

# NALC Arbitration Advocate

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## Making Management Pay *Arguing for Monetary Remedies Beyond Back Pay*

Some grievances call for remedies which are easy to define. In a discipline case, NALC typically seeks to have the discipline rescinded and the grievant made whole for all lost wages, benefits and rights. When a grievant is improperly denied holiday work, the union seeks payment for that work. Generally, the Postal Service accepts that these sorts of remedies are appropriate once a violation is established.

Yet remedies are often a battleground in arbitration. In many cases the Postal Service advocate may argue that a "cease and desist" order is sufficient and that no further remedy is either appropriate or available. The Joint Statement on Violence, for example, involved a hotly disputed issue of what remedies an arbitrator could order to address abusive supervisory behavior. (See the articles in the May, 1997 and August, 1997 issues of the Advocate.)

Most arguments about remedies grow out of more mundane disputes, of course. For instance, when the employer violates the

contract by assigning mandatory overtime to carrier A rather than to carrier B, NALC typically files grievances on behalf of both employees. The union insists that the employee who should have been worked deserves the pay he or she would have earned. And NALC

also argues that the employee who worked deserves a monetary remedy for being forced to work when he or she should have had that time off. In the latter situation the Postal Service sometimes challenges the union's remedy request.

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## No Blanket Discipline Policies *Mandated Discipline Overturned*

Regional Arbitrator Michael E. McGown overturned discipline based on a management directive that ordered supervisors to discipline carriers for all safety rule violations resulting in vehicle accidents. His award overturned a carrier's 7-day suspension solely because it was issued under the "blanket" disciplinary policy. C-16436, January 31, 1997.

In February, 1996 a Lakeland, Florida letter carrier had a low-speed vehicle accident, his only accident while working as a letter carrier. In a conversation with the

NALC shop steward, the carrier's supervisor said he expected management to issue the carrier a letter of warning. Instead, after internal discussions management suspended the carrier for seven days.

At the arbitration hearing over the discipline it became clear that management issued the suspension in response to a policy directive from the Suncoast District Manager. The policy stated:

*The increase in accidents, injuries and associated costs are far above our goals and is a*

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## No Blanket Discipline . . .

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*trend which must be reversed. Therefore, effective immediately, any violation of a safety rule or procedure will result in discipline.*

*The type of disciplinary action will be determined by the facts of the individual case and in accordance with the following general instructions:*

1. *Violations of safety rules, regardless of whether or not they result in accidents or injuries, which display extreme carelessness by the employee will normally result in a suspension regardless of the employee's past record for accidents/injuries.*

2. *Violations of safety rules, regardless of whether or not they result in accidents or injuries, which display a lesser degree of carelessness than in Item #1 above and with a past history of at-fault accident(s) may warrant a suspension. With no past record, a letter of warning will be considered.*

The letter then listed examples of "extreme carelessness" resulting in an accident. It ordered managers to read the directive's contents to all employees and post it on bulletin boards.

At the hearing the union challenged not only the merits of the discipline, but also the fact that it was issued in response to a mandatory policy. The union argued that the district disciplinary policy effectively removed discretion from the carrier's initial supervisor to either make the decision whether to issue discipline or to resolve the grievance at Step 1. It also argued that the 7-day suspension was punitive and constituted disparate treat-

ment, because a letter of warning had long been the usual measure of discipline for a first, non-serious vehicle accident. Management argued that the district directive did not mandate disciplinary action and that the discipline was otherwise appropriate.

Arbitrator McGown found that the district letter's language conflicted directly with Article 16.1, which states, "No employee may be disciplined except for just cause such as, ... failure to observe safety rules and regulations." His decision then went on to state a classic case for overturning discipline because it resulted from a mandate issued by higher level management:

*In the view of the Arbitrator this language permits—but does not require—disciplinary action to be imposed for safety violations.*

*By comparison, the District Directive states, in relevant part, that*

*"... any violation of a safety rule or procedure will result in disciplinary action." This language clearly requires supervisors in the District to impose discipline, whether or not the supervisor believes that discipline is warranted under the facts of particular situation. Thus, ... the District Directive is a mandate, since it creates within the District a policy under which all safety violations result in disciplinary action, thereby effectively removing supervisor discretion. In short, a supervisor ... is ... required to impose discipline. It follows therefrom that a supervisor lacking such discretion at the decision-making stage also lacks the authority to*

*resolve a Step 1 grievance filed to protest the discipline. Thus, the Arbitrator is required to conclude that the District Directive, by ordering discipline to be imposed by any violation, conflicts with the principles espoused in Article 16, Section 1 of the National Agreement, and thereby violates the fundamental right of an employee to a disciplinary determination unfettered by mandates from higher level authority.*

Arbitrator McGown's award ordered management to rescind the suspension and make the grievant whole. It declined to even address the merits of the particular disciplinary action.

