American Postal Workers

Union

AFL-CIO

UNDERSTANDING

PAST

PRACTICE

THE UNWRITTEN CONTRACT

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ARTICLE 5
PROHIBITION OF UNILATERAL ACTION

Management is prohibited from taking any unilateral action inconsistent with the terms of the existing agreement or its obligations under law. Section 8(d) of the National Labor Relations Act prohibits an employer from making unilateral changes in wages, hours or working conditions during the term of a collective bargaining agreement.

PAST PRACTICE

The following explanation represents the national parties' general agreement on the subject of past practice. The explanation is not exhaustive, and is intended to provide the local parties general guidance on the subject.

The local parties must insure that the facts surrounding a dispute in which past practice plays a part are surfaced and thoroughly developed so an informed decision can be made. While a past practice that is inconsistent or in conflict with the National Agreement is not binding, Article 5 may limit the employer's ability to take a unilateral action where a valid past practice exists. While most labor disputes can be resolved by application of the written language of the Agreement, it has long been recognized that the resolution of some disputes requires the examination of the past practice of the parties.

DEFINING PAST PRACTICE

In a paper given to the National Academy of Arbitrators, Arbitrator Mittenthal described the elements required to establish a valid past practice:

First, there should be clarity and consistency. A course of conduct which is vague and ambiguous or which has been contradicted as often as it has been followed can hardly qualify as a practice. But where those in the plant invariably respond the same way to a particular set of conditions, their conduct may very well ripen into a practice.

Second, there should be longevity and repetition. A period of time has to elapse during which a consistent pattern of behavior emerges. Hence, one or two isolated instances of certain conduct do not ordinarily establish a practice. Just how frequently and over how long a period something must be done before it can be characterized as a practice is a matter of good judgment for which no formula can be devised.

Third, there should be acceptability. The employees and supervisors alike must have knowledge of the particular conduct and must regard it as the correct and customary means of handling a situation. Such acceptability may frequently be implied from long acquiescence in a known course of conduct. Where this acquiescence does not exist, that is, where employees constantly protest a particular course of action through complaints and grievances, it is doubtful that any practice will be created.

One must consider, too, the underlying circumstance which gives a practice its true dimensions.

A practice is no broader than the circumstances out of which it has arisen, although its scope can always be enlarged in the day-to-day administration of the agreement. No meaningful description of a practice can be made without mention of these circumstances.

For instance, a work assignment practice which develops on the afternoon and midnight shifts and which is responsive to the peculiar needs for night work cannot be automatically extended to the day shift.

The point is that every practice must be carefully related to its origin and purpose.

Finally, the significance to be attributed to a practice may possibly be affected by whether or not it is supported by mutuality.

Some practices are the product, either in their inception or in their application, of a joint understanding; others develop from choices made by the employer in the exercise of its managerial discretion without any intention of a future commitment.

Functions of Past Practice
In the same paper, Arbitrator Mittenthal notes that there are three distinct functions of past practice:

To Implement Contract Language
Contract language may not be sufficiently specific to resolve all issues that arise. In such cases, the past practice of the parties provides evidence of how the provision at issue should be applied.

For example, Article 15, Section 2, Step 3 of the 1978 National Agreement (and successor agreements through the 2000 National Agreement) required the parties to hold Step 3 meetings.

The contract language, however, did not specify where the meetings were to be held. Arbitrator Mittenthal held that in the absence of any specific controlling contract language, the Postal Service did not violate the National Agreement by insisting that Step 3 meetings be held at locations consistent with past practice. (N8-NAT-0006, July 10, 1979, C-03241)

To Clarify Ambiguous Language
Past practice is used to assess the intent of the parties when the contract language is ambiguous, that is, when a contract provision could plausibly be interpreted in one of several different ways.

A practice is used in such circumstances because it is an indicator of how the parties have mutually interpreted and applied the ambiguous language. For example, in a dispute concerning the meaning of an LMOU provision, evidence showing how the provision has been applied in the past provides insight into how the parties interpreted the language.

