WHAT'S THIS MEAN? USE OF CONTRACT LAW PRINCIPLES TO INTERPRET LABOR AGREEMENTS

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I. INTRODUCTION AND SCOPE OF THE TOPIC

In any contract interpretation case, the issue is usually about what the parties intended. What the language means and what the parties truly intended when they negotiated it is not always easy to determine, especially when the parties are telling you the language means very different things. Labor arbitrations involve a somewhat special set of rules about how to interpret contracts and the language within it but some knowledge of contract interpretation principles can be very helpful. This is by no means going to be an exhaustive study of all of the rules in contractual interpretation one might get in a first-year law school contracts class, but will discuss some of the more prominent and widely used rules to aid in the interpretation of language.

We will also touch on those unique rules that apply to labor contracts. Most arbitral scholars and commentators have recognized that collective bargaining agreements are not ordinary contracts even though certain standards of contract interpretation are borrowed from common law principles going back centuries. There is a unique need for flexibility in labor agreements flowing from the fact that a collective bargaining agreement is not an ordinary commercial bargain but "an effort to erect a system of industrial self-government." *Common Law of the Workplace*, St. Antoine, 2d Edition, 2005 BNA, @ section 2.1, page 69-70. (Citing *Steelworkers v Warrior and Gulf Navigation Co*., 363 U.S. 574, 580, 46 LRRM 2416 (1960).

II. THE PRIME DIRECTIVE – DETERMINING THE INTENT OF THE PARTIES

The main focus of any contract interpretation matter is to determine the intent of the parties when the contract was negotiated – not when the grievance arises or when the case is heard. The starting point is of course the contract language itself. There are some general principles that are generally applied.

RESERVED RIGHTS THEORY- Many, if not most, arbitrators start with the premise that the employer retains all authority to direct the workforce and manage its business or operation as it sees fit except as limited by the terms of the CBA or by law. See *Labor and Employment Relations Arbitration*, Nolan (1998).

Unions will argue that the contract does not specifically allow the employer to do something. That seems to have the argument backwards in many cases. The question is not whether the contract *allows* it but whether the contract *prohibits* it. If it does not the Union will need to find some basis for limiting the employer's action based on contractual language, practice or other evidence to demonstrate intent.

Other arbitrators find that Unions can gain rights by inference from a reading of the CBA as a whole or from different clauses. This will depend on the facts and on the CBA clauses at issue. It still involves an analysis of the parties' intent. The question is always this: did the parties intend the particular limitation being sought? These questions will of course involve the application of the various rules set forth below – i.e., is the language clear? If not, what tools can be used to determine intent based on the language itself and how it is used or from extrinsic evidence that may help to determine what the parties intended.

Work Rules – arbitrators generally uphold management's right to promulgate reasonable work rules as long as they do not conflict with the CBA or law. See *ME International, Inc.* 117 LA 307 (Szuter 2002); *Branch County Michigan Road Comm'n*, 114 LA 1697 (Allen 2000). Note though that the application of those rules is generally subject to the grievance procedure, especially where that involves discipline or other matters that are covered under the CBA.

Note though that work rules that are unilaterally implemented or promulgated are not generally regarded as contractual. They are within management's power to create but may well be subject to the grievance procedure and/or the just cause provisions of the agreement.

IMPLIED OBLIGATIONS THEORY

Unions on the other hand, frequently espouse the implied obligation theory and contend that it is impossible to negotiate a labor agreement that covers every single detail of every practice that may exist out on the shop floor or in the employer's business. They argue that any labor agreement is thus subject to those existing practices to the extent they are not specifically limited or negated by the language of the CBA. Unions also assert that while the employer may have had unfettered discretion to operate the business prior to the CBA being in place, the document changes the underlying relationship and implicitly makes the Union a party to many workplace decisions. See, *Common Law of the Workplace*, St. Antoine, 2d Ed, 2005, Section 3.2 and 3.5 at pages 100 - 104.

Professor St. Antoine notes that "some arbitrators subscribe fully to the theory to implied management obligations, holding that the mere existence of a collective bargaining agreement imposes certain limitations on management decisions that would significantly impair the employee's job security and work opportunities or the integrity of the bargaining unit itself." See, *Common Law of the Workplace*, supra at Section 3.5 page 103.

On the other hand, he also notes in the following section that "some arbitrators agree with management that the growing global market and foreign competition, lack of profit, or the need for a better business environment and lower labor costs requires swift and unilateral decisions even where Union employees may be adversely affected. Although the employer's unilateral decision may not violate the agreement because there is no specific provision prohibiting it, such action may be an unlawful refusal to bargain in violation of state law or section 8(1) (5) of the NLRA." Id at section 3.6 and page 104.

At the end of the day, there is no perfectly clear answer and, as always, the outcome will depend on the language and bargaining history and perhaps even past practice between the parties. Professor St. Antoine notes too that many arbitrators apply a somewhat mixed standard depending on the contract language and that the outcome will depend on what it is that the Union is challenging. Those items that have "traditionally" been regarded as within management's sphere, such as production methods and use of technology, are likely to be left in management's discretion. Other matters that might affect the work environment or the integrity of the bargaining unit might be subject to greater arbitral review under a general Union security clause, a maintenance of benefits clause (discussed more below) or even a seniority clause – depending on the issue.

IS THERE A CONTRACT HERE AT ALL? MUTUAL ASSENT

Before turning to the interpretation of particular language it is sometimes argued that there was no agreement at all and that the contract is invalid because of it. In the common law, unless there is a meeting of the minds, there is no contract and the parties go their separate ways. See, *Simpson on Contracts*, 2nd Edition West Publishing, 1965; See also, *Restatement of Contracts*, Section 22. This is sometimes referred to as mutual assent and requires that parties manifest to each other mutual assent or agreement to the same bargain at the same time. If they do not, then under common law no contract is created. See also, *Restatement of Contracts* (Second) Section 201 (1981).

That is typically not what happens in labor agreements however. The US Supreme Court stated that a collective bargaining agreement is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate … the arbitration of labor disputes … is part and parcel of the collective bargaining process itself." See, *Steelworkers v Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

There are many times when the parties either do not anticipate or even discuss a particular scenario because they never considered it at all or they did consider it but got the contract done and left some ambiguity in it to be determined later. This does not invalidate the contract it merely allows for the dispute to be determined later. Once there has been a determination, the parties retain the ultimate power to "fix' it through negotiations in the next round of bargaining. (Nothing like lifetime employment for labor relations professionals.)

Elkouri has perhaps the best pronouncement on this issue as follows: "when the parties attach conflicting meanings to an essential term of their putative contract, is there then no "meeting of the minds" so that the contract is not enforceable against an objecting party? Hardly. The voidability of a presumed contract arises only in the limited circumstances where neither party knew, or should have known, of the meaning placed on the term by the other party, or where both parties were aware of the divergence of meanings and assumed the risk that the matter would not come to issue." Elkouri and Elkouri, *How Arbitration Works,* 6th Ed. at p. 428.

Elkouri further notes, citing *Colfax Envelope v Graphic Communications Union, Local 458-3M,* 20 F. 3d 750, 145 LRRM 2974 (7th Cir. 1994), that "when parties agree to even patently ambiguous terms, they submit to have any dispute resolved by interpretation. That is what courts and arbitrators are *for* in contract cases – to resolve interpretative questions founded on ambiguity." See, Elkouri at p. 429-30.

Thus, in a case where the Union insisted that causal employees be covered for weekend bonuses and where the parties signed the agreement with the weekend bonus for casual employees in it, that clause was part of the contract and enforceable by arbitration. The employer had argued that it never intended that it be there and that it was absurd to pay casual employees a weekend bonus since by their very nature most of them only worked on weekends anyway. The employer asserted that there was no mutual assent to that result and that there was no contract at all. (It was not clear what the employer intended the arbitrator to do here even if it had prevailed since on the one hand it argued there was no contract yet also had argued that only this provision be excised from it.)

Several things were important. First, the contract was clear and included casual employees in the definition of "employee." Second, all employees were to be paid the bonus – there was no exception in the agreement. Third, and perhaps most importantly, there was a specific discussion about this at the table and the Union insisted that casual employees be covered in the definition of the term "employee" and even threatened to walk out of the negotiations over it. The employer agreed to this and even signed each and every page of the agreement.

The employer argued that due to the failure of a "meeting of the minds," there was no contract at all. On these facts, the arbitrator ruled that there certainly was a "contract" and the grievance procedure was inserted to deal with this type of dispute and to have an arbitrator decide the matter. Further, it was clear that the parties intended to include casuals, as curious as that was. See, *SEIU Local #113 and St. Francis Regional Medical Center,* FMCS case # 060209-53378-7, (Jacobs 2006).

