

# NALC Arbitration Advocate

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## Arbitrators Enforce Joint Statement *Snow Award Permits Firing of Supervisors*

NALC advocates are targeting abusive supervisors, using the Joint Statement on Violence and Behavior in the Workplace against managers who intimidate, harass or threaten letter carriers. And postal supervisors are feeling the first stings of the national-level Snow award.

For the first time, union representatives are turning the tables on harassing managers, forcing them to account for their behavior and risk punishment for wrongdoing. Arbitrators are courageously enforcing the Joint Statement against postal supervisors who fail to follow its commandment of fundamental decency in the workplace. They are punishing just the sorts of shameful supervisory behavior that the Joint Statement was intended to eradicate—repeated harassment, displays of anger, shouting at employees, threats of discharge, shaking fingers in faces and other “in-your-face” physical and psychological intimidation. Supervisors are feeling the first stings of arbitral punishment for these types of misconduct.

Although NALC advocates

have pursued cases of supervisory harassment and intimidation to arbitration in the past, the Joint Statement on Violence and Behavior in the Workplace has given such cases a completely new cast—particularly

when it comes to remedies. Before the Joint Statement and the Snow award, many arbitrators felt their hands were tied when it came to remedying supervisory misconduct. Some arbitrators were willing to

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## New NALC Publication for Advocates

We are proud to present this inaugural issue of the NALC *Arbitration Advocate*. This new quarterly newsletter is intended for all those NALC representatives who enforce the National Agreement at the highest level of the grievance procedure—the arbitration hearing.

This newsletter, published by NALC’s Contract Administration Unit and Education Department, is intended to help our arbitration advocates keep abreast of current issues in the NALC arbitration arena. It will cover important national arbitration news, alert you to trends in management hearing tactics and give advice on counter-strategies, and highlight other issues and cases of urgent importance to the hundreds of NALC advocates nationwide.

To be successful, an advocate needs a broad base of knowledge, a host of well-honed hearing skills, plus a penchant for hard work and long hours. Advocates also need to learn continuously, reading and researching to augment their understanding of the contract and the arbitration process.

NALC salutes the job that you do as a union arbitration advocate. We hope this new publication assists your efforts to represent letter carriers and NALC to the best of your abilities.

*Vincent R. Sombrotto, President*

*William H. Young, Vice-President*

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order management to stop the harassment—but that was usually the extent of their remedial awards.

The Joint Statement on Violence and Behavior in the Workplace was signed in March, 1992 and the national Snow award of August 16, 1996 declared the Statement enforceable through the grievance-arbitration procedure. These two documents have given new weapons to union representatives seeking to reverse, correct and punish reprehensible supervisory behavior.

## Power to Punish

Carlton Snow's landmark award on the Joint Statement (C-15697) made two key rulings. First, he held that "the Joint Statement ... constitutes a contractually enforceable agreement between the parties. Accordingly, the Union shall have access to the negotiated grievance procedure set forth in the parties' collective bargaining agreement to resolve disputes arising under the Joint Statement." This ruling stunned the Postal Service, which had argued that the Joint Statement was a "pledge" or a "promise" or a "commitment"—but *not* a binding contractual obligation.

Second, arbitrator Snow gave his ruling teeth by specifying that

*... arbitrators have available to them the flexibility found in arbitral jurisprudence when it comes to formulating remedies, including removing a supervisor from his or her administrative duties.*

(Bold added.)

It is NALC's position that this ruling empowers a regional arbitrator to discharge a supervisor from postal employment, discipline a supervisor, remove a supervisor from duties involving supervision of letter carriers, or take any other action

which the arbitrator deems appropriate to remedy a supervisor's violation of the Joint Statement on Violence. NALC encourages advocates to request such remedies in appropriate cases of supervisory misconduct.

## Early Cases

Two regional arbitration cases decided even before Snow's historic award show how alert, aggressive NALC advocates have used the

Joint Statement to the union's best advantage.

**Renton, Washington.** In Renton, Washington, NALC's Northwest region pursued a case of supervisory misconduct appealed by Branch 79 of Seattle, Washington (C-15316).

NALC's witnesses proved that a postmaster had berated, threatened and intimidated the grievant on three occasions. In the final incident the postmaster, in a rage, shouted angrily and berated the grievant at length on the workroom floor, shook a finger in her face while he yelled, threatened her and ultimately sent her home on administrative leave. The grievant suffered medical ramifications as a result.

In his April 16, 1996 decision Arbitrator Kenneth McCaffree credited testimony by several union witnesses to the incidents and found little credibility in the postmaster's testimony. He found that the postmaster had violated the Joint Statement's requirement that "every employee at every level of the Postal Service should be treated at all

times with dignity, respect, and fairness ..." He also found violations of M-39 Section 115.4, which calls for an atmosphere of mutual respect, of the Standards of Conduct in ELM Section 666.2 requiring employees to be courteous, and of local management's posted statements for all employees that "acts of intimidation, threats or assaults by or upon postal employees will not be tolerated and will be sufficient grounds for removal."

