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Cross-Examination *A Few Pointers for Advocates*

The key management witness has testified and his story does not bode well for the grievant. If the arbitrator swallows the witness's story your case is sunk.

You, the NALC advocate, decide that you absolutely *have to break this witness* on cross. So when it's your turn you lean forward and attack, aggressively ripping into the witness's testimony. You show one contradiction, then another, and yet another. Finally you zero in, showing how the manager's story has changed completely since he first told it to the Postal Inspector. Your voice rises as you go in for the kill:

"SO, Supervisor Simpson, when you reported the incident to Postmaster Pinesap on the day it occurred, you gave a different story from the one that you just told us today. So were you lying then? Or are you lying now? Or are they BOTH LIES?" you thunder.

Supervisor Simpson sucks air, reeling from your verbal punches, sweat dripping, eyes darting. He turns for help toward the management advo-

cate. She, too, is holding her breath, stunned by the devastating thrust of your inquisition. Her witness is destroyed and she knows it. Sneer mumbles, "I ... I ... don't know ..." He hangs his head, exposed, beaten, ruined.

Back straight, chin high, you

hold your Judgement Day stare. Your voice is pure scorn as you finish: "I'm done with this witness, Mr. Arbitrator." It's over. Management's case is nuked. Ashes. Kaput.

"Uh, ... uhmmm ... uh ... I was only ... uh ... dreaming ..."

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Who Can Speak with a Witness? *Does Sequestration Mean Total Isolation?*

Every advocate knows about witness sequestration, right? Upon an advocate's request, arbitrators routinely order witnesses sequestered—ordered out of the hearing room while other witnesses are testifying. This is a matter for an individual arbitrator's discretion, as recognized by the Voluntary Arbitration Rules of the American Arbitration Association:

22. Attendance at Hearings ...
The arbitrator shall have the power to require the retirement of any witness or witnesses dur-

ing the testimony of other witnesses. ...

There's a good reason behind the practice of sequestering witnesses—it is seen as aid to the search for truth. The purpose of live testimony at a hearing is to obtain a witness's testimony about his or her own recollection or knowledge of facts, reported in the witness's own words. If witnesses heard the other witnesses testify, the theory goes, "they might conceivably be influenced by what they hear and alter

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Cross-Examination . . .

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Drama vs. Reality

This, of course, is the problem with cross-examination: It's got a rep. A false one. Too many advocates have fantasies like this one about cross-examination. If only they were true, life would be more like the old Perry Mason show.

Back to reality. Has a scene like that ever played on *this* side of the looking-glass? Oh, sure, it must have happened a few times in the annals of NALC arbitration. After all, we've got more than 18,000 cases in the computer files. Lots of crazy things happen in hearings.

But does it happen often? Absolutely not. And should you build your cases on a foundation of cross-examination?

No, hardly ever.

So what's the truth about cross-examination? Is there any art or magic to it? Yes and no. Certainly there are some people who have a knack for it, and there are cases in which the right questions on cross can tip the balance. But more often, cross-

examination is just another hearing skill which advocates develop through study, planning and much practice. And it is just one of the tools an effective advocate uses to bolster an overall theory of the case.

There are some fundamental rules to follow in most cross-examination. This article presents the most important ones.

Deciding Whether to Cross

Before deciding whether or not to cross-examine a witness, the advocate should remember that cross examination has two main purposes:

1. To get at essential facts. Most of the time we cross-examine a management witness simply because we need to get certain material facts into the record, and those facts are in the witness's possession.

2. To attack credibility. The other main purpose of cross-examination is to "impeach" a witness—to attack the witnesses' credibility. Impeachment is an attempt to show that a witness's "character for truthfulness," as lawyers put it, is poor. There are several methods for impeaching a witness, and the main ones will be discussed in the

second part of this article in the next issue.

If an advocate does not need facts from a witness and does not intend to attack his or her credibility, then cross-examination is usually a waste of time. Nonetheless, a lot of arbitration advocates (and trial lawyers, too) seem to think they sim-

ply *must* cross-examine every witness the other side puts on.

