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The Ubiquitous Yet Illusive "Merger" Clause in Labor Agreements: Semantics, Applications, and Effect on Past Practice

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The Ubiquitous Yet Illusive “Merger” Clause in Labor Agreements: Semantics, Applications, and Effect on Past Practice

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I. INTRODUCTION

A contract, especially a collective bargaining agreement, is often the result of a series of bargaining sessions, and the parties usually have had a pattern of numerous agreements and understandings between them. As a result, the parties often agree to insert a contract clause in the final written agreement stating that the written agreement is the "final expression of all the terms agreed upon and is a complete and exclusive statement of those terms."¹

In labor and employment contracts, these contract clauses are referred to by numerous different labels.² There is great confusion over the proper

¹ JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 3-6, at 156 (3d ed. 1987).

² Some of the labels used for a merger clause include: an "integration clause," a "zipper clause," a "buttoning-up clause," a "contract finality clause," a "completeness-of-agreement clause," a "full agreement clause," an "entire agreement clause," and a "wrap-up clause." See *Hubbell Indus. Controls v. International Ass'n of Machinists, Local 1825*, 100 Lab. Arb. Rep. (BNA) 350, 353 (1992) (Talarico, Arb.) (referring to a merger clause as a zipper clause and stating that the clause can also be referred to as an integration clause or completeness-of-agreement clause); *Augsburg College v. International Union of Operating Eng'rs, Local 70*, 91 Lab. Arb. Rep. (BNA) 1166, 1173 (1988) (Gallagher, Arb.) (referring to a merger clause as an entire agreement clause); *Arvin Indus., Inc. v. UAW, Local 1930*, 77 Lab. Arb. Rep. (BNA) 14, 18 (1981) (Yarowsky, Arb.) (referring to a merger clause as a zipper clause and stating that it can also be referred to as a wrap-up clause); *Bassick Co. v. International Union of Elec. Workers, Local 229*,

label for this type of contract clause. It is not uncommon for judges, arbitrators, academics, and practitioners to refer to this clause as a "zipper clause." The authors conclude that this provision is better described as a "merger" or "integration clause" and that the term "zipper clause" cannot properly be used as a synonym. A more precise use of the term "zipper clause" applies only to the waiver of the statutory duty to bargain during the term of a contract.³

A merger clause, often associated with the parol evidence rule, is a contract clause that "expressly provides that the writing constitutes the entire agreement between the parties, and that any prior or contemporaneous agreements, representations, or warranties are excluded."⁴ Thus, a merger clause signifies "the extinguishment of one contract by its absorption into another contract."⁵ A merger clause, unlike the zipper clause, is used in contracts generally and is not exclusive to the labor law setting.

A basic thesis of these comments is to identify and distinguish the zipper clause and the merger clause as used in labor agreements. Particular emphasis will be given to the impact of merger clauses on past practices. A past practice is "a prior course of conduct which is consistently made in response to a recurring situation and which the parties regard as the correct and required response under the circumstances."⁶ Employers and unions often reach agreements and understandings and develop interpretations in applying the collective bargaining agreement which are not expressly stated

26 Lab. Arb. Rep. (BNA) 627, 629-30 (1956) (Kheel, Arb.) (discussing a merger clause that was labeled a "Full Agreement Clause" in the collective bargaining agreement); MATTHEW A. KELLY, LABOR AND INDUSTRIAL RELATIONS: TERMS, LAWS, COURT DECISIONS, AND ARBITRATION STANDARDS 90 (1987) (stating that a zipper clause expresses that "the contract language contains the entire agreement" and that the terms "buttoning-up clause" and "contract finality clause" can also be used to describe this type of clause).

³ See WALTER E. BAER, PRACTICE AND PRECEDENT IN LABOR RELATIONS 15 (1972).

⁴ Kerry L. Macintosh, *When Are Merger Clauses Unconscionable?*, 64 DENV. U. L. REV. 529, 530 (1988).

⁵ Mark K. Glasser & Keith A. Rowley, *On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657, 711 (1997) (quoting *Smith v. Smith*, 794 S.W.2d 823, 827 (Tex. App. 1990)).

⁶ JAY E. GREINIG & R. WAYNE ESTES, LABOR ARBITRATION ADVOCACY: EFFECTIVE TACTICS AND TECHNIQUES § 6.45 (1989).

in the collective bargaining agreement itself. This is referred to as a past practice.

A dispute often arises when one party attempts to unilaterally end a past practice. The following example illustrates this situation:⁷ A company distributed turkeys to all of their employees, including unionized employees, at Christmas for over twenty years. There is no provision in the contract regarding the “turkey bonus.” This year, however, the company decided to discontinue the turkey bonus. The union filed a grievance, and the company defended its action by pointing out the merger clause contained in the collective bargaining agreement. What result? Is the employer bound by the past practice or can the past practice be unilaterally discontinued because the merger clause extinguished any agreements or understandings not contained in the written agreement? What factors will an arbitrator consider in determining the effectiveness of the merger clause? This Article primarily focuses on these issues.

Before discussing a merger clause’s effect on past practices, however, foundational concepts must be explored and differentiated. Part II distinguishes between a merger clause and a zipper clause.⁸ Each concept is explored, and the current legal standards applied to the two concepts are examined. Additionally, the parol evidence rule, as associated with the merger clause, is considered.⁹ Part III explores the concept and the development of a past practice.¹⁰ In order to determine the effect of a merger clause on past practices, over one hundred arbitration decisions, published and unpublished, were examined. Part IV contains the results of this examination, exploring the factors on which arbitrators focus in determining the effectiveness of a merger clause’s elimination of a binding past practice.¹¹ These factors include the semantics of the merger clause,¹² whether the past practice continued unabated into the new contract period,¹³ the parties’ bargaining history,¹⁴ whether the past practice is related to a subject contained in the contract,¹⁵ and the peculiar facts and circumstances

⁷ This example is not drawn from any particular case; however, disputes over “turkey bonuses” are common. *See, e.g.*, Radioear Corp., 214 N.L.R.B. 362 (1974) (involving a “turkey money bonus”).

⁸ *See infra* notes 18-79 and accompanying text.

⁹ *See infra* notes 47-74 and accompanying text.

¹⁰ *See infra* notes 80-94 and accompanying text.

¹¹ *See infra* notes 95-268 and accompanying text.

¹² *See infra* notes 102-84 and accompanying text.

¹³ *See infra* notes 185-206 and accompanying text.

¹⁴ *See infra* notes 207-41 and accompanying text.

¹⁵ *See infra* notes 242-49 and accompanying text.

of the case which affect the arbitrator’s decision.¹⁶ Part V summarizes the authors’ conclusions.¹⁷

II. ZIPPER CLAUSE VS. MERGER CLAUSE

A. *The Zipper Clause*

A zipper clause is often confused with a merger or integration clause. Sometimes the term “zipper clause” is used as a synonym for a merger or integration clause.¹⁸ In the labor law setting, a zipper clause “‘zips up’ the agreement by stating that the parties have had the right and opportunity to bargain over all mandatory subjects of bargaining and that they waive their right to bargain over any matters during the term of the agreement.”¹⁹ It

¹⁶ See *infra* notes 250-68 and accompanying text.

¹⁷ See *infra* notes 269-85 and accompanying text.

¹⁸ See *supra* notes 2-3 and accompanying text.

¹⁹ BRUCE S. FELDACKER, LABOR GUIDE TO LABOR LAW 129 (1980); see also Reid Carron & Angela Broughton, *When Is “No” Really “No”?*—*The NLRB’s Current Position on the Freedom of Contract, Management Rights, and Waiver*, 13 LAB. LAW. 299, 299 (1997) (stating that by including such a clause in an agreement, “the parties agree that no obligation exists to bargain over certain issues for the duration of the agreement”).

The following is an example of a typical zipper clause:

“The Parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the Parties after exercise of that right and opportunity are set forth and solely embodied in this Agreement.

Therefore the Corporation and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agree [sic] that the other shall not be obligated, to bargain collectively with respect to any subject matter referred to, or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the Parties at the time they negotiated or signed this Agreement.”

BAER, *supra* note 3, at 16 (quoting a labor agreement between Rubber Workers and Samsonite Corporation, Murfreesboro, Tennessee). A more concisely stated zipper clause was contained in the agreement underlying the dispute in *Mount Vernon Educational Ass’n v. Illinois Educational Labor Relations Board*, 663 N.E.2d 1067 (Ill. App. Ct. 1996), which stated: “The parties each voluntarily and unqualifiedly

appears that a more precise use of the term “zipper clause” would only apply to such waiver clauses, although a zipper clause may coexist with a merger or integration clause.²⁰

The National Labor Relations Act requires the employer and the union to bargain collectively about “wages, hours, and other terms and conditions of employment.”²¹ During the term of a collective bargaining agreement, there is no duty to bargain on terms “contained in” the labor agreement.²²

waive any rights which might otherwise exist under law to negotiate over any matter during the term of this Agreement, and each agrees that the other shall not be obligated to bargain collectively during the term of this Agreement.” *Id.* at 1071.

Zipper clauses can be either narrow or broad. A narrow zipper clause attempts to exclude only topics actually discussed during contract negotiations from the statutory duty to bargain, while a broad zipper clause attempts to foreclose the duty to bargain over any topic not in the final agreement, even if the topic was not discussed during negotiations. *See id.* at 1070.

²⁰ See, for example, the agreement at issue in *Lone Star Brewing Co. v. International Union of United Brewery Workers, Local 110*, 53 Lab. Arb. Rep. (BNA) 1317, 1317-18 (1969) (Autrey, Arb.).

²¹ National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1994). For a discussion of the three types of bargaining topics, mandatory, permissible, and illegal, see 1 SECTION OF LABOR AND EMPLOYMENT LAW, AMERICAN BAR ASS’N, THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 594-96 (Patrick Hardin et al. eds., 3d ed. 1992 & Supp. 1997) [hereinafter DEVELOPING LABOR LAW].

²² *See* National Labor Relations Act § 8(d). The National Labor Relations Act states:

[T]he duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions *contained in* a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Id. (emphasis added). The members of the National Labor Relations Board (“NLRB”) in *Jacobs Manufacturing Co.* interpreted “contained in” differently. *See Jacobs Mfg. Co.*, 94 N.L.R.B. 1214 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952); *see also* FLORIAN BARTOSIC & ROGER C. HARTLEY, LABOR RELATIONS IN THE PRIVATE SECTOR 325 (2d ed. 1986) (discussing *Jacobs Mfg. Co.*). Members Reynolds and Murdock interpreted the provision to allow the parties to refuse to bargain over any topic during the term of a collective bargaining agreement unless doing so would be inconsistent with an express contract provision. *See Jacobs Mfg. Co.*, 94 N.L.R.B. at 1228-35. Members Houston and Styles interpreted “contained in” to allow the parties to refuse to bargain over any topic that was actually included in the written collective bargaining agreement. *See id.* at 1217-20. Chairman Herzog articulated the final view that “contained in” not only includes

If a mandatory topic is "contained in" the collective bargaining agreement, neither party has a duty to bargain about the matter, and neither party may unilaterally modify the term without the consent of the other party.²³ If a mandatory topic is not "contained in" the collective bargaining agreement, either party may effect a change once the party has "bargain[ed] in good faith to impasse."²⁴ However, this duty to bargain may be waived.²⁵ A zipper clause is usually inserted in the collective bargaining agreement, most often by management, as an attempt to foreclose its duty to bargain during the term of the agreement.²⁶

A waiver issue often arises after an employer has unilaterally implemented a change to a mandatory bargaining topic during the term of the contract without giving notice or without bargaining to an impasse with the union.²⁷ Such an act often results in the union filing an unfair labor

written terms, but also includes terms "consciously explored" during contract negotiations even though they were not actually included in the final agreement. *See id.* at 1227-28. Thus, if a topic was consciously explored but not ultimately adopted in the contract, the term has been waived. *See id.* This final approach has been adopted by most courts. *See BARTOSIC & HARTLEY, supra*, at 325.

²³ *See* National Labor Relations Act, § 8(d); Kenneth L. Wagner, "No" Means "No" When a Party "Really" Says So: The NLRB's Continued Adherence to the Clear and Unmistakable Waiver Doctrine in Unilateral Change Cases, 13 LAB. LAW. 325, 326 n.1 (1997).

²⁴ Wagner, *supra* note 23, at 326 n.1; *see also* National Labor Relations Act § 8(d).

²⁵ *See* FELDAKER, *supra* note 19, at 129.

²⁶ *See* BAER, *supra* note 3, at 15; *cf.* 48A AM. JUR. 2D *Labor and Labor Relations* § 3187 (1994) (discussing reopener clauses which require a party to the agreement to give notice before changing a contract term).

In addition to inserting a written zipper clause into the collective bargaining agreement, the duty to bargain can be waived by bargaining room conduct and by the failure to act. *See* DEVELOPING LABOR LAW, *supra* note 21, at 700; *see also* FELDAKER, *supra* note 19, at 129. For a discussion of waiver by bargaining history, *see* DEVELOPING LABOR LAW, *supra* note 21, at 705-08. For a discussion of waiver by inaction, *see id.* at 708-10.

²⁷ *See* Wagner, *supra* note 23, at 326; *see also* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 469 (1976) (stating that "[t]he vast preponderance of cases applying the 'clear and unequivocal waiver' principle do indeed involve a charge that the employer unilaterally announced or implemented a change in the status quo without giving notice or an opportunity to bargain to the union").

practice charge against the company.²⁸ While such an act would normally constitute a violation of the National Labor Relations Act,²⁹ the employer will argue that the union waived the employer's duty to bargain by agreeing to the insertion of a zipper clause in the collective bargaining agreement.³⁰

However, the insertion of a zipper clause will not necessarily absolve the party's duty to bargain unless the "clear and unmistakable" test is successfully met.³¹ In order for a valid waiver to be found, there must be clear and unmistakable contract language evidencing the parties' intent to

²⁸ See Carron & Broughton, *supra* note 19, at 300. Another issue involving the zipper clause is whether the NLRB or an arbitrator should decide the waiver issue. While traditionally the NLRB has heard waiver issues, "[m]ore recently, however, the Board has expressed a preference to have union charges of unilateral action during the contract processed through the grievance and arbitration provisions of the parties' contract." GORMAN, *supra* note 27, at 467. Thus, the NLRB's jurisdiction under section 8(a)(5) of the National Labor Relations Act has been ignored in preference for the greater speed and efficiency of the arbitration system. See *id.* The NLRB's deference to the arbitration procedure has been referred to as the *Collyer* doctrine. See DEVELOPING LABOR LAW, *supra* note 21, at 705; see also *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971) (creating the *Collyer* doctrine). For further discussion of the *Collyer* doctrine, see DEVELOPING LABOR LAW, *supra* note 21, at 704-05, 1041-45, and Carron & Broughton, *supra* note 19, at 301 n.11.

