

# NALC Arbitration Advocate

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## Impeachment of Witnesses *Undermining the Credibility or Value of Testimony*

***I object, Mr. Arbitrator! That's a BALD-FACED LIE!***

Some new advocates are tempted to cry out an objection of this kind. How better to challenge a witness who flat-out lies in the hearing?

They should resist the temptation. This is not how it's done.

Repeat: Do not do this at home, or anywhere else.

There are methods for challenging the believability of testimony, for undermining its impact and casting doubt on its truth or value to the arbitrator. These techniques are grouped together under the

general heading of "impeachment."

This article takes on the subject of impeachment as a follow-up to the last issue's article on cross-examination fundamentals. ("Cross Examination: A Few Pointers for Advocates," NALC Arbitration Advocate, October, 1998, pp. 1-4.) Impeachment in this case has nothing to do with the House of Representatives' indictment of the President; that type of impeachment concerns an accusation of official misbehavior.

In the context of arbitration, to "impeach" a witness is to cast doubt on the credibility or value of the witness's testimony. To impeach a management witness an NALC advocate must show that the truth of a witness's testimony is highly doubtful—for any of a whole slew of possible reasons, ranging from a simple failure of memory to a real intent to mislead. For NALC advocates, the purpose of impeachment is to blunt or erase the damaging effect of a management witness's testimony.

There is no such thing as a

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## Limited Duty Job Offers *Full-Timers Need Not Take PTF Status*

National Arbitrator Carlton Snow has ruled once again that the Postal Service's contractual obligations under the NALC National Agreement are binding even though the employer may have made conflicting promises in its contract with a different postal union. Snow upheld this principle by reversing a partially disabled full-time letter carrier's forced transfer to a part-time flexible position in the clerk craft. C-18860, November 4, 1998.

The case grew out of a grievance filed by a letter carrier who accepted

a limited duty job offer as a PTF clerk "under protest" because of the threat of loss of compensation benefits if she refused to accept the position. NALC's continuing right to represent an employee concerning a position in another craft accepted "under protest" had earlier been established by a January 29, 1993 Memorandum of Understanding (M-01120).

NALC argued that the forced reassignment to PTF status violated ELM 546.141, which provides:

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## Impeachment . . .

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“Bald-Faced Lie” objection in arbitration. It’s not done, period. Nor do experienced advocates often insist to the arbitrator in the closing argument that a witness has out-and-out lied. This is not how impeachment is accomplished, typically. And arbitrators hardly ever conclude in their decisions that a witness has “lied” or is “a liar.”

Because “truth” and “lies” can be hard to pin down conclusively, matters of credibility are usually handled with more subtlety in arbitration. Advocates may argue that a witness’s testimony “lacks credibility.” An arbitrator may decide to “credit” the testimony of one witness over that of another. When a witness appears to have told complete falsehoods, an arbitrator may go so far as to conclude that the witness was “not credible.”

What can an advocate do, realistically, when confronted by a witness who tells only part of the story, who shades or embellishes the truth, or who simply invents facts to bolster management’s case? How can we attack the credibility of the testimony or the witness, and thereby convince the arbitrator that the testimony is false or at best, valueless?

## Credibility is Always an Issue

In law school students are taught that every time a witness takes the stand, credibility becomes an issue in the case. For underlying each witness’s testimony is the question of whether the testimony is accurate and should be accepted by the finder of facts.

Generally, the factfinder—the arbitrator in arbitration hearings—

starts with a presumption that each witness offers accurate and truthful testimony, at least from the witness’s perspective. An advocate then may offer evidence to support a different conclusion—that the testimony should not be believed or relied upon. These are the various techniques of impeachment.

Keep in mind that an effective impeachment usually “chips away” at credibility. Management witnesses, even when confronted by hot-shot union advocates on cross-examination, very seldom break down and cry,

*All right, I admit it! I made up the whole story... It’s all lies! Lies! Oh, boo hoo hoo hoo!*

This happens only in the fantasy art form known as “legal drama.”

Note also that some impeachment techniques do not actually attack a witness’s truthfulness. For instance, evidence that the witness’s memory is poor does not raise an issue of dishonesty. So impeachment often seeks to undermine testimony without necessarily alleging an intent to lie or mislead.

## 1. Motive, Interest or Bias

Witnesses are human beings, and all humans have preferences. It must be assumed that each arbitration witness has certain motives, interests or biases. For instance, a supervisor witness who has suspended a carrier undoubtedly is motivated by desires to please the employer, to maintain control of the carrier

workforce, and to justify his or her disciplinary decision. And the disciplined carrier should be motivated by desires for job security and to be left alone by management. None of these motives, interests or biases are either surprising or wrong.

