



**PAST PRACTICE  
THE UNWRITTEN  
CONTRACT**



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**PAST PRACTICE**

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- The Unwritten Contract
  
- What is it?
  
- How to enforce it.

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**Understanding Past Practice**

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

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**Understanding Past Practice**

- Customs are equivalent to practices.
- What is a custom?
- A frequent or common use or practice; a frequent repetition of the same act, usage or habit.
- In law, such usage which has – by long-established, uniform practice and common consent – taken on the force of law.

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**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.

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**The Unwritten Contract**

- The Labor arbitrator's reliance on "industrial common law".
  - The source of contract law is not confined to the expressed provisions of the contract.
  - The practice of the industry and the shop is equally a part of the collective bargaining agreement although not expressed in it. This is "industrial common law".

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## The Unwritten Contract

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

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## Custom & Practice as Part of The Unwritten Contract

- From the standpoint of jurisdiction, the customary way of doing things becomes the contractually correct way of doing things.  
(Arbitrator Mittenthal H0C-NA-C14)
  
- In short, past practice defines the parties' meaning of contract language that may need clarification.

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## Custom & Practice as Part of The Unwritten Contract

- 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)

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**Custom & Practice as Part of  
The Unwritten Contract**

- 2. To clarify the proper interpretation of ambiguous contract language.

(Language having different interpretations or two or more possible meanings where the parties' repetitive actions have determined what the contract means.)

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**Custom & Practice as Part of  
The Unwritten Contract**

- 3. To support allegations that clear language of the contract has been amended by mutual action or agreement.

(For example, Clerks performing duties within the Mailhandlers job description for the last 30 years; Carriers transporting mail in MVS vehicles for 20years.)

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**Practices can evolved 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

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**Recap**

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- ❑ Custom and practice is a pattern of conduct that extends over time, which is known and accepted by the parties.
  
- ❑ Long-established, uniform practice and common consent create the force of law.

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**Recap**

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- ❑ 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.

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**Recap**

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- ❑ Evidence of custom & past practice provides support for –
  - Matters not written into the contract
  - Proper interpretation of ambiguous contract language
  - Amendment of the contract

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**Binding Past Practice**

- When does the practice become 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, be followed over a long period of time and have mutual acceptance by the parties.

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**Defining Past Practice  
JCIM 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.
- As of June 2004, the JCIM gives the definition agreed to by the parties at the national level by referencing the Mittenthal “paper”.

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**Defining Past Practice**

- The JCIM lists three elements that are necessary to a past practice in an APWU bargaining unit.
  1. Clarity and Consistency.
  2. Longevity and Repetition.
  3. Acceptability.

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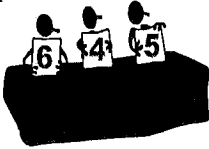
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<h3>Defining Past Practice</h3> <h4>Clarity and Consistency</h4>	
<ul style="list-style-type: none"> <li><input type="checkbox"/> It should be clear what has been done.</li> <li><input type="checkbox"/> It should be done in the same way in nearly every situation.</li> <li><input type="checkbox"/> Where the situation does not change, the practice should be followed on a consistent basis.</li> <li><input type="checkbox"/> If these are not met it is not a past practice.</li> </ul>	

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<h3>Defining Past Practice</h3> <h4>Longevity and Repetition</h4>	
<ul style="list-style-type: none"> <li><input type="checkbox"/> A consistent pattern should exist.</li> <li><input type="checkbox"/> A long period of time is needed.</li> <li><input type="checkbox"/> 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.</li> </ul>	

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<h3>Defining Past Practice</h3> <h4>Acceptability</h4>	
<ul style="list-style-type: none"> <li><input type="checkbox"/> Both parties must have knowledge of the practice. This establishes <i>mutuality</i> of the acceptance of the practice.</li> <li><input type="checkbox"/> Also, a long acquiescence helps establish the acceptability. Note this long period would help in the previous elements too.</li> </ul>	

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**Defining Past Practice**

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- The JCIM also explains how to measure a past practice against the three necessary elements –
  - The *underlying circumstances* giving rise to the practice may support the binding nature of the practice.
  - Evidence of *mutuality* may also support a conclusion that a past practice is binding.