²⁹ See National Labor Relations Act § 8(a)(5). See generally DEVELOPING LABOR LAW, *supra* note 21, at 596-601 (discussing the per se violation of the National Labor Relations Act by refusing to bargain over a mandatory topic and, instead, unilaterally implementing a change in the status quo).

³⁰ See Wagner, *supra* note 23, at 326; see also GORMAN, *supra* note 27, at 469.

³¹ See DEVELOPING LABOR LAW, *supra* note 21, at 700; see also, e.g., *Trojan Yacht Div. of Bertram-Trojan, Inc.*, 319 N.L.R.B. 741, 741-43 (1995) (holding that there was no clear and unmistakable waiver of the duty to bargain over changes made in a pension plan where a contract provision stated that the plan was to be "maintained in the same manner and to the same extent such plans are generally made available and administered on a corporate basis"); *Exxon Research & Eng'g Co.*, 317 N.L.R.B. 675, 675 (1995) (holding that there was no clear and unmistakable waiver of the duty to bargain over thrift plans because the contract stated that the bargaining unit employees' eligibility for the thrift plan should not be affected by the contract), *enforcement denied on other grounds*, 89 F.3d 228 (5th Cir. 1996); *Flatbush Manor Care Ctr.*, 315 N.L.R.B. 15, 19-20 (1994) (holding that there was no clear and unmistakable waiver of the duty to bargain over the elimination of a bonus program because the language in a memorandum was ambiguous and the union's action after the unilateral change indicated that it did not intend the memorandum as a waiver of the duty to bargain).

waive the duty to bargain.³² A waiver may also be found based on the parties’ bargaining history.³³ “[T]he Board requires evidence that the matter in issue was ‘fully discussed and consciously explored during negotiations and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter.’”³⁴ Both the National Labor Relations Board (“NLRB”) and the courts have “confined the waiver doctrine narrowly and have been reluctant to infer a waiver.”³⁵ If a valid waiver is found, only the specific item or items mentioned will be subject to waiver, not the general category.³⁶

³² See DEVELOPING LABOR LAW, *supra* note 21, at 700. In 1967, the United States Supreme Court upheld the NLRB’s application of the clear and unmistakable standard in *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 (1967) (upholding the NLRB’s refusal to find a waiver of the duty to bargain before implementing a premium pay plan under the clear and unmistakable test). For a discussion of *C & C Plywood Corp.*, see Wagner, *supra* note 23, at 336-37. In 1983, the Court once again affirmed the clear and unmistakable test. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 707-10 (1983) (upholding the NLRB’s holding that a general no-strike provision did not waive the right to strike over an unfair labor practice under the clear and unmistakable test). The Court stated: “We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated.’ More succinctly, the waiver must be clear and unmistakable.” *Id.* at 708 (citing *Mastro Plastics, Inc. v. NLRB*, 350 U.S. 270, 283 (1956)). For a discussion of *Metropolitan Edison Co.*, see Carron & Broughton, *supra* note 19, at 300-02.

³³ See BAER, *supra* note 3, at 16; DEVELOPING LABOR LAW, *supra* note 21, at 701. Originally, the NLRB strictly required clear and unmistakable language in the contract to constitute a waiver; however, in *Radioear Corp.*, the NLRB looked beyond the language of the broad zipper clause to the bargaining history of the parties and held that the duty to bargain over a “turkey money bonus” was waived because a maintenance-of-benefits clause had been consciously explored and yielded by the union during negotiations. See *Radioear Corp.*, 214 N.L.R.B. 362, 364 (1974); DEVELOPING LABOR LAW, *supra* note 21, at 702-03. The NLRB continues to analyze the waiver issue in accordance with *Radioear*; however, the circuit courts are split on the issue and apply various approaches. See *id.* at 703 & nn.761-62.

³⁴ DEVELOPING LABOR LAW, *supra* note 21, at 701 (quoting *Rockwell Int’l Corp.*, 260 N.L.R.B. 1346, 1347 (1982)). For a discussion of the recent case law applying the fully discussed and consciously explored standard, see *id.* at 706-07.

³⁵ *Id.* at 700.

³⁶ See *C & C Plywood Corp.*, 385 U.S. at 430-31 (holding that a contract clause stating that management had the right to pay “any particular employee for some special fitness, skill, aptitude or the like” at a rate above the normal contract rate

While the NLRB has consistently applied the clear and unmistakable waiver test,³⁷ another approach to determining whether the right to bargain has been properly waived is the “contract coverage” test.³⁸ Because of the heavy burden imposed under the clear and unmistakable test, the decision as to what test to apply to a given situation is often outcome determinative. It has been argued that the “rote application of the ‘clear and unmistakable’ waiver rubric” makes it virtually impossible for employers to successfully meet the burden.³⁹ Thus, the contract coverage test has been argued as a

did not constitute a waiver regarding the employer’s change in wage rate for the entire classification of employees). *See generally* GORMAN, *supra* note 27, at 469-72 (discussing case law on the scope of a waiver).

³⁷ The NLRB has solely applied the clear and unmistakable test since 1993. *See Carron & Broughton, supra* note 19, at 305. *But cf.* Southern Cal. Edison Co., 310 N.L.R.B. 1229 (1993) (deferring to the arbitrator’s application of the contract coverage test).

³⁸ *See Carron & Broughton, supra* note 19, at 303-04. The District of Columbia Circuit and the Seventh Circuit have applied the contract coverage test to management rights clauses. *See NLRB v. United States Postal Serv.*, 8 F.3d 832, 838 (D.C. Cir. 1993) (holding that a broad management rights clause, which stated that the employer had the exclusive right “[t]o transfer and assign employees,” “[t]o determine the methods, means, and personnel by which [its] operations are to be conducted,” and “[t]o maintain the efficiency of the operations entrusted to it,” allowed the employer to unilaterally implement cost-cutting measures, including reducing service hours) (quoting collective bargaining agreement); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992) (holding that “[t]he union had a statutory right to bargain over the terms of employment . . . of which a provision regulating behavior off the job was one, but it gave up that right, so far as the subjects comprehended by the management-rights clause were concerned, by agreeing to the clause”) (citation omitted). For a general discussion of *United States Postal Service* and *Chicago Tribune Co.*, see *Wagner, supra* note 23, at 329-31.

A management rights clause is a “clause which identifies, either generally or in detail, the employer’s exclusive right to manage and conduct the business, and the right to direct the work force, including the right to hire, discipline, and discharge.” *KELLY, supra* note 2, at 51. For a general discussion of management rights clauses, see *DEVELOPING LABOR LAW, supra* note 21, at 703-04.

³⁹ *Carron & Broughton, supra* note 19, at 301. According to Carron and Broughton’s research, there were no decisions by the NLRB between 1993 and 1996 in which the zipper clause was held to effectively eliminate the duty to bargain. *See id.* at 299 & n.2. Carron and Broughton argue that the application of the clear and unmistakable test is applied

with the desired result being to force employers to, at minimum, bargain with the union (and, at maximum, obtain the union’s consent) before

superior approach for evaluating zipper clauses.⁴⁰ The contract coverage test focuses on whether the contract language agreed to by the parties supports the unilateral action.⁴¹ It has been argued that this is the superior approach to the waiver issue because it requires the parties to abide by the terms of the agreement they freely reached during negotiations.⁴² While the contract coverage test has been adopted by the District of Columbia Circuit and the Seventh Circuit,⁴³ the NLRB and the majority of courts continue to apply the clear and unmistakable approach to determine the effectiveness of a zipper clause.⁴⁴

B. *The Merger Clause*

The merger clause is a contract clause that states that the written agreement is the final and total agreement between the parties.⁴⁵ Unlike the

making any change in terms or conditions of employment during the term of a collective bargaining agreement, even if the agreement contains language, freely negotiated, that the employer reasonably believes reserves the right to unilaterally take the action at issue.

Id. at 324.

⁴⁰ *See id.*

⁴¹ *See id.* at 304.

⁴² *See id.* Carron and Broughton believe that the clear and unmistakable test wrongly protects the union from the “consequences of give-and-take contract negotiations.” *Id.* at 299. Gorman argues that enforcing a waiver furthers contract stability if the union has clearly waived its privilege to have the employer bargain on a topic and has accepted some concession of value from the company in exchange. *See GORMAN, supra* note 27, at 466-67. However, allowing the union to keep the concession and not abide by its agreement would not further contract stability. *See id.*

⁴³ *See supra* note 38 (discussing the D.C. Circuit and Seventh Circuit cases that have applied the contract coverage test).

⁴⁴ *See supra* notes 31-32, 37 (discussing the application of the clear and unmistakable test by the NLRB and the courts).

⁴⁵ *See CALAMARI & PERILLO, supra* note 1, § 3-6, at 156; *see also* Glasser & Rowley, *supra* note 5, at 711 (stating that the merger clause signifies “the extinguishment of one contract by its absorption into another contract”); Macintosh, *supra* note 4, at 530 (defining a merger clause as that which “expressly provides that the writing constitutes the entire agreement between the parties, and that any prior or contemporaneous agreements, representations, or warranties are excluded”).

It is important to distinguish the parol evidence rule from the rules regarding the use of extrinsic evidence in the process of interpreting a contract. Generally, the

zipper clause, the merger clause is used in contracts generally and is not exclusive to the labor law setting. While the elementary law of contracts is not rigidly applied to labor agreements, they are not totally free of it.⁴⁶ However, in order to understand the merger clause and its full impact, it is useful to examine the use and effect of the merger clause in connection with the parol evidence rule.

1. *The Parol Evidence Rule*

A written contract, especially a collective bargaining agreement, is often the result of a series of several negotiating sessions. Sometimes during a subsequent lawsuit involving what is covered by a contract, a party may attempt to introduce these prior negotiations as evidence "to show that the terms of the agreement are other than as shown on the face of the writing."⁴⁷ When this occurs, the parol evidence rule becomes relevant.

If the judge decides that the parol evidence rule applies[,] he excludes the offered term not because it was not agreed upon but because under the rule it is legally immaterial. Conversely, if he decides that the parol

parol evidence rule addresses what the agreement encompasses, and the interpretation rules address what the contract means. See JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 84, at 396 (3d ed. 1990). Therefore, these are different inquiries.

⁴⁶ *Compare* Certified Corp. v. Hawaii Teamsters & Allied Workers, 597 F.2d 1269, 1271 (9th Cir. 1979) (stating that "[t]he courts have not strictly adhered to contract rules in dealing with collective bargaining agreements"), *with* Mohr v. Metro E. Mfg. Co., 711 F.2d 69, 72-73 (7th Cir. 1983) (applying the parol evidence rule to a collective bargaining agreement and holding that a prior oral agreement was admissible because the agreement was not completely integrated). For a discussion of case law applying the parol evidence rule to collective bargaining agreements, see Anthony Carabba, Comment, *Merk v. Jewel Food Stores: The Parol Evidence Rule Applied to Collective Bargaining Agreements—A Trend Toward More Formality in the Name of National Labor Policy*, 10 HOFSTRA LAB. L.J. 719, 727-32 (1993).

⁴⁷ 2 E. ALLAN FARNSWORTH, CONTRACTS § 7.2, at 209 (2d ed. 1998). While not pertinent to labor law employment situations, the Uniform Commercial Code ("UCC") contains the parol evidence rule applicable to the sale of goods. See U.C.C. § 2-202 (1989). See generally ROBERT A. HILLMAN ET AL., COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE ¶3.05[1] (1985) (discussing the application of the parol evidence rule under the UCC); 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 2-10 (3d ed. 1988).

evidence rule does not apply[,] he admits the term agreed upon into evidence but then leaves to the jury the issue of fact as to whether such a term was actually agreed upon.⁴⁸

The parol evidence rule basically indicates that a final and total written agreement between the parties (a total or complete integration) cannot be supplemented or contradicted by prior or contemporaneous agreements.⁴⁹ Additionally, a final written agreement that is intended only as a partial expression of the parties' agreement (a partial integration) can be supplemented by prior or contemporaneous agreements, but cannot be contradicted by such agreements.⁵⁰ The parol evidence rule is inapplicable when determining whether conditions precedent in the contract have occurred,⁵¹ whether the agreement is supported by consideration,⁵² whether the contract is illegal,⁵³ whether the contract is void or voidable,⁵⁴ and whether the

⁴⁸ CALAMARI & PERILLO, *supra* note 1, § 3-2(c), at 140.

⁴⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 215 (1981); *see also, e.g.*, *Farmers Coop. Ass'n v. Garrison*, 454 S.W.2d 644, 648 (Ark. 1970) (excluding evidence of a promise to refinance and a guarantee of competitive feed prices because the agreement was completely integrated); *Gianni v. R. Russel & Co.*, 126 A. 791, 792 (Pa. 1924) (excluding an alleged promise that the lessee would have the exclusive right to sell soft drinks at the drugstore and stating that "the written lease is the complete contract of the parties, and since it embraces the field of the alleged oral contract, evidence of the latter is inadmissible under the parol evidence rule").

The parol evidence rule applies to both written and oral prior or contemporaneous agreements. *See* 2 FARNSWORTH, *supra* note 47, § 7.2, at 212; *see also, e.g.*, *Hoover Universal, Inc. v. Brockway Imco, Inc.*, 809 F.2d 1039, 1043 (4th Cir. 1987) (excluding a written representation by the seller in a handout under Virginia's parol evidence rule because the purchase agreement was totally integrated).