Yet a witness may have other motives, interests or biases—usually personal ones—that may be exploited on cross-examination to im-

peach testimony. The most obvious biases involve family, monetary and sexual relationships. It is commonly assumed, for example, that a mother’s testimony is biased in favor of her child.

**“Truth” and “lies” can be hard to pin down. So matters of credibility are usually handled with more subtlety in arbitration.**

Here is an example closer to home. As you read it, note the classic techniques of cross-examination: The questioner has planned the flow of testimony to guide the witness toward the main objective, and each question is phrased to call for an answer anticipated in advance—which is often a simple “Yes” or “No.”

**NALC:** *Supervisor Bean, how many letter carriers do you supervise?*

**Supervisor:** *Usually about a dozen.*

**NALC:** *Do you try to treat them all fairly and equally?*

**Supervisor:** *Yes, I try to do that, the best I can.*

**NALC:** *Before you became a supervisor, you worked as a letter carrier in the same unit, right?*

**Supervisor:** *That’s right.*

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**NALC:** So you know the carriers pretty well, right?

**Supervisor:** Yeah, I guess so.

**NALC:** Were you friends with any of the carriers?

**Supervisor:** Sure, I was friendly with some of them.

**NALC:** How about Sam Korolowicz, was he a friend of yours?

**Supervisor:** I'm not sure what you mean by "friend."

**NALC:** Well, did you ever go fishing with Sam?

**Supervisor:** A few times.

**NALC:** Did you have a beer after work with Sam on a regular basis?

**Supervisor:** Yes.

**NALC:** Have you ever gone fishing with the Grievant, or had a beer after work with the Grievant?

**Supervisor:** No.

**NALC:** A month before you suspended the Grievant for deviating from his route, you talked to Sam about a deviation from the route, right?

**Supervisor:** We had a talk, an official discussion.

**NALC:** Did you discipline Sam for the deviation?

**Supervisor:** Like I said, I gave him an official discussion.

**NALC:** Did you give him a Letter of Warning, or a suspension?

**Supervisor:** No.

Although the matter of disparate treatment may be debated further, the advocate in this instance has planted a suggestion that the supervisor's disciplinary decisions may have been biased. This has occurred without the "hard" tactics of browbeating, argumentative questions or even a hint of hostility. Nor has the union advocate called the supervisor a liar or questioned his

**Sometimes testimony should not be believed because the witness may not have perceived events clearly, may not remember them well, or may not do a good job of communicating about what has been perceived and remembered.**

honesty. The advocate has merely suggested that an improper motive may have influenced the supervisor's decision, whether consciously or unconsciously.

Many NALC advocates have dealt with more extreme cases of personal animosity between supervisors and letter carriers. If the union can prove that a supervisor is personally hostile to a grievant, then it can argue that disciplinary action has been tainted by improper bias and should fail unless management can prove just cause by overwhelming evidence.

## 2. Perception, Recollection and Communication

Sometimes a witness is "unqualified" in some way to give testimony, but nonetheless offers it at a hearing. It is the advocate's job to test whether the witness had the

ability to see and hear the events to which he or she testifies, to remember accurately what happened, and to communicate that recollection accurately to the arbitrator.

In a famous NALC arbitration hearing involving carriers who were discharged for allegedly going on strike—the "Anson Jones" case—NALC's defense was that the carriers went home sick because they were made ill by the horrendous conditions in their Post Office. After a hurricane there was no power in the large facility during several days of withering heat and humidity; gasoline had spilled and sewers had backed up inside while ventilation was nearly nonexistent.

A management witness had testified on direct that he had visited and inspected the facility thoroughly and found the working conditions acceptable. On cross, NALC's advocate questioned whether the witness had paid much attention to the conditions in the main room where carriers worked. Part of NALC's cross-examination went something like this:

**NALC:** And when you inspected the facility, you say you paid close attention to the conditions under which employees were working?

**Witness:** Yes, of course. I was very thorough.

**NALC:** And did you, during your "very thorough" inspection, happen to enter the main room where letter carriers were casing up their routes?

**Witness:** Yes, I inspected the entire facility.

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**NALC:** How big was that room?

**Witness:** Good sized, I guess.

**NALC:** How high is the ceiling in that room?

**Witness:** I can't say for sure.

**NALC:** How many windows did the room have?

**Witness:** Well, I can't say for sure. I was concentrating on conditions, not the building itself. I think it had some windows.

**NALC:** Were they square windows? Tall? Round? Were they placed down low? Up high? How many were there? Two? Five? A hundred?