STANDARDS FOR INTERPRETING CONTRACTS – OBJECTIVE VERSUS SUBJECTIVE APPROACHES

There is some difference of opinion as to whether the objective or subjective approach in reading contract language should be used. Each has its proponents and advantages.

The objective approach holds that the meaning of the words and language used in a contract is that which would be attached to it by a "reasonably intelligent person acquainted with all the operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than the oral statements by the parties of what they intended to mean." Elkouri, 6th Ed. at page 431. This approach has an obvious bias toward common meanings or dictionary definitions of words and eliminates the need for a factual determination of what the parties may have intended or believed.

Dictionary definitions can have different meanings as well so it is important to be clear about what is meant by terms. If the words are intended to have a special or technical meaning particular to an industry parties should be careful to discuss that or memorialize it in some way.

The subjective approach defines interpretation as the ascertainment of the meaning of an agreement or a term thereof as intended by at least one party. However, the intention of a party is the intention manifested by him rather than any different undisclosed intention. Simpson seems to support this view as well. "Under the theory of mutual assent which today universally abounds, a contracting party is bound by the apparent intention he outwardly manifests to the other contracting party. To the extent that his real or secret intention differs therefrom, it is entirely immaterial." Simpson on Contracts, 2d Ed. West Publishing 1965 at p 8-9.

Parties' mental processes are not relevant in either of these approaches. What somebody privately intended is not at all germane. What is relevant, where it exists, is the outward manifestation by that party of the meaning of the language. Or, as Elkouri notes, "where the parties have attached different meanings to an agreement … it is interpreted in accordance with the meaning attached by one party if at the time the agreement was made that party did not know or had no reason to know of any different meaning attached by the other, and the other knew, or had reason to know that the meaning attached by the first party." Elkouri, at page 432. In other words, don't try to schnooker people.

On the other hand, if a party makes a clear statement as to what it intended the language to mean during negotiations and the other party does not indicate a contrary intent, the first party's interpretation will usually be held to attach to the disputed language. Thus, in one case there was discussion and agreement to "do a study and re-evaluation of certain positions" but no discussion of when the results of that study were to be implemented. The employer also made it clear during negotiations that it would not increase the pay of the disputed position and that it had no more money.

The study was done and the Union grieved the refusal to implement it during the current CBA term. The arbitrator ruled in favor of the employer ruling that it had agreed to do the study but made it clear that it would not increase the pay. *Electrical Radio & Machine Workers Local #93 and State of Iowa,* Iowa PERB Case # 09-GA-112 (Jacobs 2009).

In another the employer made it crystal clear that it would agree to the wage rate requested by the Union but did not have any additional money and would implement furloughs and layoffs since it had only a certain budget for that unit. The parties agreed to the wage increase and the Union grieved the subsequent actions to reduce hours by the employer. The arbitrator ruled in the employer's favor finding that the parties were well aware of the "deal" once that wage rate was implemented and there was no violation of any other part of the CBA as the result of the furloughs. See, *Metropolitan Council and Pipefitters, #455,* State of Minnesota BMS file 09-PA-1019 (Jacobs 2009).

Thus, many arbitrators find significant what one party says to the other party, not what they say to themselves. Thus, it is not relevant that the Union goes to its membership and tells it something about what has been negotiated nor is it relevant that the negotiation team goes to the governing body and tells them what it believes the language means – it is what they said to the other party that counts.

If no one discussed it during negotiations or simply pulls language out of somewhere else without a great deal of thought about what it says or any ambiguity it might create, arbitrators are forced to fall back onto time honored principles of contract interpretation to assist them in deciding what the language meant and what, ultimately, was the intent of the parties as expressed by the language itself.

This is perhaps the sort of esoteric nonsense that only a first-year contracts professor could love and may well be the reason people began using the arbitration process rather than going to Court in the first place. In either case, it likely does not really matter what one party thought it meant but rather what they said they thought it meant when the language was negotiated. See, below for a discussion of bargaining history.

III. PLAIN MEANING – WHATEVER THAT IS

If words always had one plain meaning, most of us would be out of work. Parties frequently claim that the language is clear, but of course can have opposite meanings. Imagine that.

It has long been the case that where words have but one reasonable meaning, there is no reason to resort to rules of interpretation since the meaning of the words is conveyed entirely from the language used. In order to resort to the sorts of interpretive tools we will discuss here, one needs to find an ambiguity.

An ambiguity exists where words are susceptible to more than one meaning. See Elkouri 6th Ed at p. 434. One need only look at any standard English dictionary to see the obvious potential for this to occur. Even the word "plain" has several definitions; one connoting "obvious" to one meaning "lackluster or drab." As you plainly see, no pun intended, mathematics is an exact science; the English language is not.

PATENT - Ambiguity can be patent, i.e., obvious from the face of the document or latent, i.e., only when viewed in context or when applied to a given situation. See e.g., *Midwest Reclaiming Co.*, 69 LA 198, 199 (Bernstein 1977).

Examples of patent ambiguity can be words like "whenever possible" or "as soon as practical" or "will use best efforts" or "practical and feasible" are so susceptible to differing interpretations that they are difficult to interpret or enforce. In the context of a claim that one side has violated the agreement where the basis for that claim are words like these, the arbitrator will be hard pressed to find a contract violation except the most egregious or truly arbitrary cases. These words are not necessarily ambiguous as much as they are insufficient to fix liability for definitive action.

LATENT - Latent ambiguity can arise in a variety of contexts that will depend on the facts of each case. In one case where the language provided that "holidays shall be observed and paid for at the straight time rate" the arbitrator ruled that this language did not prevent the employees from getting paid overtime pay for the 9th hour worked on a holiday. See, *Supervalu Stores*, AAA # 471-6 (Bornstein 1997).

THE PLAIN MEANING RULE – HOW PLAIN IS PLAIN?

In another, language preventing pyramiding overtime did not prevent an employee from getting both overtime pay and weekend bonus pay where he worked overtime on a weekend and was thus covered under two different provisions of the CBA. See, *Cambridge Medical Center and IUOE #70*, FMCS #061220-50874-7 (Jacobs 2006).

In one case the arbitrator ruled that the term "all employees" did not necessarily entitle all part-time employees to full time benefits even though the contract used that term. See, *Circle Steel, Inc.*, 85 LA 738 (Stix 1984) and *Univ. of California*, 100 LA 530 (Wilcox 1992).

In another case though the arbitrator ruled that under the facts of that case the term "all employees" did include the casual employees for purposes of paying a weekend bonus even though the casuals only typically worked weekends and were part-time employees. See, *SEIU Local #113 and St. Francis Regional Medical Center*, FMCS case # 060209-53378-7, (Jacobs 2006).

In another case the language provided: "Insurance option for employees not using the family plan after retirement shall be reimbursed by the District for unused sick leave days up to a maximum of $5,000.00."

The Union argued that the language was clear and called for payment of the sick leave benefits if the employee did not use the family plan insurance option after retirement. There were two grievants; one whose spouse also worked for the District and he kept the family insurance and the grievant waived the benefits. The other never had family coverage since her husband had family coverage through his employer. She opted for the single coverage upon retirement.

The District also argued that the language was clear, but asserted that this was not what the language was intended to cover. The language provided that if an employee did *not* opt for the family coverage, they got the benefits. There were no other exclusions and the grievance was sustained. See *Greenway Coleraine Schools and Education Minnesota*, Minnesota BMS 08-PA-0243 (Jacobs 2008).

So, it is in those cases where there is true ambiguity that the following rules will apply. They are in no particular order and are used for different purposes at different times but each has a place in assisting the arbitrator to figure out what the parties intended.

How plain is plain? – what does the word "to" mean?

The language in the CBA read as follows: "Any change to a four (4) ten (10), or three (3) twelve (12) hour day schedule is subject to mutual agreement of said parties."

The issue was whether the company could unilaterally change a schedule from a 4-day 10-hour schedule to a 5-day 8-hour schedule. It was clear that the schedule in existence was a 4-10 schedule and the Company wanted to go to a 5-8 schedule in this one department to be consistent with the rest of the plant.

The Company argued that the would "to" meant that mutual assent was only necessary if there was a change from some other type of schedule "to" to 4-10 schedule. In other words, "to" mean a transition from a schedule to a 4-10 schedule.

The Union argued that "to" mean any alteration to the existing 4-10 schedule and that since there as a proposed change "to" that 4-10 schedule, it required mutual assent.

