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PRINCIPLES OF CONTRACT INTERPRETATION:
INTERPRETING COLLECTIVE BARGAINING AGREEMENTS

JAY E. GRENIG*

A. Introduction

Contract interpretation requires a determination of just what the parties meant when they adopted certain language or of how the parties would have wanted their language to be applied in specific circumstances. The interpretive process involves giving meaning to the words used by the parties in their collective bargaining agreement.

Ideally, contract interpretation would result in a determination of a meaning corresponding exactly with what both parties in fact had in mind. Pointing out that this ideal is seldom attainable, Prof. Murray wrote:

In the first place, it is impossible to know exactly what the parties did have in mind. Moreover, even if this could be determined, it may be doubted whether very many cases would be found in which both parties did have exactly the same things in mind. The best we can do is to approximate that ideal by adopting as a goal something that is more nearly possible of attainment. That goal, must, however, be fair to both parties to the contract.

A number of authorities assert that the principles of contract and statutory interpretation, with necessary modifications, can be of assistance in interpreting collective bargaining agreements. Others con-

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tend the principles of interpretation do not apply to collective bargaining agreements. Prof. Cox, for example, has rejected any attempt to construct parallels between the collective bargaining agreement and contracts used in the commercial world.

Despite the concerns of some arbitrators, over the years many arbitrators have looked to the principles of interpretation for guidance in interpreting collective bargaining agreements. The principles of contract and statutory interpretation serve as guides and are not used as rigid or undeviating rules to be followed as methodically as though labor relations were an exact science. The person interpreting a collective bargaining agreement must rely on his or her total background of experience and expertise in the collective bargaining process with due regard to the relationship of the parties and their presentations in order to provide as practical and realistic an interpretation as is possible. Contract language cannot be viewed or construed in a vacuum, devoid of the background of negotiations and the circumstances and conditions leading up to the ultimate agreement. An arbitrator should not, through a highly technical interpretation of contract language, impose upon the parties conditions that were never agreed to. A true understanding
of the collective bargaining agreement may be gained only by giving careful attention to the function it was intended to perform.\textsuperscript{12}

B. \textit{Intent and Purpose}

The primary goal of contract interpretation is to determine the mutual intent of the parties.\textsuperscript{13} Many arbitration awards considering issues of contract interpretation are written in the context of the intent of the parties.\textsuperscript{14} The principle of considering the parties' intent is based on the assumption that there is an obligation to construe collective bargaining parties' agreements so that they carry out the intent, real or attributed, of the parties.\textsuperscript{15} Because no single principle of interpretation can establish exactly what the parties intended, the determination of intention requires the exercise of judgment.\textsuperscript{16}

The parties' intent is generally found in the words which they used to express their intent in the collective bargaining agreement.\textsuperscript{17} Although contract language provides a significant indication of what the parties intended, extrinsic evidence found in the bargaining history and the parties' administration of the contract may also be helpful.\textsuperscript{18} The imperfection of language makes it impossible to know what the intention is without inquiring further and seeing what the circumstances were with reference to which the words were used, and what the apparent object the parties had in view. The intent manifested by the parties to each other during negotiations by their communications and by their responsive proposals—rather than undisclosed understandings and impressions—should be considered in determining the meaning of contract language.\textsuperscript{19}

\begin{enumerate}
\item \textsuperscript{12} Elkouri, \textit{supra} note 4, at 348.
\item \textsuperscript{13} Elkouri, \textit{supra} note 4, at 348.
\item \textsuperscript{14} \textit{See, e.g.,} Boise Cascade Paper Group, 85-1 ARB \textsuperscript{¶} 8013 (Bognanno 1984); Circle Steel Corp., 85 LA \textsuperscript{7} 38, 40 (Stix 1984).
\item \textsuperscript{15} Southern Indiana Gas & Elec. Co., 86 LA 342, 343 (Schedler 1985); Indep. School Dist. No. 47, 86 LA 97, 103 (Gallagher 1985). \textit{See also} Zack & Bloch, \textit{supra} note 4, at 6; Labor Standards Ass'n, 83 LA 9, 11 (Talarico 1984); Elkouri, \textit{supra} note 4, at 348 ("In determining the intent of the parties, inquiry is made as to what the language meant to the parties when the agreement was written.").
\item \textsuperscript{16} 2A N. Singer, \textit{Sutherland Statutory Construction} § 45.05 at 22 (4th ed. 1984). [hereinafter cited as Sutherland].
\item \textsuperscript{17} Phelps Dodge Copper Prods. Corp., 16 LA 229, 233 (Justin 1951). \textit{Accord Duluth Community Action Inc.}, 82 LA 426, 430 (Boyer 1984).
\item \textsuperscript{18} Linn, \textit{Situation Ethics and the Arbitrator's Role—Comment}, Proceedings of the Twenty-Sixth Annual Meeting, National Academy of Arbitrators 176, 179 (1974) [hereinafter cited as Linn]; Robertshaw Controls Co., 85 LA 538, 541 (Williams 1985).
\item \textsuperscript{19} "Kahn's & Co., 83 LA 1225, 1231 (Murphy 1984); City of Burlington, 83 LA 973, 975 (Traynor 1984).
Consideration of what purpose a collective bargaining agreement provision is supposed to accomplish is also frequently mentioned as the basis for interpretation of a collective bargaining provision. The purpose may be ascertained from the language of the contract as well as evidence of the bargaining history and the parties' administration of the contract.

In determining the purpose of contract language, Saul Wallen suggested that an arbitrator should give consideration to his or her own familiarity with the general nature of labor agreements, the usual problems of plant administration, the particular practices of the industry or plant in question, and the sophistication and writing ability of the drafters of the disputed agreements.

C. Clear and Unambiguous Language

It is frequently stated that arbitrators are bound to give effect to the literal meaning of the language without consulting other indicia of intent or meaning when the language is "plain" or "clear and unambiguous." An arbitrator's failure to follow language which is found to be clear and unambiguous may result in the award being vacated. Language is ambiguous if it is reasonably susceptible of more than one meaning. It has been held that language is not ambiguous if an arbitrator can determine its meaning without any other guide, because the words of the agreement are plain and clearly convey a distinct idea.

20. See, e.g., Dillingham Shipyard, 86 LA 811, 815 (Tsukiyama 1986); Louisiana-Pacific Corp., 86 LA 301, 304 (Michelstetter 1986); Columbus Auto Parts Co., 85 LA 677, 680 (Abrams 1985); Tenneco West, 85-1 ARB ¶ 8158 (Williams 1984); Hussman Corp., 84 LA 137, 141 (Roberts 1983); General Battery Corp., 83-2 ARB ¶ 8548 (Seidman 1983). See B. Landis, Value Judgments in Arbitration: A Case Study of Saul Wallen 60 (1977) [hereinafter cited as Landis].


