Interpreting Collective Bargaining Agreements

• “To interpret [a collective bargaining agreement] … the governing criteria are … the practices, assumptions, understandings, and aspirations of the going industrial concern. 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.”
  • McKinney v. Emery Air Freight Corp., 954 F.2d 590 (9th Cir. 1992)

• “A collective bargaining agreement is not governed by the same principles of interpretation applicable to private contracts. Interpreting such agreements requires us to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements.”
  • Kemmis v. McGoldrick, 706 F.2d 993 (9th Cir. 1983)
The Arbitrator Is the Designated “Reader” of the Collective Bargaining Agreement

• As long as the arbitrator’s award “draws its essence from the collective bargaining agreement” and is not merely his own brand of industrial justice,” the arbitrator’s award is legitimate.

• The “draws its essence” standard means only that the arbitrator’s determination must be a “plausible interpretation of the CBA.”
Your Survival Guide

• Rules of Interpretation
• Important Language
  • Seniority Rights
  • Management Rights
  • Discipline/ Discharge
  • Grievance/Arbitration
  • Zipper Clause
• Past Practice
  • Scope
  • Elements
  • Ending A Past Practice

• Skimming/Subcontracting
• Investigating And Evaluating A Potential Violation
  • Discipline
  • Contract
  • Burdens
  • Arbitrability
  • Remedies
• Surviving the Wild: Donner Party
Interpreting A Collective Bargaining Agreement

Rules of Interpretation
Rules of Interpretation

• The intent of the parties
  • Purpose of contract interpretation is to determine the intent of the parties

• Clear and Unambiguous Language
  • What is ‘fair’ is what is written in the CBA
  • Parole evidence: a written instrument that is intended to be complete agreement cannot be varied by any prior statement or agreements
Rules of Contract Interpretation

• **Before 2013**: Article 2: The term “Employee” as used herein shall mean and include all Truck Drivers, Warehousemen, and Forklift Operators of the Company, but shall exclude . . . Part-time Students employed during the school vacation period, Temporary Employees. . .

• **After 2013**: Article 2: The term “Employee” as used herein shall mean and include all Truck Drivers, Warehousemen, and Forklift Operators of the Company, but shall exclude . . . Part-time Students, Temporary Employees…

• **Scenario**: Union grieves use of part-time students during the school year as the taking of bargaining unit work. **Result?**
Rules of Contract Interpretation

Rule:
Changes in contract language reflect change in meaning of the contract.
Rules of Contract Interpretation

International Association of Archivists has a contract with ACME Museum.
• Included in bargaining unit work is “accession” of artifacts for the collection.
• Museum hires outside staff to draft descriptions of artifacts for upcoming catalog.
• Union files grievance.
  • Employer argues that “accession” is defined as acquisition of artifacts.
  • Union puts on evidence that the technical definition of accession is “the combination of processing and cataloging an object into a museum’s collection.”
• Result?
Rules of Contract Interpretation

Rule:
Terms are given industry specific meanings, if both parties understand that meaning.
Rules of Contract Interpretation

- **Art. 4 Management Rights**: By way of example but not limitation, management retains the following rights:
  - To manage, direct and assign duties of employees
  - To establish or modify work schedules and shift schedules and the number and selection of employees to be assigned not inconsistent with the provisions of this agreement…

- **During bargaining**: Employer proposes provision that “Employer shall have the right to modify employee schedules.”

- Union balks and employer withdraws proposal.

- Employer changes from 5- 8hr shifts to 4- 10hr shifts per week.
Rules of Contract Interpretation

Rule:
Unsuccessful attempt to enlarge rights during bargaining is indication that the right did not exist under prior contract.
Rules of Contract Interpretation

• Scenario: Contract is terminated and employees go out on strike, October 1, 2014. Many employees end up crossing the picket line; employer hires permanent replacements. Bargaining continues. To break the log jam, employer proposes:
  • Article I Definitions
    • “Actively Employed” means
      • actively at work; on vacation; or on FMLA or Military leave of absence.
      “Actively Employed” does not include leaves of absence, or other than FMLA and/or Military, or layoffs.
  • Article 23 Ratification bonus
    • As a one-time payment an Award of $1,500 employees Actively Employed at the time of ratification.”