⁵⁰ See RESTATEMENT (SECOND) OF CONTRACTS §§ 210(2), 215-216. For a discussion of whether a term is consistent or contradictory, *see* CALAMARI & PERILLO, *supra* note 1, § 3-5, at 154-55.

⁵¹ See CALAMARI & PERILLO, *supra* note 1, § 3-7(b), at 158-59.

⁵² See 2 FARNSWORTH, *supra* note 47, § 7.4, at 233; *see also, e.g.*, *Fountain Hill Millwork Bldg. Supply Co. v. Belzel*, 587 A.2d 757, 761 (Pa. Super. Ct. 1991) (holding the parol evidence rule inapplicable to the determination of whether a note was supported by consideration).

⁵³ See RESTATEMENT (SECOND) OF CONTRACTS § 214(d); *see also* Glasser & Rowley, *supra* note 5, at 730 (stating that parol evidence may be used to prove that a contract is "contrary to law, public policy, or public morals").

⁵⁴ See Glasser & Rowley, *supra* note 5, at 719 (stating that "[p]arol evidence is always competent to show the nonexistence of a contract"). A contract may be void

contract was obtained by mistake, fraud, or duress.⁵⁵ Additionally, the parol evidence rule does not apply to agreements made after the written contract was entered into by the parties.⁵⁶

The first step in the application of the parol evidence rule is to determine whether a valid contract was formed. This determination can be made by examining any relevant evidence because the parol evidence rule does not apply to the determination of whether a contract was validly created.⁵⁷ Second, if a valid contract was entered into, it must then be determined if the written contract was the final expression of the agreement between the parties.⁵⁸ Once again, any relevant evidence may be used to determine if the agreement was a final expression of the parties because the parol evidence rule does not apply to this inquiry.⁵⁹ While the written agreement does not have to be signed or be in any specific format to be considered a final integrated agreement,⁶⁰ “[t]he crucial requirement is that the parties have regarded the writing as the final embodiment of their agreement.”⁶¹ Third, if the written contract was a final expression, it must

or voidable because of an illegality. *See* CALAMARI & PERILLO, *supra* note 1, § 3-7, at 161.

⁵⁵ *See* RESTATEMENT (SECOND) OF CONTRACTS § 214(d); *see also* CALAMARI & PERILLO, *supra* note 1, § 3-7(c)-(d), at 159-61; 2 FARNSWORTH, *supra* note 47, § 7.5, at 236-45.

⁵⁶ *See, e.g.*, *H.C. Schmieding Produce Co. v. Cagle*, 529 So. 2d 243, 247 (Ala. 1988) (stating that the parol evidence rule under the UCC did not apply to a potato sales contract entered subsequent to the formation of the written seed contract even though some of the negotiations for the modification took place before the initial contract was entered). The pertinent rules applied to agreements made after a contract has been formed by the parties are the rules of contract modification. *See generally* CALAMARI & PERILLO, *supra* note 1, § 5-14(a), at 262-64. For a discussion of no-oral-modification clauses which require any subsequent agreement modifying the contract to be written, *see* 2 FARNSWORTH, *supra* note 47, § 7.6, at 246-51.

⁵⁷ *See* CALAMARI & PERILLO, *supra* note 1, § 3-7, at 157.

⁵⁸ *See* 2 FARNSWORTH, *supra* note 47, § 7.3, at 216. A final agreement between the parties, whether partial or complete, is referred to as an “integrated agreement.” *See id.* § 7.3, at 217. This issue of integration is usually decided by the trial judge as a matter of law. *See* CALAMARI & PERILLO, *supra* note 1, § 3-3, at 143.

⁵⁹ *See* RESTATEMENT (SECOND) OF CONTRACTS § 214(a).

⁶⁰ *See* 2 FARNSWORTH, *supra* note 47, § 7.3, at 217.

⁶¹ CALAMARI & PERILLO, *supra* note 1, § 3-3, at 143. The more complete the written agreement is on its face, the more likely the agreement will be considered a final integration. *See id.* If it is determined that the contract was not intended as the final expression of the parties, the contract is “unintegrated,” and the parol

then be determined whether the written expression was a total or partial expression of the agreement.⁶² If the parties intended the written contract to be a complete expression of all the terms of the agreement, the contract is totally or completely integrated.⁶³ However, if the parties intended the written contract to contain only some of the terms of the agreement, the contract is partially integrated.⁶⁴

There are many different approaches in determining whether a written agreement is a total or partial integration. According to Williston's approach, a merger clause stating that the writing is the total agreement conclusively establishes the agreement as a total integration, unless the agreement is obviously incomplete on its face or the merger clause was obtained by fraud or mistake.⁶⁵ However, if the agreement does not contain a merger clause, the writing must be examined on its face to determine if it is a partial or total integration.⁶⁶ Thus, according to Williston, if the written agreement appears complete on its face, it is considered a total integration, and if the agreement appears obviously incomplete on its face, it is considered a partial integration.⁶⁷ However, if the agreement appears

evidence rule does not apply to the contract. 2 FARNSWORTH, *supra* note 47, § 7.3, at 215.

⁶² See CALAMARI & PERILLO, *supra* note 1, § 3-4, at 145. Whether an agreement is a partial or total integration is usually determined by the trial judge as an issue of law. See *id.* The parol evidence rule does not apply when inquiring whether the agreement is partially or totally integrated. See RESTATEMENT (SECOND) OF CONTRACTS § 214(b).

⁶³ See CALAMARI & PERILLO, *supra* note 1, § 3-4, at 145.

⁶⁴ See *id.*

⁶⁵ See 2 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 633 (1920); see also Helen Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 FORDHAM L. REV. 35, 55-57 (1985). The *First Restatement* adopted Williston's approach to determining whether an agreement is a partial or total integration. See RESTATEMENT OF CONTRACTS § 240 (1932); CALAMARI & PERILLO, *supra* note 1, § 3-4(c), at 147.

⁶⁶ See CALAMARI & PERILLO, *supra* note 1, § 3-4(c), at 148.

⁶⁷ See, e.g., *Gianni v. R. Russel & Co.*, 126 A. 791, 792 (Pa. 1924) (stating that in determining whether an agreement is a total integration, "the writing will be looked at, and if it appears to be a contract complete within itself, . . . 'it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing'" (quoting *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U.S. 510, 517 (1891))); *Cumru Township Auth. v. Snekul, Inc.*, 618 A.2d 1080, 1085-86 (Pa. Commw. Ct. 1992) (examining the face of the document and concluding that because of the "thorough detailing of every aspect of the entire understanding," the agreement was totally integrated).

to be complete on its face, it is considered to be a partial integration if the alleged additional terms would not naturally be included in the written agreement due to the nature of the alleged additional agreement.⁶⁸

Under Corbin's approach, the presence of a merger clause can be considered, but is not conclusive.⁶⁹ Additionally, in the inquiry of whether the writing is a total integration, examining the face of the agreement alone cannot determine the intent of the parties as to total integration.⁷⁰ Therefore, according to Corbin, all relevant evidence should be liberally admitted to determine the actual intent of the parties concerning whether the writing is a total or partial expression of their agreement.⁷¹

Under the collateral contract approach, terms that are collateral or independent of the completely integrated underlying written agreement can be admitted into evidence, unless the collateral terms contradict the underlying agreement.⁷² However, terms that relate to the main purpose of

⁶⁸ See CALAMARI & PERILLO, *supra* note 1, § 3-4(c), at 148.

[W]hen a term not found in the writing is offered into evidence by one of the parties and the court concludes that it would have been natural for the parties situated as they were to have included that term in the writing, there is a total integration with respect to that term and the term may not be admitted into evidence even if it does not contradict the writing.

Id. Williston focuses on what reasonable persons would have done, rather than inquiring into the actual intent of the parties. See MURRAY, *supra* note 45, § 84, at 389.

⁶⁹ See CALAMARI & PERILLO, *supra* note 1, § 3-4(d), at 149 ("According to Corbin, all relevant Evidence should be included on this issue of Intent, including Evidence of prior negotiations.").

⁷⁰ See *id.*

⁷¹ See, e.g., *Bussard v. College of St. Thomas, Inc.*, 200 N.W. 2d 155, 161 (Minn. 1972) (stating that to determine whether a contract is totally integrated, "the writing must be read in light of the situation of the parties, the subject matter and the purposes of the transaction, and like attendant circumstances"). "In other words the very evidence whose admissibility is challenged is admissible on the issue of total integration." CALAMARI & PERILLO, *supra* note 1, § 3-4(d), at 149. The *Second Restatement* states that "a writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties." RESTATEMENT (SECOND) OF CONTRACTS § 210 cmt. b (1981).

⁷² See 2 FARNSWORTH, *supra* note 47, § 7.3, at 225. See also, e.g., *Buyken v. Ertner*, 205 P.2d 628, 636 (Wash. 1949) (holding that an oral agreement was admissible under the parol evidence rule because it covered a different topic than the written agreement and the written agreement was not inconsistent with the oral agreement). For a discussion of the narrow and broad views of the collateral

the underlying agreement are excluded from evidence.⁷³ Therefore, under this view, the presence or absence of a merger clause is not critical. While this approach is not used widely today, it continues to be applied.⁷⁴

2. *The Effect of a Merger Clause on the Determination of Whether There is a Completely Integrated Agreement*

Under the common law, it may be uncertain how the court will interpret the parties' intent as to the integration issue. Therefore, the parties often insert a merger clause in the agreement stating that the written agreement "is a final expression of all the terms agreed upon and is a complete and exclusive statement of those terms."⁷⁵ Traditionally, courts have followed Williston's approach and have held that agreements containing merger clauses are completely integrated unless the document is facially incomplete, or the merger clause was included because of fraud or mistake.⁷⁶ Additionally, courts have reasoned that because "complete

contract approach, see CALAMARI & PERILLO, *supra* note 1, § 3-4(b), at 147.

⁷³ See 2 FARNSWORTH, *supra* note 47, § 7.3, at 225.

⁷⁴ See CALAMARI & PERILLO, *supra* note 1, § 3-4(b), at 147; see, e.g., Alabama Farm Bureau Mut. Cas. Ins. Co. v. Haynes, 497 So. 2d 82, 85 (Ala. 1986) (holding that an oral agreement regarding workers' compensation coverage was admissible under the parol evidence rule because the workers' compensation issue was collateral to the written homeowner's insurance contract).

⁷⁵ CALAMARI & PERILLO, *supra* note 1, § 3-6, at 156. It is important to note that all of the exceptions to the parol evidence rule apply to an agreement even if the agreement contains a merger clause. See 2 FARNSWORTH, *supra* note 47, § 7.3, at 206 n.36; see also *supra* notes 51-56 and accompanying text (discussing the exceptions to the parol evidence rule).

Some courts have held that merger clauses should not be interpreted literally in collective bargaining agreements because "no writing could ever embody the 'entire agreement' between a company, a union, and the individual employees." Matthew J. McDermott, *Labor Law—Between the Obvious and the Foolish: An Application of UCC Principles to the Common Law of Collective Bargaining Agreements*, 17 W. NEW ENG. L. REV. 337, 355 (1995); see also *Manville Forest Prod. Corp. v. Paperworkers Int'l Union*, 831 F.2d 72, 76 (5th Cir. 1987) (stating that "[i]n regard to the 'no modification' clause, this Court has repeatedly held that such clauses do not prevent an arbitrator from looking to past practice").

⁷⁶ See CALAMARI & PERILLO, *supra* note 1, § 3-6, at 156; 2 FARNSWORTH, *supra* note 47, § 7.3, at 206 n.36; see also *Hoover Universal, Inc. v. Brockway Imco, Inc.*, 809 F.2d 1039, 1043 (4th Cir. 1987) (holding that the contract was integrated because of the "detailed nature of the contract, including the well-drafted merger clause"); *Durkee v. Goodyear Tire & Rubber Co.*, 676 F. Supp. 189, 191

integration depends on the parties' intention, . . . merger clauses [are] conclusive evidence that the agreement is completely integrated."⁷⁷ Modernly, however, "[t]here is now some authority that a merger clause is only one of the factors to be considered in determining whether there is a total integration."⁷⁸ Another modern approach is to hold a merger clause effective only if the parties actually discussed and consciously agreed upon the insertion of the clause.⁷⁹

Therefore, the presence or absence of a merger clause can be a factor courts use to determine whether the writing is a total integration, thereby determining if the parol evidence rule is invoked to exclude extrinsic evidence. It must be cautioned, however, that sometimes courts will blend or mix the criteria used under the various approaches, resulting in an application that does not precisely fit into any of the various views.

III. EFFECT OF A BINDING PAST PRACTICE

After the parties have reached a basic agreement in bargaining, the company and the union often agree to insert a merger clause in the collective bargaining agreement. At a later time, one of the parties may attempt to use this clause to defend its action of unilaterally discontinuing a past practice not contained in the agreement. Before discussing the

(W.D. Wis. 1987) (concluding that the agreement was completely integrated because the contract contained "a clear and comprehensive merger clause").

⁷⁷ Macintosh, *supra* note 4, at 530.

⁷⁸ CALAMARI & PERILLO, *supra* note 1, § 3-6, at 156; *see* Franklin v. White, 493 N.E. 2d 161, 166 (Ind. 1986) (holding that a merger clause should be "considered as any other contract provision to determine the intention of the parties"); 2 FARNSWORTH, *supra* note 47, § 7.3, at 205-07.

⁷⁹ *See* CALAMARI & PERILLO, *supra* note 1, § 3-6, at 156; *see also* Seibel v. Layne & Bowler, Inc., 641 P.2d 668, 671 (Or. Ct. App. 1982) (holding that an inconspicuous merger clause did not exclude an oral warranty because the parties did not actually intend such a result).

Under the UCC, courts have generally held that a merger clause effectively excludes extrinsic evidence. *See* 1 WHITE & SUMMERS, *supra* note 47, at 111; *see also* Investors Premium Corp. v. Burroughs Corp., 389 F. Supp. 39, 44-46 (D.S.C. 1974) (excluding a prior written warranty because the written sales contract contained a merger clause). However, courts have held inconspicuous merger clauses ineffective. *See, e.g.,* Sierra Diesel Injection Serv., Inc. v. Burroughs Corp., 874 F.2d 653, 657 (holding that the merger clause was not conclusive evidence of total integration where the clause was not conspicuous), *amended and superseded on denial of reh'g* by 890 F.2d 108 (9th Cir. 1989).

insertion of a merger clause in a labor agreement, the concept of a past practice must be explored.