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**Defining Past Practice**  
Underlying Circumstances

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- Where did the practice come from, or how did it start?
- Evidence is necessary to show how a practice was established.
- What specific factors underlie the practice? A practice may exist only for one tour or section.

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**Defining Past Practice**  
Underlying Circumstances

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- 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.

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**Defining Past Practice**  
Mutuality

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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.

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**Recap**

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The JCIM establishes the parties' mutual understanding of what makes a past practice binding.

- Clarity and consistency
- Longevity and repetition
- Acceptability

These elements may be supported by *underlying circumstances* and *mutuality*.

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**Functions of a Past Practice**

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

1. To *implement* contract language.
2. To *clarify* contract language.
3. To implement separate conditions of employment – i.e., the contract is *silent*.

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### Functions of a Past Practice

- ❑ In the JCIM the parties also adopted Arbitrator Mittenthal's explanation of the *functions* of binding past practice.
- ❑ Understanding *function* is critical to understanding how a binding past practice may be changed.

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### Changing Binding Past Practice

- ❑ To change a practice that *implements or clarifies* contract language –
- ❑ Either the contract language itself must change, or bargaining must take place for either party to obtain the change.



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### Changing Binding Past Practice

- ❑ To change a practice that has become a *separate condition of employment* due to the *silence* of the contract –
- ❑ The party seeking change must *notify* the other party of its intention.
- ❑ The party seeking change must negotiate in good faith toward making the change.

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**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.

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**Changing Past Practices and the Law**  
Unilateral Changes

- Unilateral is defined as . . . done or undertaken by one person or party –
  - Affecting one side only.
  - Not by mutual consent.

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**Changing Past Practices and the Law**

- 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.

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**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)

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**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.

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**Article 5**

**Prohibition of Unilateral Action**

- Article 5 and the JCIM incorporate the prohibition of unilateral changes as stated in the National Labor Relations Act Section 8d. into the collective bargaining agreement.

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**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**.

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**Employee Rights and Benefits**

- Wages, hours, working conditions, other terms and conditions of employment – employee rights and benefits – are all part of the contract. **They are either written into the agreement or they exist through practice in the *silence* of contract language.**

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**Recap - unilateral changes in wages hours or working conditions**

- The NLRA 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 contract.

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## Recap

- Employee rights and benefits which evolved out of a binding past practice have the same force and effect as actual contract language.
- Conditions of employment; policies, practices, and matters, established by rule, regulation, affecting working conditions are terms of contract.

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## Changing Past Practices By Negotiation



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

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## Changing Past Practices

- Management changes in such “silent” terms of contract are generally not considered violations if
  1. The company change owners or bargaining unit.
  2. The nature of the business changes or,
  3. The practice is no longer efficient or economical.  
(There must be a change of persuasive force.)

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## 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."



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## Arbitrator Parkinson in case number C90C-4C-C93014395

- 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

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## 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

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**Arbitrator McCaffree in case number  
W0G-5G-C961**

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- 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.'

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**The Practice Has**

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- 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

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**Arbitrator Jonathan Dworkin in case  
C1C-4K-C18134**

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 Practice of permitting clerks to sit in rolling 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.