McCaffree ordered the employer to abide by the provisions of the Joint Statement and to instruct its supervisors and managers again that the working environment must be kept free from harassing, intimidating or threatening behavior from any employee, including management. He directed the

**The Snow Award empowered regional arbitrators to discharge, discipline or change the duties of supervisors. Advocates are encouraged to request such remedies in appropriate cases.**

postmaster to write a letter of apology to the grievant, and ordered the letter posted on the NALC bulletin board at the Renton, Washington post office. He also ordered USPS to restore that portion of the grievant's sick leave which he deemed attributable to the Postmaster's behavior. Management complied with the award.

The Renton case pointed out that the Joint Statement is not the only document that requires *all* USPS employees, including managers, to treat each other with dignity and respect—although it is undoubtedly the most powerful one. Advocates should be prepared to

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present the ELM and M-39 provisions as well as the Joint Statement itself—and if available, any similar, local pronouncements on workplace behavior. The case also illustrated one common type of abusive supervisory behavior which violates the Joint Statement—yelling at an employee, particularly in a manner that suggests physical threat or intimidation.

Another lesson of the Renton case is that NALC may go beyond “cease and desist and seek a “make-whole” remedy to compensate a grievant even where there has been no discipline. The union also may seek remedies aimed at correcting additional wrongs—correction, admonishment and rebuke targeting the supervisor personally for his or her misdeeds, as well as posted apologies. A public apology can be seen as remedying at least two different sorts of wrongs. First, it is the appropriate—and perhaps only—remedy that makes a grievant whole for a wrongful public humiliation. Second, a public apology also may be needed to heal a general work atmosphere damaged by the supervisor’s misdeeds.

McCaffree’s decision restored sick leave the grievant had to use because of the supervisor’s misconduct, but left open the question of whether an arbitrator might award damages for mental anguish alone, separate from lost leave or wages. In an appropriate case a union advocate might argue that an apology is insufficient and that money dam-

ages are appropriate and necessary to compensate the grievant for mental pain and suffering.

**New Brunswick, New Jersey.** One month after the Renton, Washington decision, arbitrator Rose Jacobs ruled that a supervisor in New Brunswick, New Jersey had violated the Joint Statement (C-15551). The supervisor had stood nose-to-nose with the grievant on the workroom floor and yelled, raved and sworn for several minutes so loudly and with such vulgar language that numerous union witnesses agreed that the behavior was extremely threatening and violent.

NALC argued that violence was an illness in the Postal Service that required a remedy, and proceeded to demonstrate a pattern of local management negligence in pursuing the supervisory misconduct at issue.

Local management had fired letter carriers previously for far lesser offenses, yet the Postal Inspector had not been called until the following Monday and the Inspector had failed to interview even one of the eight letter carrier witnesses to the incident.

NALC also argued that the supervisor’s subsequent private, personal apology for the incident was an insufficient remedy for what amounted to a painful public humiliation and assault on the grievant.

Arbitrator Jacobs ruled that management had violated the Joint Statement as well as a local directive promising “zero tolerance” for threats or violence in the Postal Ser-

vice. Her decision paid close attention to the standards of conduct required of managers:

*What is especially disturbing here is that the assault was by a Supervisor on a craft employee. Supervisors should be held to an even higher standard and act as an example to the rank and file. The Joint Statement on Violence and Behavior in the Workplace is intended for Supervisors as well, as Supervisors should speak to fellow employees as they desire to be spoken to themselves, i.e. in a respectful and positive manner, as assaults do not necessarily involve physical contact.*

Award at p. 17.

The arbitrator ruled that a strong remedy was required even though the supervisor had apologized privately, admitted his behavior and promised not to repeat it. Although she declined to order the Postal Service to remove the supervisor, she did direct management: to cease and desist from such behavior, to re-evaluate whether the supervisor should continue to supervise letter carriers; to instruct the supervisor to send a formal letter of apology, witnessed in writing by the Postmaster, with a copy placed in the supervisor’s personnel file; to fully retrain the supervisor in management duties; to note in the supervisor’s employment file the arbitrator’s recommendation that he be dealt with more harshly should he engage in similar conduct in the future; to post the award and a copy of the apology for 30 days on the Post Office bulletin board.

Management initially failed to obey the arbitrator’s award in the New Brunswick case. It implemented the decision only after NALC filed another grievance and

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**Arbitrator Jacobs ruled that postal supervisors “should be held to an even higher standard” of behavior than craft employees, and that “assaults do not necessarily involve physical contact.”**

a sternly-worded UMPS decision ordered compliance and added a \$100-per-day price tag for continued failure to do so.

This case shows that extremely threatening supervisory behavior calls for an extensive remedial order. In these types of circumstances NALC advocates should argue for removing the supervisor from letter carrier supervision duties. It may be useful to argue that if the arbitrator will not grant that remedy, then he or she has little choice but to order management to retrain the bad-apple supervisor thoroughly and take whatever additional precautionary steps are necessary to ensure that letter carriers have a *safe working environment* in the future. Arbitrators hardly need to be reminded that management commonly utilizes its disciplinary tools to suspend and remove carriers who allegedly pose a threat to themselves, to others or to postal property.