This is often a mistake. It gives the opposing witness a chance to repeat his or her testimony, embellishing nicely and hurting the union's case even more the second time around. And cross-examination is inherently risky because the witness does not want to help the

cross-examiner and may have additional, damaging information to offer.

Part of Your Hearing Plan

You should do your most focused thinking about cross-examining each witness *before the hearing*. That is because your cross-examination is just one act in the play that is the entire hearing.

To plan and design your arbitration case—the "play"—you must have a *theory of the case*. This theory is an overall strategy, a story you plan to tell, that drives everything you do in preparation and presentation of the case. It is "your case in a nutshell." You should have identified a handful of central arguments (or fewer) that you intend to make. Your hearing strategy must be designed to focus on those points.

Each witness's cross examination is one piece of the overall puzzle. So you should have asked yourself, for each potential witness: What can I realistically expect to accomplish by examining this person? What facts does he or she have that I need? Must I have those facts to prove my case? If you conclude that a management witness has little value to either USPS's side or your own, then absent any damaging surprises from the witness on direct, you don't need to cross-examine.

Assess the damage. If you know in advance that the witness will offer damaging testimony, or if a witness unexpectedly does grave harm to your case, you may feel forced to cross-examine to undo the hurt. But make sure to assess the benefits and risks even where a witness does your case some harm:

- ◆ How much damage did the witness really do—that is, how

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Two main purposes of cross-examination:

1. To get important facts in the record.

2. To impeach a witness—that is, to undermine the witness's credibility.

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important was her testimony in the overall case?

- ◆ Was the witness believable? How did the arbitrator react to her testimony?
- ◆ What can you reasonably expect to accomplish by cross-examination?

Nuts and Bolts of Cross

Although cross-examination has the same "truth-seeking" function as examination on direct, it is fundamentally different.

The difference is in the method of *control*. An advocate should always control and direct the testimony of any witness he or she examines. In direct testimony the advocate prepares each witness carefully in advance, shaping and structuring the testimony and offering the witnesses advice, support and a chance to practice. At the hearing, questions should be open-ended rather than leading because the witness should be the main focus of the testimony.

On cross, the witness wants to help management's case and has been prepared by the adversary—thus the term "adverse" or "hostile" witness. So the advocate *leads* the witness to retain control of cross-examination. The advocate designs leading questions that will elicit simple "Yes" or "No" answers. In a manner of speaking, the advocate "testifies" by providing a carefully constructed series of facts, and then asks the witness to confirm the advocate's statements. The questions should leave the witness little or no "wiggle room."

Let's use the facts from our fan-

tasy case above, in which a supervisor has given one version of events on the day of an alleged fight between employees, and a second and different version on direct examination three months later.

Union: *Supervisor Simpson, you reported this incident to your superiors on the day it happened, didn't you?*

Supervisor: *Yes.*

Union: *In fact you were required to report the incident as part of your duties, isn't that right?*

Supervisor: *Yes.*

Union: *So on April 27th you wrote up a report of the incident and submitted it to the Postmaster, isn't that correct?*

Supervisor: *Yes, I did.*

Union: *I now show you a document which is numbered pages 34-36 of Joint Exhibit 2. Is this your report of April 27th?*

Supervisor: *That's the report.*

Union: *And after you wrote up the report you signed it at the bottom?*

Supervisor: *Yes.*

Union: *This is your signature, then, right here?*

Supervisor: *Yes.*

Union: *And by signing the report you were indicating that it was true and correct, so far as you knew, right?*

Supervisor: *Yes.*

Union: *And after you wrote it up and signed it, you gave it to the Postmaster on the same afternoon, right?*

Supervisor: *That's right.*

Union: *So the report was submitted with an hour or two after you made your observations regarding the incident?*

Supervisor: *That's right.*

So far, so good. However, at this point many new advocates

make a cardinal mistake—they confront the witness with an inconsistency and demand an explanation.

