Past Practice at Arbitration

An Arbitrator's Perspective

Arbitrator Kathryn A. VanDagens

I. Past Practice Arises from the Duty to Bargain in Good Faith

One element of the Duty to Bargain in good faith is the condition that the parties may not change the status quo during the life of a collective bargaining agreement until they have met their obligation to confer in good faith about any proposed changes. The common practices in the work place are often referred to as "past practices."

II. Interpretation of a Collective Bargaining Agreement

A. To understand the full scope of the parties' agreement, the arbitrator may consider past practices.

First and foremost, the authority of the arbitrator comes from the language that the parties have negotiated in their collective agreement. The role of the arbitrator is to discern the intent of the parties when they agreed to the language in the document. However, some customs, or past practices, can become an implied term of the contract. In *Esso Standard Oil Co.,* 16 LA 73, 74 (1951), Arbitrator McCoy wrote,

> Custom can, under some unusual circumstances, form an implied term of a contract. Where the Company 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.

Therefore, an established past practice when known to and accepted by both parties, can establish a binding precedent.

B. The USSC recognized that arbitrators use Past Practice.

In *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960), the United States Supreme Court recognized the role of past practices in contract interpretation:

> 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.

C. Past practice gives clues to how the parties intended to interpret the contract.

If the parties have acted in a certain way over a lengthy period of time, then an arbitrator will presume that they intended that meaning to be part of the status quo. However, if a practice is sporadic or unilateral, it will not be binding on the parties.

A condition qualifies as a Past Practice if it is shown to be the understood and accepted way of doing things over an extended period of time. A past practice is a uniform response to a recurring situation over a substantial period of time and that response is known, or should be known, to responsible union and employer representatives.

P. O. Box 27383 Lansing, Michigan 48909 3023 N. Clark St., Ste. 265 Chicago, Illinois 60659
Telephone: (517) 381-1390 Fax: (517) 381-1391 E-mail: kav@vandagensadr.com
Admitted to the National Academy of Arbitrators: www.naarb.org

D. Past practices can help clarify a contract in a variety of ways.

A past practice can clarify that which is ambiguous, give substance to that which is general, and in some cases, modify what is seemingly clear. A past practice that arises where the contract is silent may be used to establish a separate, enforceable condition of employment. R. Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements, Arbitration and Public Policy*, (Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators, 30-68 (S. Pollard, ed. 1961).

III. Defining a Past Practice

A. A Past Practice is the understood and accepted way to do things.

A practice typically arises from the unique setting of the employment situation. When employees and management act in accord with the custom, they create a Past Practice. In the setting in which it is created, the practice is what seems "normal" to those who have embraced it. Both sides must see the practice as the proper response to the underlying circumstances.

At times, parties try to limit the application of a past practice to the circumstances that gave rise to it. Thus, some past practices are referred to as "local working conditions." In the steel industry, the parties agreed that a practice is only binding when "an ordinary employee in the same situation would reasonably regard the practice as a substantial benefit in relation to his job."

B. The Parol Evidence Rule may prevent proof of a past practice.

Be aware that proof of a past practice may run afoul of a rule of contract construction known as the "parol evidence rule" which, in the strictest sense, prohibits a party from offering evidence of a written or oral agreement outside the contract itself to prove the meaning of the contract.

Nonetheless, parol evidence is frequently admitted in labor arbitration. Evidence of past practices, discussions between labor and management during bargaining, and previous grievance settlements are routinely admitted to show what the parties intended by the language they used, although all are technically parol evidence. Arbitrators will consider parol evidence for the purpose of construing contract language to discern the parties' intent, but will typically disregard parol evidence offered to contradict unambiguous contract terms.

C. Proving a Past Practice is dependent on showing four things.

Where one party contends that a course of conduct has become a binding past practice, strong proof that the practice has become an implied term of the contract must be offered. In order to find a binding past practice, most arbitrators require proof of four elements:

1. Clarity and Consistency

When parties respond in the same way to a particular set of circumstances, their conduct may become a past practice. Conversely, where the conduct is vague or contradictory, it is unlikely that a past practice will be found. There may be some instances where the course of conduct is not entirely uniform. If so, the party seeking to prove the past practice must be prepared to explain the seeming contradiction, by showing that the departure was an error or unintended.