The individual grievant's apparent lack of interest in pursuing punishment of the supervisor gave an unusual twist to the New Brunswick case. Although the victim of the supervisory abuse appeared satisfied with the manager's apology, the arbitrator accepted and acted on the union's insistence that stronger measures were required.

## The Snow Award and the Management Reaction

The Snow award was a significant breakthrough for NALC, for it gave the union new powers to stop the worst of supervisory misconduct toward letter carriers. Realizing the scope of its loss, management began immediately to try to limit the award's impact. Significantly, however, management declined to try to overturn (vacate)

the Snow award through a federal lawsuit. (USPS has asked the courts to overturn arbitration cases over the past dozen years, with little success.)

Peter Bazylewicz, USPS Manager of Grievance and Arbitration, sent a letter to Area managers of human resources on September 20, 1996, warning that the Snow award did not empower an arbitrator to require supervisors to be disciplined and that such an order may be illegal. The letter also urges retaliation against letter carriers for management's loss of the national-level case, by claiming that NALC has given up the right to protest the removal of a carrier whose behavior is alleged to have violated the Joint Statement.

The Bazylewicz letter is reproduced in full below on page 12. Advocates should read the it carefully and expect their adversaries to use its nationally-packaged arguments in cases involving the Joint Statement. In particular, advocates should expect to hear

management argue that NALC has "given up" the right to protest removal when a carrier's behavior has violated the Joint Statement.

NALC advocates should argue that although NALC agreed that certain behavior *can* be grounds for removal, it did not agree that all such behavior *always* justifies removal. Arbitrators always have the power to determine the issue of just cause, and there are many situations in which a violation of the Joint Statement would not justify

removal from employment. The Statement declares that every USPS employee should be treated "at all times with dignity, respect, and fairness." It prohibits "abusive or intolerant" actions, as well as "harassment, intimidation, threats or bullying." The Statement does not require automatic removal for every imaginable type of violation. Rather, it is the arbitrator's job to match the remedy to the wrong.

## After Snow

As of this writing, two regular regional awards have been issued following the Snow award which involve supervisory misconduct in violation of the Joint Statement.

**San Carlos, California.** Arbitrator Donald Olson, Jr. ordered a supervisor to apologize for her behavior toward a letter carrier in a ruling issued January 8th of this year, in addition to ordering the removed carrier reinstated with full back pay (C-16458). The supervisor had issued the grievant con-

flicting instructions, treated the grievant in a disrespectful and unprofessional manner, and admitted that she had done so in order to "make the numbers." NALC demanded a written apology because management's behavior leading up to the removal had violated the Joint Statement. Arbitrator Olson agreed, ordering that the supervisor write an apology for her inappropriate conduct and that the

**In the San Carlos case a supervisor admitted that she had treated a carrier disrespectfully in order to "make the numbers." The Joint Statement targets precisely this kind of employee abuse.**

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apology be "posted prominently by the time clock at the San Carlos Post Office" for 15 working days.

The San Carlos case illustrates how an advocate may establish an irrefutable Joint Statement violation by showing the link between pressures for in-

creased production or efficiency and supervisors' inappropriate behavior toward letter carriers. The Joint Statement takes dead aim at inhumane treatment resulting from such work pressures:

"*Making the numbers' is not an excuse for the abuse of anyone,*" it declares (emphasis in original). Although few supervisors are likely to admit that they abused a carrier to "make the numbers," advocates may be able to paint a picture of workplace pressures in many cases, suggesting a motivation for some types of supervisory misconduct.

This decision illustrates that the Snow award may be used to punish management for *abuse plus discipline*. Carriers are often disciplined or removed after managers lose their tempers. So managerial misbehavior and carrier discipline often occur together.

However, a carrier's behavior and a supervisor's behavior are two separate matters. Each is subject to limits and to penalties when the behavior violates the Joint Statement or other workplace rules. NALC representatives may challenge management misconduct either in isolation or in grievances that seek to overturn discipline. (Of course, such grievances should challenge management misconduct and allege any violations of the Joint Statement at the earliest possible level.)

So the Statement may be used in conjunction with the "just cause" standard, to argue not only that the discipline was unjustified, but that the supervisor's behavior was improper and should be subjected to admonishment or stiffer penalties.

There are undoubtedly many cases in which supervisory behavior toward a carrier has been reprehensible; it is possible for an arbitrator to sustain such a dual-issue grievance insofar as it challenges the

supervisor's conduct, regardless of the outcome on the issue of just cause.

If management argues that supervisory misbehavior was justified by the carrier's misconduct, the union advocate should answer that the Joint Statement does not permit supervisors to "fly off the handle" or use anger, harassment, intimidation or disrespect to correct even serious carrier misconduct. As Arbitrator Jacobs pointed out in her New Brunswick decision, management should be held to an even higher standard of workplace conduct than craft employees.

**North Hollywood, California.** Regional arbitrator Kenneth McCaffree ruled on March 8, 1997 that a supervisor had crossed the line from merely "warning" a carrier to a "threat" by telling the carrier, "Don't f\_\_\_ with me or I'll have you fired" (C-16459). McCaffree found that the threat was intimidating, harassing and a violation of the Joint Statement.