• Union accepts employer proposal. Employees return to work. Employer states that it intended to deny bonus for employees who were on strike as not “actively employed.”
Rules of Contract Interpretation

Rule:
Ambiguous provisions are construed against the proposer.
Rules of Contract Interpretation

- 2016 Agreement calls for drug and alcohol testing in accordance with procedures described in Department of Transportation Regulations, 49 CFR Part 40 (2016).

- 2018 DOT Regulations change to allow for hair follicle testing in addition to urinalysis.

- In July, 2018, Employer begins administering hair follicle testing. Union grieves. Result?
Rules of Contract Interpretation

Rule:
Arbitrator looks to the law as it was at the time of the agreement.
Rules of Contract Interpretation

CBA of Springfield Zoo and the International Brotherhood of Zoo Workers (IBZW)

- Recognition clause: Zoo recognizes IBZW as the exclusive representative of … Animal Husbands…

- Provision: “Animal Husbands are responsible for feeding Lions, Tigers, Monkeys and Rhinos.”

- Zoo decides to contract out feeding of Snakes to a third party.

- Union files grievance. Result?
Rules of Interpretation

Rule:

*Expresio unius est exclusio alterus* (to express or include one thing implies the exclusion of another)
Rules of Contract Interpretation

CBA of the County of Ames and the International Union of Machine Operating Engineers

• Recognition clause: County recognizes Union as exclusive bargaining agent for all mechanical work performed on behalf of the County

• Mechanical work defines as “use of machines including, but not limited to, “Wrecking, digging or boring type machines, street sweeping, debris and snow removal machines; mine hoists, telpher and grab bucket machines, pumps, siphons, pulsometers, generators, concrete mixers and pumps; stone crushers, air compressors, drilling machines, sand blasting machines, high or low pressure boilers.”

• County hires non-union tugboat operators.

• Union files grievance. Result?
Rules of Contract Interpretation

Rule:

Ejusdem Generis (when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed.)
Rules of Contract Interpretation

• **ARTICLE 10 WAGES**
  The hourly rates of pay shall be as follows: (Wage Schedules are attached at end of this Agreement).
  - Journeymen $40.00
  - Apprentice $20.00

• **ARTICLE 17 NEW MACHINES AND PROCESSES**
  In the event new technology makes existing machines or processes obsolete and causes a reduction in the work force in any area or department within the jurisdiction of the Union, the employees in that area or department, by seniority, may transfer to other areas or departments. If the employee qualifies for the new position, he/she will displace less senior personnel at 80% of the journeyman rate.

**Scenario:** Through technological advances, department becomes obsolete and closes. Journeymen from that department bump certain apprentices in another department. Employer pays these employees $20.00 per hour. Union grieves.
Rules of Contract Interpretation

**Rule:**
Specific trumps the general.
Rules of Contract Interpretation

Collective bargaining agreement State Department of Human Services and Home Healthcare Workers

**Article 14: Wages**

- Employees shall receive the following base hourly wages:

<table>
<thead>
<tr>
<th></th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Home Healthcare Worker 1:</td>
<td>$9.25</td>
<td>$9.75</td>
<td>$100</td>
</tr>
<tr>
<td>Home Healthcare Worker 2:</td>
<td>$9.75</td>
<td>$10.25</td>
<td>$10.50</td>
</tr>
</tbody>
</table>
Rules of Contract Interpretation

Rule:
When there is an obvious mutual mistake arbitrators will allow reformation of the contract to reflect parties’ true agreement.
Rules of Interpretation: Summary

