

WHEN IS A PAST PRACTICE **BINDING?**

...and why the answer is crucial to musicians and all workers

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WHAT ARE CIRCUMSTANCES by which a **binding past practice** is created in a union contract? This question is not easily answered. All too often, I hear from union representatives and members that an employer has violated a "past practice" and that a grievance should be submitted protesting the violation. Unfortunately, past practice is often misconstrued. Not every instance when an employer varies from a prior practice will be subject to challenge. For this reason, I often find myself in the position of having to explain to members that no sustainable grievance can be asserted even when a prior practice has been violated. It makes sense for members to understand the legal definition of past practice and understand the circumstances by which a binding past practice is created.

The Supreme Court has recognized that occasionally there are circumstances when actual practices – not only the written words – define the terms of a contract. In *United Steelworkers of America v. Warrior & Gulf Navigation*

Co., 363 U.S. 574 (1960), the Supreme Court held that "the labor arbitrator's source of law is not confined to the express provisions of the contract, ... the practices of the industry and the shop – is equally a part of the collective bargaining agreement, although not expressed in it."

However, in order for a binding past practice to be created, several factors must be present. First, there must be **clarity and consistency** in the practice. If a practice is not well defined and not consistently applied, it will not rise to the level of an enforceable past practice. Second, the practice must be **repeated over a long period of time**. A practice that has occurred intermittently for only a short duration is not enforceable. Finally, the practice must be **openly accepted by both parties to the agreement**. If these three factors are present, then an enforceable practice may be established.

For example, if the parties to a collective bargaining agreement have openly established a longstanding practice of awarding additional vacation time to the most senior employee, that employee may be able to assert that a binding past practice has been created that the employer may not vary from.

However, several additional factors must be considered prior to being able to successfully assert that a binding practice has been created. **If the collective bargaining agreement has an "integration" or "zipper" clause, no past practices can be relied upon**, even if the three factors discussed above are present. These types of clauses state that the written terms of the collective bargaining agreement constitute the *entire* agreement and are the only enforceable terms between the parties. In essence, this type of clause states there are no enforceable past practices.

Another roadblock to the successful assertion of a binding past practice is where there is unambiguous contract language. Thus, in the example above,



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if the collective bargaining agreement had an explicit provision barring the employer from issuing additional vacation time, no binding past practice may be established. At best an arbitrator could permit the practice one final time to provide advance notice to the bargaining unit that the written contractual language will now be adhered to. In the parlance of labor practitioners, this is known as a "pass through."

On the opposite side of the spectrum, however, sometimes the parties to a collective bargaining agreement have negotiated a "maintenance of benefits" provision in their agreement. The effect of such a clause is that past practices between the parties are given the same force and effect as if they had actually been written into the agreement. One such clause is found in Local 802's collective bargaining agreement with the American Symphony Orchestra. This clause states that "musicians shall suffer no loss of compensation or established past practice in effect prior to the

signing of the agreement." This clause was critical to the successful resolution of a grievance Local 802 had submitted protesting the employer's decision to discontinue long-standing overscale payments it had paid to musicians who performed particular services. This practice, upon investigation, satisfied the three factor test and was an established past practice. More so, the maintenance of benefits clause rendered this practice a binding contractual term that the employer was obliged to comply with for the duration for the agreement. The employer has acknowledged its obligations as a result of the incorporation of this clause into the agreement.

Prior to advocating the existence of a past practice, workers must always look to the written terms of their contract to determine if it contains language that would impact upon their ability to successfully advance the argument. In the case of the American Symphony Orchestra, beneficial language was present and the challenge was successful.