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Joint Statement Case Update *Arbitrator Strips Supervisor of Duties, More . . .*

Important developments continue to unfold in the arbitration arena surrounding the Joint Statement on Violence and the national award that made the Statement enforceable against supervisors. (See the lead story in the May, 1997 NALC Advocate for a detailed discussion of the Snow award on the Joint Statement and related cases.)

Arbitrator Exiles Supervisor

In a landmark decision affirming the power of the Joint Statement on Violence and Behavior in the Workplace, Regional Arbitrator Leonard Bajork has ruled that because a San Antonio, Texas supervisor had repeatedly abused letter carriers, he

“will be restricted from performing the duties of any position which includes the core activity of dealing or working with carrier employees.” (C-16961, June 23, 1997).

This is the first known decision in which an arbitrator has taken supervisory duties away from a supervisor found to have abused letter carriers. It will not be the last.

Challenges to Arbitrability

It is commonly said that arbitration provides a “day in court” for a disciplined carrier or for a union challenging a contract violation. A fair hearing and a neutral decision-maker are supposed to provide a just and binding resolution to labor-management disputes.

But that “day in court” can be denied when management advocates argue successfully that the dispute is not “arbitrable” at all. Some individual management advocates, and particular districts or even

USPS Areas, are becoming known for arguing at nearly every hearing that the case is not arbitrable. One well-known USPS advocate trainer tells management representatives that winning a case on arbitrability grounds is the easiest victory of all.

NALC intends to get its “day in court” when it appeals a case to arbitration. So it is the job of each NALC advocate to learn management’s most common attacks on arbitrability, and to develop a

The arbitrator had determined that the supervisor’s repeated, abusive and intolerant behaviors toward letter carriers had violated the Joint Statement on Violence and Behavior in the Workplace. The supervisor had repeatedly blown up in anger, yelled at carriers and provoked fellow craft employees and even other supervisors. The arbitrator concluded that “a mere apology from him would be far short of an appropriate remedy,” and that the circumstances called for the stronger remedy of exiling him from any duties bringing him into contact with letter carriers.

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Management Threatens Arbitrator

In a stunning new tactical atrocity, management has begun to *threaten* arbitrators with subpoenas and other legal harassment to stop them from awarding sanctions against supervisors in Joint Statement-related cases. A management advocate recently made the following threat in a post-hearing brief:

If the arbitrator would disagree and makes a determination to discipline [the supervisor], the Postal Service will deem it necessary to issue the corrective action in the name of the Arbitrator and it is the Arbitrator who will be called upon by the Postal Service to testify in any administrative 650 hearing, E.E.O. or Merit Systems Protection Board hearing that may result in the aforementioned corrective action.

This threat of harassment signals a new ethical low point in the Postal Service's battle to undo, by any means possible, the Snow award making the Joint Statement enforceable against supervisors. This malignant paragraph is a blatant attempt to corrupt the arbitration process by intimidating an arbitrator into deciding a case in the Postal Service's favor.

Arbitrators are legally immune. NALC advocates should know that arbitrators enjoy a special type of immunity under the law—an immunity from lawsuits growing out of their arbitral functions and decisions, and an immunity from having to testify to justify their decisions in later proceedings. This "arbitral immunity" has been part of the American common law for nearly two hundred years. Both state and federal courts routinely

uphold arbitral immunity by refusing to permit arbitrators to be sued about their decisions or to be subpoenaed to explain them. To do otherwise would undermine arbitral independence and the finality of arbitration decisions, by dragging arbitrators into ongoing efforts to attack awards through later lawsuits and other legal proceedings. See Nolan & Abrams, *The Arbitrator's Immunity from Suit and Subpoena*, Proceedings of the 40th Annual Meeting of the National Academy of Arbitrators, 149-180 (BNA Books, 1988). In addition, the following passage appears at pp. 200-201 of Elkouri & Elkouri, *How Arbitration Works* (5th ed. BNA Books, 1997):

Arbitrators acting in their official capacity perform quasi-judicial duties and, like judges, are immune from civil liability for acts done in their arbitral capacity. [footnote omitted] In recognizing this immunity, it is considered that arbitrators "must be free from the fear of reprisals" and "must of necessity be uninfluenced by any fear of consequences for their acts."¹⁸⁵

¹⁸⁵ ... Based upon an extensive examination of court decisions, the AAA has offered the following summary:

The cases are unanimous in holding that arbitrators are quasi-judicial officers and as such are immune from civil liability when acting in their official capacity. ...