What swung the case was the rest of the clause that read as follows: "If the company desires to implement a work schedule of four (4) ten (10) hour days or three (3) twelve (12) hour days, the company and the Union representatives chosen by the Union from the plant potentially affected agree to meet to discuss this issue.

In fact, the parties *had* met to discuss and agree to the 4-10 schedule when the Company went "from" a 5-8 schedule "to" the 4-10 schedule in the past.

Based on that clause and the history of how the 4-10 schedule came about – which DID require mutual assent, the company's interpretation was accepted. Thus, "to" mean a transition or change *from* any other schedule *to* a 4-10 schedule and the mutual assent provision did not apply to a change "from" a 4-10 to a 5-8 schedule. See *IBT #120 and Kemps Foods*, FMCS # 210429-06270, (Jacobs 2022).

THE LETTER OF THE LANGUAGE VERSUS THE SPIRIT

Arbitrators frequently hear this, i.e. that the spirit of the language is one thing when the language seems to imply something else. The "spirit" of the language must usually be gleaned for the words themselves and possibly from the bargaining history. This is where bargaining history can be important, as noted, below. Discuss why was the language inserted? How has it been applied? What problems, if any, was it designed to fix or prevent? Were there any communications regarding this language at the table? External discussions about it?

While the language is the most important things, if you intend to argue that the "real" reason this was inserted, be prepared to show by clear evidence what the partis intended as stated at the bargaining table and not what one party later thought it said after the dispute arose.

PAROL EVIDENCE RULE – DOES THAT EVEN APPLY HERE?

The parol evidence rule is a rule of law that bars the introduction of any outside evidence that might contradict or supplement the written expression of the parties. It's what Louis B. Mayer said when he noted that an oral contract is not worth the paper it's written on. In other words, evidence about what somebody said about the contract is not material in determining what the contract actually says. It generally also bars evidence of pre-contract negotiations as evidence of contractual intent.

Under the parol evidence rule in the common law, and applicable to many commercial contracts, a written instrument intended to be the final and compete agreement of the parties cannot be supplemented or changed by any prior statements either oral or written. The idea is that any prior discussions are superseded by the written document itself and that the written words are the ultimate determiner of contractual intent. The problem of course is what to do in the event those words are ambiguous or even contradictory. As noted above, labor contracts do not generally get set aside under a mutual assent theory but are rather interpreted by arbitrators. Evidence of what the contract was supposed to mean is thus virtually always admissible.

This rule does not apply well to labor agreements. There are multiple exceptions to it. Further, there is always evidence of bargaining history that arbitrators routinely allow as an aid to interpreting labor agreements. As professor St. Antoine notes, "The parol evidence rule should not be intimidating. Almost any credible extrinsic evidence that would help to validate, invalidate or interpret the agreement can be admitted under one or another exception to the rule." See, St. Antoine, *Common Law of the Workplace*, 2d Ed, 2005, Section 2.5, page 75-76. See generally, Elkouri, *How Arbitration Works*, 6th Ed. at p. 440-41.

V. BARGAINING HISTORY

Elkouri notes that "if there is no evidence to the contrary, disputed contract language will be deemed to have the same meaning as that given it during the negotiations leading up to the agreement." See, Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at p. 453.

A. What did the parties say in negotiations? Bargaining history is still one of the best ways to determine what the parties intended when they negotiated certain language. What the parties say to each other in negotiations can certainly be a guide to contractual intent. If for example, one party suggests a meaning to the other of a contract clause and the other party is silent about it, the presumption could well be that what the first one indicated was what they mutually intended.

In one case, the employer stated during negotiations that it would "reduce work hours of bargaining unit members in order to stay within its budget." There was clear evidence that the Union understood this but did not think the employer would do it since there was so much work to do. When it in fact reduced those hours the employer's action was upheld. See, *Met. Council v Pipefitters*, BMS # 09-PA-1019 (Jacobs 2009).

In another, the employer agreed to conduct a wage study to determine the appropriate wage rate for a job classification but there was never any agreement whatsoever as to when the results of that study were to be implemented. The negotiations were long and difficult and the study was the last item for negotiation. The contract clause provided only that the study was to be done prior to the end of the current agreement. It was and it showed that the disputed category was rated at a higher number of points. There was however no language calling for the *implementation* of the study once it was done. The grievance was denied because there was no such language and because the employer had made it clear in bargaining that it would not grant an increase due to budgetary constraints. *Union of Electrical Radio & Machine workers Local #93 and State of Iowa*, Iowa PERB Case # 09-GA-112 (Jacobs 2009).

Note that the most difficult case is one where the parties intentionally leave a clause somewhat ambiguous and leave it to an arbitrator to figure it out later.

B. Keep track of what issue came up when and what the response to it was. Evidence of who wanted what and when is sometimes critical in determining the intent of the language.

C. Was the language inserted in response to a particular incident or for some specific reason? Was there a change of some sort in the plant, i.e., technological change, change in company focus, change in location of a plant(s) that gave rise to the language? The answers to these questions can be crucial in determining what the parties intended when they insert or change contractual language.

D. Clauses rejected or withdrawn. If a party attempts but fails in contract negotiations to include a specific provision arbitrators will hesitate, justifiably, to read such a provision into the agreement. This is of course another reason to be very thorough and detailed in what proposals were made by whom and when during the negotiations.

This argument is grounded in the old maxim that a party may not gain in arbitration that which it could not gain in negotiation. Thus, a clause that was proposed and rejected gives a very strong implication that the intent was to reject it.

Also, sometimes a party proposes language that purports to give it greater power or control over a term or condition of employment somewhere else. If that is rejected the party rejecting it might well argue that if the clause already in the contract did not have the meaning it (the rejecting party) thought it did, why then would the first party attempt to insert it. For example, in one case the parties' contract contained certain scheduling language for many years requiring the company to post a two-week schedule for the employees.

The Union argued that the company did not have the right to alter portions of that posted shift without paying premium pay. As partial support for this, the Union argued that the company made several proposals in bargaining that would have given the company greater flexibility in scheduling and would have eliminated certain overtime and premium pay requirements. The argument was essentially that these bargaining proposals show that the company must have known that the Union's interpretation of the language was correct, otherwise they would not have sought to change it. See, *IBEW #949 and Hickory Tech Corp.*, FMCS case # 070618-57685-3 (Jacobs 2008). (The grievance was denied on other grounds.)

In *City of Missoula and Missoula Police Officer Ass'n*, (Jacobs 2021) the prior contract called for supervisory approval to take Montana Physical Abilities Test, MPAT, time off. In bargaining for the subsequent agreement that language was specifically taken out and other provisions added to the contract in exchange for the deletion of that language. Negotiators specifically discussed the deletion and agreed that supervisory approval would no longer be needed for that specific type of leave. Supervisory approval was still required for other types of leave, so it was clear that the parties could have retained the older language if the intent had been to require supervisory approval for MPAT time.

Without the bargaining history the result would very likely have been different, but with the deletion of language that was specifically discussed in bargaining, the result was to not require supervisory approval under those unique circumstances.

PRACTICE TIP: Be careful what you ask for – you might not get it. Parties should be careful not to put something on the table in negotiations, withdraw it and later argue that they had the right to it anyway and the sole reason for putting it on the table was to "clarify it." That may well signal that the parties understood that you did *not* have it and the fact that it was proposed and later withdrawn strengthens the exact opposite conclusion.

The bottom line is that bargaining history can be a very valuable aid in determining the intent of contract language.

VI. RULES TO AID INTERPRETATION AND MEANING

Arbitrators and advocates alike frequently use common law contract interpretation tools to assist in the interpretation of disputed or ambiguous language. These can virtually always be used either in the absence of or to supplement the other sorts of interpretive devices, like bargaining history or practice, to aid in the determination of contractual intent. These are in no particular order of importance or frequency. Their use thus depends on the facts of each case.

A. What do the clauses modify or affect?

The Golden Rule, cited in Fowler, *A Dictionary of Modern English Usage* (Fowler Ed., Oxford Univ. Press, 2nd Ed, 1965) is that the words or numbers most nearly related should be placed in the sentence as near to one another as possible, so as to make their mutual relation clearly apparent. See also Elkouri, *How Arbitration Works*, 6th Ed. at p. 441, n. 43.

In one case involving weekend premium pay, the employer argued that the no-pyramiding clause prevented payment of a weekend bonus where certain other premium pay for a double back shift also applied. The problem was that the pyramiding clause was in the overtime section while the weekend bonus and double back shift provisions were in another entirely separate part of the contract. Under those circumstances the pyramiding clause applied only to the payment of "overtime" and did not apply to the bonus and double back shift premium pay, which were dealt with separately in the contract. See, *Cambridge Medical Center and IUOE #70*, FMCS case 061220-50874-7 (Jacobs 2006).