Union: *On the first page of your report, you wrote the following: "As I entered the swing room I saw Carrier Fanelli on the floor. Carrier O'Grady was standing over him." Did you write that?*

Supervisor: *Yes.*

Union: *And yet, in your testimony just here a few minutes ago, you stated that you "saw O'Grady push Fanelli down"? Isn't that right?*

Supervisor: *Yes.*

Union: *Then, HOW, supervisor Simpson, can you possibly explain the inconsistency, no, the CONFLICT, between your report, written immediately after the incident occurred, with your testimony at this hearing?*

Supervisor: *Well, I saw O'Grady push Fanelli because I*

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Cross-examination differs in the manner of *control*. The advocate usually "testifies" by reciting a series of factual statements and then asking the witness for confirmation.

Cross-Examination . . .

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could see what was happening through the little glass window in the door, just before I entered the room.

The lesson here is: Know when to quit. It is a classic no-no in cross-examination to confront and ask a witness, "Why?" Ask'em to explain an inconsistency and they will. Here's another illustration:

Union: *So, Postal Inspector Poodle, your entire investigation over an 8-week period was focused entirely on the Grievant?*

Inspector: *Yes, that is correct.*

Union: *And so why is it, Mr. Poodle, that you singled out the Grievant, rather than broadening your investigation to include other carriers at the station—who, I might add, had access to the mail in question?*

Inspector: *Well, from the information we had, it was clear that the Grievant was the guilty one. It was obvious that he had obstructed the mail.*

Ouch. Besides the problem of "one question too many," this example raises the problem of clever witnesses. Many management people are very experienced at testifying, and are fully capable of parrying most of a union advocate's

thrusts on cross-examination. Postal Inspectors are professional witnesses, so their armor is extremely difficult to pierce in verbal combat. A union advocate should work hard to limit and focus any cross-examination of such witnesses. Stick to the facts and don't argue. Get what you need and get out.

Make your arguments in your closing, rather than during the cross-examination. That's the time to tear management's case apart. During your closing, tell the arbitrator that a management witness changed his story so much that his testimony must be rejected as not credible, or that the Inspection Service obviously conducted a shoddy and incomplete investigation. But don't expect a witness to help you

make those arguments during cross-examination.

Here's one more pointer on knowing when to pass on cross-examination: Often a management witness will say something on direct examination that is very helpful to the union's case.

The natural inclination of new advocates is to cross-examine the witness on the same point to drive it home to the arbitrator. But often the witness will come to his or her senses on cross-examination and back away from the earlier testimony, or explain it away.

Fishing expeditions. Every advocate has heard that you should never ask a question on cross-examination to which you do not already know the answer. This is

essence of leading, of controlling the testimony on cross. However, there are some advocates who "go fishing" for new, helpful facts by asking a lot of open-ended questions on cross-examination. In particular, such advocates "fish" to explore the motives and actions of supervisors who issued discipline.

Fishing in unknown waters is very risky, and should be avoided unless the union's case is in truly desperate straits. It is somewhat less dangerous for experienced advocates whose instincts and skills can guide them through uncertain waters.

Remember the Fundamentals

To sum up, keep in mind that your cross-examination is most likely to be successful if you have a solid *theory of the case*, and if you have decided in advance whom you need to cross-examine and how, based on your overall hearing strategy.

Even when a witness offers damaging testimony on direct, *assess your chances* of accomplishing anything positive by cross-examination—balancing the risks of repetition and embellishment against your realistic prospects for undercutting the testimony. When you do decide to cross-examine, remember to *get what you need and quit*, and *avoid fishing* in uncharted waters. And leave the prime-time dramatics to Hollywood. □

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*In the next issue:
Cross-examination Part 2—
Attacking Credibility*

Know when to quit. It is a classic mistake of new advocates to ask those last few questions, expecting the witness to cooperate and help the union make its closing argument.

Speak with a Witness? . . .

(continued from page 1)

their testimony accordingly." *Witnesses in Arbitration*, Edward Levin and Donald Grody, p. 84 (BNA Books, 1987). Sequestration may be particularly important when the facts are hotly disputed and each witness's testimony is crucial to the case.

If a witness's testimony might be influenced or "tainted" by hearing another witness testify, then what about other contacts that could, conceivably, cause one witness's testimony to be influenced another's? For instance, say that an advocate gets a number of witnesses together in advance to review testimony for an upcoming hearing. Is there any rule against one witness hearing the others speak about the facts of the case? Absolutely not. An effective advocate needs to hear each witness's testimony and to do a dry run with each witness before the hearing. Witnesses need not be separated for this purpose.