In general, the courts have held that an arbitrator may not be deposed or required to testify in order to impeach, clarify or otherwise show that the award resulted in an unintended outcome. ... [emphasis added]

"Arbitrators' Immunity from Civil Liability—Deposition of Arbitrators," Lawyers' Arbitration Letter (AAA, Dec. 1977). ...

Both the Nolan & Abrams article and the Elkouri & Elkouri book are available in the national business agent's office.

Arbitrators are legally immune from civil liability. They are also legally immune from having to testify to explain or justify their decisions.

The management advocate's threat to drag an arbitrator into post-award proceedings is an obvious attempt to circumvent the firm rule of law on arbitral immunity. Having lost the right to threaten and harass letter

carriers with impunity, the Service has now taken to threatening arbitrators who have been asked to halt supervisory abuse. NALC advocates should be prepared to hear this newest management nonsense in Joint Statement-related cases and to put a stop to it. If management makes such a threat to an arbitrator in any case, the NALC advocate should ask the arbitrator to address the threat directly in the award.

Pre-Snow Joint Statement Case Enforceable

In another Joint Statement-related ruling, a regional arbitrator has ruled that an NALC grievance was arbitrable although it alleged

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Arbitrability . . .

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"toolkit" or repertoire of effective counter-arguments.

Defining Arbitrability

What does it mean when management argues that a case is "not arbitrable"? In essence management is saying, "Mr. or Madame Arbitrator, you simply do not have the power or authority to hear and decide this case. The union has no right to bring this dispute before you."

After making such a statement the management advocate does not simply pack up and leave the hearing room. Rather, the challenge to arbitrability becomes an initial or "threshold" issue which the arbitrator must decide before ruling on the

merits. Article 15, Section 4.A.9 of the National Agreement specifically empowers arbitrators to decide disputes over arbitrability:

Any dispute as to arbitrability may be submitted to the arbitrator and be determined by such arbitrator.

Disputes about arbitrability are different from *procedural* arguments often made by the union in discipline cases. For instance, the union may argue that discipline was procedurally defective because higher management did not review and concur, or because management failed to investigate the facts thoroughly. In such cases NALC's argument is that the discipline never should have been issued. However, we are not challenging the arbitrator's power to hear and decide our grievance challenging the discipline.

Substantive and Procedural Arbitrability

There are two different types of challenges to arbitrability—procedural and substantive.

Procedural arbitrability. A challenge to procedural arbitrability is a claim that the grievance may not be arbitrated because of a defect in the *way it was handled*. The most common attack on procedural arbitrability is a claim that a grievance was untimely filed or appealed.

Substantive arbitrability. A substantive arbitrability challenge is a claim that the *subject matter* of a particular dispute is not arbitrable—that the arbitrator has no power to hear a dispute on the particular subject raised by the grievance. To understand substantive arbitrability, one must begin with the National Agreement's grievance clause, Article 16.1:

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

This very broad definition of a grievance guarantees that almost any imaginable work-related dispute may be pursued through the grievance procedure and, when necessary, to arbitration. So the *subject matter* of a dispute is seldom

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Joint Statement . . .

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violations of the Joint Statement which occurred prior to the August 16, 1996 national Snow award on the Statement, and the union had requested as a remedy that the supervisor in question be suspended and/or fined. (C-16740, May 9, 1997).

Regional Arbitrator Robert Simmelkjaer ruled that the 1996 Snow award addressed the applicability of the Joint Statement and "can be construed as relating back" to the Statement's effective date of February 14, 1992.