In another case, the language in place to effect teacher layoffs in the event of budget reductions provided in part as follows: "When the District determines that it is necessary to reduce staff, it shall attempt to accomplish the reduction by normal attrition, unless the needs of the District make this impossible or impractical because it is necessary to maintain an existing program." This was in the preamble to the whole Article.

The specifics of how it was to be done in the event the reduction could *not* be done by normal attrition contained very specific language as follows: "In the event the reduction cannot be accomplished by attrition, it shall be accomplished by the following procedure:

A. Bargaining unit employees with emergency or temporary certification will be reduced first unless needed to maintain an existing program.

B. Regular part time bargaining unit employees and teachers in other areas where only a half time teacher is needed, will be reduced next unless needed to maintain an existing program

C. Thereafter, bargaining unit employees will be reduced according to seniority.

The language regarding maintenance of an existing program was found not to apply to the more specific language requiring seniority as the determinative factor in effecting a reduction in force. (There was also a very strong bargaining history issue as well. The parties had recently changed the language to delete a provision requiring relative ability and licensure as factors in the layoffs).

Thus, where a clause is within the contract and a determination of what it modifies can be a valuable tool. See, *Central Lee Community School District and Central Lee Educ. Assoc.,* Iowa PERB case # 08-GA –023 (Jacobs 2008). See also, discussion below regarding specific versus general language, which also applied in this case.

B. Giving words their "normal" or a "technical" meaning.

Parties frequently use dictionary definitions of words to show their commonly held or "plain" meaning. This may be helpful but, in some cases, even commonly used words have different definitions and meanings when used in different contexts. Professor St. Antoine notes that, "When interpreting agreements, arbitrators use the ordinary and popular meaning of words, unless there is an indication that the parties intended a special meaning. When an agreement uses technical terms, however, arbitrators give preference to the technical or trade usage, unless there is evidence that the parties intended a nontechnical meaning." See, *The Common Law of the Workplace*, St. Antoine, 2d ed. 2005 @ Section 2.6, p. 76. See also Elkouri at p. 450-451.

Thus "shall" typically carries with it the dictionary definition of a mandatory or required action whereas "may," means permissive or discretionary action. Elkouri cites a case where the term "illness" for purposes of sick leave did not include intoxication since the commonly held usage of the word typically did not carry that meaning. Thus, if a word is one that is used in its commonly held context arbitrators will interpret the word or clause as it is typically used in common society.

Professor St. Antoine gives the example though of what could be termed technical terminology. "Deadheading in the trucking industry means typically empty vehicles whereas in another context it could mean being passed over for promotion. If a term is used in a particular industry arbitrators will typically apply that term as it is used in that industry unless there is evidence that the parties intended something else." See, *The Common Law of the Workplace*, St. Antoine, 2d ed. 2005 @ Section 2.6

The term "day" or "workday" can have very different meanings. In some industries, the term "day" means midnight to midnight, whereas in others it may be a different 24-hour period. The same could be said for the term "year." In some industries, a "year" may mean a calendar year whereas in others, such as schools, it is a fiscal year running from July 1st to June 30th. "Work week" can also have a very different meaning depending on the industry.

Each case is different. Advocates seeking a particular interpretation should therefore be prepared to provide the arbitrator with some context for the disputed language and to show why their interpretation should be adopted.

C. Are the meanings consistent throughout the contract?

One time-honored interpretive tool is that words or phrases are to be given the same meaning throughout the contract unless there is clear evidence to the contrary. Arbitrators frequently use the standards that the contract must be interpreted as a whole and this is one place where that adage is frequently tested.

How is a word or phrase used in other parts of the contract? If they are the same, they may well carry the same meaning. If, however different words are used, the arbitrator may well find that the parties intended a different meaning.

Thus, in a case where the issue was whether overtime was to be paid in a week in which a holiday fell the clause read as follows: "Work performed in excess of 40 hours per week shall be compensated at a rate of one and one-half times the regular rate or compensatory time may be provided if taken within the same week." The term "work performed" was at issue. Did it mean hours paid as the Union argued, or hours where work was actually performed as the employer argued?

Since the parties used the term "work performed" as opposed to "employed" or "hours paid" as they had in other sections, it was clear that the parties intended that only hours where actual work was performed counted toward overtime in that provision. See, *SEIU Local #284 and Eden Prairie Schools*, State of Minnesota, BMS case # 03-PA-819 (Jacobs 2003).

Thus, if a term is used in one part of the contract it will likely be given the same meaning throughout the contract. Conversely, if a different term is used, the implication is that the parties intended a different meaning.

What about two clauses that are seemingly at odds with each other? Occasionally, two clauses appear to be at odds and mean opposite things. One rule is to look at which clause was inserted later and presume that the latter clause is the one that should hold sway. See, below, however, for discussion of avoidance of forfeiture. Arbitrators will generally strive to find an interpretation that will give some effect to both clauses.

D. Prior Settlements

Sometimes there is evidence that this or a similar issue has arisen before. Evidence of how the parties handled that can be relevant. Obviously too if you do not wish to have the settlement of grievance #1 carry over to the possible grievance #2 on as yet undetermined facts at an undetermined time, you should indicate clearly that the settlement of this is a settlement and that it is done on a non-precedent setting basis.

E. Prior arbitration awards

Obviously one very powerful tool can be prior awards over the same or similar language. These can fall into two categories: 1. Awards over this language between these parties and 2. Awards over similar language either between one of these parties or between two entirely different parties.

The most persuasive of all are those awards between these same parties. Unless something is changed over time, most arbitrators will usually give great weight to a prior award. The party seeking to undermine the effect of the prior award bears a heavy burden of showing either that the award was wrongly decided or that something has changed in the CBA language or in the underlying purpose for it, in technology or plant operations to render it moot.

Awards between these parties can be considered as actual evidence as well as argument and show what the parties intended the language to mean.

Less persuasive but perhaps of some value are awards between one of the parties that involves similar language. Obviously, there may well be differences in the way this language came into the contract and differences in history, concessions by one party that led to it and a whole host of distinguishing features. The argument is that this was how that same language was interpreted by another arbitrator with us and that should be the same here.

Parties sometimes argue that the language in dispute has been used in a particular way in the "industry" and that it is generally accepted. These awards might be of some value in that regard but the question is the intent of these parties in these negotiations over this language.

Awards that deal with similar language, perhaps in the industry, but between tow entirely different parties are of limited evidentiary value but may be worth something as argument in support of a particular position. Such awards can be used more as argument/precedent than as evidence of contract meaning.

In *SEIU and State of Minnesota*, MN BMS 21-PA-0967 (Jacobs 2021) a prior award ruling that e State had to cover the dues that were deducted from the employees paychecks but never paid to the Union by a 3rd party was determined to still control, despite some language in the CBA that appeared to say otherwise. There the earlier ruling was not applied and there was a successor CBA negotiated without any changes to the operative language.

The CBA was unusual in that the State was not the direct employer of the people from whom the Union dues were deducted. The employees were personal care assistants providing home health care to disabled individuals and under the CBA the State was not their employer; the disabled individuals were considered the employers even though the money came from Medicaid. The 3rd party was a company who as to deduct the dues and pay wages and other benefits. The State was indirectly involved but there was statute that required the state to ensure" that the 3rd party administrators complied with the CBA.

The effect of that award was limited to dues only since the earlier award only covered dues payments and not anything else.

F. CBA Language must mean something.

The general rule is that parties know what their contract says and that each word and clause in it has meaning. Arbitrators generally interpret language so that each clause – even those that appear to be inconsistent with each other to have some meaning.

In one case the employer acknowledged that the language was inconsistent and that to give meaning to one negated the meaning of the other. See, *City of Austin, MN and Austin City Employee's Association*, MN BMS # 11-PA 1013 (Jacobs 2013).

There the two clauses read as follows:

ARTICLE XI - VACATION

> 11.1 - Each full-time City employee is entitled to vacation on the following basis: When the date of hire is between January 1st and July 1st, on the following January 1st, credit for two (2) weeks will be given. When the date of hire is between July 1st and October 1st, credit for one (1) week will be given on the following January 1st. When the date of hire is between October 1st and January 1st, credit for two (2) weeks will be given on January 1st, a year later.
>
> 11.2 – After one (1) year of service, the employee will receive a total of two (2) weeks vacation and after five (5) years of service the employee will receive a total of (3) weeks vacation and after twelve years of service will receive a total of four (4) weeks vacation and after twenty (20) years of service will receive a total of five (5) weeks vacation and after twenty-five (25) years of service will receive six (6) weeks vacation. The extra week of vacation will be added to the employee's vacation balance on their employment anniversary date.