In *Monroe County Intermediate School District*, 105 LA 565, 567 (1995), Arbitrator Brodsky observed, "[A] practice can be established if, when one circumstance occurs, it is consistently treated in a certain way. The occurrence need not be daily or weekly, or even yearly. But when it happens, a given response to that occurrence always follows."

2. Longevity and Repetition

It is important that the practice have continued for some time without objection. How often or how long the practice must have occurred is not readily definable. One or two isolated incidents do not generally create a past practice.[1] The longer the time period in which the parties have acted in one way, the stronger the past practice. This is especially true if the period of time overlaps more than one contract negotiation; in that case, an arbitrator will recognize that the parties did not change or end the practice, despite having the opportunity to do so.

3. Acceptability

Both the employees and management must know of the alleged past practice and must agree that this is the correct and customary way to handle the situation. Sometimes, there is a question as to which employees or supervisors must accept the practice; it will be enough if those who negotiated the contract know of and accept the practice. Of course, one side's knowledge may be difficult to prove. In those circumstances, acceptability can be inferred from the practice's uniformity, repetition, and duration. However, where the employees have consistently protested a certain practice, common acceptability cannot be shown.

Dick Mittenthal wrote, "A practice is no broader than the circumstances out of which it has arisen… For instance, a work assignment practice which develops on the afternoon and midnight shifts and which is responsive to the peculiar needs of night work cannot be automatically extended to the day shift." In the same way, a practice at one coal mine may not be extended to other coal mines, despite the history of national bargaining.

4. Mutuality

While some practices are the result of a mutual understanding, some develop from the exercise of managerial discretion. Only the former become binding past practices. Some practices arise from the way in which the employer does business, such as changing the pay period from weekly to bimonthly.[2] In *Ford Motor Co.*, 19 LA 237, 241-42 (1952), Umpire Harry Shulman wrote,

> A practice, whether or not fully stated in writing, may be the result of an agreement or mutual understanding.…A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based.

But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future.

Dick Mittenthal wrote, "Some practices are the product, either in their inception or in their application, of a joint understanding; others develop from choices made by the employer in the exercise of its managerial discretion without any intention of a future commitment." Recognizing that it may be difficult to discern whether a practice is the result of a mutual understanding, Mittenthal wrote, "I suspect that we would be far more likely to infer 'mutuality' in a practice concerning 'employee benefits' than in one concerning 'basic management functions.'"

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[1] *Famous Supply Co.*, 132 LA 147, 150 (Cohen, 2013)("[O]ne settlement does not make for a past practice.")
[2] *Weavexx Corp.*, 133 LA 1198 (Nichols, 2014).

IV. The Subject Matter of Past Practices

While past practices can concern any subject matter, they typically relate in some way to the contractual relationship. For instance, a past practice may affect scheduling, overtime,[3] or seniority. However, they can concern things not covered in the collective bargaining agreement, such as providing free parking[4] or a take-home vehicle.[5]

A. Past Practice can clarify ambiguous contract language.

The most common use of an established past practice is to interpret ambiguous and unclear contract language. Contract language is ambiguous if it reasonably susceptible to more than one meaning.[6] If the parties' intent is not apparent in the written language, then their actions after agreeing to it may help shed light on what was meant.

A mutually accepted past practice serves to demonstrate that the parties' intentions are being realized. However, even a unilateral interpretation that is known but not objected to, can bind both parties for the future. It may be difficult for an arbitrator to believe that one party was unaware of the other's interpretation if the practice was consistent and long-standing. In those cases, arbitrators have found that the party "knew or should have reasonably known" of the practice.[7]

B. Past Practice can be used to implement general contract language.

This use of Past Practice has also been referred to as "gap-filling." Oftentimes, the parties will negotiate broad doctrines into their Agreement, and then develop the precise meaning of the terms on a case-by-case basis over the term of the contract. "One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages."[8]

The most prominent example of this principle is a provision in which the employer agrees to discipline only for "just cause." There is no way for the parties to list every example of when an employer would have cause to discipline an employee. Yet over time, they may agree on certain principles. For instance, where management has regularly tolerated tardiness of less than five minutes, it is likely that this practice has been incorporated into the parties' understanding of just cause for discipline.