It might be wise, however, for an advocate to prepare each witness separately, so one does not pick up another's language unconsciously. If several union witnesses to an incident all describe it using the same words, the arbitrator may believe the testimony was heavily coached and not credible. In addition, the opposing advocate may ask on cross-examination whether the witnesses prepared testimony together or discussed it among themselves in depth. An affirma-

tive answer may suggest that the recollections of individual witnesses could have been influenced by the group discussion.

Arkansas Case

Another sequestration issue arose in an Arkansas case first heard before expedited Arbitrator Pedro G. Molina, on October 16, 1997. At the hearing Arbitrator Molina ordered the witnesses sequestered. The Postal Service presented its case, involving a Letter of Warning, and rested. A recess followed, during which time the union advocate spoke with another union witness about his upcoming testi-

mony. The advocate was reviewing testimony with the witness concerning matters discussed between the two the night before the hearing.

When the parties returned to the hearing room the Postal Service advocate made a motion to dis-

miss the grievance, alleging that the union advocate had violated the arbitrator's sequestration order by speaking with his union witness. At this point the NALC advocate suggested, and the arbitrator agreed, that the case should be transferred to the regular regional panel.

Regional Arbitrator Leonard C. Bajork heard the case in Forth Smith, Arkansas on January 13, 1998. The Postal Service advocate immediately demanded a ruling on the alleged NALC violation of the sequestration rule. In a remarkable violation of basic advocacy behavior rules, the advocate refused to go

forward with the case's merits until the arbitrator ruled. He asked that the case be dismissed or that the arbitrator "draw an adverse inference" based on the alleged violation of the sequestration rule.

Arbitrator Bajork squarely rejected the Postal Service's argument that the NALC representative had violated Arbitrator Molina's standing sequestration order by speaking with a witness during a recess prior to the start of the union's case. Bajork's discussion is well worth a lengthy quotation:

First, the rule on sequestration is designed to insure against each witness' testimony from being colored by what another witness said. Within certain other jurisdictions, witness sequestration takes the form of establishing a witness "waiting room." The rule governs the conduct of witnesses. It does not govern the conduct of a party's representative.

... Surely, there is no rule against a representative ... reviewing with the witness, testimony before it is given. Nor is there a rule which prohibits a representative from reproaching a witness about planned testimony which the other party's witness may have earlier contradicted. There is nothing wrong with a representative's case management so long as it is designed to elicit the truth of a matter. Apparently, the Union representative's purpose for calling the witness which the Employer observed the representative speaking with was to formally introduce a document. I find nothing improper with the Employer's observation of the Union representative speaking with his witness prior to the witness giving his or her testimony

**Regional Arbitrator
Bajork: "The
[sequestration]
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of a party's
representative."**

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No *Ex Parte* Communications

Both Sides Must Hear Closing Arguments

Most advocates know there is a rule against *ex parte* communications with an arbitrator. But can we clearly define *ex parte* contacts? Are there special rules that apply in NALC arbitrations?

The Rule

Ex parte is Latin, meaning "by or for one side only." And *ex parte* communication is, generally, a communication between one party in a proceeding and the decision-maker—without the other party (or parties) present.

Prohibitions on *ex parte* communications apply to judges, arbitrators, advocates and parties in virtually all legal and administrative hearings and similar processes, including arbitration. There are two main reasons for the *ex parte* communications ban:

1. It preserves the integrity of the process by preventing impropri-

ety—the use of "secret" or off-the-record information—or the appearance of impropriety, in decision making; and

2. It ensures that all parties have a fair opportunity to address the issues and comments made by their adversaries.

Generally, the communications prohibited by the *ex parte* rule concern the *merits* of a case which is before a decision-maker and which has not yet been finally decided. So the rule typically prohibits the presentation or discussion of facts or arguments, but usually permits conversations about routine matters such as the scheduling of a case. And the *ex parte* rule does not generally ban one-party conversations with an arbitrator about matters unrelated to a case—the weather, the news and so forth.