The grievant's date of hire was September 8, 2009 and he received one week of vacation as of January 1, 2010, just as the CBA provides at Article 11.1. His one-year anniversary was September 8, 2010 and the Union contended that he should have been credited with an additional week of vacation on that date pursuant to the final sentence of Article 11.2.

The City contended that the language was inconsistent and that the clauses effectively negated each other. Thus, the matter was not substantively arbitrable.

The ruling was that the clauses, while seemingly at odds with each other could be read consistently and to give meaning to each clause. The language of Article 11.1 was interpreted to apply to the "first" adjustment of the new employee's vacation account. Article 11.2 was interpreted to apply to any additional weeks. The City's claim that this was not arbitrable due to the inconsistency was rejected based on the discussion in the Mutual Assent section above. See also, Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at p. 482.

G. Expresio exclusio rule - Specifically listing one thing or a set of things excludes others.

This is the "*expresio unius est exclusion alterius*" rule that self-absorbed lawyers, mostly young ones who think they can speak Latin, are fond of spouting. What it really means is that if you list something it implies that other things are not on the list. See, Elkouri, 6th Ed at 467-468.

Thus, if the contract or disciplinary policy lists certain grounds for immediate discharge, and is therefore not subject to a progressive disciplinary policy, which implies that anything not on that list is thus not a ground for immediate discharge. So, if the clause provides a specific list of offenses, like theft, intentional destruction of company property, deliberate falsification of company records or assaults, that are subject to immediate discharge and an employee is found to have done something not on that list, the implication is that the offense is not a ground for immediate termination.

H. Ejusdem generis – of the same kind

Somewhat closely tied to the prior notion that a specific list encompasses only those items on that list, is the doctrine that when parties follow a list of specific items with a general, catch-all sort of provision, it is assumed that they intended to include only items that are like those specifically listed.

Thus, using the example above, if the language provides for theft, intentional destruction of company property, deliberate falsification of company records or assaults and "other serious offenses," might not apply to a pattern of more minor offenses, such as absenteeism or tardiness. Obviously, each case will depend on the facts.

I. Noscitur a sociis - known by association.

This is the notion that words derive meaning from the words around them and that contracts must be read in context to determine the meaning of disputed words. For example, a clause providing for health insurance for "accidents, surgeries and other illnesses" likely does not include routine physicals. Likewise, "physical therapy" is not to be equated with a "pain clinic" as those terms are commonly used and even used by medical professionals.

These will be very fact specific cases and frankly is not used much.

J. Construing the language against the drafter.

One of the first things first year law students learn in contracts class is that ambiguous or unclear language is generally construed against the drafter of that language. Thus, if one party proposes language in negotiations arbitrators could use this principle to construe it against that party since they drafted it and presumably had some obligation to explain it or to make sure the other side clearly understood what it would mean.

Not all commentators agree that this principle applies in labor relations. For example, Professors Bornstein and Gosline, note that while this principle may apply in commercial contract interpretation, it does not apply in labor relations:

"[T]he realities of collective bargaining may not be adequately dealt with by interpreting language against its author. Because labor contracts are usually much more of a joint product than commercial contracts, this principle of interpretation should be given a much narrower application in labor arbitration." See, Bornstein & Gosline, *Labor and Employment Arbitration*, § 9.04, (2003).

K. Avoidance of harsh or absurd results or one which is contrary to prevailing law

Elkouri notes that "when one interpretation of an ambiguous contract would lead to harsh, absurd, or nonsensical results, while an interpretation, equally plausible, would lead to just and reasonable results, the latter interpretation will be used. Indeed, where the extreme positions taken by both parties would produce absurd results, an arbitrator may reject them and make an independent interpretation of the disputed provision. Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at page 470.

This theory holds to the view that one should avoid interpreting a contract in such a way as to create an absurd or Catch 22 result. This is sometimes hard to define, as what seems positively idiotic to one party may well seem perfectly reasonable to another.

In one case the employer argued that given casual employees, who were by definition part-time, a weekend bonus where they were not in many cases working many hours during the week, even though the language provided for the bonus for "all employees" was an absurd result. It was a bit odd that they would do that, but not so odd or absurd as to create a result that was patently contrary to the clear contract language. *SEIU Local #113 and St. Francis Regional Medical Center*, FMCS case # 060209-53378-7, (Jacobs 2006).

In a case involving whether a public employee had the right of independent review, the employer's lawyer argued that for a non-Union employee to have a right to gain independent review under the terms of a state statute, the employee would have to be a member of a Union. This argument not only bordered on the absurd and specious but also may have actually defined it. See *Sampson v City of Babbitt, Minnesota*, Court File # A03-380 (MN App. 2003).

Also, any interpretation of the language that is contrary to law is also generally to be avoided. As you can imagine, such results happen rarely and the arguments must be very compelling to get an arbitrator to buy that an interpretation of negotiated contract language would in fact result in illegality.

In one recent case a clause that provided that the contract expired on June 30th but would remain in full force and effect "unless a successor agreement is negotiated" did not mean that the step increases called for in the "expired" contract also expired and would not be paid. Such a result was found to be contrary to PELRA (as well as the parties' practices).

One example of a harsh or absurd result would be to either create or perpetuate a violation of the CBA by granting one party what it sought in another part of the CBA. See, *USPS and NPMHU*, J11M 1J C 14026357 (Jacobs 2014). There the Union sought payment for using career workers instead of using casuals. The problem was that the USPS had hired the casuals in error by hiring them too early and had already laid them off as of the date of the holiday. Granting the relief sought by the Union would therefore have been to perpetuate one violation by fixing another.

You can't have it both ways.

L. Inconsistency with prevailing law

One issue that has arisen in recent years involves inconsistencies between laws. As an example, what to do with marijuana. Some states have legalized its use for either medical or even recreational use but it is still illegal to use under federal law.

This may well come down to the employer's policy and whether it is allowed for certain use by policy. In one case, the state had legalized the use of marijuana for medical reasons. The employer's policy had a general prohibition against use or possession on duty and against impairment at work.

The employee was suspected of being under the influence due to a strong odor of marijuana smoke on his clothes. He tested positive for THC and was discharged.

The policy however provided in relevant part as follows: "Nothing in this procedure is intended to prohibit the use of a drug taken under supervision by a licensed health care professional, where its use is consistent with its prescribed use and does not present a safety hazard or otherwise adversely impact an employee's performance or County operations."

There was no evidence of impairment and the employee had a medical card by a health care provider to counteract the effects of the drugs he was taking for prostate cancer.

Due to these unique set of facts the employee was reinstated. See, *AFSCME #75 and Lane County*, OR, (Jacobs 2016). It is important to note however that there was no evidence of impairment, no evidence that the employee was in a safety sensitive position and he clearly fit into the employer's policy allowing the use of marijuana under certain circumstances.

M. Specific versus general language

The more specific the language the more likely it will be to take precedence over more general language. A general management rights clause will not usually prevail over a specific contract clause pertaining to schedules or other conditions of employment.

Thus, a general management rights clause that provided for the employer to have the right to select and direct the workforce will usually be interpreted in light of more specific language providing for delineated shifts. The parties had general management rights language as well as broad language in the scheduling article that allowed for the company the "right to adjust the standard work week to meet the needs of the business." There was also very specific language that called for the actual hours of the "standard work week."

In addition, the parties had a Letter of Understanding that called for "each employee hired prior to June 1, 1998 will be allowed to select either eight (8) hour or ten (10) hour shifts as their standard work week." In that case the specific language calling for the preservation of the right to select a shift took precedence over the more general language. See, *GMP and Progress Castings*, FMCS #070608-57415-3, (Jacobs 2008). See also, Elkouri, *How Arbitration Works*, 6th Ed. at p. 469-72

N. Avoidance of forfeiture

If an agreement or a clause within it is susceptible of two meanings one of which would create a forfeiture and one would not, most arbitrators will select the one that does not. The general rule is that parties are presumed to know their contract and that they did not intend to leave in a clause but negotiate another clause that negates the effect of the first one.

This can also arise in the context of timeliness of grievances. Elkouri notes that if the contract is ambiguous insofar as time limitations are concerned, or as sometimes happens, where the contract contains an "informal" time frame to allow for discussion of grievances, the ambiguity should be resolved in favor of timeliness. Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at p. 483.