22. Landis, supra note 20, at 60. See also Garrett, supra note 5, 143-44.

23. Oak Grove School Dist., 85 LA 653, 655 (Concepcion 1985); Indep. School Dist. No. 47, 86 LA at 103; Empire Tractor & Equip. Co., 85 LA 345, 349 (Koven 1985); Boogaart Supply Co., 84 LA 27, 29 (Fogelberg 1984); Town of Davie, 83 LA 1153, 1157 (Kanzer 1984); Nekoosa Corp., 83 LA 676, 679-80 (Flaten 1984); Klopfenstein's, 75 LA 1224, 1226 (Lumbley 1981). See also Nolan, supra note 1, at 162; Elkouri, supra note 4, at 342; Prasow & Peters, supra note 4, at 90.

24. District 72, Machinists v. Teter Tool & Die, Inc., 630 F. Supp. 732, 736 (N.D. Ind. 1986) (holding arbitrator had "entirely disregarded" clear language and was without authority to disregard or modify plain and unambiguous provisions of contract). Compare United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (While an arbitrator may look for guidance from many sources, an arbitration award is legitimate only so long as it draws its essence from the collective bargaining agreement.).


An arbitrator may find language to be ambiguous despite both parties' contentions that the language is clear and unambiguous. Language contains a latent ambiguity when the language is clear on its face, but some extrinsic fact makes the language susceptible to more than one interpretation.

It is not always clear whether the words of a collective bargaining agreement are clear and unambiguous. Whether contract language is ambiguous can frequently be determined only after taking into consideration the circumstances existing at the time the contract was adopted and the practice of the parties in applying it. Even where contract language appears unambiguous on its face, it can be rendered ambiguous by its interaction with and its relation to other contract provisions.

D. Strict or Liberal Interpretation

"Liberal interpretation" is often used to describe an interpretation which produces broader coverage or more inclusive application. A liberal construction makes a contract provision applicable to more things or in more situations than would be the case under a so-called "strict construction." A strict interpretation is one which limits the application of the contract provision.

It is sometimes said that remedial provisions should be given liberal interpretation and punitive provisions should be given strict interpretation. Occasionally a contract may expressly provide that it is to "be strictly construed." When an exception is stated as a general principle the exception should be strictly, though properly, construed and applied.

If a contract is properly interpreted, it probably serves no useful

27. Bell Tel. Laboratories, 39 LA 1191, 1204 (Roberts 1962) (each side claimed language was unambiguous, but asserted different interpretation). Compare RRS, Inc., 86 LA 664, 666 (Redel 1985) (parties' disagreement as to meaning of phrase did not mean it was ambiguous); Andrew Williams Meat Co., 8 LA 518, 524 (Cheney 1947) (language found to be unambiguous although parties claimed that language was ambiguous).


29. Circle Steel Corp., 85 LA at 739. See 3 A. Corbin, Corbin on Contracts § 542 (rev. ed. 1960) [hereinafter cited to as Corbin].

30. Sutherland, supra note 16, at § 46.04. But see Nat'l Steel & Shipbuilding Co., 84-1 ARB ¶ 8194 (Weiss 1984) (extrinsic evidence should be used only to resolve ambiguities which naturally exist in the written language, not to import ambiguities into language which is otherwise clear and unambiguous).

31. See, e.g., Cornelius Co., 86 LA 329, 333 (Gallagher 1986).


33. Sutherland, supra 16, at §§ 58.01 & 58.03.

34. See, e.g., Hobart Corp., 86 LA at 618 ("this Agreement shall be strictly construed").

purpose to describe the interpretation as either "strict" or "liberal."³⁶

E. Mandatory or Permissive Interpretation

Ordinarily the use of the word "shall" carries with it the presumption that it is used in the mandatory sense and "may" is used in the permissive sense.³⁷

II. INTERNAL STANDARDS

A. Introduction

Initially one must look at the collective bargaining agreement itself for evidence of what the parties intended.³⁸ Since the words in the contract are chosen by the parties to express the meaning of the contract, the words are no doubt the most important single factor in ascertaining the parties' intent.³⁹ When experienced negotiators draft collective bargaining agreements, the presumption must be that they understand what they are doing.⁴⁰

In United Steelworkers of America v. Enterprise Wheel & Car Corp.,⁴¹ the United States Supreme Court held an arbitrator is "confined to interpretation and application of the collective bargaining agreement."⁴² While the arbitrator may look for guidance from many sources, the Court said the arbitration "award is legitimate only so long as it draws its essence from the collective bargaining agreement."⁴³ Accordingly, the contract language is the first and most important point of reference when interpreting a contract.⁴⁴

B. Primary Standards

1. Plain Meaning

According to the "plain meaning rule," if a writing appears to be

³⁶. Corbin, supra note 29, § 533 at 7.
⁴². Id. at 597.
⁴³. Ibid.
plain and unambiguous on its face, its meaning must be determined from
the four corners of the instrument without resort to extrinsic evidence
of any nature.\textsuperscript{45}

The plain meaning rule has been criticized on the grounds that the
meaning of words varies with the "verbal context and surrounding cir-
cumstances and purposes in view of the linguistic education and ex-
perience of their users and their hearers or readers ...."\textsuperscript{46} Prof. Wigmore
asserts it is a fallacy to assume "that there is or ever can be some one
real or absolute meaning."\textsuperscript{47} To the same effect, Justice Holmes stated
in \textit{Toume v. Eisner},\textsuperscript{48} "A word is not a crystal, transparent and unchanged,
it is the skin of a living thought in color and content according to the
circumstances and the time in which it is used."\textsuperscript{49}

The plain meaning rule has been rejected by the Restatement (Sec-
ond) of Contracts:

It is sometimes said that extrinsic evidence cannot change the
plain meaning of a writing, but meaning can almost never be
plain except in context.... Any determination of meaning or am-
biguity should only be made in the light of the relevant evidence
of the situation and relations of the parties, the subject matter
of the transaction, preliminary negotiations and statements made
therein, usages of trade, and the course of dealing between the
parties.... But after the transaction has been shown in all its
length and breadth, the words of an integrated agreement re-
main the most important evidence of intention.\textsuperscript{50}

All surrounding circumstances, prior to and contemporaneous with
the making of the agreement, which may help clarify the sense of the
words in question should be taken into account. In \textit{Maple Heights Bd.
of Educ.},\textsuperscript{51} the arbitrator wrote:

While it cannot be disputed that the clear language of the Hours
provision of the contract, if taken by itself without relation to

\textsuperscript{45} Mohawk Rubber Co., 83 LA 814, 816 (Flannagan 1984) ("The words must be
given their ordinary meaning, even though this might not have been the meaning in-
tended by the parties."). \textit{See} Zack & Bloch, supra note 4, at 7. Elkouri & Elkouri, supra
note 4, at 348-50; Nolan, supra note 1, at 162-64. \textit{See also} J. Calamari & J. Perillo, The
Law of Contracts § 3-9 at 117 (2d ed. 1977) [hereinafter cited as Calamari & Perillo]. \textit{See}
supra text accompanying note 23 and infra text accompanying notes 123 and 172.

\textsuperscript{46} Calamari & Perillo, supra note 45, at 117, quoting from 3 A. Corbin, Contracts
§ 579 at 225 n.74 (1964 supp.).

\textsuperscript{47} 9 J. Wigmore, Evidence § 2462 (3d ed. 1940).

\textsuperscript{48} 245 U.S. 418 (1918).

\textsuperscript{49} \textit{Id.} at 425.