• Intent of the Parties
  • Dictionary Definitions
  • Changes in contract indicate changes in meaning
  • Industry specific meanings apply (when both parties so understand)
  • Unsuccessful attempts to enlarge rights through bargaining implies right did not exist under earlier language
• Ambiguous provisions construed against proposer
• Look to the law at the time of the agreement
• Expression of one implies exclusion of other
• *Ejusdem generis*
• Specific trumps the general
• Obvious mistakes
Interpreting A Collective Bargaining Agreement

Evaluating Important Language
Evaluating Important Language
Evaluating Important Language: Seniority

- Types
  - Bargaining unit
  - Employer date of hire
  - Classification
  - Building/facility
- Interruptions
  - Supervision
  - Extended leaves
- Competitive
  - Layoff
    - Bumping
  - Job transfer
  - Promotion
    - Training and trial period

- Management Discretion
- Contractual Silence
- Strict Seniority
  - Requires preference to the employee with the longest continuous service without regard to other considerations
    - “Employees shall be laid off in a department in the inverse order of their bargaining unit seniority within the job description affected by the layoff.”
Evaluating Important Language: Seniority

• Modified Seniority
  • Sufficient Ability
    • Senior employee will be given preference if he or she possesses sufficient ability to perform the job
    • “Senior employee will be retained so long as he or she possesses sufficient ability for the job.”
      • Burden on management
  • Relative Ability
    • Seniority is the determining factor only if the qualifications of competing employees are relatively equal
    • “Seniority shall govern if ability is relatively equal.”
      • Burden on Union

• Hybrid
  • Must compare and weigh seniority and ability so that if seniority is significantly different and the skills are relatively insignificant, the senior employee must be retained
  • “Seniority and qualifications shall govern.”
Evaluating Important Language: Seniority

• Qualifications: An employee shall be deemed not qualified if he has been issued a non-attendance related final warning/and or suspension within the last 12 months or has six (6) or more active attendance occurrences in his file.

• Qualifications: Presently held certifications, diplomas, or licenses necessary to perform the required work.
Seniority: Definition of Skills & Abilities

- In the event of a layoff, the Employer will consider presently held qualifications of the employees subject to layoff. Next, the Employer will consider the presently held skills and abilities (including but not limited to performance evaluations, attendance, and discipline) of the subject employees. If the qualifications and skills and abilities, as determined by the Employer are relatively equal among employees subject to the layoff then the length of service may be considered by the Employer.
Evaluating Important Language

Management Rights
Evaluating Important Language: Management Rights

• Reserved rights theory: Reserves for the Employer the affirmative right to act unilaterally and in accordance with its discretion

• Implied obligation theory: Many rights and obligations are implicit in the contract rather than explicit.
Typical Management Rights Article

• Except as specifically restricted by an express provision of this Agreement, the Employer retains and may exercise all management rights and prerogatives in its discretion.
Alternative Management Rights Article

• See program materials
Evaluating Important Language

Discipline & Discharge
Evaluating Just Cause

• Seven Tests
  • 1. Reasonable rule
  • 2. Notice
  • 3. Investigation
  • 4. Fair investigation
  • 5. Proof: substantial evidence of guilt
  • 6. Equal treatment
  • 7. Penalty

• Contemporary Analysis
  • 1. Was the employee afforded fundamental due process rights (forewarning that conduct leads to discipline and a fair investigation)?
  • 2. Was the charged offenses proved?
  • 3. Was the penalty imposed reasonably related to the seriousness of the offense, the employee’s disciplinary record, and any mitigating circumstances?
Evaluating Important Language: Discipline & Discharge

- The Employer may discipline, suspend, demote, or discharge an employee so long as such action is not arbitrary, in bad faith, or without just cause.