Arbitrators should however be cautious not to re-write language. If the language is clear and provides for a forfeiture under certain defined circumstances, then the language governs as to the parties' intentions in that regard.

VII. PAST PRACTICE

Is the faintest ink more powerful than the strongest memory? This discussion will thus focus on whether something is a *binding* past practice as opposed to a happenstance event that has no particular evidentiary or contractual significance and therefore does not bind the parties to doing it that way in the future.

A very wise older arbitrator once said that past practice is perhaps the most used and most abused concept in all of labor relations. He analogized it to the Union arguing that past practice was like the sun coming up in the morning. It has always come up like that in the past and there is nothing to lead anyone to believe that it won't keep doing that forever. The employer, however out argued that it was like lightning striking. Sure, it happened once this way but only because certain innumerable factors came together in the cosmos to create a confluence of factors so unique, they will never happen again. Past practice, he pointed out is somewhere in between these two scenarios.

No discussion about how to interpret contract language would be complete without at least some reference to custom and usage and past practice. The scope of this discussion will not allow for an exhaustive study of past practice however, as that is a much longer and more in-depth analysis. Suffice it to say that perhaps the best measure of how parties intend language to be interpreted is by how they actually have interpreted and used it.

Elkouri notes, "Unquestionably, the custom and past practice of the parties constitute one of the most significant evidentiary considerations in labor-management arbitration. Proof of custom and past practice may be introduced for any of the following purposes: … to indicate the proper interpretation of contract language." Elkouri at p. 605. There are certainly other uses for past practice including that clear language has been essentially re-written through the usage and practice of the parties. Here though, the inquiry will be limited to interpreting ambiguous language in the agreement.

There is still a division of opinion amongst arbitrators and commentators on whether truly clear language can be re-written through the use of past practice. Some argue that the written word is sacrosanct and may not be changed except by negotiation at the bargaining tale. Others however argue that the labor contract is a living document that can and frequently is altered to meet changing times and needs of employers and employees or technological or other economic conditions.

A. WHAT IS A PAST PRACTICE AND WHAT DO YOU DO WITH IT?

WHAT IS IT?

Past practice has been defined as a 'prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.' Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. See Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in Arbitration and Public Policy 30 (S. Pollard ed. 1961).

Elkouri states it in slightly different terms as follows: In the absence of a written agreement, 'past practice,' to be binding must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties." Elkouri at 632 citing to *Celanese Corp. of America*, 24 LA 168 (Justin 1954).

A past practice is thus nothing more, or less, than a custom or an accepted way of doing things as between two parties to a labor agreement that can provide either assistance in interpreting contract language where that language is ambiguous or to actually provide a binding set of terms for matters not included in the labor agreement. Clearly, as the commentators have discussed, the mere fact that something happens once or even multiple times does NOT mean that a binding past practice has occurred. The question is thus whether having done something in the past, that course of conduct will be binding in the future.

Clearly, as the commentators have discussed, the mere fact that something happens once or even multiple times does NOT mean that a binding past practice has occurred. The question is thus whether having done something in the past, that course of conduct will be binding in the future.

WHAT IT ISN'T

ONE TIME EVENTS: One-time events or events that have no particular binding significance are not usually considered a past practice.

FAILURE TO GRIEVE: The mere failure to grieve things may not count as a binding past practice (but may be evidence of contractual intent). Elkouri notes as follows: "the non-exercise of a right does not amount to a 'negative past practice' and thus become a forfeiture of it once changed. Arbitrators consistently hold that even if a party has not done so in the past, the party retains the right to police the agreement at any point." Elkouri and Elkouri, *How Arbitration Works*, 6th ed. at page 239-240.

Elkouri also noted as follows: A related rule is that a party's failure to file grievances or to protest past violations of a clear contract rule does not bar that party, after notice to the violator, from insisting upon compliance with the clear contract requirement in future cases. See also, Elkouri, 5th Ed at page 652.

UNILATERAL PRACTICES: Obviously, a unilateral practice, even one that has gone on for years, is not binding on the other party unless there is evidence that the other party knew of it and accepted it as a part of the labor agreement, or at least as a part of the labor relations culture within a bargaining unit. See, Elkouri 5th Ed at page 633, n. 14 and cases cited therein.

MANAGERIAL DISCRETION: Exercises of managerial discretion, even if longstanding and consistent may not be a binding past practice. Thus, the fact that management has always granted vacation requests in light of a clause that makes it discretionary with the employer 1000 times in the past does not require that it be granted on the 1001st.

Examples of employer discretion lack any sense of mutuality and are also generally not considered binding. See Elkouri 6th Ed. at p. 636 citing *Ford Motor Co.*, 19 LA 237, 241 (Shulman 1952) infra.

WHAT CAN YOU DO WITH IT?

Elkouri has suggested that past practice can be used for at last three major purposes. "1) to provide the basis of rules governing matters not included in the written contract; 2) to indicate the proper interpretation of ambiguous language, or 3) to support allegations that the clear language of the written agreement has been amended by mutual action or agreement representing the intent of the parties in making their written language consistent with what they regularly do in practice in the administration of their labor agreement.

Elkouri provides as follows:

> Unquestionably, the custom and past practice of the parties constitute one of the most significant evidentiary considerations in labor-management arbitration. Proof of custom and past practice may be introduced for any of the following major purposes: (1) to provide the basis of rules governing matters not included in the written contract; (2) to indicate the proper interpretation of contract language; or (3) to support allegations that the "clear language" of the written contract has been amended by mutual agreement to express the intention of the parties to make their written language consistent with what they regularly do in practice in the administration of their labor agreement. Elkouri & Elkouri, *How Arbitration Works*, Chap. 12, p. 605 (6th Ed. 2003).

There are some cases too where the language is intentionally left ambiguous because the parties cannot agree to anything better and want to get the CBA signed. It is then left to an arbitrator to figure it out. Practice can be very helpful in this regard.

"Under certain circumstances custom and practice may be held enforceable through arbitration as being in essence a part of the parties' 'whole' agreement." Elkouri and Elkouri, *How Arbitration Works*, 5th Ed. p. 630.

Elkouri cites to several arbitrations that have upheld the principle that the words on paper do not always constitute the entire story when trying to determine the parties' intent. The U.S. Supreme Court in one of the famous Trilogy cases held as follows: The arbitrator's source of law is not confined to the express provisions of the contract, as in the common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it. See *U.S. Steelworkers v Warrior and Gulf Navigation Co*., 363 U.S. 574, 80 S.Crt. 1347, 1351-52, 46 LRRM 2416, 2419 (1960).

Elkouri further notes as follows:

> Arbitrators are often hesitant to permit unwritten past practice or methods of doing things to restrict the exercise of legitimate functions of management. For example, such hesitance was evidenced by Arbitrator Whitely McCoy: But caution must be exercised in reading into contracts implied terms, lest arbitrators start remaking the contracts which the parties themselves made. The mere failure of the company, over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. … Mere non-use of a right does not entail a loss of it." Elkouri and Elkouri, How Arbitration Works, 5th Ed. at P. 635.

ELEMENTS OF A PAST PRACTICE - HOW DOES ONE PROVE THAT IT EXISTS?

The Court in *Ramsey County* noted that certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. 709 N.W.2d at 788, n. 3.

Elkouri states it in slightly different terms as follows: In the absence of a written agreement, 'past practice,' to be binding must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties." Elkouri at 632 citing to *Celanese Corp. of America*, 24 LA 168 (Justin 1954).

CLARITY AND CONSISTENCY – UNEQUIVOCAL - Thus while there is some disparity in definition, the basic concepts remain the same. It is clear that the practice must be clear and consistent, i.e., unequivocal. Obviously if the practice itself has varied over time this fact would seriously undercut the argument that there exists a binding past practice. In *Ramsey County* for example, it was shown that the vacation accrual rates had been different from the contractually provide rates for years.

LONGEVITY AND REPETITION

Evidence that the practice has gone on for a long period of time is essential. Obviously, if a practice occurs only once such facts would undercut the claim that this was the mutually accepted way of doing things in the future. While a practice may well become binding even if it occurs only once this would certainly be an argument that would hurt the claim. Certainly, a past practice should be "readily ascertainable over a reasonable period of time." This would strongly imply that it should occur multiple times as a prerequisite for it to be binding.

ACCEPTABILITY

How acceptable a practice is will depend on the facts and whether an arbitrator feels that the parties have come to accept this as the way they must continue to address a recurring situation. This, along with the discussion of the "underlying circumstances" will be very fact-dependent.

