

Past Practice

D I A M O N D L A W



What is “past practice”?

Evidence of Past Practice

- Unequivocal
- Clear and uniform
- Consistent (repeated)
- Accepted by both parties (mutual)

Uses of Past Practice

- To add to the contract when contract is silent.
- To establish the terms of an existing conditions or maintenance of standards clause.
- To interpret ambiguous language in the contract.
- To create the status quo in considering whether there is a duty to bargain.

Add to a Silent Contract: Implied Terms Established Through Custom



• Past Practice



Collective Bargaining
Agreement Terms

Contract incorporates custom

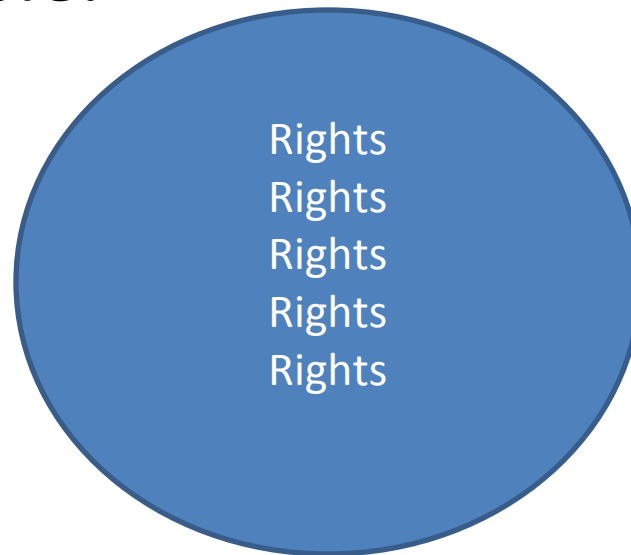


Management's reaction: lock it out



Integration Clauses

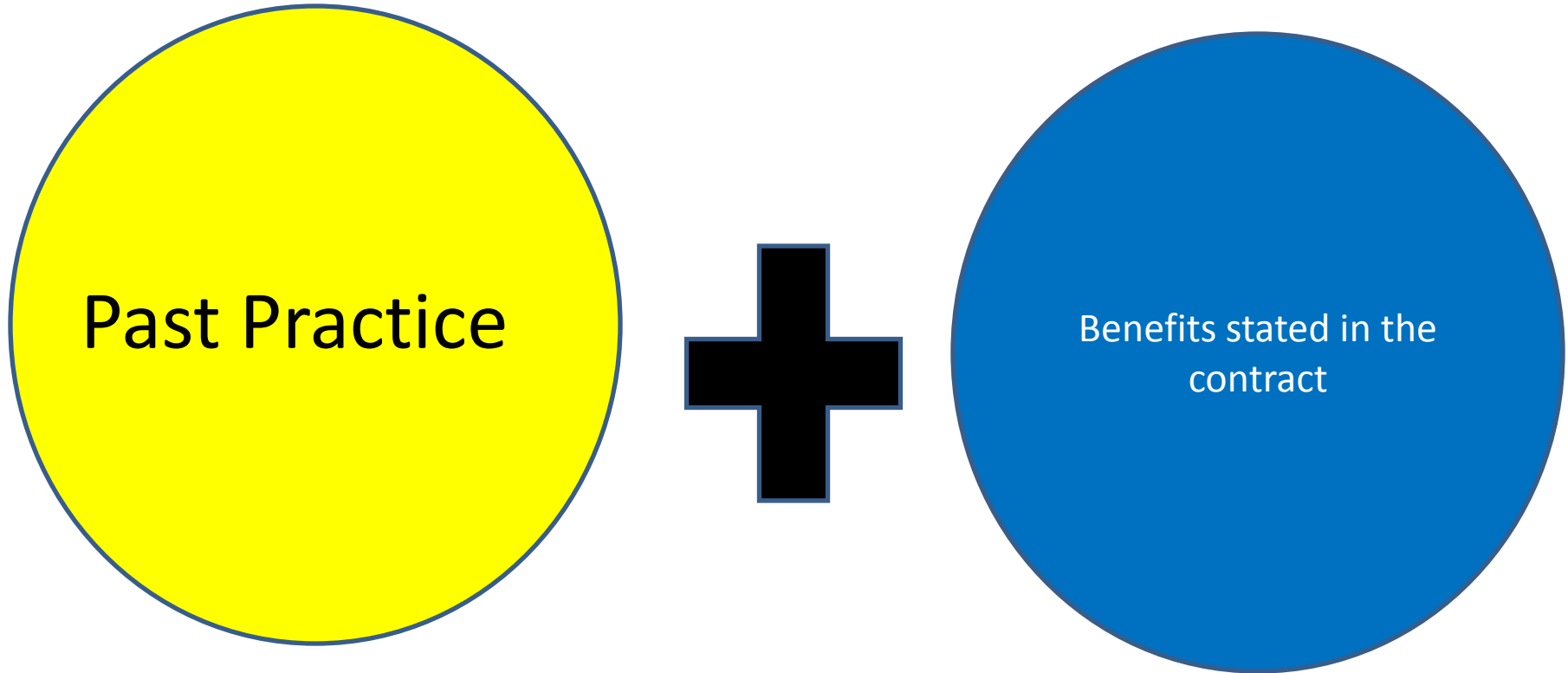
- Integration Clauses, or “this is the complete agreement and all past practices are unenforceable.”