NALC advocates should be alert to internal management policies that may amount to "blanket

**All "blanket"  
disciplinary policies  
violate the just  
cause principle.**

discipline" policies. Such directives remove from first-line supervisors the individual discretion to investigate and decide whether to issue discipline and what level of discipline to impose. They violate a fundamental requirement of just cause—that management investigate each case carefully and consider the facts involved before making disciplinary decisions. No "blanket discipline policy" can pass muster under the just cause standard because such policies cannot treat individual cases according to their unique circumstances—the severity of the infraction, the record of the grievant and so forth. This award from Arbitrator McGown is powerful proof that NALC can successfully overturn blanket disciplinary policies in any form, whether they are called "safety" directives, "zero tolerance policies," or by any other name. □

## Monetary Remedies . . .

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The following "sample" closing arguments are intended to illustrate the likely terms of such a dispute over remedies. The sample management argument is typical of what NALC advocates should expect to hear from some management advocates in arbitration. (In fact, the USPS headquarters arbitration department has urged management advocates to make these types of arguments.) A sample NALC closing argument follows, supporting the union's request for a monetary remedy due to an improper assignment of mandatory overtime.

The sample union argument is intended to illustrate the principles underlying these types of disputes. It is not intended to be the "last word" on this subject, of course. Effective advocates always supplement borrowed ideas with their own research and make sure their own arguments are customized to fit each case's unique circumstances.

## Postal Service Argument

Mr. Arbitrator, even if you do find, ultimately, that the Postal Service violated the contract by assigning the grievant to work overtime last October 14, there is no basis whatever for an award of money damages in this case. As the grievant herself testified, she received pay for the overtime she did work at one and one-half times her regular rate of pay. That is precisely the full compensation to which she is entitled under the National Agreement. Her overtime pay was, therefore, the only compensation to which she is entitled and the union is wrong in requesting an additional remedy.

Nowhere in the contract is it stated that some extraordinary, punitive remedy is ever due for a contractual violation. In fact a punitive award against the employer is improper in the context of any labor contract, absent specific language providing for such a remedy. This National Agreement contains no provision guaranteeing double payment of overtime, even where a violation of the mandatory overtime provisions has been proven.

Moreover, I would point out, Mr. Arbitrator, that our National Agreement specifically prohibits arbitrators from adding to or going beyond the language of the contract. Article 15, Section 4.A.6 provides: "... in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator." So if you were to order additional payment you would be exceeding your authority as an arbitrator. Your authority arises under the contract and is defined solely by the contract. An award which exceeds an arbitrator's authority is subject to legal challenge in the courts, and the Postal Service has actively litigated in the federal courts to vacate awards when it believed that arbitrators had overstepped their authority under the National Agreement.

Mr. Arbitrator, even if you decide to rule, against the employer's very strong urging, that you have the authority to award an extra monetary remedy in this case, the Postal Service must point out that there simply is no basis in the record of this case for such a remedy. The NALC appears to want the Postal Service to pay monetary damages simply because a contract violation has allegedly occurred. But the contract does not require the employer to pay for an alleged violation which is, at most, a harm-

less error.

To obtain a monetary remedy the union has the burden of demonstrating that the grievant has been harmed as a direct result of the alleged violation. Without proof of harm reasonably related to the violation, the union has no basis at all for its remedy request. Although the grievant did have to work on October 14, she was fully compensated for that work. She did testify that she missed an event at her child's school. Although unfortunate, this occurrence does not entitle the grievant to monetary damages. The employer has not taken on, as part of its collective bargaining agreement, an obligation to pay employees whose home schedules or family lives are inconvenienced as a result of their working times. Nor has the employer agreed, as part of the National Agreement, to pay damages for alleged emotional harm. This is an arbitration conducted under a labor contract, rather than an action for personal injury brought in a court of law, and labor arbitrators simply have no authority to award money damages for pain and suffering. The employer has agreed to pay extra wages for overtime, it has already done so and that is all it can be required to pay. So anything more than an order for the employer to cease and desist would be wholly punitive and unjustifiable.