Although *ex parte* contacts are widely viewed as improper in labor arbitration, there do not appear to be any detailed *ex parte* communications rules governing the arbitral field in general. The code of ethics for labor arbitrators adopted jointly by the American Arbitration Association, the National Academy of Arbitrators and the Federal Mediation and Conciliation Service does prohibit *ex parte* briefs, at Rule 6(A)(2):

2. *An arbitrator must not consider a post hearing brief or submission that has not been provided to the other party.*

And the American Arbitration Association's special rules for cases conducted by that organization provide a blanket rule forbidding any communication with the arbitrator outside the hearing whatsoever unless the parties consent:

45. *Communication with Arbitrator*

There shall be no communication between the parties and a neutral arbitrator other than at oral hearings, unless the parties and the arbitrator agree otherwise. Any other oral or written communication from the parties to the arbitrator shall be directed to the AAA for transmittal to the arbitrator.

National MOU

NALC and the U.S. Postal Service have executed a National Memorandum of Understanding explicitly governing *ex parte* communica-

Speak with a Witness? . . .

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on the record in the absence of evidence of some impropriety. Yet even were there evidence, it would not have established a violation of the sequestration rule.

Arbitrator Bajork's decision is particularly helpful because it explains that sequestration applies to witnesses but does not control the communications between an advocate and witnesses. There are some restraints on an advocate's conversations with a witness whose testimony is in progress—for instance, an advocate may not call a break in the middle of a witness's testimony to give the witness advice on how

the testimony is going or how it might be improved. But that has nothing to do with sequestration, which addresses only the separation of witnesses from the hearing room until it is time for them to testify.

One exception to the usual sequestration rule concerns the grievant, who always has the right to attend all of the hearing. Similarly, the union has the right to keep a technical assistant in the hearing room at all times even though the T/A may also be a witness in the case. (See "Sequestration and Technical Assistants: Should Witness TAs be Sequestered?" NALC Arbitration Advocate, Volume 1, Issue 3, November 1997, pp. 6-8.) □

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Ex Parte . . .

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tions in NALC-USPS arbitrations. (M-00815, April 11, 1988). It provides:

The United States Postal Service and the National Association of Letter Carriers, AFL-CIO, agree that in order to maintain the integrity of the arbitral process, the parties and their agents, employees and representatives should avoid the least appearance of impropriety when making contact with an arbitrator. The parties must maintain an arms length relationship with the arbitrator at all times.

Ex parte communication with an arbitrator regarding the merits of a dispute, whether oral or written, shall not be permitted. Whenever it is necessary to contact an arbitrator relative to the merits of a matter in a dispute, the contact must in all instances be made jointly or with the concurrence of both parties. Ex parte communications made in the ordinary course of business regarding necessary, routine scheduling matters are permissible.

Any dispute arising from the constraints of this agreement must be brought to the attention of the parties signing this Agreement at the national level.

This contractually binding *ex parte* communications rule governs the conduct of advocates for both NALC and the Postal Service. It specifically bans oral or written communications with the arbitrator about the *merits* of a dispute, but permits one party to contact an arbitrator regarding routine scheduling matters when necessary.

The rule also applies when an arbitrator invites or initiates an inappropriate *ex parte* communication with an advocate. A few advocates have reported being approached by an arbitrator seeking extra information about a case outside the hearing, before it has been decided. An NALC advocate's response must be: "No, I cannot discuss the merits of the case with you."

Any other response would undermine the integrity and trust that both parties need to conduct a fair arbitral process. And in fact, an approach of this kind from an arbitrator may sow seeds of distrust even when an advocate properly refuses to "go there." Is it likely that such an arbitrator is initiating

and any number of other topics are available and allowed.

Ex Parte Closing Prohibited

A recent Step 4 pre-arbitration settlement addressed a situation in which a management advocate raised an issue of *ex parte* communications. (M-01315, May 21, 1998). In a regular regional arbitration hearing the Postal Service advocate indicated that management would file a post-hearing brief in lieu of a closing argument. The union advocate chose to close orally. The arbitrator decided to exclude management from the hearing room while the union made its oral closing.