If a clear past practice has developed, it is generally found that the past practice has established the meaning of the disputed provision.

To Implement Separate Conditions of Employment

Past practice can establish a separate enforceable condition of employment concerning issues where the contract is "silent." This is referred to by a variety of terms, but the one most frequently used is *the silent contract.* For example, past practices of providing the local union with a file cabinet may become a binding past practice, even though there are no contract or LMOU provisions concerning the issue.

Changing Past Practices

The manner by which a past practice can be changed depends on its purpose and how it arose. Past practices that implement or clarify existing contract language are treated differently than those concerning the "silent contract:"

Changing Past Practices that Implement or Clarify Contract Language

If a binding past practice clarifies or implements a contract provision, it becomes, in effect, an unwritten part of that provision. Generally, it can only be changed by changing the underlying contract language, or through bargaining.

Changing Past Practices that Implement Separate Conditions of Employment

If the Postal Service seeks to change or terminate a binding past practice implementing conditions of employment concerning areas where the contract is silent, Article 5 prohibits it from doing so unilaterally without providing the union appropriate notice.

Prior to making such a change unilaterally, the Postal Service must provide notice to the union and engage in good faith bargaining over the impact on the bargaining unit. If the parties are unable to agree, the union may grieve the change.

Management changes in such "silent" contracts are generally not considered violations if 1) the company changes owners or bargaining unit, 2) the nature of the business changes or, 3) the practice is no longer efficient or economical. The first of these has rarely arisen in Postal Service cases involving its numerous bargaining units.

A change in local union leadership or the arrival of a new Postmaster or supervisor is not, in itself, sufficient justification to change or terminate a binding past practice, as noted in the previous paragraph.

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PAST PRACTICE

The Unwritten Contract

What is it?

How to enforce it?

Understanding Past Practice

What is a past practice?

- Throughout the years arbitrators have defined and applied the standards of past practices when deciding the interpretation and the implementation of the Collective Bargaining Agreement.

- In the simplest terms Arbitrator Clair V. Duff put it this way: Past practice may be described as a pattern of conduct which has existed over of time and which has been known to the parties and not been objected to, (American St. Govain Corp. 46 LA 920, 921),

Customs are equivalent to practices.

What is a custom?

1. A frequent or common use or practice; a frequent repetition of the same act; usage; habit

2. In law, such usage as by long-established, uniform practice and common consent which has taken on the force of law. (industrial law, or law of the shop)

The Unwritten Contract

How is custom and practice part of the agreement?

- Arbitrators continue to hold custom and past practice enforceable through arbitration, even though not expressed in the collective bargaining agreement. (a uniform practice and common consent which has taken on the force of law.)

- The Labor arbitrator's source of law is not confined to the expressed provisions of the contract, as the industrial common law.

- The practice of the industry and the shop is equally a part of the collective bargaining agreement although not expressed in it.

- If the contract language is silent or not clear and distinct, past practice is universally relied on to define the understanding of what the language means to them.

- Bona fide past practices rise to the level of explicit terms of the agreement.

Custom & Practice as Part of the Unwritten Contract

Arbitrator Mittenthal in case HOC-NA-C 14 expressed from the standpoint of jurisdiction, the customary way of doing things become the contractually correct way of doing things.

Simply put, past practice defines the parties meaning of contract language that may need clarification.

Evidence of custom & past practice may be introduced for any of the following major purposes.

1. To provide the basis for rules governing matters not written into the contract. (The reason for the practice or custom, the foundation that supports the practice)

2. To clarify the proper interpretation of ambiguous contract language. (language which have different interpretations or two or more possible meanings, and repetitive actions have determined what the contract means.)