For all of these reasons, Mr.

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### Note on Case Citations

*Please note that the C-number cases cited in this publication are available to interested advocates. All cases are available from the office of the National Business Agent and all but the newest cases are available on the NALC Arbitration CD-ROMS.*

## Monetary Remedies . . .

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Arbitrator, no monetary remedy is due in this case even if you do find that the Postal Service violated the National Agreement.

## NALC Argument

Mr. Arbitrator, the Grievant is clearly entitled to the remedy requested in this case, which consists of an *additional* one and one-half times her base rate of pay for each hour of overtime she was wrongly required to work last October 14<sup>th</sup>. The Union does not request payment for the overtime worked by the Grievant on October 14<sup>th</sup>. Those wages were paid long ago. Rather, the Union requests payment of a monetary remedy equal to that overtime pay, because the Postal Service flagrantly violated the contract, causing direct harm to the Grievant.

The Postal Service has made a series of baseless arguments today in its final attempt to find a way to deny the Grievant the small compensation that NALC seeks on her behalf. First, the Employer has launched an attack on your inherent powers to formulate remedies for violations of the National Agreement. It has bolstered this attack on your authority with threats of legal action. The Employer also argues that the direct harm it caused to the grievant was trivial—which it was not—and that in any event, the Postal Service can violate the contract with impunity and then wash its hands of the consequences. None of these assertions bears any relationship to reality.

First, the arbitrator clearly has authority under the National Agreement to formulate and order a monetary remedy in this case. An arbitrator has inherent authority

under the contract to formulate remedies for every sort of contract violation. I have handed you the decision of National Arbitrator Howard Gamser, C-3200, NC-S-5426, April 3, 1979, in which the arbitrator wrote, at page 8:

*However, to provide for an appropriate remedy for breaches of the terms of an agreement, even where no specific provision defining the nature of such a remedy is to be found in the agreement, certainly is found within the inherent powers of the arbitrator. No lengthy citations or discussion of the nature of the dispute resolution process which these parties have mutually agreed to is necessary to support such a conclusion.*

Regional Arbitrator Bowles addressed this issue in a detailed and scholarly decision which you have before you, C-01641, C8N-4F-13163, April 23, 1981. Unlike Arbitrator Gamser, Arbitrator Bowles did cite many authorities, starting with the very highest authority on the issue of the arbitrator's authority, the Supreme Court of the United States. I quote from the marked portion of the decision, as follows:

*On the other hand, much has been decided as to the power of the Arbitrator to provide remedies. The employer does not argue that the Arbitrator is without power or jurisdiction to decide a dispute of this kind, or this specific dispute; the argument is that he cannot provide the remedy requested by*

*the Union. In Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 [597] (1960) the United States Supreme Court ruled:*

*"When an Arbitrator is commissioned to interpret and apply the collective bargaining agree-*

*ment, 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 va-*

*riety of situations. The draftsmen may never have thought of specific remedies which should be awarded to meet a particular contingency."*

Mr. Arbitrator, the *Enterprise Wheel* decision is one of the three cases making up the Supreme Court's 1960 *Steelworkers Trilogy*, which established both the independence of arbitrators and the federal policy upholding final and binding arbitration as the preferred method for resolving labor disputes. In *Enterprise Wheel* the Supreme Court established beyond any doubt that the arbitrator has particularly broad powers to formulate remedies in response to a wide variety of contractual violations.

Many experienced postal arbitrators at the national and regional levels have upheld an arbitrator's broad remedial powers under this National Agreement. National Arbitrator Benjamin Aaron ruled in

**In *Enterprise Wheel* the Supreme Court gave arbitrators broad authority and flexibility, especially when it comes to formulating remedies.**

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## Monetary Remedies . . .