Following the Snow award, McCaffree ruled that the Joint Statement is enforceable through the grievance procedure and that arbi-

trators are authorized to interpret, apply and enforce its terms. By signing the Joint Statement on Violence and Behavior in the Workplace, McCaffree reasoned, the Postal Service "has extended the National Agreement to cover supervisors for violations of the Joint Statement." He appeared to reject the management argument that "an arbitrator may direct no discipline or other 'penalty' toward a supervisor under the provisions of the National Agreement and the Joint Statement."

The facts of this case were not as strong as its central findings. Arbitrator McCaffree found that the supervisor had committed a single offense violating the Joint Statement and "a minor one." He ordered management to admonish the supervisor verbally for her behavior and to cease and desist. He also ordered the employer to post a copy of the Decision and Award section of his decision on the post office bulletin board for five working days.

The North Hollywood decision stands for an important proposition: Although management may "warn" a carrier that certain behavior will result in discipline, it may not threaten discipline or removal as a method for workplace intimidation. Arbitrator McCaffree excused the supervisor's use of the "f-word" as foul but common shop talk, but he found that the reference to firing the carrier crossed the "fine line" between an appropriate "warning" and an intimidating "threat." He reached that conclusion by examining the tone of the statement and other surrounding circumstances including the history of interaction between the grievant and supervisor. McCaffree found that the supervisor's action was a "threat rather than a calm dissertation on the fact that these matters could lead to removal."

**The supervisor had crossed the line from a permitted "warning" to a "threat" that violated the Joint Statement.**

# Excluding Expired Discipline

## *Combatting Introduction of Improper Evidence*

Recently a number of management advocates have been seeking to introduce expired discipline as evidence during arbitration hearings. It is NALC's position that this practice is offensive, unethical and violates both the National Agreement and the grievant's right to a fair hearing.

Article 16, Section 10 explicitly prohibits management from citing expired discipline in a notice of proposed discipline or removal:

### 16.10 Employee Discipline Records

The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years.

Upon the employee's written request, any disciplinary notice or decision letter will be removed from the employee's official personnel folder after two

years if there has been no disciplinary action initiated against the employee in that two-year period.

All records of expired discipline should have been purged from an employee's official personnel folder, of course. So NALC believes that arbitrators should bar management advocates from introducing evidence of expired discipline as part of the employer's affirmative case.

## Management Tactics

However, management advocates have been introducing evidence of expired discipline by arguing that such evidence is proper to rebut union evidence or to impeach a union witness. This may occur when the union argues as a mitigating factor that the grievant has "no history of discipline." If the grievant has prior expired discipline, many arbitrators will allow management to allow introduce evidence of that discipline for the purpose of rebuttal.

In other cases a management advocate may try to trap a grievant or other important union witness by asking, during cross-examination, whether the witness has any prior discipline. This question places the grievant "between a rock and a hard place." If there is prior, expired discipline and the witness—thinking the discipline has been officially "wiped out"—answers in the negative, many arbitrators will permit management to give offer evidence of the prior discipline for the purpose of impeachment. The witness's credibility and union's case may be damaged badly. If the witness answers in the affirmative, management has already succeeded in introducing improper evidence. And the door has been opened to further description of matters that should not have been introduced at all.

## The Union Response

Advocates should avoid arguing that the grievant's record is "clean" when there is expired discipline. Depending on the case, it may be wiser either to remain silent on the issue and object if management raises it, or to offer a measured statement that the grievant "has no discipline in her official personnel file" or "has not been disciplined within the last two years." If the advocate refers to the OPF or the two-year period, he or she should explain the meaning of Article 16.10 and argue that any discussion whatsoever of expired discipline would unfairly prejudice the grievant and the union.

## Joint Statement . . .

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The North Hollywood decision award at the core of managerial intimidation of employees. It defines a whole new area of Joint Statement-related situations in which managers abuse their inherent powers over employees' job security. Although management's power to initiate discipline is an ever-present condition of employment, McCaffrey has drawn a line in the sand circumscribing the proper expression and use of that power. Management may state in a calm, factual way that

discipline may result from certain carrier conduct. But management crosses the line and violates the Joint Statement when it speaks emotionally, raises the volume or in any other way transforms a dispassionate "warning" into a "threat" intended to intimidate or harass an employee.

Additional insights will be learned in this area of advocacy as NALC representatives argue more Joint Statement cases across the country. NALC's headquarters will keep advocates and other NALC activists informed of these new developments. ■

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Advocates also must prepare witnesses to handle management's "trap" question, first by pausing for the union objection. If an arbitrator permits the question, the witness should explain that there is no discipline in his or her personnel file because of Article 16, Section 10.

The union objection to the "trap" question should be swift and aggressive. Such a question should be ruled improper and unethical, because it calls for an answer containing facts that should be inadmissible in the hearing. Permitting testimony about expired discipline both undermines the contract's explicit disciplinary scheme and damages the grievant's right to a fair hearing.