\textsuperscript{50} Restatement (Second) of Contracts § 212 comment b (1979) [hereinafter cited
as Restatement].

\textsuperscript{51} 86 LA 338 (Van Pelt 1985).
any other facts, would indicate that it was the intention of the negotiators of the 1978 contract that the secretaries would be paid for the lunch period, it is necessary in this case to look further behind the language to determine the true intent of the parties.52

According to Prof. Corbin:

[S]ome of the surrounding circumstances always must be known before the meaning of the words can be plain and clear; and proof of the circumstances may make a meaning plain and clear when in the absence of such proof some other meaning may also have seemed plain and clear. Sometimes the circumstances proof of which is offered do not have any probative value and do not affect a meaning that is arrived at without them. When such is the case, such circumstances are immaterial. In other cases, the testimony of additional factors may not be believed by the trial court after it has been admitted, in which case the meaning of words that is otherwise “plain and clear” will be adopted.

Cases in which this is said should be carefully examined to determine whether or not the circumstances proof of which is offered would in fact have any probative value. Of course, an otherwise “plain” meaning should not be disturbed by the proof of irrelevant circumstances or those having only a remote bearing or inconsequential weight. But until a court knows the circumstances it can not [sic] properly say that they have no probative value.53

In the opinion of Roger Traynor, former Chief Justice of the California Supreme Court, the test of admissibility of evidence offered to explain the meaning of contract language is not whether it appears to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.54

At the least, a party who questions the application of the plain meaning rule to a contract provision should show either that some other section of the contract expands or restricts its meaning or the provision itself is repugnant to the general purview of the agreement.55

52. Id. at 340.
53. Corbin, supra note 29, § 542 at 101-05.
55. See Sutherland, supra note 16, § 46.01 at 74.
2. Ordinary and Popular Meaning

a. Generally

It is frequently said that words should be given their ordinary and popular meaning in the absence of anything indicating that they were used in a different sense or that the parties intended some special meaning. The Restatement of Contracts provides:

In the absence of some contrary indication, therefore, English words are read as having the meaning given them by general usage, if there is one. This rule is a rule of interpretation in the absence of contrary evidence, not a rule excluding contrary evidence.

This reflects a concern for the meaning communicated to others by the contract language.

One arbitrator has suggested that, when each of the parties to a collective bargaining agreement has a different understanding of what was intended by certain language, the party whose understanding is in accord with the ordinary meaning of that language should prevail in the absence of misrepresentation, fraud, or mistake.

Because the meaning which is attributed to words and to conduct can differ from place to place, from trade to trade, and from employer to employer, application of the standard of ordinary and popular meaning may not always give the desired result.

b. Dictionary Definitions

Arbitrators have frequently relied upon the dictionary definitions of words in determining the ordinary and popular meaning. However,
one advocate has cautioned that the precise or dictionary meaning of contract language often falls short of expressing fundamental postulates, understandings, assumptions, or policies.62

c. Judicial Definitions

The decisions of appellate courts may also provide assistance in determining the meaning of contract terms.63

d. Technical Terms

Technical terms should be given their technical meaning, unless the context or usage indicates a different meaning.64 Some industrial relations terms have acquired special meaning.65 Technical dictionaries may be useful for ascertaining the meaning of terms used in their technical sense.66

3. Construing Contract as a Whole

A primary rule in construing a collective bargaining agreement is to determine the intent of the parties from the instrument as a whole.67 If one of the asserted interpretations is logically supported by other


62. Segal, Arbitration: A Union Viewpoint, Proceedings of the Eleventh Annual Meeting, National Academy of Arbitrators 47, 51 (1958). See also Sterling Casting Corp., 83-2 ARB ¶ 8456 (Steinberg 1983) (words must be given meanings the parties mutually intended, not necessarily the definitions that would be accorded in general usage); Southern New England Tel. Co., 61 LA 184, 187 (Zack 1973) ("hired" should be viewed in its labor relations context and not in its dictionary usage).

63. See City of Westland, 86 LA 305, 307-08 (Howlett 1985) (ascertaining the meaning of "salary").

64. Nolan, supra note 1, at 168-69; Restatement, supra note 50, at § 202(3)(b) comment f ("Parties to an agreement often use the vocabulary of a particular place, vocation or trade, in which new words are coined and common words are assigned new meanings."); See Zack & Bloch, supra note 4, at 8-9.

65. See General Disposal Corp., 85 LA 299, 301 (Lumbley 1985) (referring to "the common idiom of labor relations"); Viking Int'l Airlines, 85 LA 422, 423 (Flagler 1985).

66. See, e.g., Columbian Carbon Co., 47 LA 1120, 1125 (Merrill 1967). See Dostal & Lowey, 82 LA 906, 909 (Wyman 1984) (using Roberts' Dictionary of Industrial Relations to define "layoff"). See also Nolan, supra note 1, at 169.

67. Restatement, supra note 50, at § 202(2); Elkouri, supra note 4, at 352. See Amana Refrigeration, Inc., 86 LA 827, 829 (Kulkis 1986) ("The rule primarily to be observed in the construction of written agreements is that the interpreter [sic] must review and consider the agreement and/or related articles, in whole or in conjunctive parts."); Certified Grocers of Calif., Ltd., 85 LA 414, 417 (Sabo 1985); Witco Chem. Corp., 85 LA 120, 122 (Holman 1985); Allied Chem. Co., 83-2 ARB ¶ 8371 (Fitzsimmons 1983); Tri-County Metro. Transp. Dist., 68 LA at 1370; Riley Stoker Corp., 7 LA 764, 766 (Platt 1947).
contract provisions and the other is not, then the former meaning should be upheld.68

Dean Harry Shulman recognized the importance of construing a collective bargaining agreement as a whole, declaring, "Though all the parts of the agreement do not necessarily make a consistent pattern, the interpretation which is most compatible with the agreement as a whole is to be preferred over one which creates anomaly."69

Language should be construed and harmonized with other provisions so as to give it uniform meaning.70 A word used by the parties in one sense should be interpreted in the same manner throughout the contract in the absence of countervailing reasons.71 The use of two different terms probably indicates the parties intended two different meanings.72 Where the parties have agreed in other provisions to exclude certain items, their failure to exclude those items in the provision in question may indicate the parties did not intend that those items be excluded in that provision.73

4. Giving Effect to All Provisions

Because it can be assumed the parties did not intend one provision of the contract to cancel out another provision, if the language is susceptible of two constructions, one which will carry out and the other defeat the object of the contract, the one which will carry out the contract should prevail.74

All language should be given meaning and should not be ignored.75 Effect should be given, if possible, to every word, sentence, and clause in the contract.76 No words should be rejected as surplusage if any reasonable meaning can be found.77 Because the parties' use of a word