3. To support allegations that clear language of the contract has been amended by mutual action or agreement.
(Clerks have performed duties within the Mailhandlers job description for the last 30 years, Carriers transporting mail in MVS vehicles for 20 years)

Practices can evolve into Employee Rights and Benefits

- Uniforms
- Rolling chairs to distribute mail
- Bulletin Boards
- Drinks at the manual case

- Table and chairs in a hallway
- Wash up times
- Breaks

Review

Custom & Practices

- Custom and practice is pattern of conduct that extends overtime which is known and accepted by the parties.
- A long-established, uniform practice and common consent takes on the force of law.
- Arbitrators hold custom and past practice enforceable through arbitration, even if not expressed in the contract.
- Where contract language is silent or not clear, past practice is universally relied on to define what the language means to the parties.

Evidence of custom & past practice provides for:

- Matters not written into the contracts.
- Proper interpretation of ambiguous contract language.
- Where the contract has been amended by mutual action or agreement.

Binding Past Practice

- When does the practice becomes binding on the parties?

- Arbitrator Richard Mittenthal concluded that in order for a past practice to rise to the level of a binding past practice, one ordinarily would expect it to be clear, consistently followed, followed over a long period of time and mutually accepted by the parties.

Defining Past Practice
Joint Contract Interpretation Manual
and a New Day

Prior to June 2004 most parties relied upon a"paper" by Arbitrator Mittenthal to describe the needed elements to establish a past practice.

The JCIM beginning in June 2004 gives the definition agreed to by the parties at the national level for our bargaining unit by referencing the Mittenthal "paper".

Defining Past Practice

The JCIM lists three points containing five elements that **must be met** in order to establish a past practice in an APWTJ bargaining unit.

1. Clarity and Consistency.
2. Longevity and Repetition.
3. Acceptability.

Clarity and Consistency

It should be clear what has been done.

It should be done in the same way in nearly every situation.
Where the situation doesn't not change, the practice should be followed on a consistent basis.

If these are not met it is not a practice.

Longevity and Repetition

A consistent pattern should exist.

A long period of time is needed.

Please note that the JCIM uses the word "consistent" to define these elements so normally if you meet the standard of consistency in the first element you will meet the standard here.

Acceptability

Both parties must have knowledge of the practice. Frequently called mutuality.

Also, a long acquiescence helps establish the acceptability. Note this long period would help in the previous elements too.

Underlying Circumstances

Where did the practice come from, or how did it start?

Gather facts to show how the practice was established,

It could be for only one tour or section.

A practice is no broader than the circumstances out of which it has arisen, although its scope can always be enlarged in the day to day administration of the contract.

The point is that every practice must be carefully related to its origin.

Some practices are the product, either, in their inception or in their application, of a joint understanding; others develop from choices made by the employer in the exercise of its managerial discretion without intention of a future commitment.

Functions of a Past Practice

Mittenthal noted three functions of a past practice in his paper.

i. To implement Contract language.
ii. To clarify Contract language.
iii. To implement separate conditions of.

Changing Past Practices

In order to change a practice involving contract language
either the contract language itself must change, or bargaining must take place for either party to obtain the change.

Changing Past Practices and the Law

The National Labor Relations Act prohibits the employer from making unilateral changes in wages, hours or working conditions or other terms and conditions of employment during the term of the collective bargaining agreement.

Obligation to Bargain Collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.

Conditions of Employment

Means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise affecting working conditions.

- Ref: U.S.C. Title 5 Section 7103(a)(14)

Changing Past Practices and the Law

The duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) Serves a written notice upon the other party of the proposed termination.

(2) Offers to meet and confer with the other party for the purpose of negotiating.

Article 5
Prohibition of Unilateral Action

Article 5 of the Collective bargaining agreement and the JCIM incorporates the prohibition of unilateral changes as stated in the National Labor Relations Act Section 8d.

- Unilateral defined, means done or undertaken by one person or party.
- Affecting one side only.
- Not by mutual consent

Employee Rights and Benefits

Over the years, the give and take between management and employees have resulted in certain employee rights and benefits which are covered by the agreement or which evolved out of a well established practice.