Highest and Best Use!

- To establish the terms of an existing conditions or maintenance of standards clause.

Maintenance of Standards




Contract Example Language

“Matters of employment relations including but not limited to, direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment shall be continued at not less than the level in effect at the time of the signing of this Agreement. Any changes in existing employment relations during the term of the Agreement shall be negotiated with the UNION.”

Past Practice is Glued to the Contract!





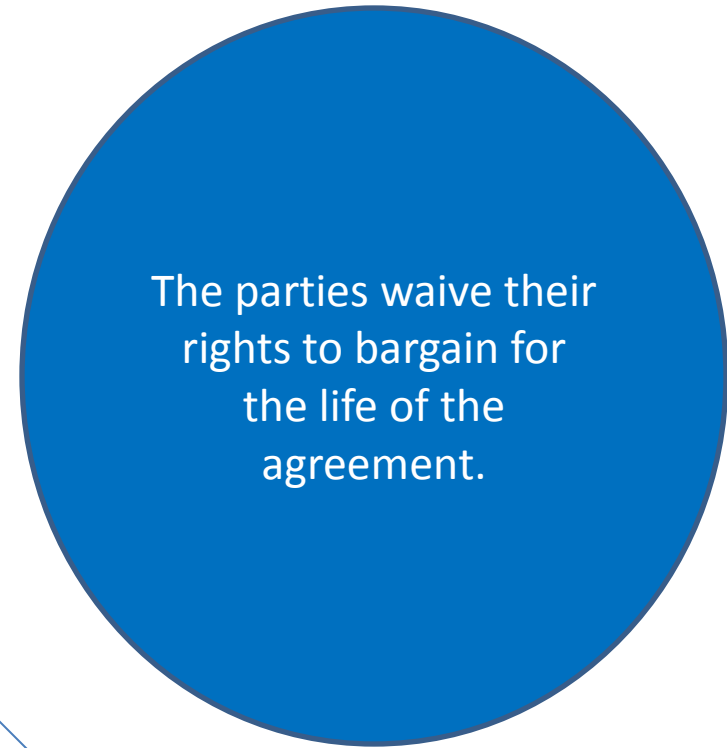
Contract Language plus
custom enforceable
through the grievance
procedure!

Management Reaction to MOS Clause



Waiver language: the parties
bargained and this is it!

Zipper Clauses



Zipper Clauses

Past Practice

The contract contains
the full agreement.
Past practices not
contained in the
contract are null and
void.

Zipper and “Complete Agreement”



Tool of Contract Interpretation

To interpret ambiguous language in the contract.

To create the status quo in
considering whether there is a duty
to bargain.



Rules for Stewards

When past practice is changed, check the contract for specific language. If there is language, file a grievance.

If the contract is silent, check if
there is a:

- Maintenance of standards clause
- Zipper clause (waiver of bargaining rights)
- Integration Clause
- No applicable language

Options

1. File a on applicable language.
2. File a MOS grievance.
3. File a demand to bargain.
4. Review for possible bargaining issue.
5. Meet with management and bang the table.

Management Defenses

- 1. Past practice is not clearly established.
- 2. Past practice is not mutual.
- 3. Past practice is mixed.
- 4. Past practice is a management prerogative, i.e. a management right.
- 5. The past practice conflicts with the contract and therefore is unenforceable.
- 6. Practices are waived by contract language.

Implications

1. Your MOS clause is worth its weight in gold. Don't give it up.
2. Don't agree to waiver language.
3. Enforce language that you have.
4. Stewards should monitor for any changes in working conditions.
5. Make contract language clear so resort to past practice evidence is unnecessary.

The End