On the other hand, an employer need not always act in conformity with its past practice, so long as the reason for the deviation can be adequately explained. Mittenthal quoted Arbitrator Aaron, "Hence, what seems on the surface to be capricious administration of a disciplinary rule 'may prove on inspection to be a flexible and humane application of a sound principle to essentially different situations.'"[9]

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[3] *Kemps*, 135 LA 1 (Daly, 2015).
[4] *Hilton Hawaiian Village*, 122 LA 1415 (Bogue, 2006).
[5] *City of Auburn Hills*, 122 LA 1761 (Sugerman, 2006).
[6] Arbitrators disagree as to whether extrinsic evidence may be considered in order to determine whether a disputed clause is "ambiguous."
[7] *See, e.g., Owens-Corning Fiberglas Corp.*, 19 LA 57, 63 (Justin, 1952)(" In the absence of a contrary intent, clearly expressed or evident, it seems reasonable to assume that the Parties intended to embody and to continue in these Sections the long established practice.")
[8] Archibald Cox, "Reflections Upon Labor Arbitration," 72 *Harv. L. Rev.* 1482, 1499 (1959).
[9] Benjamin Aaron, "The Uses of the Past in Arbitration." *Arbitration Today* (Washington: BNA Inc.1955), p. 11.

C. A Past Practice can create a separate, enforceable condition of employment.

Even where a collective bargaining agreement is silent as to a term, many arbitrators will find a binding past practice if it involves a matter of wages, hours, or working conditions. In such cases, the practice becomes a benefit of employment that cannot be unilaterally altered without negotiation, so long as it does not contradict another term of the agreement. For instance, if the employer has regularly allowed employees a paid lunch period, most arbitrators would infer that the benefit had become part of the contract and could not be unilaterally discontinued.

On the other hand, if the alleged practice, even a long-standing one, involves operating methods or direction of the work force, it is more likely to be considered an exercise of management rights that can be changed when circumstances demand.

D. Some, but not all, arbitrators will permit a Past Practice to amend or modify clear contract language.

This is by far the most controversial use of Past Practice. Those arbitrators who consider the best evidence of the parties' intent to be the language they drafted refuse to use a past practice to modify the negotiated agreement. In most cases, these arbitrators will refuse to consider the evidence of a past practice, believing that interpretative aids are unnecessary when the language is clear and unambiguous and that the issue must be resolved within the four corners of the contract. Arbitrator Justin summed up this viewpoint in *Phelps Dodge Copper Products Corp.*, 16 LA 229, 233 (1951):

> Plain and unambiguous words are undisputed facts. The conduct of Parties may be used to fix a meaning to words and phrases of uncertain meaning. Prior acts cannot be used to change the explicit terms of a contract. An arbitrator's function is not to rewrite the Parties' contract. His function is limited to finding out what the Parties intended under a particular clause. The intent of the Parties is to be found in the words which they, themselves, employed to express their intent. When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used.

Other arbitrators disagree, finding that the parties' conduct during the life of the agreement to be the "best evidence" of their mutual intent. In those cases, the parties are seen as having altered their agreement by acting in conformity with what they meant, rather than what they wrote.

The Michigan Supreme Court found that a practice that directly contradicted the City Charter, incorporated into the parties' collective bargaining agreement, prevailed over the express and unambiguous language of the City Charter and contract. "[T]he parties' actions in conformity with the past practice indicates that there was an agreement to modify the contract language to the contrary." *Detroit Police Officers Ass'n v. City of Detroit*, 551 NW 2d 349, 353 (Mich., 1996).