Management advocates may argue that they have a "right" to test a witness's credibility by asking about expired discipline, asserting that the credibility of any witness is "always an issue" in a hearing. The union advocate should respond that both courts and arbitrators routinely restrict the kinds of questions that may be pursued in attacking a witness's credibility. The parties' National Agreement explicitly makes expired discipline unavailable to the employer as a basis for further discipline, so it should be equally unavailable to the employer in an arbitration concerning later discipline.

Moreover, evidence rules typically forbid inquiry during a hearing into "prior bad acts" of a witness for the sole purpose of impeachment, except in narrowly defined circumstances. The principle

followed by courts is that a "prior bad act" may be raised only if it will tend to prove that the witness is not currently inclined to tell the truth. Under the Federal Rules of Evidence, for instance, a party may attack a witness's credibility by introducing evidence of a recent felony conviction, or of any conviction involving dishonesty (e.g., perjury or theft).

In arbitration, prior, expired discipline seldom concerns behavior that would tend to prove that the witness is untruthful. For example, a previous failure to follow

tailed answer would be prejudicial for the reasons already discussed.

## A Poor Settlement

Management advocates may well cite an APWU national-level prearbitration settlement in support of an attempt to introduce evidence of expired discipline (M-01167, USPS Case No. H4T-5D 15115, Sept. 7, 1993). The settlement states:

*After reviewing this matter, the parties mutually agreed that, in accordance with Article 16, Section 10, "records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years."*

**Management may try to argue that prior discipline may be raised solely for the purpose of attacking credibility. But courts and arbitrators routinely prohibit impeachment by inquiry into "prior bad acts" unless the acts specifically tend to prove that the witness is inclined to be untruthful. Prior discipline is hardly ever useful to show whether a witness is currently truthful or untruthful. So it should be excluded.**

instructions or to keep a regular schedule proves nothing about a witness's truthfulness. So whether expired discipline exists is hardly ever relevant to a witness's credibility. If an arbitrator needs an illustration, the NALC advocate might ask whether the union has the right to ask a supervisory witness whether he or she has ever violated the traffic laws, used illegal drugs or committed adultery.

If an arbitrator refuses to strike out management questions about expired discipline, the union advocate should consider offering to stipulate that the grievant did have some such discipline—without going into any details. The advocate can argue, once again, that a de-

*Therefore, such records of disciplinary action should not be cited in a notice of proposed removal. However, the Postal Service is not precluded from introducing such prior disciplinary action for purposes of rebuttal or impeachment in the grievance procedure, in arbitration, or in other forums of appeal.*

NALC was not a party to this settlement, would never have made such a settlement and is not bound by it. It is NALC's position that this settlement is simply wrong. ■

# The Grievant as Management's Witness

## *Management Must Establish a Prima Facie Case First*

Management advocates have been calling the grievant as the first USPS witness during the arbitration of some discipline and discharge cases. This practice violates the usual rules of disciplinary arbitration and NALC advocates should develop strategies to resist it.

It is NALC's position that the employer must first present its case in discipline or discharge matters before being allowed to call the grievant as an adverse witness. Because the employer disciplined or discharged the grievant based on facts within its own knowledge, the employer must establish at least a *prima facie* case before calling the grievant as a witness.

### Background

Arbitrators seldom permit an employer to call a disciplined or discharged grievant as its first witness in an arbitration hearing. Some arbitrators do not allow management to examine the grievant at all until it has finished presenting its case. This is not meant "to exempt the grievant from testifying," but rather to require that the grievant's testimony be elicited through cross-examination after the employer has presented its own case justifying its actions. In the event that the union does not call the grievant as a witness, the arbitrator has the power to order the grievant to testify if management so requests (unless there is an issue involving self-incrimination).

For NALC advocates, the most important precedent on this issue is a regional case decided by Arbitrator Carlton Snow, who now serves

as a national level arbitrator (C-08975, June 26, 1989). He wrote as follows:

*At the arbitration hearing, management called the grievant as its first witness. The Union vigorously objected, and the arbitrator ruled at the hearing that the grievant would not be compelled to testify until the Employer had put forth a prima facie case in support of the grievant's removal. The Employer strongly objected to the ruling and requested an opportunity to submit a post-hearing brief on the issue, which request the arbitrator granted.*

*Although the arbitrator received no post-hearing brief on this issue, it is a matter which has been raised and must be addressed. It is well established in arbitration that, as a general rule, the grievant need not testify until a prima facie case has been established against him or her. (See, for example, General Industries, Inc. 82 LA 1161, 1164 (1984); Arizona Aluminum Company, 78 LA 766 (1982); and Report of the New York Tri-Partite Committee, Proceedings of the Nineteenth Annual*

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### Transcripts in Regional Hearings

A management advocate recently persuaded a regional arbitrator to allow a court reporter to create a verbatim transcript of the hearing, without prior notice and over NALC's objection. Management then attempted to withhold the transcript from the union.