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C-4519, H1N-5F-D-2560, December 19, 1984, as follows:

*Insistence that the absence of specific language in the National Agreement or the ELM requiring or permitting the granting of interest absolutely deprives an arbitrator of the authority to award interest in any case is unwarranted. Arbitrators are often called upon to interpret ambiguous language, the meaning of which is disputed by the parties. To do this, they require some leeway in the exercise of their discretion, especially in formulating appropriate types of relief for employees who have been unfairly punished.*

Regional Arbitrator Eaton explained, in two different awards, the rationale for providing a remedy for a contractual violation where the contract contains no explicit remedial provisions. First, in C-03039, W8N-5K-C-13928, February 10, 1983, he wrote:

*It flies in the face of equitable considerations, as well as good faith enforcement of contractual requirements, to deny a remedy where a violation has occurred. As the common law maxim has long had it, "There is no right without a remedy." Nor is the party who has violated the Contract—Local or National—given much incentive to observe it in the future if the violation is allowed to occur without penalty.*

And again, in C-04543, WIN-5G-C-24783, December 6, 1984, Arbitrator Eaton wrote:

*In this regard, the argument of the Postal Service that the National Agreement does not provide for a remedy in the event of a violation of the posting requirement at issue, must be re-*

*jected. It is an ancient accepted maxim of law in any form, be it common law, statutory law, or the law and practice of collective bargaining, that, "without a remedy, there is no right." The parties to the National Agreement did not fashion empty provisions, nor did they intend that violation of the rights therein provided should occur, or continue, with impunity.*

National Arbitrator Mittenthal further explained the arbitrator's inherent remedial powers in C-3234, N8-NA-0141, July 7, 1980, as follows:

*If a violation of the Memorandum has occurred, as NALC claims, the arbitrator must then formulate an appropriate remedy. The authority to do so is implicit in the terms of the National Agreement. Indeed, the remedy for an alleged violation is a facet of every grievance. ... Hence, when the arbitrator considers the grievance and finds merit in the NALC claim, he is free to deal with the remedy question. That must have been contemplated by the parties. The grievance procedure is a system not only for adjudicating rights but also for redressing wrongs.*

I also offer, Mr. Arbitrator, three decisions in which arbitrators have ordered monetary remedies for improperly assigned mandatory overtime under this National Agreement—the very same type of violation which is before you today.

*[Discussion of individual cases omitted for purposes of brevity.]* In all three cases the arbitrators exercised their broad remedial authority to redress wrongs. You have that power, Mr. Arbitrator, and you should reject out of hand the Postal Service's attack on your remedial authority.

The facts this particular case cry out for a remedy. The Grievant gave unchallenged testimony that she spoke with her supervisor not once, not twice but three times in advance about her plans to be with her nine-year-old son at his musical recital last October 14<sup>th</sup>. The Grievant even offered to take the day off to ensure that she would be free and with her son by 4:30 that afternoon. Yet when that important day came, the supervisor broke all of the contractual rules and ordered

**Numerous arbitrators at the national and regional levels have established the broad reach of the arbitrator's remedial powers.**

her to work two and one-half hours of overtime. It is particularly outrageous that other carriers were available to do the work, including carriers on the overtime desired list. When the Grievant protested her supervisor's order he threatened her with discipline. She complied and paid a price, the high price of her son's deep disappointment and her own sorrow that she broke her promise and let him down.

Yet the Postal Service insists that it need not pay any remedy, despite the fact of the violation and the obvious harm it visited upon the Grievant. This is both irrational and irresponsible. Last October 14<sup>th</sup> the Postal Service gave overtime work to three employees—carriers

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## Sequestration and Technical Assistants

### *Should Witness TAs be Sequestered?*

Every experienced advocate knows that most arbitrators will honor a request to sequester the witnesses who will be testifying in an arbitration hearing. Arbitrators usually agree to separate the witnesses from the hearing until they are called to testify, because sequestration is seen as an aid to finding the truth.

Where different witnesses may offer different versions of the facts, sequestration keeps each witness's testimony from being "tainted" or sullied by the testimony of the other witnesses. In theory, a sequestered witness's testimony will reflect solely his or her own knowledge of the facts, given in response to questions put by the advocates. Witnesses sequestered outside the hearing room are prevented either from adopting the words and stories of witnesses on their own side of the dispute, or from formulating responses to counter the testimony

of the other party's witnesses.

