

## Second Annual Public Sector Labor Law/ WERC 2006 SPRING CONFERENCE

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### The Use of Past Practice

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#### A. Where Contract is Silent (Implied Term of Contract)

Parties often argue and arbitrators sometimes find that past practice provides the basis for rules governing certain matter not included in the written contract. This argument has its foundation in the Steelworker Trilogy where Justice Douglas stated that

“The labor arbitrator’s source of law is not confined to the express provisions of the contract, as the industrial common law---the practices of the industry and the shop---is equally a part of the collective bargaining agreement although not expressed in it.” Binding past practices –i.e., ways of doing things that have effectively become part of the parties’ agreement may become implied contract terms. The practice may be held enforceable through arbitration as being, in essence, a part of the parties’ “whole” agreement.

Some examples of this included the following:

It is generally accepted that certain, but not all, clear and long-standing practices can establish conditions of employment as binding as any written provision of the agreement.<sup>1</sup>

In the contract is silent with respect to a given activity, the presence of a well established practice, accepted or condoned by both parties, may constitute in effect, an unwritten principle on how a certain type of situation should be treated.<sup>2</sup>

A union-management contract is far more than words on paper. It is also all the oral understandings, interpretations and mutually acceptable habits of action which have grown up around it over the course of time. Stable and peaceful relations between the parties, depend upon the development of a mutually satisfactory superstructure of understanding which give operating significance and practicality to the purely legal working of the written contract. Peaceful relations depend, further, upon both parties, faithfully living up to their mutual

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<sup>1</sup> *Alpena Gen. Hosp.*, 50 LA 48, 41 (Jones, 1967).

<sup>2</sup> *Texas Util. Generating Div.*, 92 LA 1308, 1312 (McDermott, 1989).

commitments as embodied not only in the actual contract itself but also in the modes of action which have become an integral part of it.<sup>3</sup>

Custom can, under some unusual circumstances, form an implied term of a contract. Where the Employer has always done a certain thing, and the matter is so well understood and taken for granted that it may be said that the Contract was entered into upon the assumption that that customary action would continue to be taken, such customary action may be an implied term.<sup>4</sup>

These are general observations and involve older cases. Exactly what constitutes past practice has evolved over time. Whether, practice is limited to something that is a benefit to the employee versus a method of operation or direction of the workforce, the strength and scope of the “practice,” and the “mutuality” has been addressed by arbitrators more recently. The presence of a “zipper” or “entire agreement” clause has also impacted upon arbitral willingness to find that a practice constitutes an implied term of a collective bargaining agreement. Obviously, if there is explicit contract language, the binding effect of customs or practices may be eliminated. Some arbitrators have, however, held that a broad management rights clause or a statement that the written document constitutes the “entire agreement” between the parties will not negate a practice that the parties intended to be binding.<sup>5</sup>

## B. Interpreting Ambiguous Language

Past practice is the most widely used standard for interpretation of unclear or ambiguous contract language. This is the most appropriate use of past practice and often the only evidence available in many cases. The parties’ intent can often be inferred from their actions. This use of past practice is so common that no citation of arbitral authority is necessary for resort to it.

Generally speaking where practice has established a meaning for language contained in past contracts and both the practice and language have been continued into the new agreement, the language will be presumed to have the meaning given to it by the practice.

Although management asserted that a new agreement dealt with a “totally new concept,” the arbitrators, held that, absent specific declaration by management to the contrary in negotiations, the union was justified in assuming that certain key terms used in the new

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<sup>3</sup> *Coca-cola Bottling Co.*, 9 LA 197, 198 (Jacobs, 1947).

<sup>4</sup> *Esso Standard Oil Co.*, 16 LA 73,74 (McCoy, 1951).

<sup>5</sup> Labor and Employment Arbitration, Dennis Nolan, p. 253.

agreement would carry the meaning given those same terms in previous agreements by unvarying practice of the parties.<sup>6</sup>

Various issues that may arise in interpreting ambiguous language with respect to practice are the following: unilateral implementation versus continued failure to object on the part of one party to the other's interpretation, the problem of "knowledge" of the so-called practice, the frequency and repetition of the practice including whether a predominant pattern of practice exists, consistency, and confinement of a practice to specific situations, equipment, or facts giving rise to the practice.

### C. Amendment to the Contract

Arbitrators have also looked at subsequent practice as evidence of modifying written language.