The USPS advocate flatly violated the National Agreement, which prohibits either party from seeking a transcript without notifying the other party *in advance* at the *headquarters level*. Article 15, Section 4.B.7 of the national agreement provides that:

*Normally, there will be no transcripts of arbitration hearings or filing of post-hearing briefs in cases heard in Regular Arbitration, except either party at the National level may request a transcript, and either party at the hearing may request to file a post-hearing brief.*

So unless a management advocate can prove that USPS notified NALC's headquarters about the transcript request prior to the hearing, then an arbitrator is bound to deny the request. NALC advocates should enforce this requirement rigorously, for transcripts are costly and improper requests for them violate the agreed-upon hearing rules. If a management advocate improperly requests a transcript, a union advocate should ask for a recess and call NALC's headquarters contract administration unit for guidance immediately.

If the Postal Service has notified NALC headquarters properly that it will request a transcript, the contract administration unit will ensure that the national business agent and the union advocate are so advised before the hearing. If USPS has a transcript taken and NALC requests a copy, USPS must provide it and the costs will be shared. Otherwise USPS must bear the entire cost. ■

Meeting, National Academy of Arbitrators, 99, BNA Books (1967).)

*The reason for this rule is sound. Management has acted to remove an employee and, when challenged, should be expected to explain its decision. Such an explanation should not present the grievant as the chief witness against the grievant. In a removal case, the Employer has the burden of proof and "burden of proof" is a term connoting two distinct meanings.*

*One aspect of "burden of proof" refers to the burden of going forward with the evidence, that is, producing evidence to support a particular decision. Some scholars have referred to this as the "production burden." (See, McNaughton, "Burden of Production of Evidence," 68 Harv. L. Rev. 1382, 1384 (1955)).*

*In reality, this burden more accurately could be described as the risk of non-production. Management has borne the responsibility of furnishing*

*evidence which justified its decision of removal. In arbitration, the Employer has the burden of producing evidence to show the reasonableness of its decision, and the party with this burden that fails to offer persuasive evidence in arbitration will not prevail. In other words, the "production burden" imposes on one party the risk of the consequences of the nonproduction of evidence.*

*By permitting the Employer to call the grievant in a removal case as its first witness, in effect, shifts the burden of production to the Union. This causes the Union to bear the risk of the consequence of the nonproduction of evidence. Accordingly, it has been traditional among arbitrators, in the absence of special circumstances, to require an employer to make a prima facie case (one with sufficient internal consistency to justify management's action) before requiring a grievant to testify as a part of an employer's*

*case in chief. The Employer in this case has presented no reason for the arbitrator to change his earlier ruling with regard to this matter.*

Award at pp. 13-14.

Outside the postal arbitration arena, arbitrators are of two minds on this issue and it is not clear which view is in the majority. See the discussion in Elkouri & Elkouri, *How Arbitration Works*, 5th ed. (BNA Books, 1997), at pp. 430-432. Two cases supporting the NALC position are described here.

The case of *City of San Antonio*, 90 LA 159, 162 (Williams, 1987), supports the Snow view of this issue. ("LA" refers to the *Labor Arbitration Reports* published by the Bureau of National Affairs, available in law libraries and large public libraries.) That case involved a police officer suspended for allegedly violating a police department order regulating his off duty conduct. Arbitrator Williams ruled that the employer had to make a prima facie case supporting its actions before it could call the grievant as a witness. Although the arbitrator emphasized that his decision in no way recognized a privilege against self-incrimination in arbitration, he noted that it would be contrary to the interest in fair procedures to require the grievant to testify as an adverse witness before the employer established a prima facie case justifying its conduct.

Another arbitrator explained

the rationale for this view in *Rohm & Haas*, 91 LA 339, 343 (McDermott, 1988), where an employee challenged her dismissal for chronic absenteeism and tardiness. Arbitrator McDermott ruled that when the issue is whether the employer's actions towards an employee were taken with just cause, the employer bears the burden of establishing its

**NALC advocates must be prepared to oppose management attempts to call the grievant first. It is management's job to collect and present evidence justifying discipline.**

case first because the employer acted according to facts known to it. Usually, the information that caused the employer to act can be brought before the arbitrator in some form—through either testimonial or documentary evidence. The arbitrator found

that only in rare instances—where a credibility determination" must be made—can the employer be justified in calling the grievant as the first witness.

## Be Prepared

NALC advocates must be prepared to oppose management attempts to call the grievant first, or at any time before it has established a *prima facie* case. The union should argue that management must establish that it had just cause for the discipline at the time it was instituted and based on the facts it had in hand at the time. Management should not be permitted to make its case by attempting to elicit admissions from the grievant. Such a procedure would undermine fundamental fairness in both the hear-

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ing and the workplace, for it is management's job to collect evidence to justify discipline, and not the employee's or the union's.

The regional Snow award on this issue carries particular weight because it was decided under the NALC-USPS contract, and because the arbitrator currently serves on the national-level NALC-USPS arbitration panel. Advocates also should argue that under NALC's grievance procedure, management is required at each level to give a detailed accounting of its position and the reasons for it. If management is unable to amass sufficient facts and arguments to establish just cause before arbitration, it

should not be permitted to seek out fresh justifications at the hearing by attempting to make a *prima facie* case through the grievant's testimony.

It is recommended that advocates equip themselves with essential materials on this matter, carry them to each hearing and be ready to argue vigorously against the grievant being called early in management's case. Although the Contract Administration Unit considers this matter to be very important, it does not present an interpretive issue. When this question does arise it should be addressed during the arbitration hearing rather than appealed to Step 4.