Wages, hours, working conditions, other terms and conditions of employment, contract. They are either written into the agreement or are silent, though they exist though practice.

Changing Past Practices

To change a past practice that stems from silent contract language there must be notice given by the employer and "good faith bargaining" must take place.

Management changes in such "silent" contract are generally not considered violations if,

1. The company change owners or bargaining unit,
2. The nature of the business change or,
3. The practice is no longer efficient or economical. (a change of persuasive force)

New Sheriff in Town

The JCIM makes it clear that a change in either management or the union leadership is not "sufficient justification to change or terminate a binding past practice."

Understanding Past Practice
The Unwritten Contract

Arbitrator Parkinson in case number C9OC-4C-C93014395 discusses past practice relative to a uniform allowance. Arbitrator Parkinson states at page 9, "Although the Postal Service alleges that the uniform allowance was given to the Technicians in error, such an argument is diminished when one considers that for some ten (10) years the Technicians received this allowance. This type of so called error is not one which is subtle or undetectable inasmuch as the Technicians wore on their person the benefit of the allowance and it was well know to everyone." and Arbitrator Parkinson continues on page 9, "Furthermore, there is no dispute that this benefit constituted a long standing practice. It was condoned by the Postal Service for a number of years, it was an obvious benefit that all parties were aware of, and the Postal Service acted upon it by providing the benefits for all these years. Hence it has all the attributes of a past practice which in effect has ripened into one that is binding." And arbitrator Parkinson quotes from arbitrator McCaffree which is our next cite.

Arbitrator Parkinson in case number C9OC-4C-C930 14395 reasons

- Postal Service claims a uniform allowance was given to the Technicians in error (for 10 years.)
- Technicians wore on their person the benefit of the allowance and

it was well know to everyone.

- Furthermore, there is no dispute that this benefit constituted a long standing practice.
- Postal Service acted upon it by providing the benefits for all these years.
- Hence it has all the attributes of a past practice which in effect has ripened into one that is binding.

The practice has:

- Clarity and consistency
- Longevity and repetition
- Acceptability
- Function / Implement silent language
- Evolved into a benefit
- Develop from choices made by the employer in the exercise of its managerial discretion
- Unilateral change

In case number WOG-5G-C961 Arbitrator McCaffree teaches about past practice and also on a uniform issue. The arbitrator states at page 8: "The past practice of the clothes allowance to the SSPU Technicians at Salem Oregon became contractually binding under the circumstances here. The fact that the Employer may have unilaterally initiated this benefit to these employees does not necessarily give the Employer the right to cancel the allowance by its unilateral decision. Even though the Employer found that its purpose for the provision of the clothes in these cases was no longer being served, and justified the discontinuance of the practice, the employer's decision failed to recognize the "benefit" to employees. The practice was '(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,' and not prohibited by a written agreement between the parties. Although in some instances the employer may discontinue a 'gratuity' here the matter is a 'working condition'. And the arbitrator continues at page 8, "I concluded that the past practice of providing a clothes allowance to the SSPU Technicians at Salem became a binding condition of the Agreement and independent of the provisions of Article 26 and the ELM. The Employer was not privileged to discontinue the practice unilaterally where such a binding past practice had been established."

Arbitrator McCaffree in case WOG-5G-C961

- Past practice of the clothes allowance to the **SSPU** Technicians at Salem Oregon became binding.
- Employer unilaterally initiated this benefit to the employees.
- The Employer discontinued the practice unilaterally where a binding past practice had been established.
- Although in some instances the employer may discontinue a 'gratuity' here the matter is a 'working condition.

The Practice Has:

- Clarity and consistency
- Longevity and repetition
- Acceptability
- Function / Implement silent language
- Evolved into a benefit
- Develop from choices made by the employer in the exercise of its managerial discretion.
- Unilateral change

The above cases are similar in that the ELM did not provide for uniforms but both arbitrators granted the grievance because a binding past practice had been established.