**Witness:** I can't say for sure.

**NALC:** In fact you don't remember whether there were windows, or how many.

**Witness:** No.

**NALC:** If you don't recall if there were windows in that room, then you don't recall if any windows in the room were open or shut, right?

**Witness:** No.

**NALC:** So your testimony is, you thoroughly inspected this facility to ensure that employee working conditions were acceptable, yet you don't remember the room where carriers were working, you don't remember if there were any windows in this overheated pressure cooker of workroom, and so you cannot possibly remember whether the windows were locked shut, forcing the carriers to work in a sealed sweatshop while breathing gasoline and

sewer fumes?

**Witness:** (Silence.)

Although such dramatic circumstances are rare, advocates may come across many opportunities to test witnesses' perception, recollection and communication skills.

**Sometimes an advocate can undermine a management claim that it conducted a thorough investigation by showing that the investigating official can remember few details of the investigation.**

Many advocates have presented cases involving a central incident and a key management witness. Arbitration advocates sometimes joke that eye witnesses are the worst of all, for good reasons: It is not unusual for a witness to report seeing or hearing things when he or she was in a different room or too far away to see or hear clearly.

An advocate also may test the way a witness communicates what has been perceived and remembered. In the following example involving a carrier's suspension for fighting, a supervisor testified that she saw carrier King whack carrier Grady on the back of the head.

**NALC:** You testified that carrier King "whacked" carrier Grady hard on the head, right?

**Witness:** Yes, that's what I saw.

**NALC:** So it was not a punch? Mr. King's hand was not in a fist?

**Witness:** No, the hand was open. But it was a hard whack.

**NALC:** You were about 30 feet

away from both carriers when you saw this, right?

**Supervisor:** Yes. I saw the whole thing.

**NALC:** You could not hear this whack, could you, from that far away?

**Supervisor:** I don't remember.

**NALC:** You don't remember hearing anything?

**Supervisor:** No.

**NALC:** Did any other employees report to you that Mr. King and Mr. Grady were fighting?

**Supervisor:** No, I could see it with my own eyes.

**NALC:** Did carrier Grady fall down?

**Supervisor:** No.

**NALC:** Did he fall to his knees, or bend over to his case?

**Supervisor:** No, but his head went forward some.

**NALC:** Did Mr. Grady ask for medical treatment afterwards, or for sick leave?

**Supervisor:** He didn't ask me.

**NALC:** So he was not injured?

**Supervisor:** Not that I'm aware of.

**NALC:** Is it possible that this alleged "whack" was more of a "little tap" or a "light push"?

**Supervisor:** I don't think so. That's not what it looked like to me.

**NALC:** You were 30 feet away, right?

**Supervisor:** Yes.

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**NALC:** After this one alleged whack, did you see any additional whacks, swats, taps or other physical contact between King and Grady?

**Supervisor:** No.

**NALC:** Did you see any threatening gestures by either carrier?

**Supervisor:** No.

**NALC:** Were any angry words exchanged afterwards, between King and Grady?

**Supervisor:** I don't know.

**NALC:** You did not hear any exchange of angry words between them?

**Supervisor:** No.

**NALC:** No verbal threats, or profanity, or name-calling?

**Supervisor:** No.

In this example the cross-examiner tests the way a witness has communicated about her perception and recollection of the incident. Although the supervisor used the phrase "hard whack" and suspended the carrier for fighting, the advocate has brought out additional facts that call management's interpretation of events into question. The witness has not been neutralized completely, but the union advocate has raised an issue of whether the supervisor exaggerated the incident's severity and overreacted.

## 3. Direct Challenges to Truthfulness

Some impeachment techniques take direct aim at the truth or falsity of testimony. Generally, there are two

such methods: (1) evidence of a prior statement which is inconsistent with the present testimony, and (2) evidence of untruthful character. The first is a classic method for smoking out a witness who has altered his or her story over time.

### A. Prior Inconsistent Statements

Arbitration advocates often attempt to impeach by showing inconsistent prior statements, because prior statements about key incidents abound in the grievance procedure, especially in discipline cases. Management states the facts initially in a letter of charges. The Postal Service is then obligated to state the facts on

the inconsistent prior statement. This is an important check on witnesses who become overzealous under the pressure of the hearing and who try, intentionally or otherwise, a bit too hard to please their bosses with a strong version of the facts.

Generally, this form of impeachment begins with the union advocate asking the witness to repeat clearly the testimony that is to be challenged. Then the advocate proceeds to raise the inconsistent prior statement.

**NALC:** Supervisor Green, you testified that you conducted an independent investigation before placing the Grievant on emergency suspension, right?