In cases where the arbitrator supports NALC's position on this matter during the hearing, the advocate should specifically ask the arbitrator to follow Arbitrator Snow's example and address the issue in the arbitration award. It is NALC's intention to develop a sufficient body of Postal Service arbitral authority on this matter to put this management ploy to rest. And in all cases where management attempts to call the grievant as its first witness, the NALC advocate should submit a written report promptly to the CAU explaining how the issue was resolved. □

## Monetary Award for Improper TE Hiring

### *Arbitrating for Dollars Against a Defiant Local Management*

A recent decision from NALC's Dallas region proves that aggressive advocacy can force even a defiant management to obey the contract, or pay the price of a substantial monetary remedy. The case also demonstrates that an advocate can educate an arbitrator about even the most complicated contractual provisions—in this case, the rules governing the hiring and retention of transitional employees (TEs).

The Amarillo, Texas post office hired 25 transitional employees under the old DSSA guidelines set forth by Arbitrator Mittenhal's 1992 national award establishing the transitional workforce ("TE Award"). Subsequently NALC and USPS agreed to several changes in the rules controlling the hiring and use of TEs in the carrier craft—the "Six Memos" explained in *Building Our Future by Working Together*, the revised Chapter 6 of that joint training guide, and the December, 1992

national memorandum of understanding on PTF conversion.

The new rules required USPS to terminate all transitional employees by November 20, 1994 except those TEs to whom management was entitled under the new DPS impact analysis methodology, which had replaced the DSSA formula, and whom management could justify because one of the TE hiring "triggers" had occurred. In addition, management remained obligated, under the TE Award, to notify both the National Business Agent and the local union about the number of TEs and the circumstances justifying their employment.

Management in Amarillo never notified the union as required, and NALC pursued a grievance over the matter to arbitration. Arbitrator Devon Vrana found that USPS management in Amarillo had utterly failed to notify either the NBA or the local branch as required. Management had also failed to

comply with an award issued several months earlier, in which Arbitrator Searce had ordered management to supply other required information to the NALC. Searce had issued a stern warning to management that continued noncompliance might justify an award of punitive damages against it.

Arbitrator Vrana's decision succinctly summarized all of the contractual provisions relevant to the case, and accepted all of NALC's factual presentation establishing flagrant and repeated management refusals to provide the union with information. She ordered a \$25,000 monetary award calculated at \$1,000 each for the 25 transitional employees retained by management, to be divided equally among the affected career carriers in Amarillo. She also "sternly admonished" management for its failure to obey the contract, and stated that

*(Continued on page 11)*

she would consider a larger amount of punitive damages should management's violations continue.

The Amarillo case shows how a local management's chronic, intentional contract violations can be stopped through powerful monetary remedies. Although the usual arbitral remedies are compensatory—aimed at making a grievant whole for losses suffered—union advocates can obtain large awards and even punitive damages by showing that management has re-

peatedly and brazenly flouted the contract.

**Educating the arbitrator is the key to winning a case involving complicated provisions of the National Agreement.**

The decision also points out the importance of *educating the arbitrator* about the contract. It is clear from Arbitrator Vrana's decision

that the NALC advocate had made a very thorough, well-organized presentation on the meaning of the various documents controlling TE hiring. The NALC advocate explained these documents so well that the arbitrator was able to grasp their interrelationship and then focus on the particular violation. □

## Arbitrator's Retention of Jurisdiction

### *Unfinished Business May Justify Retaining Jurisdiction*

There are two common situations in which arbitrators retain jurisdiction after issuance of an award. The first involves cases where a challenge to arbitrability results in a bifurcated hearing and decision. The other situation arises when an arbitrator expressly retains jurisdiction—typically in cases where there may be unresolved issues concerning back pay or other aspects of the remedy. In both situations NALC has experienced occasional problems with USPS field processing centers attempting to schedule the second phase of the case before a different arbitrator.

Although USPS management administers the scheduling of arbitration, all aspects of the grievance-arbitration procedure, including the selection and scheduling of arbitrators, are the joint responsibility of the NALC and the Postal Service. Article 15, Section 4.A.3 provides that:

*The Employer, in consultation with the Union, will be responsible for maintaining appropriate dockets of grievances, as ap-*

*pealed, and for administrative functions necessary to assure efficient scheduling and hearing of cases by arbitrators at all levels.*

So as a matter of administrative convenience the contract provides that the USPS field processing centers will handle routine matters involved in scheduling arbitrations. However, this must be in accordance with the rules and procedures mutually agreed to at the national level. NALC advocates should be vigilant to ensure that the Postal Service does not deviate from these rules.

In some cases management challenges the arbitrability of a grievance and persuades the arbitrator that the hearing should be "bifurcated." That means that the case is divided into two distinct phases. During the first hearing the parties address only the dispute concerning arbitrability, and the arbitrator issues an award limited to that issue. If the arbitrator finds that the case is arbitrable, a second hearing is held before the same ar-

bitrator on the merits on the grievance and a second award is issued. NALC generally opposes bifurcation since it is usually unnecessary and wasteful of union resources. However, arbitrators have the authority to order it.

