# THE TWO SOURCES OF PAST PRACTICE

Professor Mittenthal's first paper on Past Practice, "Past Practice and the Administration of Collective Bargaining Agreements," was written in 1960 and appearing in the 1961 volume of the *Proceedings of the National Academy of Arbitrators*, on the web at http://naarb.org//proceedings/pdfs/1961-30.pdf.

Over 30 years later, Professor Mittenthal was invited to revisit the topic of past practice to see how his prior paper had held up over time. He did so in "The Ever-Present Past," in the 1994 volume of the *Proceedings* at 184, on the web at https://naarb.org/proceedings/pdfs/1994-184.pdf That 1994 reevaluation is seldom quoted—certainly not as often as the 1960 original—but it should be, because it completes a thought over the 30 year period since its predecessor. Here is what Professor Mittenthall found when looking back over thirty years:

> It seemed obvious back in 1960 that practice was one of the most commonly used and most important aids in contract interpretation. That is no longer true in my opinion. Dramatic changes have taken place in the content of collective bargaining agreements. Those changes tended to reduce substantially the opportunity for the parties to rely on past practice.
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> There have been two parallel developments. First, as parties grew more sophisticated, they took steps to make sure all obligations were expressed in writing. Agreements grew from 30 pages to 100, from 50 pages to 200. In the process many practices were reduced to writing in order to simplify contract administration and to avoid disputes as to how matters were handled in the past. (At 185-186.) ***
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> Second, as employers became more sophisticated and their lawyers more aware of the arbitrator's penchant for transforming a practice, by implication, into a separate, enforceable condition of employment, a counterattack began. Employers sought to prevent these implications. They sometimes succeeded by negotiating highly restrictive arbitrability clauses...

Howell L. Lankford, NAA, hll@iname.com, PO Box 22331, Portland, OR 97269