action followed from time to time by the parties in response to a certain set of circumstances, or whether it is the exclusive and unanimous response. Mutual acceptance or agreement (even though it may be implied) is the foundation for that uniform response.

What standards can be used to determine whether or not a past practice exists? There are no universally accepted standards for this purpose. A past practice is usually the product of a particular history and tradition, or a particular group of employees and employers, and a particular set of circumstances which created it in the first place.

Arbitrators frequently consider factors like the following and may give varying degrees of importance to each or any combination of factors:

1. The express terms of the written contract
2. The prior negotiations of the parties
3. The degree of mutual “acceptance” of the parties
4. The duration in which the practice has been followed

In addition there are certain characteristics which, when applicable would be given great weight in making a determination of past practice, such as:

1. Clarity and consistency
2. Longevity and repetition
3. Acceptability
4. Mutuality

How does one measure “longevity and repetition”? How long must a particular custom or practice be followed by the parties before it has become a condition of employment? A past practice arises from different situations that may occur with varying degrees of frequency throughout the employment relationship. For example, a past practice involving wash-up time arises from a particular situation every day. On the other hand, past practices involving funeral leave, Christmas bonuses or severance pay result from situations arising with much different degrees of frequency. Clearly no one formula or standard can be imagined that would clearly establish the “duration” requirement of each of these examples.

Since the continued binding effect of a past practice can be based on “acceptability,” the question of whether the practice was established by both parties, or established by one of the parties and not contested by the other, is a factor often given importance by the arbitrator. It would seem that the parties might agree that a particular practice is mutually binding regardless of how it was initiated.

For example, a group of employees may begin taking a coffee break in violation of an explicit company rule which prohibits such breaks. Or, it may originate upon the suggestion of the employer alone or the employer and union jointly. The fact remains if the coffee break is taken over a long period of time and is eventually accepted by both parties as the customary and normal way of doing things, it will be binding on the employer, regardless of how it was initiated. The origin of a practice (whether it was initiated by one or both of the parties) should be one of the relevant facts to consider in determining whether the necessary “mutual agreement” is present.

An express agreement is not necessary to create a binding past practice. Once it can be shown the parties had knowledge of the particular course of conduct, agreement may be implied when there is a continued failure on the part of one party to object to the other’s activity.

II. Function of a Past Practice

A. **When the Contract Language is Ambiguous** — The most common function of a past practice is to clarify ambiguous contract language. Arbitrators will determine what the parties meant when they cause such language to be incorporated into the agreement by observing how the parties have conducted themselves under the language.

B. **When the Contract Language is General** — Arbitrators will use past practice in implementing general contract language. There are subjects included in contracts that just cannot be made specific. The parties may be satisfied to express their general standard of agreement knowing that the provision is too general to answer every practical problem that may arise.

Many times the parties are content to permit the general clause to receive its real meaning in the grievance or arbitration procedure. The parties may re-interpret the language in light of grievance decisions or arbitration awards. All of these factors in some way influence the formation of a binding past practice. The role of past practice in giving specific meaning to general contract language is considerable.

C. **When the Contract is silent** — Even where the collective bargaining agreement may be silent on a particular matter, past practice has been held to constitute a separate, binding obligation. Obviously, since the issue arises over matters which are not covered in the agreement, the central question is

whether duties and obligations can be imposed on the parties which they have not specifically bargained for.

III. The Burden of Proof

There is no question that the burden of proving the existence and mutual acceptance of a past practice is upon the party alleging it. If custom or past practice is invoked to resolve a contract ambiguity and the arbitrator is not persuaded of the correctness of interpretation sought by either party, the moving party may be held to have failed to prove the burden.

In many cases, the union will see the alleged practice as an “important condition of employment.” On the other hand, the employer may feel it is simply an “inherent right of management” which the employer is free to terminate at will. The burden of proving the existence and application of a past practice is no small or easy task.

IV. Termination of a Past Practice

Once the practice has been mutually accepted by the parties as a binding condition of employment, it becomes, in effect, an integral part of the labor contract. As such, it cannot be changed or terminated without the mutual consent of the parties.

An important point to consider is the effect of changing circumstances on the viability of a binding past practice during the term of the collective bargaining agreement. **The practice must continue to be a response to the same underlying conditions. When there is a change in those conditions, the practice may be changed.** But those changes must be accomplished through negotiation rather than through unilateral action.

V. Conclusion

A valid past practice can be as much a part of the labor agreement as any written provision. Useful in defining the intent of ambiguous language, it gives focus to general provisions and may also establish independent conditions or benefits of employment. Where it is clearly established over a lengthy period of time, it may also be considered by some arbitrators to amend the apparent language of the contract.