68. Landis, supra note 20, at 58.
70. City of Burlington, 83 LA 971, 975 (Traynor 1984).
72. Dept. of Navy, 86 LA 92, 96 (Connors 1985) ("Since the parties used both terms ['negotiation' and 'discussion'], they intended that each must have some different meaning."). See also Hanz Trucking, 46 LA 1057, 1062 (Anderson 1962).
73. Consolidation Coal Co., 83 LA 927, 931 (Duff 1984).
74. See Sutherland, supra note 16, § 46.05 at 91; Restatement, supra note 50, at § 202(2) comment d ("Where the whole can be read to give significance to each part, that reading is preferred; if such a reading would be unreasonable, a choice must be made."). See also Kroger Co., 85 LA at 1201; Chillicothe Tel. Co., 84 LA 1, 3, 85-1 ARB ¶ 8109 (Gibson 1984); IMC Magnetics Corp., 84 LA 1310, 1313 (Talmadge 1985).
76. Sutherland, supra note 16, at § 46.06.
77. Armstrong Rubber Co., 17 LA 741, 744 (Gorder 1952).
indicates they intended it to have some meaning, an interpretation which
gives meaning to every part of the contract is preferred to one that
gives no effect to one or more parts. 78 However, when there is an
unavoidable conflict between general and specific provisions, the specific
provision will prevail. 79

5. Context

Words must be interpreted with a view to the context in which they
are employed. 80 The Restatement of Contracts states:

Meaning is inevitably dependent on context. A word changes
meaning when it becomes part of a sentence, the sentence when
it becomes part of a paragraph. . . . To fit the immediate verbal
context or the more remote total context particular words or
punctuation may be disregarded or supplied; clerical or gram-
ratical errors may be corrected; singular may be treated as
plural or plural as singular. 81

The language being construed must be considered along with all the
other words by which it is surrounded, the history of the parties, the
nature of the industry or business, and other relevant circumstances. 82

In addition to the contractual context, the importance of keeping
in mind the labor relations context when interpreting collective bargain-
ing agreements was stressed by Dean Shulman:

The effects on efficiency, productivity and cost are important
factors to be considered. So also are the effects on the attitudes
and interests of the employees. The interpretation, no matter
how right in the abstract, is self defeating and harmful to both
sides if its day-to-day application provides further occasion for
controversy and irritation. 83

78. Restatement, supra note 50, at § 203(a); Murray, supra note 3, at § 115; Landis,
79. See F & F Mold & Die Works, 17 LA 488, 490 (Uible 1951). See also Restate-
ment, supra note 50, at § 203(c).
80. Landis, supra note 20, at 59.
81. Restatement, supra note 50, at § 202 comment d. See, e.g., Dallas Symphony
Ass'n, 85 LA 1089, 1094 (Goodstein 1985); Bridgeport Shop 'n Save, 85-1 ARB ¶ 8021 (Das
1984); United States Steel Corp., 84 LA 49, 52 (Garrett 1985); Aloha Airlines, Inc., 84
LA 891, 893 (Brown 1985); Oklahoma City Air Logisties Center, 83 LA 781, 785 (Williams
1984); Firestone Tire & Rubber Co., 20 LA 880, 888 (Gorder 1953).
82. Corbin, supra note 4, § 549 at 185-86; Murray, supra note 3, § 114 at 245; Landis,
supra note 20, at 59.
83. Shulman, supra note 69, at 1018. See, e.g., General Elec. Co., 85 LA 36, 40
(Gibson 1985).
C. Secondary Standards

1. Obvious Mistakes

Obvious mistakes of grammar or punctuation may be corrected when interpreting a contract.\(^{84}\) All that is necessary is that the agreement as a whole and the surrounding circumstances convincingly establish that a wrong word was inadvertently written or the punctuation is inappropriatel.\(^{85}\)

2. Reasonable, Lawful, or Effective Interpretation

Where a provision is susceptible of two interpretations, one reasonable or lawful and the other unreasonable or unlawful, the reasonable or lawful interpretation is preferred.\(^{86}\) This principle is based on the assumption that the parties did not intend to negotiate a provision that is unreasonable, unlawful, or ineffective.\(^{87}\) However, if a term is unconscionable or otherwise against public policy, it should be dealt with directly rather than by spurious interpretation.\(^{88}\)

3. Harsh, Absurd, or Nonsensical Results

If the words of the agreement can be reasonably interpreted so as to avoid a harsh, absurd, or nonsensical result, that interpretation is preferable.\(^{89}\) Since the parties are charged with full knowledge of the

\(^{84}\) Murray, supra note 3, at § 122; Restatement, supra note 50, at § 202 comment d ("To fit the immediate verbal context or the more remote total context ... clerical or grammatical errors may be corrected."). See, e.g., Diversified Maint. Co., 84 LA 894, 897 (Drazin 1985) (inadvertent omission of "not"); Paper Converting Machine Co., 55 LA 1074, 1077 (Somers 1970) (inadvertent omission of "not").

\(^{85}\) Corbin, supra note 29, § 552 at 209. Compare PPG Industries, Inc., 70 LA 1148, 1151-52 (Taylor 1978) ("[I]t does appear somewhat suspect that such a blatant error could have happened even once, much less repeatedly, as is apparently the case here.").

\(^{86}\) Murray, supra note 3, at § 116; Restatement, supra note 50, § 203(a) ("an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or no effect"). See, e.g., Owens-Illinois Co., 85 LA 967, 970 (Feldman 1985); W.E. Plechaty Co., 84 LA 571, 577 (Duda 1985); Chardon Rubber Co., 84-1 ARB ¶ 8117 (Leach 1984). See infra text accompanying note 182.

\(^{87}\) Nolan, supra note 1, at 146; Corbin, supra note 29, § 546 at 171; Restatement, supra note 50, at § 203(a) comment d ("In the absence of contrary indication, it is assumed that each term of an agreement has a reasonable rather than an unreasonable meaning, and that the agreement is intended to be lawful rather than unconscionable, fraudulent or otherwise illegal.").

\(^{88}\) Restatement, supra note 50, at § 203(a) comment d.

\(^{89}\) Tri-County Metro. Transp. Dist., 68 LA at 1370; Elkouri, supra note 4, at 354. See, e.g., Witco Chem. Corp., 85 LA at 122; Hussman Corp., 84 LA at 141; Cloudsley Co., 84 LA 1264, 1289 (Donnelly 1985); Fort Pitt Steel Casting Div., Conval-Penn, Inc., 76 LA 909, 911 (Sembower 1981); Amax Lead Co., 74 LA 998, 1004 (Roberts 1980); Bower Roller
provisions of the contract and the significance of its language, the clear meaning of the language is generally enforced even though the results may be harsh or contrary to the general expectations of one of the parties. It is not for the arbitrator to question whether the parties made a good bargain.


Unless a contrary intention appears from the contract construed as a whole, the meaning of a general provision of the contract should be restricted by the more specific provisions of the contract. It is thought that the specific provision is more likely to be accurately expressed. The Restatement of Contracts explains:

People commonly use general language without a clear consciousness of its full scope and without awareness that an exception should be made. Attention and understanding are likely to be in better focus when language is specific or exact, and in case of conflict the specific or exact term is more likely to express the meaning of the parties with respect to the situation than the general language.

If the specific term can be read as an exception or qualification of the general term, both terms are given some effect.