**Supervisor:** That's right.

**NALC:** And you further testified that your independent investigation consisted of speaking to the police officers who arrested the Grievant, and obtaining a copy of the police report, right?

**Supervisor:** Yes, I checked it out before I acted.

**NALC:** Mr. Green, you attended the Step 2 meeting on this grievance on September 18th, didn't you?

**Supervisor:** I was there.

**NALC:** And at that meeting you told the union representative, in fact, that you spoke to police officers and obtained their report two days after the emergency placement of the Grievant, didn't you? And isn't it also true

**Proof of prior statements inconsistent with the present testimony is the most common attack on a witness's truthfulness. It is a good tactic for NALC advocates because records of prior statements abound in the grievance procedure.**

which it has relied each time it denies a grievance in writing. There also may be Inspection Service investigative memorandums or other internal management documents describing the facts of a case. If the union has done its job, it also should have written down management's version of the facts.

So by the time a management witness testifies at an arbitration hearing the union often has some type of prior statement for comparison. If a management witness relates an embellished, slanted or wholly new version of the facts at arbitration, the union advocate can move to impeach the witness using

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*that you and the other management representative present argued that management's investigation justified the emergency placement even though it was admittedly made after the fact?*

**Supervisor:** *I don't remember that.*

A few points should be made here. First, the NALC advocate had better have the evidence to back up this allegation. It is flatly unethical to allege unprovable facts in cross-examination questions, and arbitrators will not allow it. Otherwise hearings could be tainted by baseless smears. ("Isn't it true, Ms. Anderson, that several of your neighbors consider you a lying pervert?")

Second, there's the problem raised here by the supervisor's failure to acknowledge the prior oral statement when asked about it. If the supervisor had admitted the prior statement then this impeachment maneuver would have been completed during cross. But what if he denies it outright or, as here, claims to have forgotten?

The solution is that the NALC advocate will get a chance to present evidence of the prior inconsistent statement during its own case-in-chief. All arbitrators should permit a party a chance to introduce independent evidence to prove a prior inconsistent statement that is central to the issues in the hearing.

However, arbitrators may place limits on the amount of evidence presented for the sole purpose of impeachment. Without some restrictions on such "extrinsic" impeachment evidence, hearings could devolve into endless arguments about matters not central to the case.

Third, if the NALC advocate has a written prior statement that is inconsistent with the witness's present testimony—rather than an oral prior statement—then the statement should be raised, quoted and shown to the witness during cross-

*sion to remove the Grievant from postal property at once."*

**USPS:** *May we see that?*

**Arbitrator:** *Show him the statement.*

**NALC:** *Yes, Mr. Arbitrator. This is from Joint Exhibit 2, page 27, and I have extra copies for everybody.*

Fourth, at this point a witness, confronted with evidence of a prior inconsistent statement, is usually given a chance to explain the apparent contradiction. To the chagrin of countless advocates, such witnesses typically either (1) explain away the inconsistency with enormous creative zeal, or (2) develop an acute memory disorder. In short, pinning a witness with a "bald-faced lie" is difficult and rare. However, a witness's evasiveness may be highlighted in ways that make an impression on the arbitrator.

A final note on impeachment by prior inconsistent statement: As a practical matter, witnesses seldom testify in direct contradiction to prior statements they have made. Witnesses are more likely to embellish earlier statements or just slant them differently after speaking with their advocates, reflecting, and practicing their testimony in preparation for the hearing. Advocates must be alert to a management witness's small but accumulating inconsistencies with prior accounts. Cross-examination should be used as an opportunity to chip away at credibility by pointing out insistently how the witness's story has changed over time.

### B. Proof of Untruthful Character

This second type of direct attack on a witness's truthfulness deserves little space here because it applies more to criminal trials than to labor

**Typically, witnesses confronted with prior inconsistent statements are given an opportunity to explain. They are often creative with their explanations. Or their memories tend to fail. The advocate's job is to highlight a witness's evasiveness for the arbitrator's benefit.**

examination. Continuing the example, it would go something like this:

**NALC:** *Supervisor Green, did you participate in the preparation of the written Step 2 denial of this grievance?*

**Supervisor:** *I believe so, yes, along with the Postmaster.*

**NALC:** *Then you will recall, Mr. Green, that the Step 2 denial states as follows:*

*"The infraction alleged was severe, justifying an immediate emergency placement. The follow-up investigation involved contacting the police officers involved and obtaining their report. This investigation fully supported management's deci-*

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arbitration. Basically this type of impeachment attacks the witness's "character for truthfulness," based on evidence of: (1) prior convictions of serious crimes (felonies) or of other crimes involving lying or dishonesty (lawyers say such crimes involve "moral turpitude"—perhaps the juiciest-sounding of all legalisms); or (2) the witness's reputation in the community for lying. Opportunities for this type of impeachment seldom occur in NALC arbitrations.

