Insights, News & Events

"WHAT'S PAST IS PROLOGUE." BUT IS IT BINDING?

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In our representation of employers with unionized work forces, we have seen a number of issues come up which cause employers needless hardship and expense, and which in our view could have been avoided by some thoughtful advance planning. Of course every work place is different with different personalities on both sides of the table and different relationships, all of which are important and all of which preclude the imposition of very many firm "laws" of labor relations. But there are some themes which arise which we believe can be of use for unionized employers to consider.

It's our goal to discuss some of these areas to bring them to management attention and to suggest ways to avoid future problems. We refer to the long term because in our experience very seldom does anything happen immediately in the labor relations area. We do not say this as a criticism of either management or of unions. When there are ongoing relationships in any area of life, immediate change is seldom possible. Usually change comes over time with advance planning and thoughtful implementation. Sometimes change can come all at once, but this typically only occurs during a time of contract negotiations which is a time when more significant changes can be introduced in a more compressed time frame.

The first area we want to consider is the topic of past practice.

WHY IS THERE EVEN SUCH A CONCEPT?

No labor agreement ever written spells out *every* right that either party has or doesn't have. And sometimes when all else fails (that is, there is nothing in the contract to support their argument), union reps have been known to rely on the

existence of a “past practice” to support an argument that the company should or should not have taken some particular action. “We’ve always done it this way.” Or, “We can show you three instances where people performing this work have been paid at the higher rate” etc.

While the term “past practice” gets thrown around a lot, it’s important to understand what it is and how far it goes. We want to provide you with tools so that you can evaluate claims of past practice with a fair degree of certainty that you are right. (Of course, no definition yet written will result in absolute certainty in this or almost any other area of life.)

The term “past practice” generally refers to a way of doing things over time. A more precise definition was offered by Arbitrator Nathan in 1995: “Practice is a pattern of conduct which appears with such frequency that the parties understand that it is the accepted way of doing something.” *Weyerhaeuser Co.*

No matter how much union stewards may claim past practice establishes that they are right, there are generally accepted limitations of past practice in labor relations. As an initial matter, past practice will not change or negate clear contract language. If the language in the parties’ agreement is clear and unambiguous on a particular point, no amount of past practice is likely to change that language.

Of course, as noted above, you can’t write everything down in a collective bargaining agreement. Labor relations, like the law, is never a static subject, and situations always come up which were not covered in the parties’ written agreements and likely which were not even thought of by those who negotiated the agreement.

Past practice is one of the ways of filling in the blanks. But in our experience, past practice is frequently used as a last fall back position when the union can’t think of anything else to justify a course of action it wishes to advocate or oppose. It is also usually the case that the union representatives have been at the company much longer than has the company labor relations representative and unions find this to be a strong advantage in wielding the past practice hammer.

HOW TO SHOW THAT IT REALLY EXISTS

If past practice is a way of doing things over time, how many times does it have to happen and over how long a period does it have to be done that way to become a past practice? You’ll not be particularly comforted to know that *it varies*. There are no cut-and-dried guidelines or interpretations, nor are we familiar with any universally accepted formula to tell you precisely when you have a real binding past practice as opposed to a weak argument dressed up in past practice clothes.

Although the authorities are not exact, they do provide some guidance to the labor relations professional. As an initial matter it will be important to consult with historical sources to the extent you can do that to determine how a specific situation has been handled in the past. This may require checking with payroll to see whether this situation has occurred in the past; and, if it did, how it was handled. It may require a review of past grievance settlements or discussions with supervisors. Frequently this historical sleuthing will show that the company has handled the same situation in a number of different ways. How does that impact on the question of past practice?

There are some principles applied by respected arbitrators which can be helpful here. Arbitrators are often required to decide disputes between management and labor which turn on the applicability and interpretation of contract language in light of claims of "past practice." Some arbitrators have applied standards which can be used to help in distinguishing a real past practice from a fervently-wished-for past practice. In arbitration there is no requirement that one arbitrator must follow another arbitrator's reasoning, the way lower courts are required to apply the legal principles upheld in their circuit or the way all courts are required to follow United States Supreme Court holdings. However, well-reasoned arbitrator opinions are frequently followed or found persuasive by arbitrators dealing with similar situations.

One widely-applied articulation of the test for determining whether there is a binding past practice includes the following: 1) the practice is unequivocal (this is the way this particular situation is always or usually handled); 2) the practice is clearly enunciated and acted upon; 3) the practice is readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

This test suggests that just because one foreman has done something a certain way, that does not necessarily constitute a binding past practice for the entire facility which has many foremen on many different shifts over several operating departments.

That's a quick look at the "what" and "why" of past practices. In our next issue, we'll explore how long they can last, and how to get rid of them.