5. Ejusdem Generis

Under the doctrine of ejusdem generis, where general words are enumerated along with specific words, the general words are construed to include only objects similar in nature to those objects enumerated by the specific words. The doctrine is an attempt to reconcile an in-


90. Certified Grocers of Calif., Ltd. 85 LA at 417; Safeway Stores, Inc., 85 LA 472, 475 (Tharp 1985); Nolan, supra note 1, at 171. See Northwest Packing Co., 80 LA 591, 596 (Hedges 1983). But see Elkouri, supra note 4, at 360 (asserting that some arbitrators have refused to apply "strict construction" where it was found the negotiators were untrained in the precise use of words).


92. Chillicothe Tel. Co., 84 LA at 3, 85-1 ARB ¶ 8109; Allied Chem. Co., 83-2 ARB ¶ 8371 (Fitzsimmons 1983); F & F Mold & Die Works, 17 LA at 490; Elkouri, supra note 4, at 356; Nolan, supra note 1, at 167; Murray, supra note 3, at § 122; Restatement, supra note 50, at § 203(c) ("specific terms are given greater weight than general language").

See, e.g., Midwest Printing Co., 85 LA 615, 619 (Ver Ploeg 1985).

93. Corbin, supra note 29, § 547 at 178.

94. Restatement, supra note 50, at § 203 comment e.

95. Ibid.

96. Florsheim Shoe Co., 85-1 ARB ¶ 8061 (Roberts 1984); Tri-County Metro. Transp. Dist., 68 LA at 1370; Sutherland, supra note 16, at § 47.17.
compatibility between specific and general words so that all words in a document can be given effect and no words will be superfluous. The doctrine applies when the following conditions exist:

1. The clause contains an enumeration by specific words;
2. The members of the enumeration suggest a class;
3. The clause is not exhausted by the enumeration;
4. A general reference supplementing the enumeration, usually following it; and
5. An intent that the general term be given a broader meaning than the doctrine requires is not clearly manifested.

In Giant Stores, Inc., the contract provided that "seniority shall prevail in layoffs, reduction in hours, rehiring, promotions, transfer from one work shift to another, etc." Applying the doctrine of ejusdem generis, the arbitrator concluded that the general term "etc." was limited by the preceding specific terms.

In United Technologies Essex Group, Inc., the contract defined "temporary layoff" as "a layoff due to curtailment or failure of electrical, gas, water or any power or general disaster, or when it is due to breakdown of machinery or other reasons beyond the control of the Company." Construing the phrase "other reasons beyond the control of the Company", the arbitrator held the doctrine of ejusdem generis limited the meaning of the phrase to the class described by the preceding specific terms. According to the arbitrator, "other reasons beyond the control of the Company" as used in the provision did not include economic downturn or strikes.

6. Avoidance of Forfeiture

If a provision can reasonably be given either of two possible interpretations, one of which will result in a penalty or forfeiture, the interpretation that will not result in a forfeiture or penalty should be favored. Prof. Nolan suggests that forfeitures are not to be found unless the intent is clear or no other interpretation is reasonably possible.
However, an arbitrator is not free to decide whether he or she likes the terms of a collective bargaining agreement. 107 Arbitrators cannot stretch clear language of default in order to avoid forfeitures. 108

7. Grievance Settlements and Prior Arbitration Awards

When prior arbitration awards between different employers or unions involve contractual provisions similar to those in question, the prior awards may provide guidance for interpreting the contract in question. 109 Arbitrators are reluctant to arrive at a different conclusion when there is any ground at all for reaching the same conclusion reached in a prior arbitration between the parties, when passing on the same question under identical contract language. 110

The settlement of a grievance by the mutual agreement of the parties deserves considerable weight as providing a settled construction of contract language. 111

8. Changes in Contract Language

When parties change contract language, it would appear that they also intended to change the meaning of the contract. 112

When the prior contract contains an express exception and the newly negotiated language does not include the express exception, it would appear the parties have clearly intended to abolish the exception. 113

9. Expressio Unius Est Exclusio Alterius

The maxim expressio unius est exclusio alterius (to express one thing

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112. See, e.g., Thrifty Corp., 85 LA 780, 783 (Gentile 1985); Florsheim Shoe Co., 85-1 ARB 1 8061 (Roberts 1984); Wagner-Wood Co., 84 LA 753, 758 (Dworkin 1985) (employer’s rights increased when, in the 1984 negotiations, union agreed to remove school vacation proviso so that students could be employed year round).
is to exclude another) is frequently applied by arbitrators.\(^{114}\) The maxim provides that where certain matters are specified in detail in a contract, other matters of the same general character relating to the same matter are generally held to be excluded.\(^{115}\) This maxim is based on the reasonable assumption that if the matter does not appear in the list, the parties did not intend it to be there.\(^{116}\) However, the rule must be applied with caution, and if its application would result in injustice or inconsistency, it should be ignored.\(^{117}\)

In *County of Orange*,\(^ {118}\) the contract banned "discrimination by reason of physical handicap, marital status, or medical condition . . . or race, religion, color, sex, age, national origin or ancestry." The arbitrator concluded that, by expressly prohibiting specific types of discrimination which did not include sexual preference or homosexuality, the parties had excluded claims of discrimination because of homosexuality from the contract.\(^ {119}\)

The maxim is inapplicable where the listed exceptions were obviously not meant to be the only exceptions.\(^ {120}\) For example, the use of the term "include" in a list may indicate the parties did not intend the list to be limited.\(^ {121}\)

III. STANDARDS GOING BEYOND THE CONTRACT

A. Introduction

Consideration of matters outside the written contract may provide assistance in interpreting contract language. While the express provisions of the contract are an important source for determining the meaning of contract provisions, it is frequently necessary to go beyond the contract provisions in order to interpret the contract.\(^ {122}\)

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115. Murray, *supra* note 3, at § 120; Elkouri, *supra* note 4, at 355. See Kroger Co., 86 LA 357, 368 (Miletz 1986); Hussman Corp., 84 LA at 141 (to expressly state certain exceptions indicates there are no other exceptions); Iowa Meat Processing Co., 84 LA 933, 935 (Madden 1985); Bolens Corp., 83 LA 1286, 1289 (Wyman 1984).
116. Zack & Bloch, *supra* note 4, at 8; Sutherland, *supra* note 16, at § 47.24 ("It expresses the learning of common experience that when people say one thing they do not mean something else.").
117. Murray, *supra* note 3, at § 47.25.
118. 76 LA 1040 (Tamoush, 1981).
119. *Id.* at 1043.
121. *Id.* at § 47.23.
122. Linn, *supra* note 18, at 179. *See, e.g.*, Robertshaw Controls Co., 85 LA at 541. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597 (An arbitrator may look for guidance from many sources provided the award draws its essence from the collective bargaining agreement.).
B. Parol Evidence Rule

1. Generally

The parol evidence rule provides that, in the absence of fraud, duress, or mutual mistake, a final written expression of the complete agreement may not be contradicted by evidence of prior or contemporaneous oral or written understandings and negotiations. It is not a rule of evidence, but one of substantive law which defines the limits of a contract. Where parol evidence is excluded, it is because the evidence is irrelevant.

The parol evidence rule applies when the parties to a written contract intend the written agreement to be the final and complete integration of all the terms of that contract. Where the parties to an oral agreement choose their words with explicit precision and completeness, it may be treated as an integrated agreement and the parol evidence rule applied to it. The question of whether an agreement is an integrated agreement is a question of fact to be determined in accordance with all relevant evidence.