Management objected and sent the issue to Step 4.

NALC and USPS agreed at the national level that the arbitrator's order excluding an advocate from the other side's closing argument would have resulted in an

improper *ex parte* communication in violation of the national MOU. The key portion of the settlement follows:

The issue in this grievance is whether a party who chooses to file a post-hearing brief may be excluded from an arbitration hearing during the time in which the other party presents oral closing arguments.

In this case, the regular arbitrator issued a ruling that would have excluded the employer's representative from the hearing room during the Union's oral closing statement.

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The National Memorandum prohibits *ex parte* oral or written communications between NALC and USPS advocates and the arbitrator about the merits of a dispute.

similar discussions with the other side?

The memorandum does not, of course, offer a detailed guide to all the types of contacts and conversations that may violate the *ex parte* rule. What about a very common situation—those times when management's side takes a caucus and the NALC advocate remains in the hearing room with the arbitrator? Or when one advocate gives the arbitrator a ride to the airport? There is nothing wrong with being alone with the arbitrator, and there is no need to avoid conversation so long as it does not concern the facts or arguments involved in the case. Once again, the weather, the news

Ex Parte . . .*(continued from page 7)*

During our discussion, we mutually agreed to settle the issue represented as follows:

In the absence of a contractual provision to the contrary, an arbitrator has inherent authority to decide procedural questions raised at the arbitration hearing. At the same time, the arbitrator has no authority to contradict procedural rules that the parties themselves have bargained for and made a part of their Collective Bargaining Agreement.

In this particular case, the MOU on ex parte communication would prohibit the ruling made by this particular arbitrator. In light of the above, this grievance will be remanded to regional arbitration in accordance with the memo on Step 4 procedures.

The Union will be given an opportunity to reconsider its decision in this particular case not to file a brief. If the Union decides to close orally, the USPS representatives will not be excluded from the hearing during closing arguments. At the time the employer files its brief, a copy must be sent to the Union. We further agree that the Union, at its discretion, may request leave from the arbitrator in this case to file a reply brief at that time.

Some advocates might see a "rough parity" in the arbitrator's exclusion of management from the union's closing argument where management intended to file a brief. After all, why should management have the benefit of hearing NALC's closing before sitting down to compose its brief? That would give management an advantage—unlike an even exchange of arguments given together at the close of

the hearing, or an even exchange of briefs on a later deadline.

However, the national parties' settlement solves a more serious problem of *ex parte* communications. If the ruling had been allowed to stand, then one party would have been excluded from part of the hearing itself. An impartial hearing is the heart of the arbitral system of justice. Its fairness is sacrosanct.

The *ex parte* rule guarantees the parties access to the arbitrator in an open forum, where each can observe and respond to the other.

The *ex parte* rule keeps hearings fair by guaranteeing the parties access to the arbitrator in an open forum, where each can observe and respond to the other. Private or secret communications between one party and the neutral—even when nothing improper occurs—would undermine the integrity of the process. And all parties—the grievant, the union and management—have strong interests in protecting the fairness of arbitration. □

Mail Volume Affects Street Time Management Denials Ruled "Not Credible"

A regional arbitrator has flatly rejected management arguments that varying daily mail volume has no appreciable affect on the amount of street time required to complete a route. Regional Arbitrator Michael E. McGown found such arguments "not credible" when management used them to justify removing a 18-year carrier in Altus, Oklahoma. C-18612, August 11, 1998.

Management removed the letter carrier, a former NALC steward with a park-and-loop route, based on two charges: (1) repeated, unauthorized use of overtime and (2) failure to provide an accurate estimate for delivery of the carrier's assigned route.

The first charge involved a series of incidents in which management had repeatedly denied the

carrier overtime or had attempted to restrict the overtime which the carrier could use to complete his route. NALC disputed many of management's allegations, producing evidence that the carrier had indeed filled out Forms 3996 and had informed the supervisor that additional overtime would be needed. The union addressed each alleged incident one day at a time, casting doubt on management's version of the facts.