According to Elkouri and Elkouri, past practice is “one of the most significant factors in labor-management arbitration.”⁸⁰ Past practice refers to “a prior course of conduct which is consistently made in response to a recurring situation and which the parties regard as the correct and required response under the circumstances.”⁸¹ Past practice can be used to interpret ambiguous contract language and to enforce general contract language and can even become an implied contract term.⁸² The United States Supreme Court recognized the binding effect of past practice in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*⁸³ in 1960, stating “[t]he labor arbitrator’s source of law is not confined to the express provisions of the contract, as the industrial common law—the practice of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.”⁸⁴

There is no set standard for determining if a binding past practice exists.⁸⁵ A frequently cited test for determining the existence of a binding

⁸⁰ FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 630 (5th ed. 1997).

⁸¹ GRENIG & ESTES, *supra* note 6, § 6.45.

⁸² *See id.*; MARVIN F. HILL & ANTHONY V. SINICROPI, *MANAGEMENT RIGHTS* 38-39 (1989).

⁸³ *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

⁸⁴ *Id.* at 581-82; *see also* *Metal Specialty Co. v. International Ass’n of Machinists, Local 1089*, 39 Lab. Arb. Rep. (BNA) 1265, 1269 (1962) (Volz, Arb.). [C]ontractual 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.

Id.

⁸⁵ *See* ELKOURI & ELKOURI, *supra* note 80, at 632. Parties may expressly ensure the continuance of past practices with a contract clause. *See id.* at 646-47. *But see* *Bethlehem Pac. Coast Steel Corp. v. United Steelworkers of Am., Local 1069*, 17 Lab. Arb. Rep. (BNA) 382 (1951) (Miller, Arb.) (holding that the employer could discontinue the past practice of retaining third shift assignments on certain jobs regardless of a clause stating that past practices were to be continued). *See generally* BAER, *supra* note 3, at 14-15 (outlining the general guidelines followed by arbitrators in determining the effectiveness of clauses attempting to ensure the continuation of past practices); 1 LABOR AND EMPLOYMENT ARBITRATION §

past practice was enunciated by Arbitrator Jules J. Justin in *Celanese Corp. of America v. Textile Workers Union, Local 1093*.⁸⁶ Arbitrator Justin stated that a binding past practice must be "(1) unequivocal; (2) clearly enunciated and acted upon; [and] (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties."⁸⁷ Generally, arbitrators have required that a binding past practice be clear and accepted by both parties for a sufficient period of time.⁸⁸ Arbitrator Richard Mittenenthal set forth elements he felt were required to establish a binding past practice, including clarity and consistency, longevity and repetition, acceptability, underlying circumstances, and mutuality.⁸⁹ A party may assent to a past practice by acquiescing in the conduct over time.⁹⁰ Many issues arise regarding binding past practices which are outside the subject matter of this paper, including the scope of the past practice⁹¹ and the subject matter appropriate for a binding past practice.⁹² Additionally, even if a past practice has been successfully established and binds the parties, it may be terminated by specific agreement of the parties.⁹³

18.03[4] (Tim Bornstein et al. eds., 1997) (discussing the impact of a maintenance-of-benefits clause on past practices).

⁸⁶ *Celanese Corp. of Am. v. Textile Workers Union, Local 1093*, 24 Lab. Arb. Rep. (BNA) 168 (1954) (Justin, Arb.).

⁸⁷ *Id.* at 172.

⁸⁸ *See, e.g., WPLG TV v. Photographers, Local 666, F.M.C.S. No. 92-06073*, 1993 WL 788164, at *18 (June 15, 1993) (Abrams, Arb.) (stating that "[i]n order to be binding, a practice must be clearly understood and based on conduct that is repeated over time").

⁸⁹ *See* Richard Mittenenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *ARBITRATION AND PUBLIC POLICY: PROCEEDINGS OF THE FOURTEENTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS* 32-33 (Spencer D. Pollard ed., 1961); *see also* HILL & SINICROPI, *supra* note 82, at 22-31 (discussing these factors in detail).

⁹⁰ *See Bethlehem Steel Co. v. United Steelworkers of Am., Local 1374*, 33 Lab. Arb. Rep. (BNA) 374, 376 (1959) (Valtin, Arb.) (stating that a party's assent may be implied where a past practice has continued pervasively over a long period of time).

⁹¹ *See* ELKOURI & ELKOURI, *supra* note 80, at 633.

⁹² *See id.* at 633-41 (discussing various theories as to what topics may become binding past practices).

⁹³ *See id.* at 644. Also, a party may take actions to guard against abuse of the past practice, alter or eliminate the past practice to promote safety concerns, or eliminate the past practice if the underlying circumstances have changed. *See id.* at 642-45. A past practice may even be eliminated by "its gradual discontinuance

Management or labor unions may seek to eliminate binding past practices by obtaining an agreement for the insertion of certain language in the collective bargaining agreement. A merger or integration clause stating that the agreement is the total agreement of the parties is the most common clause used to defend against a binding past practice.⁹⁴

IV. FACTORS IMPACTING THE EFFECTIVENESS OF A MERGER CLAUSE'S ELIMINATION OF A BINDING PAST PRACTICE

While arbitrators have attempted to formulate bright line rules, "many factors operate, perhaps in combination, to make each decision of an arbitrator relatively unique."⁹⁵ In order to determine the effect of a merger clause on past practices, over one hundred arbitration decisions, published and unpublished, were examined. The various factors which arbitrators relied upon in these decisions in determining the effectiveness of a merger clause in this situation will be discussed.⁹⁶ Assuming a valid past practice has been established, some of the factors impacting on successful exclusion of such past practices by a merger clause include: the contract language,⁹⁷

over a period of time." *Id.* at 644 (citing *Bethlehem Steel Co.*, 37 Lab. Arb. Rep. (BNA) at 958).

⁹⁴ See, e.g., *George E. Failing Co. v. United Steelworkers of Am., Local 4800*, 93 Lab. Arb. Rep. (BNA) 598, 602 (1989) (Fox, Arb.) (holding that an integration clause stating that all previous agreements were eliminated and that no future agreements may bind the parties unless written precluded the company's reliance on a past practice). A management rights clause has also been successfully used to fight off the binding effect of a past practice. See, e.g., *City of Tampa v. Hillsborough County Police Benevolent Ass'n*, 74 Lab. Arb. Rep. (BNA) 1169, 1173 (1980) (Wahl, Arb.) (holding that management could alter a past practice where, *inter alia*, a management rights clause stated that management retained its "rights . . . to 'alter or vary past practices'" (quoting collective bargaining agreement)).

⁹⁵ BAER, *supra* note 3, at 9-10.

Consequently, an arbiter may, on a particular occasion, assert an absolute doctrine that the practices and customs of the parties, in the language they choose to adopt, actually represents the true agreement between them. This same arbiter may turn around on another occasion and declare with no less conviction that his view of past practice is that it cannot alter the meaning of a clear contract provision.

Id.

⁹⁶ See *infra* notes 102-268 and accompanying text. Only those cases that contain a significant discussion of the arbitrator's reasoning will be discussed.

⁹⁷ See *infra* notes 102-84 and accompanying text.

whether the past practice has continued unabated into the new contract period,⁹⁸ the bargaining history on the subject,⁹⁹ whether there was an ambiguous contractual provision related to the subject matter of the past practice,¹⁰⁰ and the peculiar facts and circumstances of each case.¹⁰¹

A. *Contract Language*

Elkouri and Elkouri state that the binding effect of past practices “may be eliminated if the [merger clause] contract language is quite strong.”¹⁰² The question remains, however, what is strong language? This section summarizes various arbitration decisions reflecting what types of merger clause language have the effect of eliminating the binding effect of a past practice. First, Part 1 will explore the effect of using the term “past practice” or “practices” in the contract clause. Then, Part 2 will examine clear and unequivocal merger clause language that does not use the term “past practices” or “practices.”

1. *Use of the Term “Practices” or “Past Practices” in the Merger Clause*

The survey of decisions revealed that, generally, when the term “past practices” or “practices” was specifically referenced in the merger clause, the clause would effectively eliminate the past practice. However, if there was a separate contract clause on the topic of the past practice that could be construed as ambiguous, the past practice could still be used to interpret the ambiguous language, regardless of the specific merger clause.

In *Oxford Paper Co. v. United Papermakers, Local 19*,¹⁰³ Arbitrator Dworkin relied heavily on the language of the contract clause in his decision to exclude the past practice. In *Oxford Paper Co.*, the employer assigned cutting work to male employees which had in the past been done by women.¹⁰⁴ The Union argued that the employer was bound by the past practice and should have recalled laid-off female employees rather than assigning the work to male employees. The employer argued that the

⁹⁸ See *infra* notes 185-206 and accompanying text.

⁹⁹ See *infra* notes 207-41 and accompanying text.

¹⁰⁰ See *infra* notes 242-49 and accompanying text.

¹⁰¹ See *infra* notes 250-68 and accompanying text.

¹⁰² ELKOURI & ELKOURI, *supra* note 80, at 645 (emphasis added in part).

¹⁰³ *Oxford Paper Co. v. United Papermakers, Local 19*, 44 Lab. Arb. Rep. (BNA) 630 (n.d.) (Dworkin, Arb.).

¹⁰⁴ See *id.* at 631.

contract language did not require it to recall the women and that the work could be assigned to anyone it wished.¹⁰⁵ Section A of article VII of the contract stated: "The plain meaning of this agreement and other agreements signed upon the effective date of this Labor Agreement and hereafter shall control and be binding upon the parties to the agreement, to the exclusion of *past practices* and past oral agreement."¹⁰⁶ Arbitrator Dworkin concluded that the past practice was not binding because it was excluded by the contract clause.¹⁰⁷ Arbitrator Dworkin appeared to rely solely on the language of the clause in excluding the past practice. He pointed to the use of the term "past practice" by quoting the language of the clause and italicizing the phrase "*to the exclusion of past practices*."¹⁰⁸ Thus, Arbitrator Dworkin concluded that "[t]his language clearly manifests the intent to eliminate the binding effect of past practices."¹⁰⁹

The arbitrator in *McGraw-Edison Power Systems Division v. International Ass'n of Machinists, Lodge 1234*¹¹⁰ held that the extensive contract clause specifically using the term "past practice" effectively eliminated the binding force of the past practice under the agreement.¹¹¹ The employer banned transistor radio use in the plant after it had allowed radios in the plant for over twenty years.¹¹² The contract contained the following merger or integration clause:

"No agreement, waiver or modification of any of the provisions hereof shall be binding on the parties unless executed in writing by the parties. Waiver or lack of enforcement of any understanding herein or of any disciplinary or other rule in any particular case shall not constitute a precedent unless the parties stipulate in writing that it does establish a precedent.

It is agreed and understood that any and all agreement[s], written and verbal, entered into between the parties hereto are cancelled and superceded by this agreement. There are no side agreements or verbal understandings relative to this agreement and the present contract between the parties is as set forth in this agreement. . . . Unless specifically so

¹⁰⁵ *See id.*

¹⁰⁶ *Id.* at 631-32 (emphasis added).

¹⁰⁷ *See id.* at 634.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *McGraw-Edison Power Sys. Div. v. International Ass'n of Machinists, Lodge 1234*, 53 Lab. Arb. Rep. (BNA) 1024 (1969) (Lewis, Arb.).

¹¹¹ *See id.* at 1027.

¹¹² *See id.* at 1024.

provided in this contract to the contrary, *past practices shall not be binding on either party.*"¹¹³

Arbitrator Lewis concluded that the clause excluded the past practice from binding the employer, stating that "[t]his language was hammered out by the parties at the bargaining table and it would seem to us that in the absence of any memorandum of understanding to the contrary the Company would have a right to issue a rule banning the use of transistor radios," unless the company's actual purpose was discriminatory.¹¹⁴ The contract clause, which specifically stated that "*past practices shall not be binding on either party,*"¹¹⁵ could not have been more clear and unambiguous. Thus, the clause was controlling.

In *Union Camp Corp. v. United Paperworks International Union, Local 388*,¹¹⁶ the arbitrator held that a contract clause effectively eliminated the past practice.¹¹⁷ The agreement in *Union Camp* contained a provision requiring any workforce reductions to be determined by seniority.¹¹⁸ However, there had been a practice of ignoring this provision when determining who to layoff during short-term "partial operation" layoffs of one or two days.¹¹⁹ The following clause was inserted in the agreement:¹²⁰

"This Agreement contains the full and complete Agreement on all bargaining issues between the parties.

Any side agreements, memoranda of understanding of any kind, written or oral, and any *past practices* which are not incorporated into this Agreement are null and void.

¹¹³ *Id.* at 1025 (quoting the collective bargaining agreement) (emphasis added).

¹¹⁴ *Id.* at 1027.

¹¹⁵ *Id.* at 1025 (emphasis added).

¹¹⁶ *Union Camp Corp. v. United Paperworks Int'l Union, Local 388, F.M.C.S. No. 93-18279, 1994 WL 836436* (Feb. 14, 1994) (Nolan, Arb.). Other arbitration decisions have excluded a past practice where the contract clause specifically used the term "past practice." *See, e.g., Preferred Coupled Hose Prods. v. Aluminum Workers Int'l Union, Local 119, F.M.C.S. No. 94-12123, 1995 WL 594611* (Feb. 16, 1995) (Heekin, Arb.) (involving a past practice of paying employees vacation pay where they did not meet the service requirement because the past practice was not properly established and the agreement contained a merger clause that specifically stated that "prior practices" were canceled by the agreement).

¹¹⁷ *See Union Camp*, 1994 WL 836436, at *7.

¹¹⁸ *See id.* at *3.

¹¹⁹ *See id.*

¹²⁰ Arbitrator Nolan referred to this clause as a "zipper clause." *See id.* However, the clause actually appears to be a merger clause.