The parol evidence rule does not preclude parol evidence from being used to prove the making of a contemporaneous contract which does not cover the same ground as the integrated writing, or one which might reasonably be expected to be embodied in a separate contract. The rule applies only to evidence, which if given weight, would alter, vary, or contradict the terms of the written contract. The rule has no application to agreements made after the integrated contract.

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123. Corbin, supra note 29, § 573 at 357-58; Williston, supra note 56, § 631 at 948-49; Murray, supra note 3, § 105 at 227-28; Calamari & Perillo, supra note 45, at § 3-2; Fairweather, supra note 4, at 199. See supra text accompanying notes 23 and 45.


125. Calamari & Perillo, supra note 45, at § 3-5. See also Restatement, supra note 50, at § 215.

126. Hill & Sinicropi, supra note 124, at 51; Calamari & Perillo, supra note 45, at § 3-2; City of Gainesville, 82 LA 825, 828 (Hall 1984). See Restatement, supra note 50, at § 209.

127. See Restatement, supra note 50, at § 209 comment b.

128. Restatement, supra note 50, at § 209 comment c.

129. Williston, supra note 56, § 631 at 949-50; Restatement, supra note 50, at § 213 comment c. See, e.g., Pettibone Corp., 70 LA 383, 385-86 (Gootnick 1978).

130. Hill & Sinicropi, supra note 124, at 52; Zack & Bloch, supra note 4, at 9; Restatement, supra note 4, at § 215. See, e.g., Modesto City Schools, 85 LA 795, 797 (Concepcion 1985) (parol evidence will not be allowed where the contract is clear and unambiguous; Boogaart Supply Co., 84 LA at 29, 85-1 ARB ¶ 8068 (oral statements are not normally admissible to modify, vary, explain or contradict the plain terms of a valid written agreement).

The parol evidence rule is based on the theory that, where the parties have expressed their agreement in writing, it is conclusively presumed the written agreement represents the complete agreement, and evidence of prior or contemporaneous conversations or declarations tending to substitute a new and different contract for the one evidenced by the writing is incompetent.  

2. Complete Agreement

There is persuasive authority for the view that the parol evidence rule does not preclude consideration of extrinsic evidence relating to the preliminary question of whether the parties intended the written contract to be the complete agreement. According to Prof. Corbin, a writing cannot prove its own completeness. Even if the agreement contains an express statement as to its own completeness, Corbin states that the assent of the parties must still be proved. Prof. Corbin concludes that parol testimony is certainly admissible to show the circumstances under which the agreement was made and the purposes for which it was executed.

On the other hand, if the contract expressly declares that it contains the entire agreement of the parties, Prof. Williston believes the introduction of evidence of prior understandings to vary or contradict the written contract is improper unless the document is obviously incomplete. Williston's view has been adopted by a number of arbitrators, some of whom have relied upon zipper and completeness of agreement clauses.

Arbitrators have also relied upon provisions limiting the arbitrator from "amending, modifying, nullifying, ignoring, or adding to the provi-
sions of the agreement" as requiring strict application of the parol evidence rule.\(^\text{139}\)

### C. Clear and Unambiguous Language

Most authorities agree that parol evidence should not be allowed to vary terms that are clear and unambiguous.\(^\text{140}\) However, consideration of parol evidence may be necessary in order to determine whether the terms are "clear and unambiguous."\(^\text{141}\)

It is clearly appropriate to use parol evidence to construe ambiguous language.\(^\text{142}\) The evidence is used, not to contradict the terms of the contract, but to explain or clarify.

### C. Bargaining History

#### 1. Generally

Bargaining history and pre-contract negotiations between the parties are valuable and proper sources from which to ascertain the meaning of contract language.\(^\text{143}\) The intent manifested by the parties to each other during negotiations by their communications and their responsive

\(^{139}\) See, e.g., Bd. of Educ. of Cook County, 73 LA at 316. For a management advocate's view of the parol evidence rule, see Fairweather, supra note 4, at 199:

In labor arbitration the parol evidence rule is a construction doctrine which is closely related to the view that the scope of an arbitrator's jurisdiction is limited to disputes which involve the interpretation and application of a provision of the written agreement between the parties. In addition, the parol evidence rule is closely related to the reserved rights construction doctrine which holds that management is restricted by the commitments it has made and recorded within the four corners of the written labor agreement, and that unless so restricted the basic managerial authority remains unrestricted.

But see Garrett, supra note 5, at 127-28 (Because collective bargaining agreement cannot contain all essential rules or guidelines for day-to-day administration of industrial relations, this casts doubt on the suggestion that the typical "will not add to" boiler plate language describing the arbitrator's authority fairly represents a conscious adoption of the parol evidence rule.).

\(^{140}\) Nolan, supra note 1, at 140. See, e.g., Northern Calif. Woodworking Mfrs. Ass'n, 79 LA 946, 947-48 (Koven 1982).

\(^{141}\) See Restatement, supra note 50, at § 214 comment b ("Even though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed."); Nolan, supra note 1, at 140-41; Zack & Bloch, supra, at 4; Summers, Collective Agreements and the Law of Contracts, 78 Yale L.J. 525, 549-50 (1969). See also supra text accompanying note 29.

\(^{142}\) See Fairweather, supra note 4, at 203; Elkouri, supra note 4, at 413; Hill & Sinicropi, supra note 124, at 53.

\(^{143}\) Pacific Southwest Airlines, 86 LA 437, 440 (Darrow 1985); Mid-South Transp. Mgmt., 85 LA 1204, 1210-11 (Holley 1985); Monsanto Indus. Chems., 85 LA 113, 117 (Grinstead 1985); Central Bag Co., 82 LA 13, 125 (Madden 1983); Southwest Ornamental Iron Co., 38 LA 1025, 1028-29 (Murphy 1962). See also Landis, supra note 20, at 62.
proposals—rather than undisclosed understandings and impressions—may be considered in determining the meaning of contract language.  

2. Rejection of Proposal

There is remarkable unanimity among arbitrators that an attempt to obtain a specific enlargement of rights in negotiations which is rejected is not only an indication that the right does not exist by agreement, but not by past practice as well. Because a party cannot obtain through arbitration that which it could not obtain through negotiation, an arbitrator should not construe the contract as though the rejected provision had been agreed to. However, one advocate has warned that the use of offers and counter-offers made during the process of negotiations is sometimes an unsafe guide to the meaning of the contract.

One should be careful of construing the rejection of an offer as terminating an established past practice. In *FMC-Ordinance Division*, the arbitrator stated:

The body of arbitral thought supports the conclusion that a new item sought in negotiations and not achieved should be viewed as an admission that the asking party does not then have the right or thing it is seeking, and that if it is unsuccessful in obtaining that which was sought the asking party has probably foresworn possession of that right or thing sought, and an arbitrator should reject any subsequent attempt of the party to achieve it via an arbitration award. Where it has been an established and uncontested—though unwritten—practice of the asking party, rejection of the proposed codification of that practice in the agreement should not be construed by an arbitrator as indicative of the party's relinquishing of the right without additional evidence that such was the parties' intent. Rather, what the party has done—absent evidence of the contrary—is relinquish the right to pursue its attempt to put the matter into the agreement, while relying upon a clear history of practices to support its position should it be challenged at some future date.

