PAST PRACTICE

A clear definition of past practice as stated by Arbitrator Clair Duff (American St. Gobain Corp., 46 LA 920, 921) is as follows:

> **"Past practice may be described as a pattern of conduct which has existed over an extended period of time and which has been known to the parties and has not been objected to."**

Q. When does a past practice become binding on the parties?

A. Arbitrator Richard Mittenthal concluded that in order for a post practice to rise to the level of a binding past practice, one ordinarily would expect it to be clear, consistently followed, followed over a long period of time and to have been mutually accepted by the parties.

Q. What do we mean by "clear" past practice?

A. With respect to clarity, arbitrators have found that the party claiming the past practice should show that, given a set of similar circumstances, the past practice was followed in nearly every situation where there were not extenuating circumstances. That is, where the circumstances did not change, the practice was followed on a consistent basis.

Q. What is meant by "consistently followed"?

A. To determine if a past practice has been consistently followed, it is not required that in every case the results be the same. The criteria required, given the same set of circumstances, is that the parties could reasonably expect a similar outcome.

Q. What length constitutes an "extended period of time" in establishing a past practice as a binding past practice?

A. Any place from weeks to years depending on the frequency. If a certain practice occurs every hour for a period of one week, some arbitrators have found that a past practice would be binding, while a practice which occurs once a year would require a period of years to establish a binding past practice.

Q. What determines if a past practice has been "mutually accepted by the parties"?

A. To prove that a practice was mutually accepted a showing must be made that both parties were cognizant of the practice and accepted it. The determination of whether parties had knowledge of the practice lies with the arbitrator. In many cases arbitrators have made that determination based on the action or inaction of either party. That is, where it can be shown that a particular practice was widespread, clearly utilized and done over a reasonable length of time, an arbitrator will hold both parties to such a practice, even if they claim at the arbitration hearing they had no knowledge that such a practice was occurring. In those cases, mutuality is implied by the meeting of the other criteria of past practice.

Q. When can you change past practice?

A. When a past practice exists and has not been used by an arbitrator to define ambiguous language, such a practice may be changed if the nature of the practice and the circumstances under which it arose have been altered. As Arbitrator Richard Mittenthal stated in Houston Electronics Corporation, 70 LA 887:
"One must consider the underlying circumstances that give a practice its true dimensions. A practice is not broader than the circumstances out of which it has arisen."

Q. What are some changes to the "underlying circumstances" that could permit a change in past practice?

A. There are basically four ways that underlying conditions can be changed, thereby causing the past practice to be negated.

First is by showing that the practice has become inefficient or uneconomical. Such a statement must be accompanied by empirical evidence which supports the position of the party indicating that the past practice should be stopped.

Second, past practice may be invalidated when there is an underlying change in the way the company does its business.

Third way to alter past practice is in those situations where the bargaining unit changes. If either the company changes owners or the union that represents the employee changes, then the past practice ends. Arbitrators are divided in these situations and may retain the practice if one of the parties remain. (Change of owners or unions does not mean change of the Postmaster or the branch president.}

The fourth way that a past practice may be changed is if the party that would like to discontinue the practice makes its desire known during the course of negotiating a new contract. If either party fails to do this during negotiations, the practice may not be unilaterally revoked during the life of the contract.

SUMMARY

A past practice, to exist, must be clear, consistently followed, followed over a reasonable length of time and shown by the record to have been accepted by the parties.

Arbitrators consider past practice to clarify ambiguous language and will uphold past practice unless the existing language which contains the ambiguous language is changed during collective bargaining. If the ambiguous language is not changed, the past practice will continue to define mutual intent.

It is crucial to note that where a past practice has developed between the parties, and is not used to define ambiguous language, the practice can be changed or nullified in circumstances where: (1) the practice is no longer economical or efficient; (2) the company changes owners or the bargaining unit changes; (3) the company changes operations or the nature of the business changes; or (4) one party informs the other during the negotiation of a new contract that it is not bringing forth into the new contract the specific past practice that had developed.

Absent these factors, established past practice is given great weight in grievance arbitration and should be duly noted by the parties.
