Past Practice
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

Past Practice

Collective Bargaining Agreement
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

Past Practice

Benefits stated in the contract
“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!
Past Practice

The parties waive their rights to bargain for the life of the agreement.
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