In case number C1C-4K-C18134 Arbitrator Jonathan Dworkin discusses past practice and a unilateral action or removing the practice. The Postal Service abolished the practice of permitting clerks to sit in rolling chairs while distributing mail to customer boxes. The practice was in place before the Postal Reorganization Act and it remained in effect during each Collective Bargaining Agreement subsequent to the passage of the Act, The clerks in the Joplin Post office continued to distribute mail from these chairs for an uninterrupted period of twenty two years. Arbitrator Dworkin states at page 7, "In the arbitrator's opinion, proper decision in this case turns on the question of whether practice claimed by the Union was binding. If it was, the Postmaster exceeded his authority by unilaterally abolishing it. A practice is a way of doing things -- a mutually recognized, repetitive response to given circumstances. It comes about through implicit (or explicit) agreement and usually (but not always) defines a benefit or condition of employment. The arbitrator agrees with Arbitrator Larson's (case number S8C-3P-C2752) concept that a binding practice is part of the 'whole contract' between the parties. Once established, it is obligatory to the same extent as it would be if it were set forth in contractual language. It cannot be ignored by management on the grounds that it is costly or inefficient any more than other negotiated benefits can be extinguished for those reasons." And Arbitrator Dworkin continues at page 11, "The concept of shifting evidentiary responsibilities applies in this dispute. The Union presented a prima facie case when it proved that a benefit of employment was removed by the Joplin Postmaster's sudden abandonment of a twenty-year practice - - a practice that was formed to settle a 1963 grievance. The Union's evidence confirmed that the practice continued in an unbroken pattern spanning several collective bargaining agreements. The Union also stated without refutation that no accidents occurred because of the practice and, although the Arbitrator recognizes that this argument is a logical fallacy, he finds it compelling nevertheless. It is particularly persuasive in view of the fact that the Joplin Postmaster held his position for ten years before he questioned the safety of the practice."

Arbitrator Jonathan Dworkin in case C1C-4K-C18134

- Chairs while distributing mail to customer boxes was ended after twenty two years.
- The practice was formed to settle a grievance.
- The Joplin Postmaster held his position for ten years before he questioned the safety of the practice.
- A benefit of employment was removed.
- The practice continued in an unbroken pattern spanning several collective bargaining agreements.

The practice has:

- Clarity and consistency
- Longevity and repetition
- Acceptability
- Function / clarify Contract language
- Underlying reason / formed to settle a grievance
- Evolved into a benefit of employment
- Unilaterally discontinued

Jonathon Dworkin in case number C4C-4A-C1805 the arbitrator discussed past practice with bulletin boards. Management unilaterally removed three APWU bulletin boards and placed them in different locations throughout the Chicago Bulk Mail Center. The actions of the Maintenance Manager, was not malicious or intended to harm the Union. Its purposes were to eliminate eye-sores and create orderliness in what seemed to be chaotic and poorly maintained bulletin boards scattered throughout the work place. The arbitrator states as page 8, 'The arbitrator finds that the Union's claim is supported by a binding practice. The three bulletin boards had been assigned to the APWU for a long time and were always recognized as belonging to the Union. The

practice did not conflict with anything in the National Agreement. The bulletin boards were located in a work area inaccessible to the public; they did not interfere with management's authority to preserve a sound business relationship with postal customers. There is absolutely no evidence that the bulletin boards impeded safety or diminished efficiency. The grievance will be sustained on the finding that management overreached its authority by changing an established binding past practice. It is important to note that the practice constituted a mutual understanding between the Union and Bulk Mail Center Supervision on how the silent portion of Article 22 would be interpreted for that facility. It filled in the contractual gap, prescribing the number of APWU bulletin boards required by Article 22 for that particular facility. Supervision was not at liberty to change the practice without bargaining on the subject.