Sequestration is a matter of hearing procedure governed by individual arbitrators, whose discretion is guided by the traditional practices or "common law" of labor arbitration. That common law is reflected in Rule 22 of the Voluntary Labor Arbitration Rules of the American Arbitration Association, which provides:

**22. Attendance at Hearings**

*Persons having a direct interest in the arbitration are entitled to attend hearings. The arbitrator shall have the power to require the retirement of any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.*

The classic book *Witnesses in Arbitration* notes two further procedural rules which supplement the practice of sequestration by protect-

ing witness testimony from improper influence. First, "While a witness is in the process of testifying, there should be no discussion of the testimony with anyone." So, for example, when the parties decide to take a break from the hearing during a witness's testimony, the witness should not speak with anybody at all about the testimony during the break. And second, "Nor may a witness who has completed testimony discuss it with others waiting to testify." Such talk could undermine the sequestration. David Levin and Donald Grody, *Witnesses in Arbitration*, p. 84 (BNA Books 1987).

(Note that sequestration applies only to witnesses—to those who will be or may be giving testimony in the case. A union advocate may bring a non-witness observer to a hearing so long as the arbitrator grants permission. Observing an arbitration hearing can be an eye-opening experience for NALC shop stewards, for example, who learn how essential it is to investigate and document grievances thoroughly from the start.)

The value of sequestration may be exaggerated to some extent, because an effective arbitration advocate carefully prepares each witness in advance, running through the testimony repeatedly in practice sessions. Advocates should also educate each witness about how his or her testimony fits in with the case as a whole and with the testimony of other witnesses. Thorough witness preparation is the key to dashing management hopes for surprises or inconsistencies in the

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Fanelli and Roth, in addition to the Grievant. It paid each of these carriers time-and-a-half for the overtime. The Postal Service now has the audacity to claim that it has already paid the Grievant for its violation by paying her the overtime. If that is so, how are we to differentiate between the assignment of overtime work to Fanelli and Roth, which was correct under the National Agreement, and the assignment of overtime to the Grievant, which was clearly wrong? The Postal Service has not paid anything at all for this violation—at least not yet.

If the Grievant's right to time off last October 14<sup>th</sup> means anything, then the taking of her right and the resulting harm to the Grievant absolutely requires a remedy. The Union is not asking for "punitive damages," as the Postal Service asserts, but rather for compensation—payment for harm wrongly done. In fact, the paltry sum sought by the Union obviously cannot compensate fully for the damage which this Employer has done to the Grievant. Yet a genuine wrong has been committed under the contract which demands a remedy, and the Union requests that you, Mr. Arbitrator, exercise your authority to provide that remedy. Thank you. □

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## Sequestration & TAs . . .

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testimony of sequestered NALC witnesses.

Still, experienced NALC advocates know that sequestration of the other party's witnesses can sometimes help them to expose inconsistencies or other flaws in management's case. For instance, in a recent discipline case the factual dispute came down to the supervisor's word versus the carrier's word—there were no other witnesses to the key incident. The supervisor on direct that he had attended the Step 2 meeting on the grievance. He restated this claim when the NALC advocate asked him about it on cross-examination. Yet the Postmaster, sequestered during the supervisor's testimony, later testified that the supervisor had not attended that meeting. Three union participants in the meeting agreed. The result was a successful attack on the supervisor's overall credibility, a crucial issue in the case.

As another authority has noted:

*Sequestering of witnesses, in appropriate circumstances, can be an effective method of highlighting fabrications and inaccuracies that might not be apparent where witnesses have had an opportunity to hear the evidence presented by other members of the group.*

Elkouri & Elkouri, *How Arbitration Works*, p. 340 (BNA, 5<sup>th</sup> ed. 1997).

## Sequestration and Technical Assistants

Certain people have a right to be present throughout an arbitration hearing. The AAA rule quoted above states that persons with a "direct interest in the proceedings" are "entitled to be present."

This means that an individual grievant *always* has the right to be present throughout all parts of an arbitration hearing. This rule is almost universally applied by arbitrators whether or not the grievant is to testify and whether the case involves discipline or a contractual violation. NALC would strongly oppose any restriction whatever on this right of the grievant.

What about technical assistants? Does NALC's technical assistant have a "direct interest in the proceedings" and thus a right to attend all of the hearing even though the TA may also be called to testify? And what rules apply to a management TAs or some other USPS representative besides the management advocate?

