

## **Contract Interpretation: Refinements**

When you argue your next contract case, consider the following points. They are refinements of the general rule and might be a distinguishing factor in your case.

### **1. Burden of Proof**

The general rule in a contract interpretation case is that the moving party goes first and has the burden of proof. This is almost always the union. The union is the party which is alleging that the contract has been violated. For example, in a past practice case, the union must have some facts to argue each element of a past practice: longevity, consistency and mutuality. But there's a twist here.

Many arbitrators feel that the union has the burden of proof in coming forward with enough facts to suggest a contract violation. But when it comes to interpreting the applicable contract language, the burden is equally shared by both parties.

In other words, there are many arbitrators who feel that the parties have equal burdens of proof when the case comes down to what the contract language is intended to mean. Both sides had an equal opportunity to read and discuss the language during bargaining, and neither should be able to hide under a technical concept such as shifting the burden of proof to the other side.

### **2. Plain Meaning Rule**

Many arbitrators will state that if the contract language is clear on its face, that is the end of the case. There is no need to look at bargaining history, past practice, industry custom or any other evidence. To these arbitrators, their job is to read the contract and if the contract provision is clear and unambiguous, they must enforce the language as written. The plain meaning of the words prevails.

Other arbitrators do not follow this rule. One reason is because they can envision contract language which is clear on its face, but does not reflect the intent of EITHER party. Commentator Arthur Corbin gave the extreme example of two parties who write a contract provision in code words. They know what it means, and they don't expect or want others to know. An arbitrator comes along and says, this language is clear and unambiguous. But the parties reply that the plain or surface meaning of the words is not what they intended. Prof. Corbin says the intent of the parties prevails, and not the plain meaning of the words.

Now, take the next logical example of when one side argues that the language is ambiguous. That party will have other evidence to show that the language can be interpreted another way. It might be a past practice or a prior contract or a memo, etc. The other side can base its case on the clear language. But the party with more evidence than just the words in the contract may have the stronger case.

### **3. Last offer is the one accepted**

Arbitrators look for a meeting of the minds. At what point did the parties agree?

During bargaining, proposals go back and forth. An agreement is reached, and each side prepares a summary for their constituency. The union tells its rank and file about the pay increase and assumes the effective date is the one in an earlier management proposal. The company's negotiator gives upper management a summary of what the union

negotiators accepted. As to effective date, the company's negotiator uses a date cited in an earlier proposal.

The case goes to arbitration because management and labor are looking at different earlier proposals. Which one should the arbitrator give effect to?

Here's the general rule: The last offer on the table is the one that is accepted.

This rule has a common sense ring to it. Presumably both parties are looking at the latest documents. And the other side could always have objected and counter-proposed. However, this rule may or may not resolve the case, because there have been cases in which the company's summary has been used by the union to sell ratification to its members. If the company summary is silent, the union can argue that there was a meeting of the minds on an earlier proposal.

In summary, the general rules will help you resolve cases, but it is important to recognize when the rule can be distinguished in a specific case.

April 20, 2005

Wisdom of the Week is copyrighted and sent only to current subscribers. Any further dissemination or distribution by the subscriber or anyone else is prohibited. Please call 507-663-1220 for permission on any other uses. Thank you for your cooperation.

Copyright 2005 Labor Arbitration Institute. All rights reserved.