## 4. Contradiction

The last major impeachment technique to note is the most obvious one—simple contradiction by other evidence. If a management witness

tells a story that should not be believed, the most direct way to discredit the story is to produce other, credible witnesses who tell a different and more believable story.

This has happened, for instance, in Joint Statement on Violence cases in which NALC has alleged that a supervisor threatened or harassed a letter carrier. When five carrier witnesses have told similar stories of improper behavior and the accused manager has denied it, arbitrators have tended to find the management testimony less than credible.

## It Goes Both Ways

NALC advocates must keep in mind that management advocates use these impeachment techniques, too. Union advocates need to prepare witnesses carefully for attacks

on their testimony. They must ensure that union witnesses can pass the tests of perception, recollection and communication, and that their testimony cannot be undermined by evidence of improper motive, interests or bias.

Witnesses also should be cautioned against giving too strong a slant to their testimony, or relating facts in too argumentative a style. An effective management advocate will see the errors of overzealous witnesses as opportunities for effective impeachment.

Finally, union advocates should take the time to conduct a practice cross-examination with each union witness, and to correct any problems with testimony before it is offered in the hearing. As with so many other arbitration hearing skills—used defensively or offensively—preparation is the key to success. □

## Limited Duty Job Offers ...

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### 546.141 Obligation

*When an employee has partially overcome the injury or disability, the USPS has the following obligation:*

a. *Current Employees. When an employee has partially overcome a compensable disability, the USPS must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance (see 546.611). In assigning such limited duty, the USPS should **minimize any adverse or disruptive impact on the employee.** ... (Emphasis added.)*

\* \* \*

Management countered by arguing that no specific National

Agreement language supported NALC's position and that absent contract language to the contrary, this area of decision-making belongs to management pursuant to its powers under Article 3. USPS also argued that a national APWU award controlled the outcome of the case. In C-13396, October 11, 1993, Arbitrator Snow had ruled that the reassignment of a partially recovered, formerly employed full-time carrier to a full-time clerk position violated the NALC/APWU-USPS National Agreement because it impaired the seniority and conversion rights of part-time flexible clerks.

## Stronger Debt to Current Employees

In the 1998 case, NALC pointed out to Arbitrator Snow that the grievant was still employed by the Postal Service when the forced reassign-

ment was made. NALC argued and the Arbitrator ultimately agreed that the Postal Service's obligations to *current* employees under ELM Section 546.141 are greater than its obligations to former employees, who are covered by the lesser protections of Section 546.141(b):

**Former employees.** *When a former employee has partially recovered from a compensable injury or disability, the USPS must make every effort toward reemployment consistent with medically defined work limitation tolerances. Such an employee may be returned to any position for which he or she is qualified, including a lower grade position than that which the employee held when compensation began.*

Snow concluded that the transfer of a partially recovered full-time carrier to PTF clerk position vio-

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## Limited Duty Job Offers ...

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lated the stronger protection afforded to current employees:

*Inherent in shifting a worker from a full-time regular schedule to that of a part-time flexible employee is a denial of employee protections that were gained through the settlement process which produced ELM Section 546.141(a). Under ELM Section 546.141(a), cross-craft transfers were to take place only as a last resort and, then, only when a schedule reasonably similar to the employee's previous schedule could be guaranteed. A partially disabled current employee's status as a part-time flexible worker strips away these protections for an employee who held a full-time regular schedule and lost it due solely to an on-the-job injury.*

Award at pp. 17-18.

APWU intervened in the case to argue that the reassignment of a carrier as a full-time clerk to the detriment of PTF clerks violated its now-separate National Agreement with the Postal Service. The arbitrator's analysis took note of the change in contractual obligations among USPS, NALC and APWU that occurred when NALC and APWU negotiated separate contracts for the first time in 1994:

*The two unions have discontinued joint bargaining. This*

*fact greatly impacts the relevance of the 1993 case to the current situation. The 1993 decision was affected by an underlying assumption which no longer exists. That assumption was that both crafts were covered by essentially the same agreement and that compliance with the agreement for one craft, in effect, would satisfy the Employer's obligation with regard to the other craft.*

*When the parties chose to negotiate separate agreements, they separated from the past and wrote a new chapter in their relationship. ...*

*Rights of letter carriers and*

**Snow has ordered management to keep the promises it makes under each union's contract, even where potential conflicts could occur. Where strict compliance with one contract would violate another, USPS must provide a monetary remedy.**

*clerks are no longer determined collectively. Management must be diligent in being certain that it can keep promises it makes to each craft. If promises to one craft infringe on rights of another, the Employer is obligated to negotiate the authority to implement such rights within the craft whose rights are being infringed. ... **Simply because complying with one agreement would violate the other does not relieve management of its obligation to comply with both.***

(Award at pp 22-23; emphasis added.)