A dispute over this issue arose in a 1990 Salt Lake City arbitration hearing, with Arbitrator Carlton J. Snow presiding. C-10214, August 17, 1990. Although the case was heard at the regional level, Arbitrator Snow currently serves as the only member of the NALC-USPS national arbitration panel, so even his regional decisions carry particular weight.

The case involved the removal of a letter carrier and NALC re-

quested that all witnesses—including management's technical assistant—be sequestered. Management argued strenuously against the exclusion of its TA. The arbitrator ruled that each party would be permitted the use of a TA throughout the hearing, but that management's TA could remain present only if he testified first in the employer's case. The arbitrator's ruling ensured that the TA's testimony was not tainted by observation of other witnesses' testimony.

Management argued in its post-hearing brief that the arbitrator's ruling handicapped and disadvantaged USPS in presenting its case by forcing the TA to testify first, and thus out of the sequence that the advocate had planned.

Arbitrator Snow analyzed this issue in depth and ultimately ruled in the employer's favor on the issue. He nonetheless overturned the removal after reasoning that the employer had not been prejudiced by his procedural ruling.

Snow's careful analysis of this issue was characteristic of this thoughtful arbitrator, who teaches law at the University of Willamette. He noted both that leading arbitral scholars supported both the granting of requests for witness sequestration, and the special right of the grievant to be present despite a sequestration order. "There is virtually no debate about the right of grievant to be present throughout an arbitration hearing."

In the case at hand the debate was about whether management may have somebody in addition to its advocate present throughout the hearing. Arbitrator Snow noted the first sentence of the AAA Rules: "Persons having a *direct interest* in the arbitration are entitled to attend hearings."

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**Sequestration can help to expose disparities in the stories of different Postal Service witnesses.**

## Sequestration & TAs . . .

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Snow cited arbitration authorities to establish that an exception to the sequestration procedure may permit one union or management representative, in addition to the advocate, to remain throughout the hearing. He quoted Levin & Grody, as follows:

*An exception to the sequestration procedure arises when an individual who is going to testify is needed to assist the advocate in the presentation of the case. For example, the company advocate may need a supervisor's or manager's assistance with the details of the case, or a union advocate might require a union representative's input on certain technical or factual aspects of the case. [...] (See, Levin & Grody, Witnesses in Arbitration, 84 (1987), emphasis added.)*

Snow went on to address the principle that "the real parties in interest" have a right to be present at a hearing. The USPS advocate had argued that he should have been treated as an outside advocate who needed the assistance of a TA/manager familiar with the details of the case—and that the manager was actually the "real party in interest."

The arbitrator rejected the "real party in interest" analysis, though, noting the difficulty of sorting out who is actually a "real party in interest" on the employer's side. It could be, Snow observed, a supervisor whose decision has been challenged, the employer as a corporate entity, or the advocate who represents both.

Instead, Snow adopted a "test of fairness," asking, "What approach to sequestration of witnesses will produce the most fair and orderly arbitration hearing?"

He concluded that he had ruled wrongly at the hearing: The exception to sequestration granted to the grievant "ought also to extend to a person designated by either party's advocate as essential for its presentation." Snow wrote:

*... it was incorrect to deny the Employer's request and to compel a compromise according to which management retained its technical assistant as a witness only if he testified first. While it ultimately was within the arbitrator's discretion to determine the order to be used for introducing evidence, it was not appropriate to condition the basis on which management could retain its designated representative throughout the hearing.*

Snow went on to lay out rules for examining requests that an individual be exempted from a sequestration order:

*"It is only with the grievant that the exception is automatic. If a person other than the advocate in the case is to serve as a designated representative for the employer, some word of explanation must be offered for the designation. If a person's presence is essential and either*

*party needs for him or her to be excepted from a sequestration order, the burden is on the party to persuade the arbitrator that the sequestration order should not be applied to a particular individual.*

Although he reversed his own ruling, Arbitrator Snow nonetheless sustained the union's grievance, reasoning that the error had not harmed the Postal Service because it had presented all of its testimony, albeit out of order, and the management TA had attended the entire hearing.