Generally, evidence that the parties operate under the practice with the full knowledge of the other party is very beneficial to the party seeking to enforce the practice. Each case will be different but the longer one can prove the practice has existed and the stronger the evidence is that the parties all knew it existed, despite possible language to the contrary or without language at all, the better.

CAN PAST PRACTICE BE USED EVEN WHERE THERE IS CLEAR CONTRACT LANGUAGE?

Note that there is always considerable argument in a case involving past practice as to whether a practice can be used at all to redefine clear contractual terms. There is no definitive answer to this question. Some arbitrators will disallow past practice in the face of what they find to be clear and unambiguous contract language while others will find that strong evidence of practice, if it meets the tests discussed below, can be used to determine intent even in the face of clear contract language.

Perhaps the best-known case in Minnesota was *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981). There the arbitrator found that the parties' practice with respect to vacation accrual rates differed from the clear language of the contract. The matter arose when it was discovered that employees had for years been receiving vacation accruals and payments upon their departure from the County that were very different from what the clear language of the contract indicated.

The County argued that the clear language of the contract, and it was, indicated that the County had simply been paying the incorrect accrual rates for years and that it was simply done in error. The County also argued that the language of the contract where clear must always govern lest the whole process of negotiations be threatened with too liberal a use of past practice.

The County also argued that the so-called zipper clause made the past practice argument moot. This clause, it was argued prohibited the use of any practice or matter outside of the present collective bargaining agreement form being considered. It was supposed, the County claimed, to prevent the very argument being made by the Union in that matter. (See below for a general discussion of zipper versus maintenance of benefits clauses.)

Despite that, the arbitrator ruled in favor of the employees because the practice, even though different from the clear language, met the tests for a binding past practice. The Minnesota Supreme Court held as follows:

> "past practice has been defined as a 'prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.' Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. 709 N.W.2d at 788, n. 3 (Citing from Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in Arbitration and Public Policy 30 (S. Pollard ed. 1961).

Thus, the essential feature of any award, whether it is derived from reliance on past practice or not, is whether it "draws its essence from the labor agreement." See, 709 N.W.2d at 790-91. It appears thus pretty clear that in Minnesota at least, it is well settled that custom and practice of the parties may be used to provide interpretation of existing language or it may be used to establish that the practice is binding even in the face of contrary and clear contract language, as in *Ramsey County*.

It should be noted however, that there is a reluctance of many arbitrators to overturn or alter what appears to be clear contract language. Not all arbitrators are so quick to allow evidence of past practice much less to use it to overturn clear contract language to the contrary. Elkouri, cites to Arbitrator Whitley McCoy as follows:

"… caution must be exercised in reading into contracts implied terms lest the arbitrators start remaking the contracts which the parties have themselves made. The mere failure of a company over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. … Mere non-use of a right does not entail the loss of it. See Elkouri at 635, citing to *Esso Standard Oil*, 16 LA 73 (McCoy 1951).

The eminent Arbitrator Harry Shulman also observed the need for caution and noted as follows:

> "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 to the future. Such practices are merely present ways, not prescribed ways, of doing things. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion." Elkouri 6th Ed. at p. 636 citing to *Ford Motor Co.*, 19 LA 237, 241 (1952).

Some of these cases are now getting old but their principles remain relevant. Past practice, while it may be used to provide clarity to unclear language or to supplant the agreement where it is silent, there are limitations to its use and its effect.

Did the party objecting to the practice even know about it? The requirement of mutuality and acceptability.

In one case the employer argued that past practice superseded clear contract language regarding the probationary period for new hires. The contract clause was clear and required that all new employees serve a 6-month probationary period. For years, the employer had applied this in a somewhat loose way and pro-rated the probationary period depending on the FTE the employee was hired for. Thus, for example, if an employee was 0.50 FTE, their period was extended to a year. A 0.80 FTE was 9 months and so forth.

The Union provided evidence that they never knew this was going on and would not have because the employees never told them that and were under the impression that they had no grievance rights until their probation had passed. Those who failed probation had never filed a grievance over that before.

In the case at hand, one employee who had been hired at 0.50 FTE, but who had been there for more than a year was fired for various reasons. (Her period had been extended due to several medical leaves of absence, which also complicated the case somewhat, but the issue was whether the clear CBA language prevailed over the practice to the contrary). The Union argued that despite the practice, they never agreed to it, were never aware of it and thus there was no acceptability or mutuality as required by the elements of a practice. The Union relied on the clear CBA language. The arbitrator agreed on those facts given the lack of any evidence that the Union was ever aware this was going on. See *AFSCME and Wright County, Minnesota* MN BMS 09-PA-0933 (Jacobs 2009)

ZIPPER CLAUSES VS. MAINTENANCE OF BENEFIT CLAUSES

A zipper clause, or entire agreement clause, as they are sometimes known, generally forecloses a prior practices or agreements and states that the entire agreement is contained in the written agreement. As noted above, there have been cases that have found ways around them, See, *Ramsey County*, supra but unless there is evidence to suggest that something has changed, they are frequently used to deny the application of a past practice. See discussion of reserved rights theory above.

Note though that they foreclose only practices that existed *prior* to the execution of the current agreement. In one case a City had a practice of allowing dispatchers to leave the premises for lunch. When they built a new city hall the City directed that this practice be discontinued. The parties negotiated over this item and eventually went to interest arbitration over this, along with other issues. The arbitrator awarded the City's position and further inserted a zipper clause into the agreement.

Note too that zipper clauses "do not negate practices that are relied upon for the purpose of casting light on ambiguous contract language." Elkouri, *How Arbitration Works* BNA Books 6th Ed. (2007) at page 621. This is perhaps the most widely used way around such a clause – by arguing that the contract provision is ambiguous and that a practice is necessary to determine contractual intent.

Maintenance of benefits clauses do almost the opposite. They preserve any practices that existed prior to the contract and call for them to stay in place or at least be maintained at whatever levels they were at the commencement of the labor agreement.

Elkouri notes that under such clauses the question often arises as to which practices or local working conditions are to be preserved. … General catch-all provisions, designed to freeze general working conditions, have been held to be ineffective to nullify an express provision of the contract. See, generally, Elkouri, *How Arbitration Works*, 6th Ed. BNA Books (2007) at pages 620-623. See discussion of implied obligation above.

PAST PRACTICE SUBJECT TO REASONABLE REGULATIONS

Arbitrators have held that a practice may be binding, but is still subject to reasonable regulations to prevent its abuse. Elkouri notes that the mere fact that a benefit has been established by a past practice does not necessarily mean that all arrangements by which it has been provided are frozen forever. In cases where the practice was established to provide for parking for employees the company was allowed to provide substitute facilities for that purpose. Elkouri 6th Ed at p. 642.

Thus, even practices that have been established are subject to some regulation and may be altered as circumstances warrant. Practices are subject to circumstances that gave rise to it. If those change, the practice may as well. Technological changes or a new facility or methodology may require it. Management retains the right to change its operation and the mere fact that "we've always done it that way" may not rise to the level of a binding past practice.

ONCE THERE IS A PRACTICE ESTABLISHED, CAN IT EVER BE CHANGED?

Short answer: yes. A practice can be altered or even terminated in several ways as follows:

NEGOTIATE IT AWAY

All such practices can be changed or eliminated by negotiations. Be specific about it and have good notes. Keep in mind that a past practice must find its "essence" in the labor agreement or in the practices by the parties in administering it. If the agreement specifically negates it and the parties are clear that this is their intent, the past practice no longer exists.

PAST PRACTICE CHANGED WHERE THE UNDERLYING REASON FOR THE PRACTICE HAS CHANGED

Elkouri also notes that practices may be changed or even eliminated where the underlying basis for the practice has changed over time. The "rule" was stated as follows: "It must be stated as a general proposition that, absent language in the 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." See, *Gulf Oil Co.*, 34 LA 99 (Cahn 1959).

The operative language in the statement of the rule is "absent language in the collective bargaining agreement." We are talking about practices that draw their essence from the collective bargaining agreement but are not actually found expressly or impliedly in it. These situations will again be very fact specific but the commentators seem to agree that where a practice has grown up over time in response to a given set of problems or circumstances, the practice may be altered where those underlying conditions are changed. Elkouri notes the example of a plant that gave 10 minutes of overtime to allow painters to clean their tools being changed where management fixed the congestion problem that had created the need for the additional time in the first place. Elkouri at p 643.