Snow concluded that transferring the grievant to a part-time flexible position had violated management's obligations under its agreement with NALC. He remanded the issue of remedy to the parties "so that they may attempt to agree on a negotiated settlement". The arbitrator declined to decide whether the reassignment had further violated the rights of PTF employees under APWU's national contract, because that issue was not before him.

## Two Contracts, Separate Obligations

This was not the first national arbitration decision which management's freedom to act has been restricted because of potentially conflicting obligations under separate collective bargaining agreements. For instance, in C-18159, April 8, 1998, National Arbitrator Snow ruled that the NALC-USPS National Agreement requires the Postal Service to make temporary cross-craft assignments to provide work for carriers whose occupational drivers' licenses have been suspended or revoked.

However, Snow further ruled that where such assignments would violate provisions of the APWU-USPS contract, the employer is not relieved of its obligations under either agreement. If the Postal Service cannot accommodate temporary cross-craft assignments in a way that does not violate the APWU agreement, a letter carrier who is deprived of the right to a temporary cross-craft assignment in an APWU-represented craft must be placed on leave with pay until such time as he or she may return to work without violating either union's contract. □

## Authenticity and Electronic Documents Are They Good as a Photocopy?

Here's a situation that NALC advocates have been known to face in regional arbitration:

**USPS:** *Mr. Arbitrator, I submit to you a national Step 4 settlement that is directly on point in this case. It establishes beyond any doubt that the Postal Service's position in this case has been confirmed by binding national precedent. Simply put, the parties have settled this matter already.*

**Arbitrator:** *I see what you've given me, but I'm not sure what it represents. Does the union have any questions about this document?*

**NALC:** *Yes, I do. If I may, Mr. Arbitrator. What is the source of this document?*

**USPS:** *It was obtained from the Postal Service's national database of Step 4 decisions.*

**NALC:** *What is the original source of this document? Where did you get it? How was it printed or copied? And I don't see any signatures. I've never seen this decision before. What is this, exactly?*

**USPS:** *Mr. Arbitrator, the union is trying to create an issue where there isn't any. This Step 4 settlement was printed locally in my office after being downloaded off the USPS national labor relations computer database, the "Folio" system. This is where all of the national arbitration decisions and other national labor*

*relations materials are stored. The system is routinely used by management labor relations reps. We use these documents in the regular course of business. They are just as good as the originals.*

**Arbitrator:** *Is the union prepared to stipulate that this document is an authentic national-level settlement under the USPS-NALC National Agreement?*

The proper union response: Absolutely not. It is not authentic and should not be accepted by the arbitrator.

The reasons for this are straightforward. Most importantly, *the parties have not agreed to accept the Postal Service's electronic printouts as authentic.* For

**The Postal Service's NLRs database contains documents that have no contractual force whatever—internal drafts and proposals rejected by NALC. Union advocates must demand authentic copies of important documents.**

many years the parties have accepted legible *photocopies* as authentic, so that actual originals need not be submitted in the grievance procedure or arbitration. This practice is followed by all courts and administrative forums. However, NALC has not agreed to accept printouts from

USPS databases.

Moreover, text database printouts usually consist of retyped or scanned text. Their appearance is entirely unlike the originals, and they do not contain signatures. The quality of proofreading is unknown to NALC. So unlike a photocopy of the original, the authenticity of such a document is always questionable until verified.

### USPS Folio System Problems

Furthermore, the Postal Service's national labor relations computer system has been known to have some problems. Notably, it contains documents that may appear to be national settlements, but which are not. Some of these documents are management's *proposed* settlements of national grievances. NALC never agreed to them.

For reasons unknown to NALC, management labor relations representatives in the field appear to have access to these draft documents. And it appears that some of those representatives have confused actual settlements or arbitration decisions on the one hand, with irrelevant materials such as internal drafts, drafts that were proposed to but rejected by NALC, or other internal doodle-pads and waste paper.

What NALC does know is that these text-only draft settlements,

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## Authenticity of E-docs . . .