V. Addressing Past Practices in the Contract

A. A "maintenance of standards" clause may support a claim that the parties intended to be bound by a past practice.

In certain contracts, the parties negotiate a "maintenance of standards" clause, under which the employer must maintain certain benefits for the life of the collective bargaining agreement. For instance, they may agree, that the employer must maintain "all conditions of employment related to wages, hours of work .... and general working conditions to highest standards in effect at time of signing of agreement." Such a clause recognizes past practices that have arisen with the parties' approval. The explicit inclusion of such a clause will trump more general provisions, such as the Management Rights provision.[10]

The absence of a maintenance of standards clause will not defeat a claim of past practice, where it can otherwise be proven. On the other hand, the inclusion of a clause will not foreclose all action by the employer related to any arguable "condition of employment." The wording of the clause will preclude only that action expressly referenced.

B. Arbitrators will narrowly interpret a "zipper clause" that arguably eliminates a past practice.

Conversely, the parties may include a "zipper clause" such as "this contract expresses the entire agreement between the parties." The purpose of including such as clause is typically to foreclose either party from insisting on bargaining over new proposals during the life of the contract or to confine the extent of the parties' bargain to those items expressed in the collective bargaining agreement. Since a zipper clause acts as a waiver of bargaining rights, the parties' intention must be clear and unmistakable.

A more broadly worded zipper clause, such as "any matters or subjects not herein covered have been satisfactorily adjusted, compromised, or waived by the parties for the life of this agreement," may be more successful at eliminating past practices.[11] The effect of a zipper clause on a past practice may depend on whether the specific past practice is overridden, or whether the past practice can be inferred from the express terms of the collective bargaining agreement.

Finally, a past practice which serves to clarify ambiguous contract language may not be eliminated by the inclusion of a zipper clause. "It is well established that a zipper clause… does not prevent the use of a practice in the interpretation of contract language and establishing the meaning of such language."[12]

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[10] *See, Sara Lee Corp.*, 129 LA 1 (Holley, 2011).
[11] *Bassick Co.*, 26 LA 627 (Kheel, 1956).
[12] *American Red Cross*, 127 LA 12, 20 (Cohen, 2009).

VI. Altering a Past Practice

Once the parties become bound by a past practice, the type of practice will determine how they can repudiate it.

A. An established past practice which exists separately from the collective bargaining agreement cannot be unilaterally altered or terminated during the term of the contract.

Arbitrators assume that parties are aware of their existing past practices and if they negotiate an agreement that does not address them, will conclude that the parties intended those practices to continue unabated for another contract term.

Such a practice may be repudiated by either party when they negotiate their next collective agreement. If so, the inference that the parties intended to continue existing conditions in place would no longer be valid. Without a party's acquiescence, the practice is no longer a binding condition of employment. If one party objects, the other must have the practice incorporated into the agreement in order to have it continue.

B. A practice that clarifies an ambiguity in the contract is binding for the life of the agreement and may be altered only by mutual agreement.

On the other hand, a past practice that serves to clarify existing language in the parties' agreement remains the definitive interpretation of that language, until there is a mutual agreement rewriting the contract. This practice cannot be unilaterally repudiated at the time of negotiation, but any change must be accompanied by a rewriting of the language that the practice serves to clarify. When the practice establishes a meaning for language in the collective bargaining agreement, the language will be presumed to retain that meaning, so the practice can only be terminated by mutual agreement.

C. A change in circumstances that gave rise to the practice may excuse a party from conforming to the practice.

When the conditions that gave rise to the practice no longer exist, a party is not obligated to continue to apply the practice. Dick Mittenthal explained that a practice relates to the conditions under which it arose, and if those conditions substantially change, the practice may be subject to termination.[13] For example, one arbitrator found that an employer could implement a no-smoking policy, because "the conditions giving rise to the past practice have changed (i.e., health information, attitudes, liability of the Company, laws, etc.); thus, the working condition is no longer protected." *Lockheed Aeronautical Systems Co.*, 104 LA 840, 844 (Hewitt, 1995).

[13] *See, e.g., Saginaw Mining Co.*, 76 LA 911 (Ruben, 1981).