Jonathon Dworkin in case number C4C-4A-C1 805

1. Three bulletin boards had been assigned to the APWU for a long time and were always recognized as belonging to the Union.
2. Management unilaterally removed the APWU bulletin boards and placed them in different locations throughout the facility.
3. Its purposes were to eliminate eye-sores and create orderliness.
4. The practice was a mutual understanding between the parties on how the silent portion of Article 22 would be interpreted for that facility.
5. It filled in the contractual gap, prescribing the number of APWU bulletin- boards required by Article 22 for that particular facility.

The practice has:

- Clarity and consistency
- Longevity and repetition

- Acceptability
- Function / Clarify ambiguous language

In case S4C-3U-C24483 Ernest Marlatt, the evidence indicates as far back as anyone could remember, manual distribution clerks were allowed to pick up drinks during their breaks or before clocking in and carry the drinks to their work stations and consume them there. In a joint labor-management meeting the Union was advised that "coffee and cokes are creating a problem in work areas. If not properly treated, will be eliminated from workroom floor." Arbitrator Ernest Marlatt talks about past practice and states at page 3; "An unwritten practice which has existed for a substantial period and which is a benefit to the employees becomes a part of the National Agreement itself and cannot unilaterally be changed by the employer during the life of the contract, unless some change in operations make the practice impossible unsafe or inefficient.. .a violation of the practice is a violation of the agreement." And the arbitrator continues "The postal service made no attempt to deny that there was a long-standing practice at the Pasadena Post Office allowing manual distribution clerks to bring drinks to their cases and consume them there. The employees were only allowed to pick up their drinks during breaks, so there was no evidence of any loss of productive time. Nor is there any evidence of changed conditions at the Post Office which would impact on the continuation of the privilege."

Ernest Marlatt in case number S4C-3U-C24483

- As far back as anyone could remember manual distribution clerks at the Pasadena Post Office were allowed to bring drinks to their cases and consume them there.
- Management advised that beverages were are creating a problem in the work areas. And if not properly treated, would be eliminated from workroom floor.

- There was no change in conditions at the Post Office which would impact on the continuation of the privilege."
- An unwritten practice in existence for a substantial period of time and is a benefit to the employees becomes part of the contract.

The practice has:

- Clarity and consistency.
- Longevity and repetition.
- Acceptability.
- Function / clarify Contract language.
- Underlying reason / Develop from choices made by the employer in the exercise of its managerial discretion.
- Evolved into a benefit.
- Unilaterally discontinued.

In case number E00C4EC040185553 AIRS No. 42319 arbitrator Sarad D Jay, at the Fargo main post office, overtime list employees were called in for OT according to the terms of the LMOU. Employees on the list were contacted by telephone and offered overtime opportunities. In 1996 employees asked if they could list a second phone number for call-ins. Most employees used cell phones as a second number, sometime in 1999 employees who belonged to the bowling league listed the bowling alley number as their second number. The Postal Service contacted employees for OT at the bowling alley number on a regular basis. In 2003 management notified the Union during a labor-management meeting of their intent to only list one number for overtime call-ins. The change was made effective October 14, 2004. Arbitrator Sarad D Jay discusses past practice at page7, "The nature of a past practice has been defined by theses parties through their Joint Contract Interpretation Manual (JCIM, Article *5*. While other definitions and reference may be available, these parties have agreed that the JCIM is controlling. As to the existence of a past practice, the JCIM adopts the classic definition of Arbitrator Richard Mittenthal,.. .Summarily stated, Arbitrator Mittenthal

wrote that a past practice must have clarity, consistency, longevity and repetition and mutual acceptability. He also wrote that there are different functions of a past practice... .implement contract language,. . .clarify ambiguous language,... implement a separate condition of employment." Arbitrator Sarad discussed that the practice was unequivocal, clearly enunciated & acted upon over a number of years. This practice took place consistently over a reasonable period of time and a showing of longevity.