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which have no force whatsoever, have been submitted as authentic settlements more than once. Just a few months ago an alert regional advocate called NALC headquarters during a break from a hearing to ask about the authenticity of such a purported "settlement." It was an internal USPS draft rather than an actual grievance settlement. Management's errors in these instances were almost certainly unintentional. Yet these mistakes mean that NALC cannot permit text printouts of important documents into the arbitration record without proof of their authenticity.

Technology marches onward, of course. NALC advocates know they need not quibble with a computer-based document so long as it is, in fact, an accurate representation of the original, authentic document. (And see the article below on page 11 below concerning a number of NALC and USPS electronic documents which are authentic.) But it pays to be sure. If management does introduce a computer-based text document and the NALC advocate checks to ensure the language is identical to the original, fine. But if there is any uncertainty advocates should insist on a photocopy of the original.

Here is what an advocate can do:

**NALC:** *I've never seen this before. Mr. Arbitrator, I have some questions about this purported settlement. It does not appear to be an original document. Rather it is some kind of*

*text reproduction of what management says is an original. Second, there is no signature on it. How can we be sure that the parties have agreed to this at the national level?*

**USPS:** *Mr. Arbitrator, I repeat, I obtained this directly from the Postal Service's national computer database, which is used every day by labor relations representatives throughout the organization. NALC is certainly aware of that.*

**NALC:** *Yes, Mr. Arbitrator, and NALC is also aware that the Postal Service's database is chock-full of documents which are not, in fact, actual settle-*

**Text-based printouts cannot be accepted as authentic copies of original documents. They must be verified against the originals.**

*ments. The system contains draft proposals and other documents that never became settlements, and management advocates have mistakenly introduced such things in arbitration before.*

**Arbitrator:** *Can we verify whether this document is authentic, somehow?*

**NALC:** *Certainly, Mr. Arbitrator. I suggest that we recess for 30 minutes and give the management representative a chance to obtain at least a faxed copy of the signed original, if there truly is one. If that is not possible then you might hold the record open after the hearing closes while management tries to find the real thing, and the Postal*

*Service advocate can mail it to you with a simultaneous copy to me. If that becomes necessary, of course, I must have a right to look over whatever management submits and challenge the document if necessary.*

**Arbitrator:** *Good enough. Let's take a break.*

## In Denial?

Finally, it should be noted that the Postal Service's databases also contain many management denials of grievances. From time to time a management advocate submits a denial in arbitration—either a printout from the database or a photocopy of the original—and argues that the denial and its rationale are binding on the union because the NALC failed to appeal and overturn the grievance.

Aside from the issue of whether a text-based printout is authentic, NALC advocates should know that such denials should be rejected outright in arbitration. A denial is a management document, written by management alone. It is not a binding settlement or agreement of any type concerning the proper application or interpretation of the National Agreement.

NALC may decline to appeal a grievance for any number of reasons—because the particular facts of the case were not strong, because additional issues were involved, because other issues were more important to appeal at the time, and so forth. So denials have no force as precedent, and union advocates should ensure that management does not use them to establish the meaning of the National Agreement. □

## Electronic Documents for Contract Enforcement

### *Digital Documents from NALC and USPS*

NALC advocates know that the union has been creating computer-based contract materials for some time now. So has the Postal Service. Now a new wave of electronic publishing has begun, which promises to make important contractual materials more available and much easier to research.

Both NALC and USPS have begun to create and distribute a number of important labor relations documents in digital form. NALC advocates know about the Arbitration CD-ROM collection, which contains scanned images of all of the more than 15,000 NALC national and regional arbitration awards.

The *Materials Reference System* (MRS) CD-ROM contains scanned images of thousands of original national settlements, memorandums and other important contract materials. A scan of the 300+ page *MRS Summary and Index* is included on the CD-ROM.

Last year NALC created and distributed a database search engine for the arbitration CD-ROM collection. The new program, an intuitive and powerful application written in Foxpro for Windows, replaced the text-based system used for many years at NALC headquarters and in the national business agents' offices. And for the first time it placed arbitration search technology in the hands of branch representatives who purchased the CD-ROM collection.

### Acrobat Documents

Now NALC and USPS have begun to publish several important contractual documents in a special electronic format known as Adobe Acrobat®. These include the *USPS-NALC Joint Contract Administration Manual* (JCAM), the *NALC Supplement to the JCAM*, the *USPS Employee and Labor Relations Manual* (ELM) Issue 13, the M-39 and M-41 Handbooks, the *NALC Guide to the Family and Medical Leave Act*, and NALC's *MRS Summary and Index*.