NALC and USPS management signed a Step 4 settlement last year establishing that both parts of a bifurcated case will be heard by the same arbitrator. The October 31, 1996 settlement (M-01253) resolved a problem that arose when certain USPS Areas attempted to change the parties' longstanding practice concerning the scheduling of bifurcated cases. The settlement states:

We agreed that the parties' practice on a national basis has been that the same arbitrator who determined the arbitrability of the case, is scheduled to hear the merits; assuming that the arbitrator in question is still on the appropriate panel and is otherwise available. This practice is to be followed by all field processing centers.

*(Continued on page 12)*

## Appendix: USPS Letter on Snow Joint Statement Award

### *USPS Attempted to Limit Impact of Landmark Award*

Management reacted quickly to the Snow award on the Joint Statement on Violence and Behavior in the Workplace by attempting to restrict its impact, rewrite its contents and also retaliate against NALC for winning the case. (See story, page 1.) The USPS headquarters grievance and arbitration department issued this letter a month after Arbitrator Snow issued his award.

September 20, 1996

MANAGERS, HUMAN RESOURCES (AREA)

MANAGERS, HUMAN RESOURCES (DISTRICT)

SUBJECT: National Arbitration Award Case No. Q90N-4F-C 94024977  
Joint Statement on Violence and Behavior in the Workplace

In the above-referenced Award, Arbitrator Carlton Snow held that the Joint Statement constitutes a contractually enforceable agreement between the parties and that the Union shall have access to the grievance-arbitration procedure to resolve disputes arising under the Joint Statement.

At page 22 of the Award, Arbitrator Snow summarizes his holding as follows:

The grievance procedure of the National

Agreement may be used to enforce the parties' bargain, and arbitrators have available to them the flexibility found in arbitral jurisprudence when it comes to formulating remedies, including removing a supervisor from his or her administrative duties

Such action would violate the individual supervisor's constitutional, statutory, and regulatory due process rights. This would include rights under Title 5 of the United State Code for those managers and preference eligibles entitled to appeal to the Merit Systems Protection Board, as well as rights to a fair hearing on adverse actions as required by 39 U.S.C. § 1001(b) and ELM 650. Any attempt by the NALC to seek discipline of a supervisor as a remedy in arbitration should be brought to Headquarters attention.

Even an arbitral remedy that required a supervisor to be reassigned from supervising carriers to some other duties would be very troublesome. Nothing in Arbitrator Snow's Award, of course, requires such a remedy. Even when an arbitrator concludes that the standards of the Joint Statement were not followed, he or she should be strongly encouraged to rely on traditional remedies, such as a cease and desist order, rather than embroil themselves in supervisory assignments normally the prerogative of management.

Additionally, the NALC acknowledged during the course of the hearing in this case that they have "relinquished the right to challenge whether certain behavior is grounds for removal." NALC Post-hearing Brief, p. 14. This means that once a letter

carrier's behavior is established as rising to the level of a violation of the Joint Statement, the NALC do not have the right to challenge whether such behavior is grounds for removal.

Attached are copies of the Snow Award and copies of the parties' post-hearing briefs in this case. As noted above, the NALC's brief contains the acknowledgment that it gave up the right to challenge certain behavior as grounds for removal in consideration for the commitments made in the Joint Statement by the Postal Service. Accordingly, the NALC's post-hearing brief can be used as an exhibit to demonstrate this point. Assistance in the preparation and presentation of such cases will be provided as needed.

Grievances alleging supervisory misconduct should be reviewed closely. If the NALC uses the grievance procedure to harass, intimidate, coerce or control supervisors in the performance of their duties for the purposes of collective bargaining or in the adjustment of grievances, then there may be a violation of Section 8(b)(1) of the National Labor Relations Act. Such instances should be brought to the attention of your respective Area Managing Counsel for review as appropriate.

Lastly, because of the sensitive nature of the issues involved, any such cases proceeding to arbitration should be coordinated with Headquarters. Contact Patricia Heath at (202) 268-3813 or John Dockins at (202) 268-3833 if there are any questions concerning this matter.

/s/

Pete Bazylewicz  
Manager  
Grievance and Arbitration

Attachments

## Jurisdiction . . .

(continued from page 11)

Arbitrators also may retain post-award jurisdiction, often for a specified period of time, to resolve any disputes that might arise over the issue of remedies. This typically involves back pay orders or other monetary remedies that may involve detailed calculations, or that may lead to disputes over who should receive money payments or the amounts to be paid.

NALC encourages the arbitral practice of retaining jurisdiction to ensure a proper remedy, because it

ensures that any remaining issues will be resolved quickly and in accordance with the award. In any case where an arbitrator has retained jurisdiction, the Postal Service must comply if the union requests that the case be rescheduled. Any problems concerning this requirement should be brought to the immediate attention of the Contract Administration Unit. To help NALC resolve any disputes, the CAU requests that union advocates keep careful notes of any discussions during the hearing concerning the arbitrator retaining jurisdiction. □

NALC Arbitration  
**Advocate**

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