There are and shall be no other Agreements except as enumerated herein, or may be agreed upon during the contract term of the Agreement. Any such Agreements that are made during the contract term shall be reduced to writing and signed by the parties."¹²¹

After the merger clause was inserted in the new agreement, an incident occurred where four of six employees were laid-off temporarily for nondisciplinary reasons.¹²² Rather than laying off the employees in order of seniority, the supervisor asked for two volunteers to stay and continue to work and four workers were sent home.¹²³ The union argued that the merger clause eliminated the past practice of allowing the employer to determine short-term layoffs without regard to seniority, and thus, the contract provision governing seniority was violated.¹²⁴ Holding that the merger clause did eliminate the past practice, Arbitrator Nolan stated, "Where the contract is clear on its face and the party challenging that clear meaning fails to prove an alternative intention, obviously the plain meaning has to control. Here the contract unqualifiedly applies seniority to layoffs and eliminates contrary practices."¹²⁵ Claiming that it did not intend to eliminate this specific past practice,¹²⁶ the company argued that after the merger clause was negotiated, the company proposed a two-day rule for temporary layoffs not requiring seniority to be considered.¹²⁷ The union refused and the company withdrew the proposal assuming that the past practice survived.¹²⁸ Arbitrator Nolan, however, examined the negotiating history and noted that it was unclear whether the discussion regarding the two-day rule proposal occurred before or after the merger clause discussion.¹²⁹ He concluded that

[a] murky negotiating history is no reason to believe the parties did not mean what they said, or that they could not have written what they really meant.

¹²¹ *Id.* at *4 (quoting the collective bargaining agreement) (emphasis added).

¹²² *See id.* at *1-2.

¹²³ *See id.* at *2.

¹²⁴ *See id.* at *4.

¹²⁵ *Id.* at *9-10.

¹²⁶ *See id.* at *5.

¹²⁷ *See id.* at *6.

¹²⁸ *See id.*

¹²⁹ *See id.*

I must therefore find that the zipper clause means exactly what it says—that is, the 1986 Agreement wiped out all side agreements and past practices that the parties did not expressly protect.¹³⁰

Arbitrator Nolan noted that the parties had discussed past practices they wished to protect from the merger clause and that this practice was not brought up by either party. Additionally, he stated that there was “no proof of the Union’s devious intentions” and that “the more likely explanation is that the Union was happy to let the Company accidentally eliminate a practice the Union disliked.”¹³¹ Therefore, Arbitrator Nolan appeared to weigh heavily the agreed-upon language between the parties in excluding the past practice, regardless of the fact that the employer may have misunderstood what practices would be eliminated by the merger clause.

While it appears that the use of the term “past practice” provides clear and unambiguous proof of the parties’ intentions to eliminate past practices, some arbitrators have held that past practices are not eliminated by a specific contract clause containing the word “past practices.” For example, even the clearest contract language will not eliminate a past practice used to interpret ambiguous contractual provisions.¹³² In *Edmont*

¹³⁰ *Id.* at *7.

¹³¹ *Id.* at *6.

¹³² See, e.g., *Spartan Stores, Inc. v. General Teamsters Union, Local 406*, 105 Lab. Arb. Rep. (BNA) 549, 550 (1995) (Kanner, Arb.) (refusing to exclude a past practice under a very specific contract clause entitled “Past Practices,” reasoning that the “so-called ‘zipper’ provision does not preclude consideration of extrinsic evidence of past contract language and contract negotiations if the subject contract provision is ambiguous”); *International Bhd. of Elec. Workers v. Municipality of Anchorage, A.A.A. No. 75-L390-0253-91*, 1992 WL 717751, at *19 (June 15, 1992) (Runkel, Arb.) (holding that a contract clause entitled “Exclusive Nature of Agreement” that explicitly used the word “practices” did not exclude the past practice because the issue involved “the parties’ interpretation of the contract and not as a matter of unrelated past practice”). In *International Brotherhood of Electrical Workers, Local 1547 v. Municipality of Anchorage*, 1993 WL 788749 (Oct. 21, 1993) (Henner, Arb.), the arbitrator held that a past practice was not excluded by a specific contract clause using the term “practice” because

[a]lthough arbitrators are bound by such zipper clauses, as they are by any other language agreed to by the parties, such clauses generally are not viewed as a barrier to an arbitrator’s effort to understand the parties’ intent in the meaning of the agreed-upon words.

Arbitrators recognize such zipper clauses as excluding from consideration past practice and other arrangements made between the parties but not reflected in the agreement. Nonetheless, arbitrators must

Wilson v. United Rubber Workers, Local 688,¹³³ Arbitrator Nichols held that a contract clause did not eliminate the past practice that five days notice was required to qualify for vacation severance pay where the agreement stated that employees who were discharged or who quit “without notice” would not qualify for vacation severance pay.¹³⁴ Arbitrator Nichols stated:

It is abundantly clear that the parties adopted this close-out clause as a means of eliminating side agreements and understandings affecting matters not covered by this contract. That, however, does not negate understandings or practices which *interpret and apply* language which was negotiated by the parties and which is a part of the Agreement which they have entered into as the guide lines for their mutual relationships during the term of the Agreement.¹³⁵

In *Union Local Board of Education v. Union Local, Local 283*,¹³⁶ Arbitrator Fullmer held that the merger clause did not exclude the past practice because the contract clause was ambiguous.¹³⁷ After a new contract

have evidence of the parties’ understanding of the contract language in order to issue a decision based on that language, even with the presence of a zipper clause.

Id. at *2. *But see* *Seven-Up Bottling Co. v. Construction Laborers, Local 185*, 108 Lab. Arb. Rep. (BNA) 587, 591 (1997) (Staudohar, Arb.) (excluding a past practice of not allowing probationary employees to receive holiday pay even though there was a contract clause on holiday pay that could have been construed as ambiguous, stating that “[t]he zipper clause bars consideration of any past understandings that may have existed to deny this benefit”).

¹³³ *Edmont Wilson v. United Rubber Workers, Local 688*, 54 Lab. Arb. Rep. (BNA) 686 (1970) (Nichols, Arb.).

¹³⁴ *See id.* at 687. Article XV of the agreement stated: “The Parties by this Agreement have set forth their entire understanding on all matters which are or may be properly subject for collective bargaining, and by this Agreement do invalidate and supersede except as provided in Appendix One attached hereto, all previous written or oral understandings, agreements, *practices*.” *Id.* (emphasis added).

¹³⁵ *Id.* at 688.

¹³⁶ *Union Local Bd. of Educ. v. Union Local, Local 283*, A.A.A. No. 52-390-00162-95, 1995 WL 793768 (Dec. 28, 1995) (Fullmer, Arb.).

¹³⁷ *See id.* at *6. The contract clause stated: “This agreement supersedes and cancels all previous agreements, verbal or written, or based on alleged *past practices*, between the Board and the Union and constitutes the entire agreement between the parties.” *Id.* at *3 (emphasis added).

was in effect, the employer, despite no changes in the contract language, denied extra trips exceeding sixty miles to regular bus drivers when the employer determined that the regular driver's schedule conflicted with the trip.¹³⁸ However, a past practice had been to choose drivers for these extra trips exceeding sixty miles based on seniority and to accommodate their schedule regardless of a conflict.¹³⁹ The term in the agreement stating "[c]onsideration for extra trips" was held to be ambiguous.¹⁴⁰ Arbitrator Fullmer stated that "[i]f the terms are ambiguous, resort may be had to such aids to interpretation as past practice and bargaining history."¹⁴¹ Arbitrator Fullmer pointed out that the merger clause "would obviously be sufficient to extinguish any 'free standing' agreement based on a past practice. An example would be a customary free Thanksgiving turkey awarded by an employer without any basis in the written agreement."¹⁴²

Other arbitrators have noted the absence of the term "past practice" in the merger clause as a reason for not excluding the past practice.¹⁴³ In *Chesapeake & Potomac Telephone Co. v. Communications Workers of America*,¹⁴⁴ the arbitrator held that the past practices of paying taxi fares for women who worked past midnight and providing meals for certain employees who worked two or more hours of overtime were not eliminated by a merger clause.¹⁴⁵ Article 34 of the agreement stated:

"Section 1. This Agreement . . . [and other Agreements specifically listed] . . . set forth all of the understandings, commitments and agreements [existing] between the Company and the Union, and it is agreed that the Company and the Union shall not be bound by any understandings, commitments or agreements not included therein.

Section 2. If agreements are made between the Company and the Union modifying the provisions of the Agreements set forth in Section 1

¹³⁸ See *id.* at *1-2.

¹³⁹ See *id.*

¹⁴⁰ See *id.* at *2.

¹⁴¹ *Id.* at *5.

¹⁴² *Id.* at *7.

¹⁴³ See, e.g., *Alaska Airlines, Inc. v. Airline Flight Attendants*, No. 36-18-2-50-94, 1995 WL 862215, at *17-19 (Oct. 9, 1995) (Levak, Arb.) (holding that the contract clause did not exclude the past practice because the previous agreement contained a substantially similar merger clause under which the past practice was allowed and noting that the merger clause did not mention the word "past practices" specifically).

¹⁴⁴ *Chesapeake & Potomac Tel. Co. v. Communications Workers of Am.*, 50 Lab. Arb. Rep. (BNA) 417 (1968) (Duff et al., Arbs.).

¹⁴⁵ See *id.* at 418.

above, or covering conditions not contained in these Agreements, they shall not be binding on either the Company or Union unless reduced to writing in the form of an addition or amendment to these Agreements and signed by the parties hereto. This Section shall not be construed as relieving either party from obligations assumed in the settlement of a grievance; however, no grievance settlement shall have any binding application beyond the particular employee or employees for whom the grievance is presented unless the settlement is adopted by the Company and Union through collective bargaining and reduced to writing in the form of an addition or amendment to these Agreements.”¹⁴⁶

Arbitrator Duff carefully examined the language of article 34 which stated that “understandings, commitments, or agreements” shall not bind the parties if not included in the agreement.¹⁴⁷ Arbitrator Duff concluded, “In our opinion, it is significant that the words ‘past practice’ or its equivalent are not used anywhere in the Agreement. If the parties desire to rule out past practices as being a part of their working agreement, it could have been easily accomplished.”¹⁴⁸ Thus, the arbitrator concluded that past practices were not intended to be governed by article 34. A dissenting, company-appointed arbitrator stated:

The Chairman’s statement that the term “practices” is not within the contemplation of the terms “understanding, commitments, or agreements” not only negates the intent of the parties as revealed in the bargaining history, but also runs contra to the meaning of the term “practice” as it is used in the Labor-Management Relations field. Thus, arbitrators, including the Chairman in other cases, have consistently given effect only to those practices which may be said to be either the product of a joint “understanding” or which, because of their uniformity and consistency, give rise to the inference that they constitute an “understanding.”¹⁴⁹

While arbitrators do not normally read merger clauses as strictly as Arbitrator Duff, he may have tried to find a reason to disallow the withdrawal of these minimal benefits for employees who worked such long hours for the benefit of their employer.

¹⁴⁶ *Id.* at 419 (quoting the collective bargaining agreement).

¹⁴⁷ *See id.* at 421.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 424-25 (Duff, Arb., dissenting).

2. *Clear and Unequivocal Merger Clause Language Without the Term "Practices" or "Past Practices"*

Contrary to the illustrative cases of the preceding section, the term "past practice" is not necessary for a merger clause to effectively eliminate a past practice. As a matter of fact, the term is usually not included in such clauses because the use of the merger clause to eliminate a past practice is often an afterthought by the employer or the union. Arbitrators have held that the following clauses effectively eliminated past practices without containing the term "past practices" or "practices":

Example 1—

"This Agreement contains all of the provisions agreed upon by the Company and the Union. All prior agreements and understandings, unless written and signed by both the company and the Union, shall terminate upon execution of this Agreement. No amendments or modifications of this Agreement shall be valid unless it is agreed to by the Company and the Union and reduced to writing."¹⁵⁰

Example 2—

"No agreement, alteration, understanding, variation, waiver or modification of any of the terms or conditions or covenants contained herein shall be made by any employee or group of employees with the Company and in no case shall it be binding upon the parties hereto unless such Agreement is made and executed in writing between the parties hereto and same has been ratified by the Union."¹⁵¹

Example 3—

"This Agreement is the entire Agreement between the Employer and the Union. The parties acknowledge that they have fully bargained with respect to all terms and conditions of employment and have settled them for the duration of this Agreement. This Agreement terminates all prior agreements and understandings either verbal or in writing except as provided in B below, and concludes collective bargaining for the duration of this Agreement.

¹⁵⁰ Hubbel Indus. Controls v. International Ass'n of Machinists, Local 1825, 100 Lab. Arb. Rep. (BNA) 350, 351 (1992) (Talarico, Arb.) (quoting the collective bargaining agreement).

¹⁵¹ Micro Precision Gear & Mach. Corp. v. International Ass'n of Machinists, Local Lodge 439, 42 Lab. Arb. Rep. (BNA) 165 (1964) (Klein, Arb.) (quoting the collective bargaining agreement).

Letters of Agreement or other contract modifications entered into prior to the effective date of this Agreement shall terminate thirty (30) days subsequent to the effective date of this Agreement (except as otherwise specified in this Agreement), unless expressly renewed in writing by the parties."¹⁵²

Example 4—

"This contract represents complete collective bargaining and full agreement by the parties in respect to rate of pay, wages, hours of employment, or other conditions of employment which shall prevail during the term hereof and any matters or subjects not herein covered have been satisfactorily adjusted, compromised or waived by the parties for the life of this agreement."¹⁵³

Example 5—

"This Agreement constitutes the entire Agreement of the parties superceding and invalidating any previous commitments of any kind, for the duration of this agreement."¹⁵⁴

Example 6—

"In reaching this agreement, all parties hereto have fully exercised and complied with any and all obligations to bargain and have fully considered and explored all subjects and matters in any way material to the relationship between the parties. In negotiating and consummating this contract, all matters concerning which the parties could contract have been considered and disposed of. This contract expresses, embodies and includes the full and complete agreement between the parties, for the full term hereof and shall not during such term be reopened. This agreement supersedes any previous agreements between the parties."¹⁵⁵

¹⁵² Alaska v. Alaska State Employees Ass'n AFSCME, Local 52, 1992 WL 725777, at *4 (Sept. 29, 1992) (Levak, Arb.) (quoting the collective bargaining agreement).