This decision gives NALC advocates a powerful shield against management arguments that the union TA cannot both testify and attend the entire hearing. NALC advocates should have a copy of this decision case in hand when planning to use a potential witness as a technical assistant. And when management challenges the presence of a union TA they should argue that, given Arbitrator Snow's status as the parties' national-level arbitrator, this regional ruling carries special authority because it reflects the thinking of the parties' top neutral. □

## Tips on Technical Assistants

### A Good TA is an Advocate's Best Friend

Experienced advocates love to have efficient and observant technical assistants. They know that an effective TA can do a great deal to make the case go smoothly, and also offer valuable help with the facts, the witnesses and questioning that make up the hearing process. What does a TA do, exactly, and how can an advocate use a TA effectively? Here are some tips from experienced advocates.

**Familiarity with the facts.** A well-chosen technical assistant should have special knowledge of the facts of the case which the advocate may not have. A TA from the grievant's station or installation may know the layout of the station, the carriers' usual starting times, the customs and practices followed in the local post office and additional facts that relate the particular case.

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## Tips on TAs . . .

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The advocate can use a knowledgeable TA to help prepare the case and to advise during the hearing.

### **Familiarity with the players.**

Every advocate is happy to have a TA who knows the grievant, the supervisor and other managers personally, and who can give advice about the likely behavior of such people during the hearing. It means a lot to an advocate to know, for example, that a key management witness tends to mumble, shift his feet and change his story under pressure, or that another speaks clearly and stands up well to cross-examination.

**Keeping a clean table.** A good TA is extremely well organized, especially when keeping the documents in order during the hearing.

He or she has four copies of each exhibit neatly arranged, numbered, and ready for the advocate to pick up at any time. The TA also collects, numbers and keeps management's exhibits well-organized and accessible. These "clean table" services are absolutely essential for the advocate, who wants to concentrate on the progress of the hearing and avoid having to flip through stacks of messy papers instead.

**Handling the grievant.** Many experienced advocates insist that the TA sit directly between the advocate and the grievant during the arbitration hearing. Typically the grievant cares deeply about the case and may tend to interrupt with taps on the elbow and whispered suggestions. By acting as a buffer, the TA can collect these comments and suggestions and deliver them at the right time, helping the advo-

cate to keep his or her attention riveted on the hearing. Most advocates do want input—observations, suggestions and advice—from both the grievant and the TA, but want it written down and passed on unobtrusively, or given during a break.

**Extra eyes and ears.** Many advocates, upon finishing their questions to each witness, routinely check with the TA and the grievant to ask if anything important was missed. The TA can be another good set of eyes and ears throughout the hearing. Sometimes the TA can perceive more "objectively" than the advocate just how well the union's story is playing out, how the arbitrator is reacting and what areas need to be strengthened. Many TAs routinely take notes on their observations, for delivery to the advocate during a break in the action. □

## Advocate's Rights

### *Time off to Prepare for Arbitration*

An expedited arbitrator has ruled that an NALC arbitration advocate from Texas City, Texas has the right to adequate time off work to prepare for an arbitration hearing. Arbitrator Ronald E. Bumpass decided on August 13, 1997 to postpone the hearing on a disciplinary grievance because the Postal Service had wrongfully denied the advocate's repeated requests for time off to prepare for the hearing.

The hearing, which was to have addressed a disciplinary case, had opened the previous day. The NALC advocate, a Local Business Agent who works full-time as a letter carrier in Texas City, raised

her procedural objection at the outset. The parties stipulated that NALC advocate had made re-

NALC advocate on her own behalf.

Management's advocate was aware of the requests and the denials, but stated that he had no authority to order the NALC advocate off the clock. Management further said it

**Management refused the NALC advocate's repeated requests for time off to prepare her case for arbitration.**

quests several times for time off to investigate and prepare her case. Her supervisor had denied each request and had given her time off only to come to the hearing. That issue was the subject of a separate, contractual grievance filed by the

believed that the union should have reassigned the case to a different advocate until such time as NALC advocate's contractual grievance was resolved.

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## Advocate's Rights . . .

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NALC argued that management had no right to deny the grievant the effective assistance of a competent, well-prepared advocate in arbitration by denying the union adequate preparation time. The union argued that permitting management to deny such preparation time would undermine the entire contractual scheme for resolving dispute through arbitration. NALC also objected to any suggestion that management should be permitted, by simply denying the advocate time off, to remove her from union advocate duties until such time as her contractual grievance over the matter was finally resolved.

