

THE THING THAT WOULDN'T DIE: DO PAST PRACTICES LAST FOREVER?

Publication
Jul 1, 2010

(Labor Letter, July 2010)

In our last issue we took a look at how past practices get started, and what that can mean to a company in a unionized setting. This time we'll take a look at keeping them from overwhelming you.

Assuming that there is a valid and enforceable past practice which meets the criteria above, such ways of doing things need not last forever. On the other hand, management usually cannot change them just because it has concluded that the practice is no longer useful or has found a better way to perform a task. Both arbitrators and the National Labor Relations Board discourage unilateral action by management. So the change or elimination of genuine past practices needs to be addressed thoughtfully and usually in the context of discussions with the union before taking any action to eliminate or change it/them.

More can be done with respect to the elimination or modification of past practices in the context of contract negotiations. Some employers use what is known as a "zipper clause" which basically says that the written contract contains the parties' entire agreement and that nothing exists outside of the four corners of the document. Other employers include a list of past practices which the parties have agreed exist with the statement that any practice not specifically listed is of no force or effect.

Lest any reader conclude that changing a past practice is easy, remember that any proposals to change a practice can work against management if it raises the subject and proposes a change and does not finally get a union's agreement to that change across the bargaining table. In that situation, the practice can be found to be better entrenched than it was before because of management's failure to obtain union agreement to its negotiations proposal to change or eliminate the practice.

Another way to deal with claims of past practice is take them seriously and research the allegations and challenge them whenever they are made where the facts do not indicate the existence of a true past practice. Just because something has been done a certain way sometimes does not necessarily translate to a binding past practice.

Keep in mind the criteria above necessary to a finding of past practice. If the action *does not* meet those criteria, it is our belief that management is better served by clearly addressing the claim and stating that there is no past practice with regard to that situation and explaining why this is so. Management's opposition to claims of past practice may not eliminate the claims themselves, but careful observation and appropriate challenge to unfounded claims of past practice will keep new past practices from springing up and taking root because of management's failure to address them.

Those are some thoughts about the frequently used but often misunderstood term "past practice." It is not always used correctly and it doesn't mean that management automatically loses. Now you know what it means and how to analyze claims of past practice and you know that saying it doesn't necessarily make it so.