¹⁵³ Bassick Co. v. International Union of Elec. Workers, Local 229, 26 Lab. Arb. Rep. (BNA) 627, 630 (1956) (Kheel, Arb.) (quoting the collective bargaining agreement).

¹⁵⁴ Midwest Dental Prods. Corp. v. Tool & Die Makers, Local 113, 94 Lab. Arb. Rep. (BNA) 467, 468 (1990) (Wies, Arb.) (quoting the collective bargaining agreement).

¹⁵⁵ Lone Star Brewing Co. v. International Union of Brewery Workers, Local 110, 53 Lab. Arb. Rep. (BNA) 1317, 1317-18 (1969) (Autrey, Arb.) (quoting the collective bargaining agreement).

Example one was the contract clause used by the employer in *Hubbel Industrial Controls v. International Association of Machinists, Local 1825*¹⁵⁶ to defend its action of unilaterally denying payment to union shop committee members for their time spent handling grievances after the employer had paid the members for such activities for over thirty years.¹⁵⁷ Arbitrator Talarico stated that the language of the merger clause was "clear and unambiguous" and concluded that the language excluded the past practice.¹⁵⁸ Additionally, while noting that in cases such as this one where language is clear and unambiguous it is not necessary to examine the bargaining history, he stated that the parties engaged in give-and-take bargaining prior to adopting the merger clause.¹⁵⁹

Example two was the clause used in *Micro Precision Gear & Machine Corp. v. International Association of Machinists, Local Lodge 439*¹⁶⁰ to eliminate the binding effect of the past practice of promoting employees by seniority when skill and ability were comparatively equal.¹⁶¹ After noting that nothing in the collective bargaining agreement required the company to promote based on seniority, Arbitrator Klein stated:

In view of the precise language of Article XIX, it is clear that the obligations of the Company *under this Contract* cannot be modified by verbal representations or by past practice; nor can a waiver of a contractual right by either the Company or Union on one occasion establish a binding precedent as to the future.¹⁶²

Example three was the merger clause used in *Alaska v. Alaska State Employees Ass'n AFSCME, Local 52*¹⁶³ by the State to defend its action of discontinuing a past practice of paying overtime pay for hours exceeding 37.5 hours per week to certain Department of Transportation and Public Facilities employees who were exempt from the Fair Labor Standards Act

¹⁵⁶ *Hubbel Indus. Controls v. International Ass'n of Machinists, Local 1825*, 100 Lab. Arb. Rep. (BNA) 350 (1992) (Talarico, Arb.).

¹⁵⁷ *See id.* at 351-52.

¹⁵⁸ *See id.* at 353.

¹⁵⁹ *See id.*

¹⁶⁰ *Micro Precision Gear & Mach. Corp. v. International Ass'n of Machinists, Local Lodge 439*, 42 Lab. Arb. Rep. (BNA) 165 (1964) (Klein, Arb.).

¹⁶¹ *See id.* at 166, 168.

¹⁶² *Id.* at 168.

¹⁶³ *Alaska v. Alaska State Employees Ass'n AFSCME, Local 52*, 1992 WL 725777 (Sept. 29, 1992) (Levak, Arb.).

("FLSA").¹⁶⁴ Arbitrator Levak held that the contract clause excluded the past practice.¹⁶⁵ After citing Elkouri and Elkouri's language regarding strong contract language eliminating past practice, Arbitrator Levak stated, "Article 37.A and 37.B are quite strongly written. Indeed, it is difficult to see how they could have been any more strongly written."¹⁶⁶

Example four was the clause used in *Bassick Co. v. International Union of Electrical Workers, Local 229*¹⁶⁷ to defend the employers unilateral action of discontinuing payment of a nonproductive group bonus to certain employees.¹⁶⁸ Arbitrator Kheel stated that he agreed with the basic principle that an established past practice may become part of the contract despite a contractual clause prohibiting it, but that

each case must be viewed in light of the specific language of the contract involved. In my opinion the contract between the parties in this case expressly prohibits the implication that the non-incentive group bonus became incorporated in the contract. . . . I do not see how it would be possible to hold that a bonus not expressly covered by the contract nevertheless became incorporated in the contract in face of the language above quoted¹⁶⁹

Example five was the concise merger clause used in *Midwest Dental Products Corp. v. Tool & Die Makers, Local 113*¹⁷⁰ to exclude the twenty-year past practice of issuing paychecks weekly and paying vacation pay in advance.¹⁷¹ This is proof that an effective merger clause does not have to be lengthy. Arbitrator Wies held that the clause eliminated the binding effect of the past practice and stated that the contract clause was "clear and unambiguous."¹⁷²

¹⁶⁴ See 29 U.S.C. § 201 (1994); *Alaska State Employees Ass'n AFSCME, Local 52*, 1992 WL 725777, at *1.

¹⁶⁵ See *Alaska State Employees Ass'n AFSCME, Local 52*, 1992 WL 725777, at *13.

¹⁶⁶ *Id.* at *12.

¹⁶⁷ *Bassick Co. v. International Union of Elec. Workers, Local 229*, 26 Lab. Arb. Rep. (BNA) 627 (1956) (Kheel, Arb.).

¹⁶⁸ See *id.* at 627.

¹⁶⁹ *Id.* at 629-30.

¹⁷⁰ *Midwest Dental Prods. Corp. v. Tool & Die Makers, Local 113*, 94 Lab. Arb. Rep. (BNA) 467 (1990) (Wies, Arb.).

¹⁷¹ See *id.* at 468-69, 472.

¹⁷² *Id.* at 472.

The sixth and final example given above was the contract clause used in *Lone Star Brewing Co. v. International Union of Brewery Workers, Local 110*.¹⁷³ This clause appears different from the other clauses because the parties combined both a zipper clause dealing with the duty to bargain and a merger clause attempting to totally integrate the agreement.¹⁷⁴ This contract clause was effective to allow the company to unilaterally discontinue the past practice of paying a "Driver-Salesman Safety Award."¹⁷⁵ Arbitrator Autrey reasoned that "this case must be decided on the very clear and unequivocal language of the collective bargaining agreement which the parties entered into."¹⁷⁶

In the cases discussed above, the language of the clause was a primary factor in the arbitrators' decisions. Often, however, other reasons were stated. Generally, arbitrators have held that if there is clear and unambiguous language on point, that is sufficient to eliminate the past practice. In such cases, arbitrators will often not examine bargaining history and/or specific circumstances.¹⁷⁷ However, in *Elberta Crate & Box Co. v. International Woodworkers of America, Local S-181*,¹⁷⁸ Arbitrator Murphy stated that the language of the clause alone is not enough to eliminate a past practice and that the bargaining history and the pattern of circumstances must also be examined.¹⁷⁹ In *Elberta Crate & Box Co.*, the employer unilaterally eliminated a past practice of allowing employees to eat their lunches while working and required employees to take a half-hour lunch without pay.¹⁸⁰ Arbitrator Murphy held that the past practice was binding on the employer and was not excluded by the existence of the merger clause.¹⁸¹ Arbitrator Murphy reasoned:

In the face of such an established usage the plain management prerogative clause and the clause that this is the "entire understanding" between the

¹⁷³ *Lone Star Brewing Co. v. International Union of Brewery Workers, Local 110*, 53 Lab. Arb. Rep. (BNA) 1317 (1969) (Autrey, Arb.).

¹⁷⁴ *See id.* at 1317-18.

¹⁷⁵ *See id.* at 1319-20.

¹⁷⁶ *Id.* at 1320.

¹⁷⁷ *See Hubbel Indus. Controls v. International Ass'n of Machinists, Local 1825*, 100 Lab. Arb. Rep. (BNA) 350, 353 (1992) (Talarico, Arb.); *supra* notes 156-59 and accompanying text (discussing *Hubbel Indus. Controls*, 100 Lab. Arb. Rep. (BNA) at 351).

¹⁷⁸ *Elberta Crate & Box Co. v. International Woodworkers of Am., Local S-181*, 32 Lab. Arb. Rep. (BNA) 228 (1959) (Murphy, Arb.).

¹⁷⁹ *See id.* at 233.

¹⁸⁰ *See id.* at 228-29.

¹⁸¹ *See id.* at 233.

parties is not enough to prevent this past practice from becoming a definite part of the Agreement. Those clauses have their specialized meanings to be sure, but they by themselves are not enough to defeat such a history and pattern of circumstances as exists in this case. My feeling is that there would have been no doubt that both parties would have argued against eliminating this past practice by an express provision in the Collective Bargaining Agreement had the matter been brought up for discussion during the negotiation of the present Collective Bargaining Agreement.¹⁸²

Arbitrator Murphy appeared to stress the employees' reliance on this benefit and was reluctant to eliminate it.¹⁸³ Thus, he ignored the language of the clause and looked to the absence of give-and-take bargaining between the parties over the insertion of the merger clause.¹⁸⁴ This decision illustrates that while the language of a clause is a primary factor as to its effectiveness, arbitrators may explore other factors that justify their decision. The remainder of this section will discuss these other factors.

B. Past Practice Continuing Unabated into the New Contract Period

Whether a past practice continued unabated into the new contract term under a merger agreement is often a factor scrutinized by arbitrators in determining whether to exclude the binding effect of the past practice. One view is that a past practice is not binding if the contract contained a broad integration clause and the past practices do not continue into the new contract term.¹⁸⁵ If a past practice continues into the new contract period, there are two views as to the effectiveness of a merger clause. First, the past practice is not canceled by the contract language because the fact that the practice continued unabated proves that the parties did not intend to discontinue the practice.¹⁸⁶ Second, the past practice is canceled even

¹⁸² *Id.*

¹⁸³ *See id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See HILL & SINICROPI, supra note 82, at 58-59.*

¹⁸⁶ *See id.* at 59-60. In *Warren City Board of Education*, Arbitrator Heeking held that a past practice granting leave for attendance of an education association assembly was not eliminated by a merger clause. *See Warren City Bd. of Educ. v. Warren Educ. Ass'n*, A.A.A. No. 53-390-00673-92, 1993 WL 788645, at *4-5, *8 (Sept. 24, 1993) (Heeking, Arb.). Arbitrator Heeking reasoned that the past practice could be used to clarify ambiguous contract language, but also stated that "once a past practice has been carried forward into the present contract such as occurred in

though the past practice continued because there is no better evidence of the parties' intent than to look at the explicit contract language.¹⁸⁷

In *Fruehauf Trailer Co. v. UAW, Local 811*,¹⁸⁸ Arbitrator Jones held that the past practice was not canceled by the merger clause because the past practice continued unabated into the new contract period.¹⁸⁹ In *Fruehauf Trailer Co.*, there was a past practice of testing welders who were bidding for job openings and awarding jobs to senior employees who passed the tests.¹⁹⁰ After a senior employee was denied the position, the union filed a grievance.¹⁹¹ The merger clause that was inserted in the agreement stated:

“This contract supersedes and cancels all previous Agreements, both written and oral, and constitutes the entire Agreement between the parties hereto. No agreement, understanding, alteration, variation, waiver or modification of this Agreement, terms, provisions, covenants or conditions contained herein shall bind the parties hereto unless made and executed in writing by the parties hereto and made a part hereof.”¹⁹²

However, the merger clause was not newly inserted, but continued from the previous contract term, and under both terms, the past practice remained in effect.¹⁹³ Arbitrator Jones held that the past practice was binding on the company and thus they had violated the contract by denying the senior employee the position.¹⁹⁴ Arbitrator Jones reasoned that “[t]he repeated execution of collective bargaining agreements which contain exclusive agreement provisions cancelling ‘all previous agreements’ has no magical dissolving effect upon practices or customs which are continued in fact

this matter, an attendant ‘zipper clause’ such as Section 9.05 is deemed to have been waived.” *Id.* at *8; *see also* *Michigan Milk Producers Ass’n v. Dairy Workers, Local 86*, 95 Lab. Arb. Rep. (BNA) 1184, 1186 (1990) (Kanner, Arb.) (noting that the past practice had occurred during the current contract term, a factor that favored holding the past practice binding on the parties).

¹⁸⁷ *See* HILL & SINICROPI, *supra* note 82, at 59-60.

¹⁸⁸ *Fruehauf Trailer Co. v. UAW, Local 811*, 29 Lab. Arb. Rep. (BNA) 372 (1957) (Jones, Jr., Arb.).

¹⁸⁹ *See id.* at 375.

¹⁹⁰ *See id.* at 372-73.

¹⁹¹ *See id.*

¹⁹² *Id.* at 374 (quoting the collective bargaining agreement).

¹⁹³ *See id.* at 375.

¹⁹⁴ *See id.*

unabated and which span successive contract periods.”¹⁹⁵ Additionally, Arbitrator Jones stated that

it is well accepted that a course of conduct engaged in by one party and acquiesced in by the other party to a collective bargaining agreement, spanning two or more contract terms, without any interim contractual reaction to it, becomes a part of the agreement between the parties and cannot be substantially altered or discontinued except by bilateral negotiations and agreement.¹⁹⁶

In *Alaska v. Alaska State Employees Ass’n AFSCME, Local 52*,¹⁹⁷ the arbitrator held that the contract clause excluded the binding effect of the past practice regardless of the fact that the past practice continued unabated into the new contract period.¹⁹⁸ In *Alaska State Employees Ass’n AFSCME, Local 52*, the State defended its action of discontinuing a past practice of paying overtime pay for hours of work exceeding 37.5 hours per week to certain FLSA-exempt employees in the Department of Transportation and Public Facilities.¹⁹⁹ Article 37.A of the agreement stated:

“This Agreement is the entire Agreement between the Employer and the Union. The parties acknowledge that they have fully bargained with respect to all terms and conditions of employment and have settled them for the duration of this Agreement. This Agreement terminates all prior agreements and understandings either verbal or in writing except as provided at B below, and concludes collective bargaining for the duration of this Agreement.”²⁰⁰

Holding that the merger clause excluded the past practice, Arbitrator Levak stated: “[W]hile there is some disagreement, a majority of arbitrators support the position that merely because a practice is in effect for some

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Alaska v. Alaska State Employees Ass’n AFSCME, Local 52*, 1992 WL 725777 (Sept. 29, 1992) (Levak, Arb.).