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<p><b>The Practice Has</b></p> <hr/> <ul style="list-style-type: none"> <li><input type="checkbox"/> Clarity and consistency</li> <li><input type="checkbox"/> Longevity and repetition</li> <li><input type="checkbox"/> Acceptability</li> <li><input type="checkbox"/> Function / clarify Contract language</li> <li><input type="checkbox"/> Underlying reason / formed to settle a grievance</li> <li><input type="checkbox"/> Evolved into a benefit of employment</li> <li><input type="checkbox"/> Unilaterally discontinued</li> </ul>
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<p><b>Jonathon Dworkin in case number C4C-4A-C1805</b></p> <hr/> <ul style="list-style-type: none"> <li><input type="checkbox"/> Three bulletin boards had been assigned to the APWU for a long time and were always recognized as belonging to the Union.</li> <li><input type="checkbox"/> Management unilaterally removed the APWU bulletin boards and placed them in different locations throughout the facility.</li> <li><input type="checkbox"/> Its purposes were to eliminate eye-sores and create orderliness.</li> <li><input type="checkbox"/> The practice was a mutual understanding between the parties on how the silent portion of Article 22 would be interpreted for that facility.</li> <li><input type="checkbox"/> It filled in the contractual gap, prescribing the number of APWU bulletin boards required by Article 22 for that particular facility.</li> </ul>
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<p><b>The Practice Has</b></p> <hr/> <ul style="list-style-type: none"> <li><input type="checkbox"/> Clarity and consistency</li> <li><input type="checkbox"/> Longevity and repetition</li> <li><input type="checkbox"/> Acceptability</li> <li><input type="checkbox"/> Function / Clarify ambiguous language</li> </ul>
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**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.

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**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

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**Sarad D Jay in case number  
E00C4EC040185553**

- 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

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<h3>The Practice Has</h3> <hr/> <ul style="list-style-type: none"> <li><input type="checkbox"/> Clarity and consistency</li> <li><input type="checkbox"/> Longevity and repetition</li> <li><input type="checkbox"/> Acceptability</li> <li><input type="checkbox"/> Function / Implement silent contract language</li> <li><input type="checkbox"/> Underlying reason / Develop from choices made by the employer in the exercise of its managerial discretion.</li> <li><input type="checkbox"/> Evolved into condition of employment</li> <li><input type="checkbox"/> Unilaterally discontinued</li> </ul>
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<h3>Grievance Denied !</h3> <hr/> <ul style="list-style-type: none"> <li><input type="checkbox"/> So you go through all of the JCIM language and management still wants to change or end the practice. What do you do?</li> </ul> <p style="text-align: center;"><b>DOCUMENT!</b></p> <p style="text-align: center;"><b>DOCUMENT!</b></p> <p style="text-align: center;"><b>DOCUMENT!</b></p>
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<h3>Document</h3> <hr/> <ul style="list-style-type: none"> <li><input type="checkbox"/> How long has the practice been in place?</li> <li><input type="checkbox"/> Is there a clear contractual or negotiated rule regarding the practice?</li> <li><input type="checkbox"/> When did the practice change?</li> <li><input type="checkbox"/> Why did it change?</li> <li><input type="checkbox"/> Obtain documentation from management why the practice ceased.</li> <li><input type="checkbox"/> Obtain witness statements or interviews (history).</li> </ul>
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**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

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**Burden of Proof**



The documentation will help establish that it is a past practice based on the elements listed in the JCIM.

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**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 subsequent awards to support the decision in those awards.

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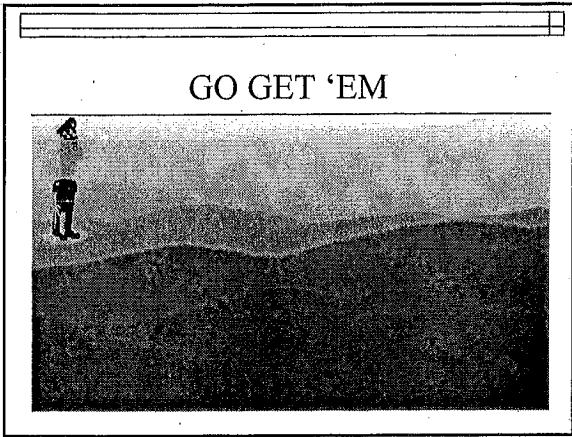
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