- The Employer shall neither discipline nor discharge any post-probationary employee without just cause. Just cause means a cause reasonably related to the employee’s ability to perform work. The term includes any willful violation of reasonable work rules, regulations or written policies.
Evaluating Important Language: Alternative Discipline & Discharge

• See program materials
Evaluating Important Language: Grievance/Arbitration

• See program materials
Evaluating Important Language

• Zipper Clause
Interpreting a Collective Bargaining Agreement

Past Practice
Past Practice

• What is a past practice?
• What is the scope of a past practice?
• What are the elements of a past practice
• Gratuity vs. Past Practice
• Changing or ending a past practice
Past Practice

• What is a past practice?
  • A course of conduct that is the understood and accepted way of doing things over an extended period of time, and thus, mutually binding and enforceable.
    • Arbitrator Richard Mittenthal

• A past practice is “ordinarily the unique product of a particular plant’s history and tradition, of a particular group of employees and supervisors, and of a particular set of circumstances which made it viable in the first place.”
  • Mittenthal

• Illustrates the clash between reserved rights management rights theory and implied obligations
Past Practice

Scope
Past Practice: Scope

• What does past practice do?
  • Clarifies ambiguous language (e.g., designating a holiday a certain shift despite the employee working a portion of the 24-hour holiday while on another shift)
  • Establishes detail to general terms (e.g., just cause for discipline over 5 minutes tardy)

• What does past practice do?
  • Gap fills (e.g., contract specifically addresses one work group, but leaves a gap for the other group)
  • Adds/amends separate condition of employment when CBA is silent (e.g., Christmas half-day paid)
Past Practice: Scope

- What past practice does NOT do
  - Modify, amend, or contradict clear and unambiguous provisions of CBA

- Contract provides that Operating Engineers represents all employees who operate all equipment used by the Employer
  - Equipment: loaders, stackers, cranes, mobile shears, backhoes, and forklifts

- 25 year practice Teamsters drove bobcats to sweep and load containers

- Employer introduced a CAT IT38F loader with a sweeper attachment. The IT38 has an articulated middle
Past Practice

Elements
Past Practice: Elements

- Elements (with varying degrees of importance):
  - **Clarity.** What is the practice (goes to burden of proof: “full, complete and clear proof” – *Sioux City Battery Co.*, 20 LA 243 (Updegraff, 1953))
  - **Consistency.** Total compliance or predominant pattern

- Elements (with varying degrees of importance):
  - **Longevity and Repetition.** A sufficient period of time has to elapse during which a consistent pattern of behavior emerges
    - 1 x per year (Funeral leave)
    - Everyday wash up pay as hours worked
  - **Mutually accepted.** Awareness of the practice and agreement to continue without objection
Past Practice: Mutuality

• Need awareness and agreement
  • Awareness
    • Can’t plead ignorance when “should’ve known” or to shut his eyes to the suspected conduct
  • Agreement
    • Oral/Written agreement
      • M.O.B. language:
        • “All existing practices and benefits provided by the Employer will continue for the life of this agreement.”
        • “Bidding on job vacancies shall be in accordance with past practices.”

• Need awareness and agreement
  • Agreement
    • Conduct
      • Acquiescence on the part of the Employer
        • Use of Employer vehicle for personal errands
        • Allowed employee to take off early on Fridays
      • Concession on the part of the Union
        • No grievance/no proposals in bargaining
Gratuity vs. Past Practice

• Mere gratuity rather than working condition
  • Christmas bonus which was used to determine vacation pay
  • Christmas bonus which depended upon sufficient profits or approval of Board of Directors

• Factors include:
  • Product of unilateral action by Employer or through bargaining
  • Subsequently subject of bargaining
  • Prior provision was conditional
  • Amount remained constant
  • Treated as income/wages
  • Subject to SPD
  • Consistently provided
  • Dollar value
Past Practice: Change/Terminate

- How to terminate a past practice?
  - Negotiate new language specific to the practice during contract negotiations
    - Must give specific notice of the change
  - Negotiate a strong zipper clause
  - Clean slate memo with notice to Union (watch out for a likely demand to bargain)
    - Notice to supervisors insufficient
Past Practice: Change/Terminate