At the Altus Post Office management followed a common Postal Service practice: Carriers were not permitted to see how much DPS mail they had each day. The carrier's supervisor testified that:

... carriers were not ... required to count or measure mail, but they generally make an assess-

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ment of their mail volume either before or while casing. He conceded that, while carriers could "glance at" the DPS mail, they would not necessarily be able to see which trays were theirs, and they were not allowed to review their DPS mail prior to making their time estimates.

The supervisor maintained that, "DPS mail is at the station when the carriers arrive and *does not add significantly to delivery time.*" (Emphasis added.) The same supervisor had repeatedly pressed the carrier for accurate estimates of his overtime, and he ultimately cited "inaccurate estimates of overtime" as a charge in the removal. (Management's allegations actually appeared to boil down to "expansion of street time"—but that was not charged explicitly.)

Arbitrator McGown ruled that the grievant's testimony was credible; he found it "difficult to comprehend" why a carrier would suddenly become unreliable after eighteen years of service. However, his most significant findings concerned the charge of "inaccurate estimates" of overtime:

First, it seems to the Arbitrator that if a carrier is expected to make an estimate, then it is unreasonable for management to fault the carrier when the estimate proves not to be accurate. An estimate is, by definition, a rough calculation, while accurate means "having no errors." Thus, the two terms are, at least in the mind of this Arbitrator, somewhat incongruous. Second, it is hard to comprehend how a carrier can be expected to make such an accurate estimate when the carrier is not permitted to see the DPS

mail that forms part of the entire volume of mail that he will be expected to deliver. Evidence offered at the Hearing .. shows the volume of mail delivered by the Grievant on the day in question. These records indicate that DPS mail volume ranged from a low of 721 pieces on June 19 to a high of 2,517 on July 5. Given that the latter amount is over three times as much as the former, it is difficult for the arbi-

trator to credit the testimony of [the supervisor] that DPS mail does not add significantly to delivery time. Nor is it likely that a carrier could accurately assess his time requirements in the absence of such information. In a similar vein, it is noted that the Grievant's total available volume ranged from a low 9.25 (with 6 parcels) on June 24 to a high of 24.00 (with 26 parcels) on July 5. Nonetheless, the Arbitrator was presented with supervisory testimony suggesting that the number of parcels that a carrier has to deliver does not increase substantially the time required to complete the route. These claims by the Employer are simply not deemed credible by the Arbitrator. As a result, it is the conclusion of the Arbitrator that the second charge—failure to provide an accurate estimate for delivery—cannot be sustained, for the Employer's own witness agreed that carriers were being asked to make accurate estimates without hav-

ing full knowledge of the quantity of mail that they would be required to deliver.

Arbitrator McGown reversed the grievant's removal and ordered him reinstated and made whole. His decision stands for two important points that NALC advocates

should advance in similar cases:

1. Mail volume affects street time. Postal management has attempted to ignore, minimize or outright deny this obvious and indisputable fact over and over

" ... it is difficult for the arbitrator to credit the testimony of [the supervisor] that DPS mail does not add significantly to delivery time.

again as it has implemented DPS across the country. Yet every letter carrier knows what Arbitrator McGown came to conclude—that management's position on this issue was utterly nonsensical.

2. A carrier cannot estimate delivery time without seeing the DPS mail. This fact is inescapable once it is understood that mail volume affects street time. In its zeal to shield its consciousness from any evidence that carriers actually need to see and touch DPS mail, management has made it a policy to permit carriers to see DPS mail only as they leave the station and go out on the route. Yet this practice undermines any management claim that a carrier failed to make an "accurate estimate" of the delivery time, including any overtime that may be required to finish the route. If management wishes carriers to predict their overtime with anything approaching reasonable accuracy, it must provide the carrier with some basic information about mail volume. □

Arguing for Progressive Remedies

Increasing Remedies to Stop Repetitive Violations

Every experienced advocate has faced the problem of repeated management contract violations. In some offices supervisors repeatedly violate the contract, either because they don't know its provisions or simply do not care to follow them. Contract compliance is difficult to achieve in such offices, and in some cases even repeated arbitration awards can fail to stop management from piling up additional violations.