Arbitrator Simmelkjaer also squarely rejected management's argument that the remedies of suspension or fine were not available against the supervisor. He quoted the Snow award and concluded that

because the language:

...contemplates multiple remedies of which removal of a supervisor from his or her administrative duties is but one such remedy, the remedies of suspension, fine or a range of other appropriate penalties are undoubtedly encompassed by the Snow Award language and available to the Arbitrator to ensure the "flexibility" necessary to equate the penalty with the offense. □

Note on Case Citations

Please note that the C-number cases cited in this story, as well as several additional such cases cited throughout this publication, are available from the office of the National Business Agent, although they are not yet available on the NALC Arbitration CD-ROMS.

a bar to arbitration—although it can be in a few situations.

Presumption favoring arbitrability. Most arbitrators follow the Supreme Court's 1960 *Steelworkers Trilogy* cases in holding that doubts concerning arbitrability, especially substantive arbitrability, should be resolved in the affirmative. This "presumption in favor of arbitrability" means that arbitrators will place the burden on management to prove that a case is not arbitrable, and will resolve close cases by favoring the grievant's interest in a fair hearing on the merits.

How Arbitrability Issues are Handled

Arguments that a grievance is not arbitrable may be raised for the first time at the arbitration hearing itself. This is a well-recognized exception to the usual rule that neither party may raise new arguments at arbitration (see, e.g., C-03319, National Arbitrator Aaron, April 12, 1983). However, management must make an argument that a grievance is untimely promptly, or it is waived. Article 15, Section 3.B provides:

...if the Employer fails to raise the issue of timeliness at Step 2, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.

Bifurcation. When management does raise an arbitrability issue at the hearing, it often asks to *bifurcate* the hearing—to divide it in two. In a bifurcated case a first hearing deals only with the issue of arbitrability, and the arbitrator renders a decision on that issue alone. Then, if the arbitrator has ruled the dispute arbitrable, a second hearing

addresses the merits of the grievance.

NALC strongly opposes bifurcation in nearly every circumstance, because it wastes a tremendous amount of union resources and delays justice for the grievant. Management often favors bifurcation for the same reasons. Arbitrators have discretion in this area, so it is up to them to rule. However, NALC advocates should argue vigorously in opposition to management requests to bifurcate.

The arbitrator typically has three main options when ruling on a request to bifurcate. First, the arbitrator may grant the request, hold a separate hearing on arbitrability, and then go home to write a decision on that issue alone. If the case is found arbitrable, another time is scheduled for a hearing on the merits. The parties have agreed at the national level that the case is referred to the same arbitrator for the hearing on the merits. M-01253, Step 4 settlement, October 31, 1996.

A second alternative is to bifurcate the hearing but hear both parts of it on the same day. The arbitrator may choose to hear opening statements, receive testimony and other evidence, and hear closing arguments on just the arbitrability issue. Then the arbitrator might issue a "bench" or oral decision at that time, and proceed to the merits if the case is found arbitrable. A hearing on the merits would then

proceed.

A third alternative is for the arbitrator to hear the arbitrability issue and the case on the merits on the same day (either separated into

two mini-hearings or all in one hearing), and then reserve judgment on both matters until a decision is written. Then, the first portion of the arbitrator's decision would address arbitrability. If the arbitrator finds the case not arbitrable,

Arbitrators follow the Supreme Court's *Steelworkers Trilogy* cases by enforcing a "presumption favoring arbitrability." So the burden is on management to prove that a dispute is not arbitrable.

the decision ends there and the grievance is denied. If it is found arbitrable, the decision proceeds to address the issues on the merits. (It is possible, of course, for an arbitrator to find a case arbitrable but deny the grievance on the merits.)