• Underlying conditions of practice have changed
  • “Absent language in a collective bargaining agreement expressly or impliedly to the contrary, once the conditions upon which a past practice has been based are changed or eliminated, the practice may no longer be given effect.”
    • *Gulf Oil Co.*, 34 LA 99 (Cahn, 1959)
  • Practice of giving crane operators additional breaks because of heat in cab changed due to Employer’s purchase/installation of air conditioners in cabs
  • Free parking, move operations downtown
    • *NBC*, 67 LA 989 (Bloch, 1976)
Past Practice: Arbitrability

• “There are too many people, too many problems, too many unforeseen contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all rules governing a community like an industrial plant to fifteen or even fifty pages….

• Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. 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 part of the collective bargaining agreement although not expressed in it….”

Past Practice: Arbitrability

• Potential Attack?
  • If the benefit is not provided for in the CBA, how is the matter arbitrable?

• The test is whether “it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute with doubts resolved in favor of coverage.”
Interpreting a Collective Bargaining Agreement
Skimming and subcontracting
Skimming/Subcontracting

- **SERVE, Local 23 and the City of Tenderloin**
Skimming/Subcontracting

• What is Skimming or transfers of bargaining unit work out of the unit?
  • Work formerly done by bargaining unit employees now performed by employees who are not members of the bargaining unit

• What is subcontracting?
  • Work formerly done by bargaining unit employees now performed by a 3rd party’s employees
Skimming/Subcontracting: Implied Limitation

• Contract “as a whole” protects bargaining unit work
  • Recognition clause
  • Seniority
  • Wage Appendix

• “Job security is an inherent element of the labor contract, a part of its very being. If wages is at the heart of the labor agreement, job security may be considered its soul.”
  • New Britain, 8 LA 720 (Wallen, 1947)
Skimming/Subcontracting: Reasonableness

- Balancing test
  - Employer’s legitimate interest in efficient operations vs. Union’s interest in protecting the job security of its members and the stability of the bargaining unit
    - Economic downturn
    - Upturn in the economy for temporary surges in work
Skimming/Subcontracting: Considerations

- Exclusively performed by bargaining unit employees
- Work has historically been done by bargaining unit employees
- Availability of bargaining unit employees to perform the work
- Work is supervisory or confidential
- Quantity of work or *de minimis*
  - 55 minutes per week of the banana room lead to a supervisor did not meet de minimis
  - Layoffs or loss of pay
Skimming/Subcontracting: Considerations

• Temporary assignment for a special purpose
• Change in the work methodology or processes
  • Due to economic conditions
• Technology changing the nature of the work
  • Must cause changes in the nature of the work
• Emergency
Interpreting a Collective Bargaining Agreement

Investigating and evaluating evidence of a violation
Investigating & Evaluating
Investigating a Violation: Discipline/Just Cause

• Interview notes
  • Especially must interview bad actor prior to discipline

• Personnel file
  • Prior discipline
  • Seniority
  • Knowledge of rule

• Other discipline (or lack of it) in this work unit and/or facility
Evaluating a Violation: Discipline Just Cause

- Consider Mitigating Circumstances:
  - Corrective Discipline vs. Summary Discharge
  - *Weingarten* violations
  - Double jeopardy
  - Employee’s past record
  - Length of service with company
  - Knowledge of rules
  - Lax enforcement of rules
  - Unequal or discriminatory treatment
  - Charges of anti-Union discrimination
Investigating & Evaluating

Contract Violation
Investigating and Evaluating a Violation: Contract Violation

• “Prior negotiations, discussions, meetings, complaints, grievances, unfair labor practices charges, disputes in arbitration or in court, leave footprints on what is troubling the parties in a collective bargaining relations.”
  • *Kennedy Center*, 101 LA 174 (Ables, 1993)
Investigating and Evaluating a Violation: Contract Violation

• Bargaining History
  • Prior CBAs
  • Proposals
    • If made a proposal and did not get it
      • Clarification?
  • Negotiation Notes
    • Must be communicated to the other side
  • Witness testimony