REPUDIATION OF A PAST PRACTICE DURING NEGOTIATIONS

Perhaps the most widely used ploy to obviate past practice is to repudiate the practice during negotiations. Past practices are part of the CBA and may be eliminated or modified by one party giving the other notice of intent to terminate the practice at the end of the current CBA. The weight of arbitral authority holds that even absent a change in the underlying basis for a past practice and even though that practice may not be subject to change during the life of a contract, that practice **is** subject to termination by one party giving the other notice of intent not to carry over the practice into the next contract. This must generally be done during contract negotiations. Once this has been done, the party seeking to continue the practice must negotiate the practice into the collective bargaining agreement.

> Professor/Arbitrator Mittenthal states as follows: Consider first a practice that is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For … if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

> That inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of the new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In the face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding." Elkouri, at p. 643-44, Citing Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, proceedings of the 14th Annual Meeting of the NAA.

See also, *SEIU Local 284 and ISD 272, Eden Prairie Schools*, BMS CASE # 03-PA-819 (Jacobs 2003). There the parties had an admitted past practice of paying overtime during weeks in which the employees were paid for holidays and vacation etc. and where they were paid for more than 40 hours. The contract language was quite clear and was to the contrary of how the actual practice had been operating.

Without more, this would likely have been a situation like *Ramsey County*, where the past practice would have prevailed over the contract language, despite its apparent clarity. The contract language in question as well as the practice had existed over the course of several negotiation periods. The practice was to pay overtime for hours paid versus hours actually worked in a week where a paid holiday such as Labor Day fell and where the employees were called in to work additional hours. There were thus weeks in which the employees had been paid for more than 40 hours due to the paid holiday but actually worked less than 40 hours.

During negotiations, the District sent a letter to the Union advising it of the intent to terminate the practice of paying overtime in those weeks where a holiday or other paid time off fell. The Union took the position that the practice would continue after the contract unless there was a change in the contract language. No change was made to the existing contract language despite the notice from the District that it would discontinue the practice of paying overtime as set forth above upon the signing of the new agreement.

Based on the almost unanimous line of arbitral authority, the practice was allowed to be discontinued on these facts. See also, *National Tea Company*, 94 LA 730 (1990) wherein the arbitrator held that past practices do not necessarily continue ad infinitum, but may be repudiated by either party through timely and proper notice on intent to do so before or during negotiations.

In *Gillette Company*, 1996 W.L. 874463 (Fogelberg 1996) the arbitrator discussed a fact scenario very similar to that presented in *Eden Prairie Schools*. There he found that management had fulfilled its obligation to put the Union on notice of the intention not to continue the practice that had been in existence for several years during the negotiations for the labor agreement. The Union thus had the obligation to bring this up in negotiations and place language regarding the practice into the agreement. The Union did not do that and instead chose not to address the matter at all, arguing later that the practice continued unless there was a change in the contract language.

The arbitrator found that the exact opposite was the case and held that the company had successfully repudiated the practice. "Once placed on notice of the timely repudiation of the practice, the obligation switched to the Union to bargain over this subject at the next round of negotiations. Yet this was not accomplished, and consequently the 'practice' was properly eliminated by Management." *Gillette Company* at p 4 of the opinion. See accord, *Copaz Co and UFCW Local 7A*, 1993 W.L. 790196 (Traynor 1993).

In *City of Blaine and LELS*, MN BMS 15-PA-0671 (Jacobs 2016) there was a practice regarding contribution to an employee cafeteria plan. The language provided for a monthly contribution for that purpose. There was a longstanding and well accepted practice whereby employees could opt out of single coverage since many had coverage through their spouse. If they did, the city would then provide the stated amount in the CBA less the cost of single coverage plus $50.00 per month. The $50.00 was simply added to the employees' paychecks.

There was no question that this practice was a binding past practice and the Union initially filed a grievance to have the entire amount paid to the employee, but withdrew it in the face of a clear practice.

The Union then sent a notice seeking to repudiate the practice during negotiations for a successor agreement. The city responded by telling the Union that it would need to negotiate different language – since there was no language at all calling for the payment of the $50.00.

No changes were made in the language and the practice continued. The Union then filed another grievance claiming that the practice had been repudiated and argued that the employees should be paid the entire amount of the contribution even though they had opted out of single coverage.

The grievance was denied again, based on the lack of any change in the language. The contractual language was in that case ambiguous – in fact it was silent on the practice and the practice was necessary to "give meaning" to the contractual language. In that case the practice actually added something to the language.

In that case, the Union sought to change the practice but was unable to negotiate different language calling for the employees to get the full amount of the contribution even though they opted out of coverage. There was further some evidence that the Union actually tried to do that in negotiations but agreed to drop that request in exchange for concessions on wages and other matters.

Thus, it is fairly clear that a binding past practice can be repudiated by giving timely notice of the intention to do so. Once this has been given, it falls to the party seeking to continue the practice to negotiate this into the contract. One cannot simply assume that because the underlying language did not change, that the practice will continue.

Thus, as in the *Eden Prairie* and *Gillette Co.* cases set forth above, if the language is clear, the party seeing to *keep* the practice must change the language in order to change the result. If the language does not change the implication is that the practice was repudiated.

Conversely, if the language is ambiguous and the practice has been used to clarify it, the party seeking to *change* the practice must seek to amend the contractual language in order to change the result. If the language does not change the implication is that the practice remains in effect.

PRACTICE TIP: Note too that the repudiation should be very specific. I do not believe that sending a general letter stating that "any and all" past practices will end as of the end of the contract term and leaving it at that will be sufficient. I could not find any reported case were that scenario was presented but it would seem that in order to repudiate a practice the notice must be quite specific as to what that practice is and what the party seeking to change it wants to do with it.

FURTHER PRACTICE TIP: If you have successfully repudiated the practice be careful not to re-start it.

In one other case, the employer was able to successfully repudiate a past practice but then made the mistake of re-upping it during the life of the next contract. The city had a practice of allowing its 911 dispatchers to leave city hall for lunch. There was little question that this was a binding past practice and everyone agreed it was.

City hall moved to a new location that was next to a major rail line. The city argued during negotiations that it would no longer allow dispatchers to leave for lunch. First, there was a risk that they could get caught on the wrong side of the tracks during an emergency. Second, the new city hall was much larger and had a nice lunchroom for people to eat and be available for emergency calls. The city argued during negotiations that the practice needed to change since the underlying reason for the practice had changed.

When the new contract went into effect there was language that disallowed people from leaving. That should have been the end of the practice but the city continued the practice for more than 8 months after the execution of the CBA. The problem arose when the police chief continued to allow dispatchers to leave for lunch without consequence and with his full knowledge for almost a year after the execution of the new contract.

When a new chief came on board, he wanted to revert to the contract language. In that circumstance, the practice had essentially been re-started and could not be changed during the life of the current agreement without negotiation by the parties. Thus, be very careful to actually stop the practice or you may unwittingly restart it. See, *IAFF v City of Bloomington, Minnesota,* MN BMS # 4-PA-99 (Jacobs 2004).

Certainly, this practice likely was repudiated again in the next round but the case stands as a reminder to make sure (as the employer did in the Eden Prairie School case cited above) to make sure the practice is changed if the language changes or the practice is repudiated.

REPUDIATION OF A PRACTICE THAT IS REALLY A MANAGEMENT RIGHT

The simple answer here is that one cannot "repudiate" a management right by sending a letter to the employer during negotiations. Likewise, a clearly defined right or benefit in the CBA cannot be done away with or limited simply by sending a letter stating, "we won't do this any longer," or words to that effect. Any changes in clear contractual language or reserved rights must be made during negotiations and generally result from an actual change in contractual language.

In one case, the parties had a longstanding practice of allowing the employer to "flex," i.e., change, employees' scheduled days off where they worked on those days to avoid paying overtime. The employer also argued that it was a management right and that a "repudiation" of a past practice where that practice was nothing more than the exercise of a managerial right, was not effective. One simply cannot do away with an inherent management right by "repudiating" it in negotiations. In that instance, if the Union wants to change that it must be specifically negotiated and placed in the CBA.

It was a clever ploy but ultimately the evidence showed that the "practice" was in fact based on clear contract language and was nothing more than the exercise of a managerial right. See, *City of Forest Lake, MN and LELS,* MN BMS 13-PA-0861 (Jacobs 2014).

SUMMARY

The first order of business in any contract interpretation case is divining and determining the parties' intent. Start with the language of the contract. What does it say? What does it modify and what modifies it? Is there evidence of any special meaning to be given to these particular words from an industry practice, bargaining history or any verbal or written communications about the meaning of the words or why they are there? Is there evidence of how this has been interpreted in the past?

As in all things arbitral, the answers to these questions will greatly affect the outcome and, as always, it depends on the facts.