It is a basic idea in contract law that parties can amend an earlier agreement by later conduct (oral, written, or otherwise) so long as it is not in conflict with an agreed and operative mechanism for amendment.<sup>7</sup>

An employer was ordered to reinstate a day labor rate of pay for a group of employees when it demonstrated that the rate had been paid for a four-year period subsequent to the negotiation of the agreement. Alleging that the rate was in error, the employer discontinued it because there was no provision in the contract that authorized payment. Although the language in the agreement provided that the parties were without the power to alter, waive, or amend any of the provisions without the written consent and approval of both the union and the employer, the arbitrator, nevertheless found that the employer's conduct operated against unilaterally making such a change.<sup>8</sup>

(However, obviously, there must be very strong proof and the practice must be shown to exist as the mutually understood and accepted way of doing things over an extended period of time.) Some arbitrators have required convincing proof to this effect.<sup>9</sup>

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<sup>6</sup> *Sheboygan County*, 70 LA 92, 96 (Gratz, 1978); *East Orange Bd. Of Educ.*, 69 LA 674, 677 (Spencer, 1977); Elkouri And Elkouri, *How Arbitration Works, Sixth Edition*, p. 623-624.

<sup>7</sup> *Evidence in Arbitration, Second Edition*, Hill & Sinicropi, p. 343; "Report of the West Coast Tripartite Committee" in *Problems of Proof in Arbitration*, supra note 15, at 185," Proceedings of the 19<sup>th</sup> Annual Meeting of the National Academy of Arbitrators (BNA Books, 1967).

<sup>8</sup> *Kaiser Aluminum & Chemical Corp.*, 61 LA 703 (Sembower, 1973).

<sup>9</sup> *Total Petroleum, Inc.*, 78 LA 729, 737 (Roberts, 1982) where arbitrator stated that the "highest quantum of proof will ordinarily be required in order to show that the parties intended by their conduct to amend or modify unambiguous contractual language..."

D. As a Gap-Filling Remedy

Evidence of a consistent past practice may be used by the arbitrator to supplement the written agreement. In certain instance what the parties do under a contract may be more important than what they say in it.<sup>10</sup> Past practice can also be used to implement general language such as “just cause” for discharge or “relatively equal ability” for promotion.<sup>11</sup> Where the language addresses the matter generally, but fails to cover all aspects, such that “gaps exist,” practice may be resorted to. Rights and or benefits which are generally defined by for which a violation is not described may fall into this category. Past practice may be resorted to where an arbitrator must choose between alternative remedies for certain contractual violations.

E. Where contract language is silent

Much more controversial is the use of past practice to supplement a silent contract. Some arbitrators believe the parties intend their written agreements to be complete and exclusive and that they should not be burdened by any “implied” obligations, while other regard all past practices not in conflict with the written terms of the agreement to be incorporated into it, *sub silentio*. The latter view is expressed by the Justice Douglas quote above. Where the latter view is accepted, to achieve contractual status, a past practice must concern a “major condition of employment.”<sup>12</sup> Arbitrators subscribing to this view believe that a collective bargaining agreement should be deemed, unless a contrary intention is manifest, to carry forward for its term the major terms and conditions of employment, not covered by the agreement, which prevailed when the agreement was executed.<sup>13</sup>

F. Where past practice is used to contradict clear, unambiguous language to the contrary

Even more problematic is the use of a past practice to contradict apparently unambiguous contract language. Traditional contract law frowns upon such use of past practice and most arbitrators take the same view. The underlying theory for this is that the parties would not settle on certain specific language if in fact they did not intend to follow it.<sup>14</sup> The presumption always favors the clear written language since other considerations being equal this is considered the best indication

<sup>10</sup> Evidence in Arbitration, *supra*, at p. 349.

<sup>11</sup> Labor and Employment Arbitration, *Ibid.* p. 253.

<sup>12</sup> How Arbitration Works, *supra*, at p. 634.

<sup>13</sup> Cox & Dunlop, “The Duty to Bargain Collectively During the Term of an Existing Agreement,” 63 Harv. L. Rev. 1097, 1116-17 (1950).

<sup>14</sup> Labor and Employment Arbitration, *Ibid.* p. 252.

of what the parties intended.<sup>15</sup> Some arbitrators when presented with this scenario, will conclude that the language applies but find that there has been a waiver on the part of the party relying upon the language and apply notice requirements to return to reliance upon the language. Others will simply refuse to admit evidence of the past practice where the language is clear and unambiguous. Yet others will be very reluctant to rule that parties amended their clear contractual language by their behavior subsequent to negotiating an agreement.

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<sup>15</sup> Evidence in Arbitration, *ibid.*, at pp. 343-44.