• Settlements and Understandings
  • Stewards – binding?
  • Grievances
    • Same parties
    • Failure to appeal grievance denial

• Unfair Labor Practices
  • Withdrawn
  • Settlement
  • Decision
    • Same parties
Investigating and Evaluating a Violation: Contract Violation

- **Unemployment Awards**
  - Are not admissible as evidence in any other civil action or proceeding
    - Testimony is still under oath - impeach

- **Arbitration Awards**
  - Same language at issue?
  - Other facilities
  - Same parties?
Investigating & Evaluating
Arbitration: Burdens of Proof in Discipline

• How much evidence is required?
  • Generally, preponderance of the evidence
    • But, more serious offenses resembling crimes require a greater degree of proof:
    • Clear and convincing

• Burden of Proof: Who must prove what?
  • Under just cause, an employer must prove guilt of wrongdoing and that the penalty imposed fits the offense.
  • In court/agency litigation, the employee bears the burden of proof on the prima facie case and the Employer bears the burden to prove a legitimate non-discriminatory reason.
Arbitration: Burden of Proof in Contract

• Burden is on the party asserting a violation
  • Union
    • Except in sufficient ability seniority clauses (‘job given to the senior bidder provided he is qualified’)
  • Preponderance
Arbitrability

Substantive and Procedural Arbitrability
Substantive Arbitrability

“Unless otherwise expressly limited by the terms of this Agreement, the exercise of any management prerogative, function, or right is not subject to the Grievance Procedure and Arbitration, and is not within the jurisdiction of any arbitrator.”
Substantive Arbitrability

“The merits of a grievance and the substantive and procedural arbitrability issues arising in connection with that grievance may be consolidated for hearing.”
Procedural Arbitrability

“Grievances must be processed within ten (10) workdays from the occurrence, or the employee’s reasonable first knowledge thereof. The grievance shall be reduced to writing and signed by the aggrieved employee and include the following information:

1. A statement of the grievance and the facts upon which it is based;
2. The remedial action requested;
3. The section of this Agreement to which the grievance relates.”
Arbitration Remedies

Discipline and Contract Violations
Arbitration: Remedies

• Make-Whole Remedies: An award of damages should be limited to the amount necessary to make the injured whole
  • Upon finding a contract violation, arbitrators have inherent power under a contract to award monetary damages to place the parties in the position they would have been in had there been no violation

• “When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need for flexibility in meeting a wide variety of situations.”
Arbitration: Remedies for Improper Discipline

• Discipline Grievance
  • Rescinding of discipline
  • Expunge Record
  • Reinstatement
    • With or without suspension
      • Give Arbitrator reasons to reinstate
      • Anger management training
      • Contrite at hearing

• Back Pay
  • May not get any
  • Duty to mitigate
  • Overtime, bonuses, and lost opportunities

• Benefits
Arbitration: Remedies for Contract Violation

• Contract Violation Grievance
  • Undo subcontracting
  • An award of money to employees affected by the Employer’s improper subcontracting
    • How determine?
      • Give $$ to Union to decide?
      • Review who would have worked and divided based upon typical hours
      • What if employees on layoff?
      • Pro-rata to the bargaining unit as a whole?
  • Direction not to subcontract
  • Remedy to Union?
  • Remedy to Employer for Union breach
    • No strike clause
    • Bulletin boards/Union access
    • Union delay in processing?
Arbitration: Remedies Beyond Make-Whole

• Generally, CBAs provide that arbitrators cannot add to/subtract from the agreement
  • Notice posting?
  • Attorneys fees

• Discipline to Supervisor?

• Pre-Award Interest

• Post-Award Interest

• Front Pay?

• Punitive damages

• Costs
  • Loser pays

➢ Washington state public sector
Donner Party Hypo

Surviving the Wild
Questions?

**These materials are intended to provide general information and are not intended as legal advice applicable to any particular situation.**
Thank You

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