Sarad D Jay in case number E00C4EC0401 85553

- Fargo post office, employees on the overtime list were contacted by telephone and offered overtime opportunities.
- In 1996 an additional phone number could be used for call-ins. Employees listed the bowling alley number as their second number and it was routinely used by management.
- Management notified the Union during a labor-management meeting of their intent to only list one number for overtime call-ins

The practice has:

- Clarity and consistency
- Longevity and repetition Acceptability
  Function / Implement silent contract language
- Underlying reason / Develop from choices made by the employer in the exercise of its managerial discretion.
- Evolved into condition of employment Unilaterally discontinued

Grievance Denied!

So you go through all of the JCIM language and management still wants to change/end the practice. What do you do?

DOCUMENT,
DOCUMENT,
DOCUMENT!

How long has the practice been in place?
Is there a clear contractual or negotiated rule regarding the practice?
When did the practice change?
Why did it change?
Obtain documentation from management why the practice ceased.
Witness statements or interviews (history)

Document

- Interview senior employees! former union stewards / retirees / other craft members
- Management interviews or statements
- LMOU provisions (if applicable)
- Labor-Management minutes / local history
- Management documents or correspondence expressing the past practice
- Proposals if bargaining took place on change
- Grievance settlements

Argument

- Show how the practice meets the elements listed in the JCIM.
- Discount any arbitration cites that do not support our theory of the case.
- Show that our arbitration cites are after the JCIM or are mentioned in those awards to support their decision in that award.

Past Practices

Documentation needed resulting from BPI evaluations.

Wash-up Time reduced or eliminated.

- How long has the practice been in place?
- Is there a clear contractual or negotiated rule regarding the practice?
- When did the practice change?
- Why was it changed?
- Review you Local Memorandum of Understanding?
- Are Mechanics allowed to take showers at the end of their tour?
- Do mechanics routinely wash up after a completed work assignment?
- Do mechanics routinely wash up during a work assignment if the need arises?
- Do drivers get wash-up time prior to lunch? How much time?
- Is the drivers' wash-up time included or written on his schedule?
- Interview witnesses to and obtain statements to establish that the practice existed for a lengthy period of time.
- Interview senior employees who have been in work area for long period of time.
- Interview other employees who have knowledge of the practice
- Interview supervisors and managers who have supervised the unit that have direct knowledge that the practice observed by the parties on a daily basis or however often it occurred.
- Obtain evidence that the practice was not objected to by either party; normally this would be in the form of witnesses statements.
- Obtain the bargaining history from local president, officers and stewards.
- Obtain copies of Labor Management Meetings where- the issue may have been discussed.

Breaks reduced or eliminated

- How long has the practice been in place?
- Is there a clear contractual or negotiated rule regarding the practice?
- When did the practice change?
- Why was it changed?
- Review you Local Memorandum of Understanding?
- Are breaks included in the drivers' schedule? -
- How long are breaks?
- Interview witnesses to and obtain statements to establish that the practice existed for a lengthy period of time.
- Interview senior employees who have been in work area for long period of time.
- Interview other employees who have knowledge of the practice
- Interview supervisors and managers who have supervised the unit that have direct knowledge that the practice observed by the parties on a daily basis or how ever often it occurred.

In case number E00C1EC04048076 AIRS No. 42678 Jeanne M. Vonhof discusses past practice at page 8. There is no dispute in this case that for about 20 years employees on Tour 3 at the Minneapolis/St. Paul BMC have been permitted not to work on Christmas Eve, at their own discretion. Past practice is discussed in the JCIM, the joint interpretation manual for the Agreement, under its discussion of Article *5,* Prohibition of Unilateral Action. Both parties rely upon this section in this case. The JCIM notes the reference in Article S to Section 8(d) of the National Labor Relations Act, which, it states, "prohibits an employer from making unilateral changes in wages, hours or working conditions during the term of a collective bargaining agreement." The conditions set out by the JCIM for establishing a past practice are all present here. There is clarity and consistency, longevity and repetition in this practice. The evidence shows that any employee who wanted to take leave has been