**Electronic "Adobe Acrobat" documents contain their own fonts and graphics and a fixed page layout. So they look the same and print the same on all types of computers, so long as one has obtained the free Acrobat Reader program from the Adobe Web site.**

NALC has distributed these documents to the networked computers in the national business agents' offices, and plans to include some of them in its upcoming 1999 update of the MRS CD-ROM.

The Acrobat format was developed by Adobe, Inc., a software powerhouse in the fields of desktop publishing, graphic arts and video production. Acrobat documents are particularly useful because Adobe has created and given away free an Acrobat Reader for every major

computer operating system—Windows and Macintosh in various flavors, Unix and so forth. Anybody can get a free Acrobat Reader from Adobe's World Wide Web site, [www.adobe.com](http://www.adobe.com).

With an Acrobat Reader installed and running, Acrobat documents—known as PDFs because of their default extension of \*.pdf (for "portable document format")—look the same and print the same on every computer. They can contain their own fonts (type-faces), so text is sharply defined rather than jagged as with many scanned documents.

Because their layout is fixed, Acrobat documents can be created which are exact copies of paper documents, regardless of the computer platform on which they are viewed.

Unlike scanned images, Acrobat documents contain searchable text.

The basic Acrobat Reader contains a simple Find tool which can search a single document for a word or phrase.

The Reader also comes in a version including a Search plug-in. If the creator of an Acrobat document has indexed the document, the Search-enabled Reader can perform a very fast index-search for text across multiple documents. For instance, a user can find every instance of the phrase "sick leave" across the entire *ELM*, *JCAM*, *MRS*

(Continued on page 12)

## Digital Documents . . .

(continued from page 7)

*Summary & Index*, and so forth, all in the blink of an eye. (An aging 66-MHz Pentium recently completed such a search in about a second.) The upcoming 1999 MRS CD-ROM will contain the Acrobat Reader with Search, as well as indexed versions of several USPS and NALC Acrobat contract enforcement documents.

## NALC-Distributed Acrobat Documents are Authentic

The Acrobat documents distributed by NALC are intended to be authentic versions of the paper originals. They may be printed to create what is, for all practical purposes, the same as a photocopy of the original. To ensure their authenticity, all the electronic documents NALC distributes will be passworded and “read-only”—secured against alteration.

The Acrobat *JCAM* has been distributed by USPS and NALC headquarters, and NALC’s national office has distributed the *NALC Supplement to the JCAM*. The Acrobat versions include some clean-up of the original documents’ typos and minor layout errors, but otherwise are identical to the paper versions.

The *MRS Summary and Index* is an official NALC publication, and in fact the original paper version was printed from the identical Acrobat document. The Acrobat *NALC Guide to the Family and Medical Leave Act* is almost if not precisely the same as the paper original; the only changes in the Acrobat version are small variations in layout described in an included “Note to the Electronic Edition.”

The Postal Service’s headquarters directly supplied NALC’s national office with the Acrobat versions of the USPS *ELM Issue 13* and the March, 1998 M-39 and M-41 handbooks, with assurances that they are the same as the paper versions.

**A researcher can search through a collection of indexed Acrobat documents for a word or phrase, in the blink of an eye.**

ready on various Web sites.

Other types of union and management documents are showing up on the Web as well, usually in HTML (Hypertext Markup Language). HTML is the format for most of the vast information on the World Wide Web. However, authenticity is a problem for HTML-

source documents because anybody can change them.

How can one be sure that a particular electronic document—even an Acrobat document—is authentic? Check the source. If it comes from an official Web site it is the real thing. For instance, the Postal Service has posted the new Domestic Mail Manual on its official World Wide Web site., [www.usps.gov](http://www.usps.gov). NALC is distributing Acrobat

documents which state the author’s name and are secured electronically; this is intended to assure users that the item is authentic. Computer hackers or crackers undoubtedly could unlock these documents but they are probably more interested in other prey.

When an advocate has questions about an electronic document, the tried-and-true methods of authentication still work. ( First raise the question and find out more about it the document, how it was created and the source from which it was obtained. See “Introducing Documents,” *NALC Arbitration Advocate*, October 1997.) When still in doubt, check it against a version that is known to be authentic—an original or photocopy. □

**The Acrobat documents distributed by NALC have been secured. They are read-only and have password protection.**

Please note that these Acrobat documents and many other useful contract materials undoubtedly will be floating around the Internet soon. Some of these documents may be available already

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*Please note that the C-number arbitration cases and M-number Materials Reference System materials cited in this publication are available to interested advocates. All materials are available from the office of the National Business Agent. All but the newest arbitration cases are available on the NALC Arbitration CD-ROMs. The M.R.S. CD-ROM contains the M-number materials; an update is due out early this year.*



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