144. Kahn's & Co., 83 LA 1225, 1231 (Murphy 1984); City of Burlington, 83 LA 971, 975 (Traynor 1984).
146. Owens-Corning Fiberglass Corp., 85 LA 305, 308 (Madden 1985); Central Grocers of Calif., Ltd., 85 LA at 417; Disneyland, 85-1 ARB ¶ 8213 (Gentile 1984); Hussman Corp., 84 LA at 141; Bolens Corp., 83 LA 1286, 1289 (Wyman 1984); Central Bag Co., 82 LA at 125.
148. 84 LA 163 (Wyman 1985).
149. *Id.* at 167.
3. Clarification

Rejection of a proposal should not be construed as extinguishing a right, if it can be shown the claimed right existed prior to negotiations and the proposal was merely an attempt to clarify the situation. Arbitrator Saul Wallen has reasoned:

Sometimes ... language is proposed in order to remove any doubts about the clarity of the clause but if the language is objected to and is withdrawn to facilitate agreement, it does not automatically follow that the party withdrawing the proposal embraces the opposite interpretation. He may in fact withdraw the language, in order to clear an obstacle to agreement, either on a specific assurance that the language accepted means just what the proper of the additional words intends or, more frequently, in the expectation that the words finally agreed on will be interpreted in the light of their inherent meaning after due consideration is given to all factors and not alone to the fact of abandonment of the clarifying language. In the latter case the parties in effect agree to take a chance on what the clause, minus the clarifying words, means.

D. Construction Against Party Creating Ambiguity

It is frequently stated that, when language is ambiguous, it should be construed against the party that proposed the language. However, the realities of collective bargaining may not be adequately disposed of by interpreting language most severely against its author. Because labor contracts are usually much more of a joint product than commercial contracts, this principle of interpretation should be given a narrow application in labor arbitration.

E. Past Practice

1. Generally

Past practice is one of the most useful and frequently resorted to aids for interpreting collective bargaining agreements. While the ex-

150. Landis, supra note 20, at 63.
151. Id. at 63-64.
152. See, e.g., Bunny Bread Co., 85 LA 1118, 1121 (Krislov 1985); Lull Engineering Co., 85 LA 581, 583 (Gallagher 1985).
153. Ahner, supra note 4, at 84.
154. Ibid.
press provisions of the contract are an important source for determining the parties' intent, often the arbitrator must go beyond the contract provisions and consider the conduct of the parties as an additional indicia of intent. Reliance on past practice also provides stability and predictability by assuring the parties that the interpretation "will fall within an established tradition rather than the frolic of a single man."

Past practice may be defined as a prior course of conduct which is consistently made in response to a recurring situation and is regarded by the parties as the correct and required response under the circumstances. In order for a past practice to have persuasive effect, the practice should be one that has been consistently applied, was well-known to the parties, and has existed over a relatively long period of time. The weight given a past practice must be adjusted depending upon the degree of underlying acceptability of the practice.

2. Interpretation of Ambiguous Terms

The most common use of past practice is the interpretation of ambiguous language. Where language is ambiguous, established practice may be evidence of the mutually accepted interpretation of the language. Past practice is persuasive evidence of what the language meant to those who wrote it.

3. Implementing General Language

Past practice may also be used to give more specificity to general

See also Murray, supra note 3, at § 118; Williston, supra note 56, § 623 at 789-90 (great weight is given as to how parties have interpreted contract); Corbin, supra note 29, at § 556.

156. Restatement, supra note 50, at § 220 comment d ("Usage relevant to interpretation is treated as part of the context of an agreement in determining whether there is ambiguity or contradiction as well as in resolving ambiguity or contradiction.").


159. Fashion Shoe Products, Inc., 84 LA 330 (Hilgert 1985). See Elkouri, supra note 4, at 440-41; Nolan, supra note 1, at 143-44; Restatement, supra note 50, at § 220 comment b ("[A] party who asserts a meaning based on usage must show either that the other party knew of the usage or that the other party had reason to know of it.").

160. Gilman, supra note 157, at 706; Treece, supra note 158, at 371.

161. See Dobbeltrae, supra note 155, at 33. See, e.g., Sunrise Medical, 86 LA 798, 799 (Redel 1985); Whitman & Barnes, 46 LA 637, 638 (Smith 1965).

162. Mittenthal, supra note 158, at 37.
language. As the parties respond to the many different situations confronting them, they find mutually acceptable ways of dealing with the situation which serve to guide them in future situations. Thus, practices arise which represent the reasonable expectations of the parties and provide a sound basis for interpreting and applying the general contract language.

4. Adding Terms to Contract

Past practice, if sufficient in nature, may become a part of the contract where the contract is silent. In Metal Specialty Co., Arbitrator Volz stated:

[It is well recognized that the contractual relationship between the parties normally consists of more than the written word. Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are not at variance with any written provision negotiated into the contract by the parties and where they are of long standing and were not changed during contract negotiations.]

Professor Corbin wrote that usage and custom may be used, "not only to aid in interpretation of the parties, but also to affect the contractual relations of the parties by adding a provision to the contract that the words of the parties can scarcely be said to have expressed." He explained that the use of past practice is generally to ascertain and to give effect to the intention of the parties; it is not for the purpose of compelling the parties to contract in accordance with usage.

5. Modification of Clear and Unambiguous Language

Arbitrators disagree as to whether a past practice may modify clear

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163. See Dobbeleaere, supra note 155, at 35; Mittenthal, supra note 158, at 38. See also Elkouri, supra note 4, at 456.
164. Mittenthal, supra note 158, at 38.
165. Id. at 38-39; Dobbeleaere, supra note 155, at 35.
166. Mittenthal, supra note 158, at 44-55; Restatement, supra note 50, at § 221 comment a ("[I]f there is a reasonable usage which supplies an omitted term and the parties know or have reason to know of the usage, it is a surer guide than the court's own judgment of what is reasonable."). See, e.g., Transamerica Delaval, Inc., 84 LA at 192, 85-1 ARB ¶ 8147; Keystone Steel & Wire Co., 85-1 ARB ¶ 8136 (Schwartz 1985); Dillon Stores Co., 84 LA 84, 87 (Woolf 1984); Scott Paper Co., 82 LA 755, 757 (Caraway 1984); Gas Service Co., 81 LA 245, 248-49 (Penfield undated); Edward C. Levy Co., 81 LA 529, 534-36 (Borland 1983).
167. 39 LA 1265 (Volz 1962).
168. Id. at 1269.
169. Corbin, supra note 29, § 556 at 240.
170. Id. § 556 at 241-42.
and unambiguous contract language.\textsuperscript{171} The traditional approach maintains that evidence of past practice cannot overrule clear and unambiguous language.\textsuperscript{172} This reasoning is based on the principle that, where the language is clear and unambiguous, there is no need for the arbitrator to resort to interpretative aids such as past practice in order to ascertain the parties' intent.\textsuperscript{173}