permitted to take leave, if the employee so desired, on Tour 3 on Christmas Eve. There is no evidence of any employee being refused leave on this day on Tour 3 over a 20-year period. There is no question that Management had knowledge of the practice and acquiesced to it over a long period of time supervisors openly acknowledged the practice in their holiday schedule planning and scheduled around it. There is a binding past practice going back 20 years of granting leave to any employee on Tour 3 at the Minneapolis/St. Paul Bulk Mail Center who wished to take leave on Christmas Eve. Management of the Postal Service violated the collective bargaining agreement (including the JCIM) when they changed the practice without bargaining in good faith with the Union over the impact of such a change on the bargaining unit. No monetary remedy is appropriate. The practice remains in effect, however, and cannot be changed without good reason and without bargaining with the Union over the impact of any change on the bargaining unit.

In Case number C98V-1C-C98127936 AIRS No, 42266 Michael F. Zobrak, Tractor trailer operators at the Cincinnati Bulk Mail Center routinely transported trailers to the wash pad to be washed by a private contractor. The drivers were directed by supervision over a period of 20 years to transport the trailers to the wash pad area. Because of Environmental Protection Agency regulations the Postal Service built a trailer washing pad and also enter into a contract which required the contractor to transport trailers to and from the wash pad. Zobrak discusses past practice at page 6, "In order for there to be a finding of an existing past practice it must be established that over an extended period of time the parties have mutually accepted the customary way of doing things. . .witnesses clearly detailed the customary way trailers were moved in order to be washed since 1985.. . .As such, the movement of trailers for washing began an integral part of the TTO duties.

In case, number S8C-3F-C2752, Arbitrator Lennart Larson mentions past practice and he states at page 7: "It is generally

understood that while a collective bargaining contract is in effect, the employer may not, for no reason or for economy reasons only, withdraw or terminate an unwritten practice which has existed for a substantial period and which is a benefit to the employees. The practice must be consistent and of such duration that the inference is that the parties have tacitly agreed to it, if indeed they have not orally agreed to it. The practice then is a part of the whole contract. Article V of the national agreement (prohibition of unilateral action) is consistent with this understanding."

In case numbered C1C-4H-C32988 by Jonathon Dworkin the arbitrator teaches about past practice and he states at page 3; "The Union is on firmer ground in demanding restoration of the table and chairs to the hallway. The evidence demonstrates that this benefit was a binding past practice. It existed for five years with management's knowledge and, consent. The continuity of the benefit was broken temporarily when the table and chairs were removed to permit installation of a new floor. However, that in itself did not constitute an abandonment. It was reasonable for the employees to assume the interruption was temporary. A binding practice cannot be unilaterally altered or amended so long as conditions supporting it do not change. If conditions do not change to the extent that a practice is no longer appropriate management has the right to abandon it. A practice is inextricably connected to conditions which engender it. Therefore, material changes in the workplace will dissolve the foundation of some practices and justify the employer to disregard them. If circumstances supporting a binding practice remain intact and the practice is not inconsistent with the agreement, unilateral abandonment is prohibited. Article *5* of the agreement touches on the subject."

In case number C1C-4B-C7458 Linda Deleone Klein on past practice and wash up time, arbitrator Linda Deleone Klein comments at page 9: "Based upon this evidence the arbitrator finds that the clerks were accustomed to taking a five-minute wash up period prior to the end

of their tours of duty. There was acquiescence on the part of management regarding the wash up time the employees took prior to April, 1982 and this is tantamount to an understanding that a five minute wash up period was acceptable. This established a working condition which, while not written or clearly enunciated, management was aware of. The fact that there was no written policy to this effect does not mean that it was not official. Two wash up periods per day was a condition of employment. To affect a change in a condition of employment without negotiation constitutes a violation of article 5 of the national agreement."