Most union advocates try to solve the problem of runaway violations by arguing that arbitrators should grant additional remedies. Take, for instance, the situation in which management refuses to grant a special route inspection although the requirements of M-39 Section 271g have been met. Beyond the issue of "harm suffered," NALC also requests a monetary remedy in many cases *simply to remedy management's repeated violations*. (See "Remedy for Delayed Adjustments - Proof of Harm Supports Advocate's Demand for Remedies," in the May, 1998 *Advocate* at pp. 11-12.).

Analogy to Progressive Discipline

Some advocates have made an analogy to progressive discipline: If carriers must suffer progressive "remedies" for violations of their contractual obligations—in an employee's case, discipline ranging from letters of warning up to removal—then management, too, should be subject to increasingly severe remedies when it repeatedly,

flagrantly or intentionally violates the contract.

Management advocates resist NALC calls for extra, usually monetary remedies even where its own violations have been flagrant and repetitive. Their arguments usually follow these general themes:

1. The arbitrator cannot issue such a remedy because the contract does not provide for it.
2. The arbitrator can only make a grievant whole for proven harm.
3. The arbitrator can decide only the particular case, and the particular violation, which is grieved and brought to the arbitration tribunal for decision. The arbitrator cannot issue "injunctive" remedies to try to influence management's future conduct.
4. It is beyond an arbitrator's authority to impose "punitive damages" on the employer.

NALC advocates can make several strong arguments, backed by substantial precedent, to overcome such management claims. First, the United States Supreme Court established, in three 1960 decisions known as the *Steelworkers Trilogy*, both the independence of arbitrators and the federal policy uphold-

ing final and binding arbitration as the preferred method for resolving labor disputes. In one of those cases, *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960) the Court established beyond any doubt that the arbitrator has particularly broad powers to formulate remedies in response to a wide variety of contractual violations:

When an Arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem.

This is especially true when it comes to formulating remedies. There is the need for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of specific remedies which should be awarded to meet a particular contingency.

Management, too, should be subject to increasingly severe remedies when it repeatedly, flagrantly or intentionally violates the contract.

lar contingency.

Numerous arbitrators deciding cases under the NALC-USPS National Agreement have ruled that arbitrators have inherent powers to fashion a remedy to correct a wide variety of wrongs. For instance, National Arbitrator Howard Gamser wrote:

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Progressive Remedies . . .

(continued from page 10)

... [T]o provide for an appropriate remedy for breaches of the terms of the agreement, even where no specific provision

defining the nature of such remedy is to be found in the agreement, certainly is found within the inherent powers of the arbitrator.

C-03200, April 3, 1979, page 8. For additional discussion of this issue see "Making Management Pay: Arguing for Monetary Remedies Beyond Back Pay," in the November, 1997 *Advocate*.

As for the management arguments challenging arbitral authority to issue "injunctive relief," advocates can point out that arbitrators routinely order management to perform specific acts. It is common-

place for arbitrators to order management to reinstate employees, or to expunge any record of a disciplinary action from the grievant's record.

Arbitrators also routinely control future management behavior by issuing "cease and desist" orders to stop harassment of employees or other repeated contract violations. In fact, advocates seeking additional remedies for repeated violations should point out any previous cease-and-desist orders which cover the same issue in the same office. The case for an additional remedy is stronger yet if management has flagrantly ignored previous arbitration decisions.

Finally, a request for a monetary remedy in a case of repeated violations is *not* the same as a request for "punitive damages." Most arbitrators will not entertain requests for punitive remedies, so

NALC advocates have little to gain by requesting them. However, that does not mean that a remedy is "punitive" simply because it is not based on a scientifically measurable degree of "harm."

On the contrary, both the grievant and the union have powerful interests in contractual compliance. Repetitive contractual violations, especially those that appear flagrant or intentional, certainly do harm to those interests. Arbitrators have the authority to make reasonable monetary awards, or to fashion other remedies, to make a grievant whole for that harm. When repeated violations lead to repeated arbitrations, advocates should argue that the harm increases with each new violation, and that the arbitrator should increase the remedy accordingly. Anything less would fail make the grievant whole. □

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Note on Citations

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