Arbitrator Bumpass agreed with NALC, ordering the hearing postponed. He ordered management to take steps to instruct the union advocate's supervisor that she must be given sufficient time off work to prepare the case. The arbitrator suggested that the union should seek additional remedies if the union's advocate were not notified of the new arrangements or if the union believed the results were unreasonable.

Of all the NALC advocates working around the country, those who work full-time as letter carriers surely have the toughest advocacy jobs. They have to find the hours, somewhere between their family, work and other union responsibilities, to prepare a case for arbitration. Under the best of circumstances, preparation for a hearing requires both plenty of time and a nearly obsessive ability to focus completely on the details of the case during the days and hours before the hearing begins. In short, arbitration is a very hard thing to do part-time.

## No Exit from X-Route Money for Ignored Route Adjustments

Regional Arbitrator Nicholas R. Duda, Jr. ordered management in Largo, Florida to pay \$500.00 to each carrier whose route it had refused to adjust through the agreed-upon X-Route process. The decision held management accountable for acting unilaterally in withdrawing from the local X-Route process, a violation of the X-Route Memorandum of September, 1992. C-17214, July 9, 1997.

Following negotiation of the Six Memorandums of September, 1992, the NALC branch president and local postmaster in Largo negotiated and signed an X-Route agreement. The agreement set forth target DPS percentages and the procedures to be used in identifying X-Routes—routes slated for abolishment due to automation. It also set forth a dispute resolution procedure to resolve disagreements that arose concerning adjustments or other matters under the X-Route

agreement.

Arbitrator Duda correctly found that once the local parties decided to enter into an X-Route process and signed a local X-Route agreement, neither party could either change the agreement or withdraw from the X-Route process. The rules for the X-Route process are set forth in *Building Our Future by Working Together*, the national joint training guide that reprinted and explained all six of the September, 1992 Memorandums. The national Memorandum of Un-

derstanding on the X-Route process provides:

*... once the decision to use the X-Route Process has been finalized, that decision can only be changed through joint*

*agreement between the local Union and Management.*

The joint training guide further provides:

(Continued on page 11)

**Once the local parties enter into an X-Route agreement, no withdrawal is permitted except through the consent of both parties.**

Although this expedited award cannot be cited as precedent, it does illustrate the principle that management has affirmative obligations to cooperate with the grievance and arbitration processes. It must give paid time off to stewards to process grievances and investigate potential grievances. It must make its facilities and personnel available to assist in the

grievance-arbitration procedure. And it must give NALC advocates sufficient time off to prepare for an arbitration hearing.

Advocates who are denied sufficient time off should protest the matter in the case and in a separate grievance, and should contact the National Business Agent for assistance. □

## No Exit from X-Route . . .

(continued from page 10)

*An agreement by the local parties to pursue the X-Route process is binding and may not be changed except by mutual agreement.*

Yet the Largo X-Route process began to unravel after the parties began to implement it by jointly reviewing route inspection data. After a joint NALC-USPS team reviewed route data and made recommendations concerning the adjustment of certain routes at Seminole Station, the station manager rejected the recommendations because scheme changes would be required. From that point on management unilaterally withdrew from the local X-Route process at Seminole Station, failing even to

invoke the special dispute resolution procedure negotiated as part of the local X-Route agreement. Four the six affected routes later received special route inspections as requested by the carriers, and adjustments resulted.

The union grieved after it became clear that management was not going to adjust the routes in accordance with the negotiated X-Route process. In the grievance procedure management continued to assert that it was acting unilaterally.

Arbitrator Duda awarded a remedy of \$500.00 to each of the six affected employees, including those who had later received route adjustments. He rejected management arguments that no remedy was due those four, finding that they had requested special route inspections

only after management had "walked away" from its commitment to the joint process. The award called management's action "a flagrant breach of promise and commitment."

It is clear from the arbitrator's extensive citation of contractual materials and other facts that the NALC advocate did a thorough job of educating the arbitrator. The arbitrator clearly learned the significance of the national memorandums, the training guide explaining them and the local X-Route agreement. And it is also clear that he understood the course of the parties' dealings over the particular routes in question, well enough to fashion an award that compensated the grievants for management's flagrant and intentional refusal to honor its contractual obligations. □

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