UE STEWARD
FIRST LINE OF DEFENSE
UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA • NOVEMBER 2022

Winning Past Practice Grievances

A powerful tool for every steward is the understanding and use of past practices. Stewards need to know what constitutes a valid past practice and what are the past practices in their workplace. It is important that all stewards are aware of the past practices so they can defend them from erosion by management.

Definition of a past practice

A past practice is any long-standing, frequent practice that is accepted and known about by both the union and management. A practice that meets the standards of being a bona fide past practice is considered to be part of the contract. Since it is part of the contract, grievances can be filed if management violates a past practice. In most cases management cannot end a past practice without first bargaining with the union. In some cases management must wait until contract negotiations to change a past practice.

Be sure to check your contract for any language that may limit the use of past practices for grievances.

The test for a valid past practice is as follows:

Mobilize the members! Don't depend on any arbitrator or NLRB agent to save the day. Everything cited in this UE Steward are "guidelines" that most arbitrators follow BUT they are under no obligation to do so. Rely on the membership to win past practice grievances, just like all grievances.

❑ **It must exist for a reasonably long time.**

The longer a practice has been in effect the more weight it carries. We are talking about years, not weeks or months. Many arbitrators think that a practice must have been in effect for 3-5 years and "cross over contracts" — that is, it must have been in practice during the life of at least two contracts.

❑ **It must occur repeatedly.**

To be valid, a practice has to occur many times, the more times the better. It should also occur consistently. A practice that happened five times four years ago and hasn't happened again is not a very strong past practice. An exception to this might be a practice that occurs around a specific holiday. If every year for seven years management has allowed workers to go home after working only half the day on the day before Christmas without penalizing them, this could be a valid past practice.

❑ **It must be clear and consistent.**

Whatever the past practice is, there must be a clear and consistent pattern of it being repeated in the same way each time. If there are minor deviations, then there must be at least a predominant pattern of consistency.

Example: Management has always let workers accept personal phone calls. The union can document over 100 times in the last five years. Management says they can prove that on three occasions workers were refused the right to accept a personal phone call. In this case the clear and overwhelming pattern is in favor of the union. Three refusals over five years doesn't break up the clear and consistent pattern.

❑ **It must be known to both management and the union.**

While a past practice does not have to have been "negotiated," it must be something that both parties know about. On the management side it is not always good enough for a low-level foreman to know; it must be higher management.

Example: For years workers have been leaving the workplace early on Fridays and the foreman knows it. According to the "absentee program" workers should receive one point for leaving early, but the foreman never gives points for Friday. Upper management finds out and decides to give everybody warnings for leaving work early. The union could argue that nobody should get a warn-

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ing because management did not inform the union that they wanted to change the practice of no discipline for leaving work early on Friday. However, since upper management did not know about this practice, it would be hard to argue that workers could continue to leave work early every Friday without discipline.

❑ **It must be accepted by both management and the union.**

The practice not only has to be known by both parties, it must be accepted by both parties. Oftentimes the fact that a practice occurs frequently over a long period of time indicates that the parties agree to it. A practice that is openly agreed to by both parties gains past practice status quicker than one that is not openly accepted. When management acknowledges a past practice as part of a grievance answer, its status as a past practice is much more secure.

Example: For many years workers have been allowed to line up at the time clock after the first bell rings, signifying there are five minutes left until quitting time. A new boss says that no one can line up until the quitting bell rings. The union has a strong case of past practice. Management cannot claim they didn't know workers were lining up after the first bell. In this case since management never did anything to stop this practice, this indicates acceptance of the practice.

The UE Steward wishes to thank Bob Schwartz for his useful book, *How to Win Past Practice Grievances*. It can be ordered for $13 plus shipping from Labor Notes, ***labornotes.org/store***.

Types of Past Practice

There are three categories of past practice. The "contract clarifying past practice" is the strongest type and the "contract conflicting past practice" presents the weakest legal argument.

Contract clarifying past practice: These practices come into being when there is contract language that is vague or general. The practice clarifies the meaning of the language.

Example: The contract language reads, "The company will allow union stewards reasonable time off from work to attend union meetings." The general phrase is "reasonable." For many years the company has allowed stewards to attend monthly union meetings and the Regional council meeting two times a year. Every other year one steward and the officers get time off to attend the National Union convention. This past practice now clarifies what the contract means by "reasonable."

This is the strongest type of past practice because it is backing up negotiated language. In most cases an employer must bargain to change the past practice, and they cannot change it if the union doesn't agree.

Independent past practice: This is a practice that is not addressed by any contract language. Most often these are "benefits" that workers take for granted and so were not included in the contract.

Example: There have always been vending machines in the cafeteria. Management cannot just decide to remove them.

Independent past practices can be terminated by management for the following reasons:

- If they can prove that there has been a significant change in the original conditions that started the practice;
- If they can prove significant ongoing employee abuse of the practice;
- If they notify the union during contract negotiations that they will end the practice during the next contract.

Even under the "change in conditions" and "abuse" situations the employer must bargain with the union before ending the practice.

Most arbitrators will not extend these past practice rights to "work methods."

Example: Management wants workers to run three machines instead of two, claiming new technology makes them easier to run. The union probably cannot claim it is a past practice that workers only run two machines. However in most cases the union can demand that management bargain over a change in working conditions.

Contract conflicting past practice: In this case the practice clearly conflicts with the contract language. These are the hardest to prove, with most arbitrators coming out on the side of saying the contract should prevail. An arbitrator may look at practices that have existed for very long times, happen very frequently, very clearly conflict with the contract and were very clearly known to both parties. In these cases the arbitrator may rule in favor of the practice.

Example: The employer has never given Union Representatives "points" under the absentee system for attending union conventions, even though there are no provisions for this exclusion in the absentee system which is part of the contract. This has been going on for ten years. Each time, the union notifies management as to who will be attending the convention. In this case although the practice conflicts with the contract, it probably would be considered a valid past practice.

The employer must notify the union of its intent to end the past practice and must bargain with the union, if the union requests to bargain. After bargaining the employer may end the past practice.