Other arbitrators have permitted evidence of past practice to modify clear and unambiguous language.\textsuperscript{174} According to these arbitrators, where the past practice is persuasive evidence of the parties' mutual intent, it should be controlling even where the contract is clear and unambiguous.\textsuperscript{175} These arbitrators recognize that the expressed language is not always the best evidence of the parties' intent and that the parties' day-to-day actions, when they run counter to the plain meaning of the contract's words, evidence an intent to substitute that which they actually do for that which they said in writing they would do.\textsuperscript{176}

\textsuperscript{171} Dobbelaere, supra note 155, at 36. See supra text accompanying notes 23 and 45.
\textsuperscript{172} Landis, supra note 20, at 65 ("I draw the line at using past practice to modify or amend what is unambiguous in an agreement.") See, e.g., Woodhaven School Dist., 86 LA 215, 217 (Daniel 1986) (past practices are seldom recognized when there is clear and unambiguous language in the contract); BASF Wyandotte Corp., 84 LA at 1057. See also Detroit Coil Co. v. Machinists Lodge 82, 594 F.2d 575, 580-81 (6th Cir. 1979) (Absent evidence that parties had waived notice provision, arbitrator's finding of waiver manifested clear failure to draw essence of award from agreement.). See supra text accompanying notes 23 and 45. Compare infra text accompanying note 174.

\textsuperscript{173} Mittenthal, supra note 158, at 40-41. Compare Restatement, supra note 50, at 8203(b) ("express terms are given greater weight than course of performance, course dealing, and usage of trade").

\textsuperscript{174} See, e.g., Hercules Products, Inc., 81 LA 191, 193 (Goodman 1983) ("It is also generally accepted in arbitration that the parties by their actions effectively modified the written agreement by their actions in a binding past practice."); Louisiana-Pacific Corp., 79 LA 658, 664 (Eaton 1982) ("Normally, the intent is best and most clearly expressed in the written collective bargaining agreement. However, it is clear that in other cases . . . it may be equally clearly expressed by actions."). See also Braniff Airways, Inc., 79 LA 383, 389 (Sisk 1982); Metropolitan Coach Lines, 27 LA 376, 383 (Lennard 1956); Smith Display Service, 17 LA 524, 526 (Sherbow 1951); Loveless v. Eastern Air Lines, Inc., 681 F.2d 1272, 1280 (11th Cir. 1982) (Absent some express restriction upon the arbitrator's authority, the arbitrator is not limited to the bare words of the agreement and common law rules for the interpretation of private contracts."). See also, Aaron, Use of the Past in Arbitration, Proceedings of the Eighth Annual Meeting, National Academy of Arbitrators 1, 3-6 (1955).

\textsuperscript{175} Farrell Lines, Inc., 86 LA 36, 39 (Hockenberry 1986) (such conduct must be unequivocal, clearly acted upon and readily ascertainable over a reasonable period of time); Federal Mogul Corp., 86 LA 225, 230 (Blinn 1985); Ford Motor Co., 83-1 ARB ¶ 8075 (Roumell 1983). Cf. Hussman Corp., 84 LA at 142 (in order to modify the plain language of the contract, the evidence of a past practice must be exceedingly strong, frequent and constant in order to infer that the parties intended to change the contract specifically and by mutual agreement).

\textsuperscript{176} Cf. Wallen, The Silent Contract vs. Express Provisions: The Arbitration of Local
In *Mid-America Canning Corp.* the arbitrator reasoned:

During collective bargaining the parties to the process often spend considerable time negotiating over specific language. In some cases what is agreed to is clear and unambiguous in meaning. In other cases the language is purposely vague in order to provide flexibility in application. In constructing language it is not always possible to know what situations will arise that could lead to dispute over the intent and application of language. The real meaning of language is determined by how it is applied on a day-to-day basis. In some instances consistent past practice can provide an entirely different meaning to what appears in the agreement to be clear and unambiguous.

This view is in accord with the basic principle of contract law that parties can amend an earlier agreement by later conduct, so long as it is not in conflict with an agreed upon and operative mechanism for amendment of the contract.

**F. Employer Handbooks**

Generally, manuals and handbooks unilaterally established by an employer are not binding upon the union. However, a procedure unilaterally put in effect through an employer's handbook and unchallenged by the union for a substantial period of time should not be ignored in determining the meaning of contract terms.

**G. External Law**

Arbitrators frequently look to external law for help in construing
contract language. If the parties have chosen to incorporate external law into their agreement, the arbitrator must interpret and apply that law. Separability or savings clauses have sometimes been construed as indicating an intent that the parties expect the contract to be construed consistently with "external law" and "public policy."

It has been asserted that, even in the absence of incorporation of external law into the contract, an arbitrator must consider external law in construing a collective bargaining agreement. Others have taken the position that it is appropriate for an arbitrator to consider external law only in construing a contract where a contract provision is found to be ambiguous and one of the reasonable interpretations would be unlawful. According to Arbitrator Mittenthal, while an arbitrator's award may permit conduct prohibited by law, it should not require conduct forbidden by law.

Frequently state or federal employment discrimination laws are considered in construing nondiscrimination clauses in collective bargaining agreements.

G. Industry Practice

Industry custom and practice may aid in determining the intended meaning of a contract provision. Where the same agreement has been

182. See, e.g., Container Corp. of America, 84 LA 489, 494 (Nicholas 1985) (arbitrator relied upon NLRB and court decisions in determining the meaning of "supervisor"); Service Care, Inc., 84 LA 736, 737 (Duff 1985) (every collective bargaining agreement should be interpreted in harmony with the national labor policy established by Congress). See supra text accompanying note 86.

183. See, e.g., United States Steel Corp., 86 LA 805, 808 (Beilstein 1986) (determining what payments were "required by law").


185. Howlett, The Arbitrator, the NLRB and the Courts, Proceedings of the Twentieth Annual Meeting, National Academy of Arbitrators 67, 87 (1967). But see Meltzer, Ruminations About Ideology, Law, and Labor Arbitration, Proceedings of the Twentieth Annual Meeting, National Academy of Arbitrators 1, 16-17 (1967) ("Where ... there is an irrepressible conflict, the arbitrator ... should respect the agreement and ignore the law.").

186. Meltzer, supra note 185, at 15-16.

187. Mittenthal, The Role of Law, supra note 184, at 50.

188. See, e.g., City of Grand Rapids, 86 LA 819 (Frost 1986); Naval Ordnance Station, 81-1 ARB ¶ 8239 (Dunsford 1981); Hurley Hosp., 70 LA 1061, 1062-63 (Roumell 1978) ("When parties use a phrase such as 'discrimination as to ... creed,' they presumably are incorporating the applicable law on that subject into their contract.").

189. Restatement, supra note 50, at § 222. See also id. at § 203(b) ("Express terms are given greater weight than ... usage of trade, course of performance is given greater weight than ... usage of trade ...").
entered into by other employers or unions, the interpretation of those agreements by the other employers or unions may provide persuasive evidence of the meaning of the common language. 190

190. See ITT-Continental Baking Co., 74 LA 92, 95 (Ross 1980); Furr's Inc., 71 LA 233, 237 (Finston 1978); Durkee-Atwood Co., 70 LA 765, 766 (Grabb 1978).