¹⁹⁸ *See id.* at *12-13.

¹⁹⁹ *See id.* at *1.

²⁰⁰ *Id.* at *4 (quoting the collective bargaining agreement).

period of time after the effective date of a new contract, the employer is not estopped to rely upon the zipper clause.²⁰¹

In *Hubbell Industrial Controls, Inc. v. International Association of Machinists, Local 1825*,²⁰² the employer cautiously ensured that the past practice did continue unabated into the new contract period after the merger clause was inserted in the agreement.²⁰³ In *Hubbell Industrial Controls, Inc.*, the employer refused to pay union shop committee members for their time while attending a fourth step grievance meeting, even though the employer had allowed such pay for over thirty years.²⁰⁴ In addition to give-and-take bargaining over the insertion of the clause, Arbitrator Talarico noted the employer's reaction the first time such an issue arose during the new contract term.²⁰⁵ Arbitrator Talarico stated:

Some reported decisions reveal that Arbitrators have sometimes ignored the effect of a "zipper" clause under circumstances where the disputed practice was continued after the adoption of an Agreement containing a "zipper" clause. However, in this case there is no question that *the very first time* a grievance arose subsequent to the new Collective Bargaining Agreement the Employer determined that it would not pay Union Shop Committee members for their attendance at Fourth Step grievance proceedings.²⁰⁶

²⁰¹ *Id.* at *12. It is interesting to note that Arbitrator Levak dealt with a similar issue in *Alaska Airlines, Inc.*; however, the result was different. See *Alaska Airlines, Inc. v. Airline Flight Attendants*, No. 36-18-2-50-94, 1995 WL 862215, at *8 (Oct. 9, 1995) (Levak, Arb.). In *Alaska Airlines, Inc.*, Arbitrator Levak held that the contract clause did not exclude the past practice, reasoning that the clause was "substantively indistinguishable" from the clause in the prior agreement under which the past practice continued. See *id.* at *8.

²⁰² *Hubbell Indus. Controls, Inc. v. International Ass'n of Machinists, Local 1825*, 100 Lab. Arb. Rep. (BNA) 350 (1992) (Talarico, Arb.).

²⁰³ See *id.* at 354.

²⁰⁴ See *id.* at 351-52. Section 85 of the collective bargaining agreement stated: "This Agreement replaces the Agreement of August 1, 1988, and such former Agreement shall be null and void and deemed not to exist. This Agreement contains all of the provisions agreed upon by the Company and the Union. All prior agreements and understandings, unless written and signed by both the company and the union, shall terminate upon execution of this Agreement. No amendments or modifications of this Agreement shall be valid unless it is agreed to by the Company and the Union and reduced to writing."

Id.

²⁰⁵ See *id.* at 353-54.

²⁰⁶ *Id.* at 354 (emphasis added).

Therefore, the company’s action of ensuring that the past practice discontinued at the start of the new contract term was one factor that led to the successful elimination of the binding past practice.

As reflected by the decisions discussed above, arbitrators hold different views as to the impact of a past practice continuing into a new contract term when the contract contains a merger clause. It is clear, however, that this is an important factor examined by arbitrators.

C. *Bargaining History*

Sometimes arbitrators turn to the parties’ bargaining history to determine the effect of a merger clause on binding past practices. Some arbitrators have held that the specific past practice must have been discussed during bargaining; otherwise, the practice is not revoked by the insertion of the merger clause.²⁰⁷ However, most arbitrators do not require evidence of actual notice to discontinue a specific past practice, but give-and-take bargaining over the insertion of the merger clause is often a factor considered.²⁰⁸

In *UAW, Local 882 v. Douglas Autotech Corp.*,²⁰⁹ Arbitrator Knott required actual notification of intent to discontinue the past practice.²¹⁰ In this case, employees had been allowed reasonable time to take breaks and use vending machines during work hours for over thirty years.²¹¹ The

²⁰⁷ See *infra* notes 209-24 and accompanying text.

²⁰⁸ See *infra* notes 225-41 and accompanying text.

²⁰⁹ *UAW, Local 882 v. Douglas Autotech Corp.*, 94-1 Lab. Arb. Awards (CCH) 3791 (1993) (Knott, Arb.).

²¹⁰ See *id.* at 3797; see also *Albertson’s Inc. v. Hospital & Serv. Employees Union, Local 399*, 106 Lab. Arb. Rep. (BNA) 897, 900 (1996) (Kaufman, Arb.) (holding that the merger clause did not preclude the continuation of the past practice because “[t]o escape, the employer must advise the union during contract negotiations that it will no longer consent to the continuation of the practice”); *Elberta Crate & Box Co. v. International Woodworkers of Am.*, Local S-181, 32 Lab. Arb. Rep. (BNA) 228, 233 (1959) (Murphy, Arb.) (requiring bargaining over the elimination of the past practice because the employees had relied on the practice for a long period of time).

²¹¹ See *UAW, Local 882*, 94-1 Lab. Arb. Awards (CCH) at 3792. It is important to note that there was a contractual clause in the contract on break periods, but not on the use of vending machines. See *id.* at 3791-92. See generally FAIRWEATHER’S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 179-82 (Ray J. Schoonhoven ed., 3d ed. 1991) [hereinafter FAIRWEATHER’S PRACTICE AND PROCEDURE] (discussing the use of bargaining history to interpret ambiguous contract language).

employer issued new rules regarding breaks which unilaterally terminated this past practice.²¹² A merger clause in the bargaining agreement stated: "This Agreement supersedes and cancels all prior practices and agreements, whether written or oral, unless expressly stated to the contrary herein, and constitutes the complete and entire agreement between the parties."²¹³ Arbitrator Knott held that the merger clause did not allow unilateral termination of the past practice.²¹⁴ Arbitrator Knott stated that "[a]rbitrators have consistently held that established practices which were in existence when the contract was negotiated and were not revoked at the time are binding on the parties and continue for the life of the agreement."²¹⁵ Thus, he concluded that "[t]he key here is that no clear notice was given to the Union about the elimination or curtailment of the use of the vending machines."²¹⁶

In *United Paperworkers International Union, Local 713 v. Stone Container Corp.*,²¹⁷ however, the arbitrator required actual bargaining over the past practice in order to *save the past practice from elimination* by the contract's merger clause.²¹⁸ The company unilaterally terminated the past practice of allowing the office switchboard employees to take personal messages for employees, except in emergency situations.²¹⁹ Article II of the contract, entitled "Prior Customs and Practices," stated: "This Agreement supersedes all rules, regulations or customs heretofore established. All understandings entered into during the life of this Agreement must be reduced to writing."²²⁰ Arbitrator Bain held that the employer had the right to unilaterally terminate the past practice under the merger clause.²²¹ The arbitrator reasoned that there was no contract provision on the topic of the past practice and that the agreement contained a merger clause excluding oral past practices not included in the agreement.²²² Additionally, Arbitrator

²¹² See *UAW, Local 882*, 94-1 Lab. Arb. Awards (CCH) at 3792.

²¹³ *Id.* at 3794.

²¹⁴ See *id.*

²¹⁵ *Id.* at 3796.

²¹⁶ *Id.* at 3797. Arbitrator Knott also noted that the practice had continued unabated into the new contract period for almost one year. See *id.*

²¹⁷ *United Paperworkers Int'l Union, Local 713 v. Stone Container Corp.*, 94-2 Lab. Arb. Awards (CCH) 5235 (1994) (Bain, Arb.).

²¹⁸ See *id.* at 5238.

²¹⁹ See *id.* at 5236.

²²⁰ *Id.* at 5235.

²²¹ See *id.* at 5238.

²²² See *id.* It is also interesting to note that the current agreement became effective between the parties on January 21, 1993, and the memo banning the past

Bain stressed that there was no discussion of the practice during negotiations.²²³ Thus, he concluded that "[a]bsent such evidence[,] the Company has the ability to institute a unilateral change unless the phone call policy had been a major benefit or discontinuance of the benefit would oppress the employees."²²⁴

In *Weyerhaeuser Co. v. Allied Industrial Workers of America, Local 345*,²²⁵ the bargaining history was the sole factor considered by Arbitrator Rauch. Arbitrator Rauch found an oral merger clause through statements made during bargaining.²²⁶ In *Weyerhaeuser Co.*, a past practice existed that allowed employees to go to the lunchroom during working hours.²²⁷ This is an interesting case because there was no written merger clause in the agreement; however, the arbitrator found that an oral merger clause effectively eliminated the binding effect of the past practice.²²⁸ Arbitrator Rauch reasoned that while the company tried to unsuccessfully insert a merger clause into the agreement, "[m]anagement made it clear to the Union Committee that the terms of the new contract, as written, would be 'the Bible.'"²²⁹ The company told the union that all past practices the union thought existed should be revealed, bargained over, and if both parties agreed, inserted in the written agreement.²³⁰ Arbitrator Rauch concluded, therefore, that because the union did not discuss this past practice with the company during bargaining and because the practice was not included in the written agreement, the past practice was not binding on the parties.²³¹ Effectively, the oral statement made by the company during bargaining constituted an oral merger clause eliminating the binding effect of the past practice.²³²

practice was issued on April 6, 1993. *See id.* at 5236. Thus, the past practice continued unabated over three months into the new contract period; however, the arbitrator made no mention of this occurrence. *See id.*

²²³ *See id.*

²²⁴ *Id.* at 5238.

²²⁵ *Weyerhaeuser Co. v. Allied Indus. Workers of Am., Local 345*, 71 Lab. Arb. Rep. (BNA) 61 (1978) (Rauch, Arb.).

²²⁶ *See id.* at 63.

²²⁷ *See id.* at 62-63.

²²⁸ *See id.*

²²⁹ *Id.* at 63.

²³⁰ *See id.*

²³¹ *See id.*

²³² *See id.*

In *Hubbell Industrial Controls, Inc. v. International Ass'n of Machinists, Local 1825*,²³³ Arbitrator Talarico used bargaining history as one factor in his determination of the effectiveness of the merger clause.²³⁴ In *Hubbell*, the employer refused to pay union shop committee members for their attendance at a fourth step grievance meeting, even though the employer had paid for such time for over thirty years.²³⁵ Section 85 of the agreement stated:

"This Agreement replaces the Agreement of August 1, 1998, and such former Agreement shall be null and void and deemed not to exist. This Agreement contains all of the provisions agreed upon by the Company and the Union. All prior agreements and understandings, unless written and signed by both the company and the union, shall terminate upon execution of this Agreement. No amendments or modifications of this Agreement shall be valid unless it is agreed to by the Company and the Union and reduced to writing."²³⁶

Arbitrator Talarico held that the contract clause eliminated the binding effect of the practice.²³⁷ Talarico noted the clear merger clause language and stated that "[a]lthough, normally it is not necessary to delve into bargaining history when confronted with clear contract language, I consider the bargaining history surrounding this provision to be a very significant factor in support of the ultimate determination reached herein."²³⁸ Reviewing the bargaining room conduct, Arbitrator Talarico stated that the union protested the first proposed merger clause by the company because

²³³ *Hubbell Indus. Controls, Inc. v. International Ass'n of Machinists, Local 1825*, 100 Lab. Arb. Rep. (BNA) 350 (1992) (Talarico, Arb.).

²³⁴ *See id.* at 353-54; *see also* *Oakland Univ. v. Michigan Council 25 AFSCME, Local 1418*, 106 Lab. Arb. Rep. (BNA) 872, 874 (1996) (Daniel, Arb.) (noting that one reason the merger clause did not eliminate the binding effect of the past practice was because the parties bargained over the insertion of the clause knowing that there were past practices that they intended to continue); *Union Camp Corp. v. United Paperworkers Int'l Union, Local 388*, F.M.C.S. Case No. 93-18279, 1994 WL 836436, at *5-6 (Feb. 14, 1994) (Bragg, Arb.) (discussing the murky bargaining history between the parties regarding the merger clause, but concluding that the language of the merger clause sufficiently eliminated the binding effect of the past practice).

²³⁵ *See Hubbell*, 100 Lab. Arb. Rep. (BNA) at 351-52.

²³⁶ *Id.* at 351 (quoting the collective bargaining agreement).

²³⁷ *See id.* at 353.

²³⁸ *Id.*

it eliminated written side agreements in addition to oral agreements.²³⁹ However, the union agreed to the present clause, which only terminated oral agreements or understandings not contained in the written agreement.²⁴⁰ Therefore, the give-and-take bargaining between the parties was an additional factor used by the arbitrator in reaching his conclusion.²⁴¹

D. Use of Past Practice to Interpret Ambiguous Contract Provisions

Past practices may be used to interpret ambiguous contractual provisions, regardless of the existence of a merger clause.²⁴² However, this provides an opportunity for arbitrators to allow past practices to bind the parties regardless of a merger clause any time there is a separate contractual provision on point because the finding of an ambiguity is by its very nature somewhat subjective.

*HS Automotive, Inc. v. United Steelworkers of America, Local 7597*²⁴³ is an example of where an arbitrator stretched the idea of using a past practice to interpret an ambiguous contractual provision.²⁴⁴ A past practice had developed that allowed overtime to be voluntary even though a contractual provision stated that it was required due to the nature of the business.²⁴⁵ The agreement contained a strongly worded merger clause.²⁴⁶

²³⁹ *See id.* (noting that the union disapproved of the employer's proposal to amend section 85 because the amendment purportedly revoked "all prior agreements and understandings—whether written or oral," thereby eliminating "many extraneous written agreements that should be retained by the parties").

²⁴⁰ *See id.*

²⁴¹ *See id.*

²⁴² *See, e.g.,* International Bhd. of Elec. Workers, Local 1547 v. Municipality of Anchorage, A.A.A. No. 75-L390-0253-91, 1992 WL 717751, at *7-8 (June 15, 1992) (Runkel, Arb.) (holding that "payments to [a pension fund] were made under the Old Contract as a matter of the parties' interpretation of the contract and not as a matter of unrelated past practice"); Michigan Milk Producers Ass'n v. Dairy Workers, Local 86, 95 Lab. Arb. Rep. (BNA) 1184, 1186 (1990) (Kanner, Arb.) (holding that the merger clause did not preclude a party from using the past practice to clear up an ambiguous contractual provision). *See generally* FAIRWEATHER'S PRACTICE AND PROCEDURE, *supra* note 211, at 172-78 (discussing the rules of contract interpretation).

²⁴³ *HS Automotive, Inc. v. United Steelworkers of Am., Local 7597*, 105 Lab. Arb. Rep. (BNA) 681 (1995) (Klein, Arb.).

²⁴⁴ *See id.* at 686-87.

²⁴⁵ *See id.* at 682-84.

²⁴⁶ *See id.* at 684. Article XVI, section C entitled "Complete Agreement" stated: "The above basic agreement concludes all negotiations affecting wages,

Arbitrator Klein held that the merger clause did not eliminate the binding effect of the past practice because the contract clause on overtime was ambiguous.²⁴⁷ Arbitrator Klein cited the Eighth Circuit's rule that

[r]esort to such extrinsic sources as bargaining history and past and collateral agreements is permissible *even where the terms of the agreement are superficially clear, if the arbitrator discerns a latent ambiguity in any of the terms or if the language of the agreement does not appear fully to express the intent of the parties.*²⁴⁸

Therefore, according to this arbitrator, any time there is a past practice on the topic of the contract provision, the past practice can be used even if the contract clause appears to be clear and unambiguous because the agreement "does not appear fully to express the intent of the parties."²⁴⁹ Therefore, it can be extremely difficult to predict the effectiveness of a merger clause when the contract contains another contract clause on the same or a similar topic that is in dispute.

E. Peculiar Facts and Circumstances of the Case Affecting the Arbitrator's Decision

Sometimes it appears that particular facts or circumstances of the case affect the arbitrator's decision. The following facts have influenced arbitrators: (1) the parties' reliance on the past practice;²⁵⁰ (2) the benefits

hours and working conditions, is in final disposition of all demands of the Union presented or which could have been presented in the negotiations leading to its execution, and the parties [sic] relationship shall be governed solely by this basic agreement. All prior agreements and understandings, whether oral or written are rendered null and void, and this basic agreement executed by the parties or any letter of understanding, signed by the Company and by a representative of the International Union and the Local Union President shall govern the relationship between the parties."

Id.

²⁴⁷ *See id.* at 686-87.

²⁴⁸ *Id.* at 686 (emphasis added) (citation omitted in original).

²⁴⁹ *Id.*

²⁵⁰ *See* *Elberta Crate & Box Co. v. International Woodworkers of Am., Local S-181*, 32 Lab. Arb. Rep. (BNA) 228, 233 (1959) (Murphy, Arb.) (noting the reliance of the employees on the past practice and holding that the merger clause did not eliminate the binding effect of the past practice).

of continuing the past practice;²⁵¹ (3) the bad faith conduct of the parties;²⁵² and (4) whether the company is undergoing change.²⁵³

In *Dura Corp. v. Allied Industrial Workers, Local 238*,²⁵⁴ Arbitrator Cabe held that the normal result as to the effect of a merger clause on a past practice was not applicable to the particular circumstances in the case.²⁵⁵ The prior contract allowed a three-minute period to clean up around the machinery and to wash before checking out.²⁵⁶ However, the new contract required employees not to check out until the entire shift had ended, while the wash period provision of the contract remained unchanged.²⁵⁷ Section 3 of article XIII contained a merger clause which stated:

²⁵¹ See *Oakland Univ. v. Michigan Council 25 AFSCME, Local 1418*, 106 Lab. Arb. Rep. (BNA) 872, 874 (1996) (Daniel, Arb.) (stressing that the past practice of allowing the union president parking privileges benefited both parties by allowing "the benefit of expeditious and convenient access to the union president to assure proper administration of the contract and to avoid labor disputes disrupting operations").

²⁵² See *Arvin Indus., Inc. v. UAW, Local 1930*, 77 Lab. Arb. Rep. (BNA) 14, 17-19 (1981) (Yarowsky, Arb.) (involving a union representative's misleading comments to a company representative during bargaining); *New York Tap Rock Corp. v. International HOD Carriers of Am.*, Local 60, 19 Lab. Arb. Rep. (BNA) 421, 422 (1952) (Giardino, Arb.) (allowing the unilateral discontinuance of a past pay practice, stating that it was discriminatory to those who did not receive such pay); cf. *Union Camp Corp. v. United Paperworkers Int'l Union, Local 388*, F.M.C.S. No. 93-18279, 1994 WL 836436, at *6 (Feb. 14, 1994) (Bragg, Arb.) (noting that there was no evidence of the union's "devious intentions"); *Hubbell Indus. Controls, Inc. v. International Ass'n of Machinists, Local 1825*, 100 Lab. Arb. Rep. (BNA) 350, 353 (1992) (Talarico, Arb.) (stating that the employer did not "attempt to 'slip one past' the Union by inserting amended language into the new contract that would perhaps go unnoticed").

²⁵³ See *Midwest Dental Prods. Corp. v. Tool & Die Makers, Local 113*, 94 Lab. Arb. Rep. (BNA) 467, 470 (1990) (Wies, Arb.) (stating that the facts in the particular case did not justify the normal conclusion because the elimination of the past practice appeared justified because of the cost savings and the fact that the company was under new ownership); *Dura Corp. v. Allied Indus. Workers, Local 238*, 68 Lab. Arb. Rep. (BNA) 94, 98 (1977) (Cabe, Arb.) (distinguishing the case from a normal outcome because of "the substantial changes that occur in a plant when it moves from a small operation to one of a larger production capacity").

²⁵⁴ *Dura Corp. v. Allied Indus. Workers, Local 238*, 68 Lab. Arb. Rep. (BNA) 94 (1977) (Cabe, Arb.).

²⁵⁵ See *id.* at 98.

²⁵⁶ See *id.* at 95-96.

²⁵⁷ See *id.* at 96.

“The provisions of this Contract constitute the entire Agreement between the Company and the Union, and no agreement, alteration, understanding, variation, waiver or modification of any of the terms, conditions or covenants contained herein shall be made by an employee or group of employees with the Company, and in no case shall it be binding upon the parties hereto unless such agreement is made and executed in writing and signed by the proper Company and Union officials.”²⁵⁸

Arbitrator Cabe held that the contract language eliminated the binding past practice.²⁵⁹ Arbitrator Cabe noted that “[a]rbitrators usually rule that when a contract does not specifically change a provision the past practices in effect will continue.”²⁶⁰ However, he differentiated this case because arbitrators do not normally allow past practices to be eliminated in such cases in order to maintain normal operations, but in this case, the plant was undergoing changes in size and the change was necessary to adjust.²⁶¹

In *Elberta Crate & Box Co. v. International Woodworkers of America, Local S-181*,²⁶² the arbitrator stressed the importance of the consideration of the particular facts of the case in reaching a decision.²⁶³ In *Elberta Crate & Box Co.*, the employer eliminated the past practice of allowing employees to eat their lunches while working and required employees to take a half-hour lunch without pay.²⁶⁴ Arbitrator Murphy held that the merger clause did not allow the elimination of the binding past practice.²⁶⁵ Arbitrator Murphy stressed that “[e]ach agreement and each past practice must, of course, be interpreted in the light of their own special circumstances and the relationship between the parties, their understandings and what they have done under the Agreement, and the meaning which has grown up and around the Agreement.”²⁶⁶ Arbitrator Murphy seemed to be most concerned with the employees’ reliance on this past practice and

²⁵⁸ *Id.* at 95 (quoting the collective bargaining agreement).

²⁵⁹ *See id.* at 98.

²⁶⁰ *Id.*

²⁶¹ *See id.*

²⁶² *Elberta Crate & Box Co. v. International Woodworkers of Am., Local S-181*, 32 Lab. Arb. Rep. (BNA) 228 (1959) (Murphy, Arb.).

²⁶³ *See id.* at 230.

²⁶⁴ *See id.* at 228-29.

²⁶⁵ *See id.* at 233.

²⁶⁶ *Id.* at 230.

appeared to conclude that it would be unfair to withdraw the employees' ability to choose to work through lunch.²⁶⁷ Arbitrator Murphy stated:

My feeling is that where the past practice has been established for such a long period of time, where the employees working there have been given reasonable grounds for believing that it will continue and they therefore could be expected to adjust their personal lives to working under these conditions, and where the practice began through a definite understanding between the Company and the employees concerned growing out of a mutual problem which both Company and employees meet and faced and decided upon, then this is strong evidence that this is the kind of practice which will become a part of an Agreement unless the Agreement clearly says that this is not to be so.²⁶⁸

Therefore, as reflected by the arbitration decisions above, it can be very difficult to predict the outcome of a particular case because often arbitrators may consider the particular facts and their reactions to the parties' actions in determining the effectiveness of a merger clause's elimination of a binding past practice.

V. CONCLUSION

A zipper clause and a merger clause involve separate and distinct concepts. A merger clause "exclud[es] from coverage any external agreements not made an explicit part of the parties' collective bargaining agreement."²⁶⁹ A zipper clause states, however, that "the parties have had the right and opportunity to bargain over all, mandatory subjects of bargaining and that they waive their right to bargain over [such] matters during the term of the agreement."²⁷⁰ The great confusion regarding the label of a merger clause necessitates a close examination of the clause before concluding whether a contract clause is a merger clause or a zipper clause. It is important to determine which type of clause the issue involves because the legal consequences of the two clauses are radically different.²⁷¹

²⁶⁷ See *id.* at 233.

²⁶⁸ *Id.*

²⁶⁹ *St. Joseph County Mental Health Facility v. American Fed'n of State Employees, Council 25*, 86 Lab. Arb. Rep. (BNA) 683, 685 (1985) (Girolamo, Arb.).

²⁷⁰ FELDACKER, *supra* note 19, at 129.

²⁷¹ See *supra* notes 18-79 and accompanying text.

The merger or total agreement clause, which has its origins in general contract law, can have a significant impact on the interpretation and application of collective bargaining agreements. A merger clause in a collective bargaining agreement may be important in determining the impact of the parol evidence rule on an agreement alleged to have been made in bargaining, but has not found its way into a written contract.

Additionally, the presence or absence of a merger clause, as well as the specific language in the clause, may impact an arbitrator in determining if otherwise binding past practices survive the negotiation and execution of a new collective bargaining agreement. A major portion of these comments have dealt with this inquiry. Based on an examination of arbitration decisions, it is submitted that arbitrators often consider the following factors in determining the effectiveness of a merger clause's elimination of a binding past practice: (1) the precise wording of the merger clause;²⁷² (2) whether the past practice continued unabated into a new contract term;²⁷³ (3) the parties' bargaining history regarding the past practice and insertion of the merger clause;²⁷⁴ (4) whether an ambiguous contractual provision is involved;²⁷⁵ and (5) whether there are any peculiar facts or circumstances that might affect the arbitrator's decision.²⁷⁶

As to the merger clause language, if the term "past practices" or "practices" is contained in the clause language, it is very likely that the merger clause will successfully eliminate the binding past practice.²⁷⁷ However, if there was a separate contract clause on the topic of the past practice which could be construed as ambiguous, the past practice can be used to interpret the ambiguous contract language, regardless of the specific merger clause language, under the rules of contract interpretation.²⁷⁸ However, the term "past practice" is not necessary for a merger clause to effectively eliminate a binding past practice.²⁷⁹ As a matter of fact, the term is usually not included in such clauses because the use of the merger clause to eliminate a past practice is apparently often an afterthought by the employer or the union. However, the lack of a specific

²⁷² See *supra* notes 102-84 and accompanying text.

²⁷³ See *supra* notes 185-206 and accompanying text.

²⁷⁴ See *supra* notes 207-41 and accompanying text.

²⁷⁵ See *supra* notes 242-49 and accompanying text.

²⁷⁶ See *supra* notes 250-68 and accompanying text.

²⁷⁷ See *supra* notes 103-31 and accompanying text; *cf. supra* notes 143-49 and accompanying text (discussing arbitration cases that have noted the absence of the term "past practices" in the merger clause language).

²⁷⁸ See *supra* notes 132-42 and accompanying text.

²⁷⁹ See *supra* notes 156-84 and accompanying text.

reference to past practices in a merger clause leaves more room for an arbitrator to find that the parties did not intend that the merger clause eliminate binding past practices.

Arbitrators' views vary as to the effect of a past practice continuing unabated into a new contract period; however, it is an important factor considered by most arbitrators.²⁸⁰ As to the parties' bargaining history on the past practice or on the insertion of the merger clause, most arbitrators do not require evidence of actual notice of intent to discontinue a specific past practice,²⁸¹ but give-and-take bargaining over the insertion of a merger clause is often a factor considered by arbitrators.²⁸²

It must be remembered that past practices may be used to interpret ambiguous contractual provisions, regardless of the existence of a merger clause.²⁸³ However, this opens the opportunity for arbitrators to allow past practices to bind the parties regardless of a merger clause any time there is a separate contractual provision on point because a finding of an ambiguity is by its very nature somewhat subjective.²⁸⁴ Finally, an arbitrator might consider the particular facts and his or her reactions to the parties' actions in determining the effectiveness of a merger clause's elimination of a binding past practice.²⁸⁵

The better-reasoned arbitral awards indicate that contract language is the most important factor in determining the effectiveness of a merger clause's elimination of a binding past practice. However, if the contract language is not particularly strong or weak, arbitrators frequently give considerable weight to other factors, such as whether the past practice continued unabated into the new contract term, the parties' bargaining history regarding the past practice, and the insertion of the merger clause into the collective bargaining agreement. Perhaps most significant of such other factors is the fact that past practices may be used to interpret ambiguous contractual language, thus leaving the opportunity for arbitrators to ignore even the strongest-worded merger clauses. Additionally, it must be remembered that the specific facts of a case may influence the particular arbitral outcome.

²⁸⁰ See *supra* notes 185-206 and accompanying text.

²⁸¹ See *supra* notes 209-24 and accompanying text.

²⁸² See *supra* notes 225-41 and accompanying text.

²⁸³ See *supra* notes 242-49 and accompanying text.

²⁸⁴ See *supra* notes 242-49 and accompanying text.

²⁸⁵ See *supra* notes 250-68 and accompanying text.