Procedural Arbitrability Issues

Timeliness. Untimeliness is usually fatal to a grievance. There are a few cases, however, in which arbitrators have excused late filings and found cases arbitrable because of special circumstances, for example: the parties have been lax in observing time limits in the past (see C-00970, Regional Arbitrator Bowles, April 18, 1983); the union learned of a termination five months later but filed a grievance within 14 days of acquiring knowledge of it (C-11193, Regional Arbi-

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trator Zack, December 27, 1985); the grievance was filed within 14 days of when the union learned of its cause, but longer than 14 days after the grievant learned of its cause (C-08842, Regional Arbitrator Goodman, May 3, 1989).

In rare cases arbitrators have ruled that management misconduct has excused a

union failure to meet the time limits. For example, arbitrators have found

grievances timely where: management refused to accept an employee's grievance and then claimed it was untimely (C-01536, Arbitrator Aaron, April 29, 1974); management refused to disclose information and re-

refused to permit a carrier to confer with his steward (C-03941, Regional Arbitrator Walsh, November 21, 1983). However, in other cases arbitrators have enforced the usual, iron rule of untimeliness even where management contributed to the missing of a deadline. For example, Regional Arbitrator Goldstein refused to find a case arbitrable even though management had told the NALC national business agent, "Don't file a grievance, I'll try to take care of the problem, if I can't you can file a grievance later" (C-03543, May 9, 1983).

Additional untimeliness claims have arisen concerning "continuing violations" of the contract. In such cases NALC must argue that each instance or each day in which man-

agement violates the contract is a *separate* violation with its own 14-day time limit, even though the violation(s) may have begun weeks or months before and continued since then. For example, in C-10134 (July 23, 1990) NALC successfully persuaded Regional Arbitrator Skelton that a grievance concerning management's failure to adjust routes

was arbitrable because the violation was continuing in nature.

Arbitrability challenges surrounding technical requirements of the grievance procedure have produced mixed results. For example, one regional arbitrator ruled that a grievance was not arbitrable because it was filed by a stew-

ard not properly certified in writing (C-10798, Regional Arbitrator Foster, April 23, 1991). Other arbitrators have ruled that grievances were arbitrable even though the union failed to submit copies of the standard grievance form and the Step 2 decision with its Step 3 appeal (C-00167, Regional Arbitrator Levak, December 14, 1982), and where a grievance was mistakenly filed with a USPS Division rather than the Region (C-09929, Regional Arbitrator Zumas, March 21, 1990).

Proposal notice versus decision letter. A number of cases have dealt with timeliness issues in cases of suspensions of more than 14 days and removals. In such cases management issues a "notice of proposed" suspension or removal

and then a letter of decision 30 days later, in accordance with Article 16, Section 5.

Although NALC has always advised its representatives to grieve the notice of proposed discipline or removal—and continues to do so, to be on the "safe side"—there is no definitive agreement or holding that a grievance challenging only the decision letter is untimely. APWU did sign memorandums in 1992 conceding that it must grieve the proposed disciplinary notices or be untimely (M-01137, September 16, 1992). However, NALC has signed no such memo and does not agree that a grievance filed following the letter of decision is untimely.

Although arbitrators have ruled both for and against NALC's position on this issue, NALC believes Regional Arbitrator Britton ruled correctly in finding that the APWU/USPS memo did not apply in an NALC case, and that a grievance filed protesting a letter of decision was arbitrable. C-12205, July 17, 1992.

Substantive Arbitrability Issues

Usually, management advocates are the sources of arguments that a grievance's subject matter renders it non-arbitrable. However, the National Agreement also specifically bars the arbitration of certain types of cases—those involving probationary terminations and MSPB dual filings.

Probationary terminations.

The contract does not permit the arbitration of cases challenging a probationary employee's termination prior to the end of the 90-day

In certain cases NALC can defeat a claim of untimeliness by showing that each instance or day management violates the contract is a separate violation, separately grievable because it is a "continuing violation."

probationary period. Article 12, Section 1 provides:

The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto."

Unless a union advocate can demonstrate that management failed to effect a termination within the 90-day period, an arbitrator will refuse to consider the merits of such cases.

MSPB dual filings. The contract also bars from the arbitration process those cases in which a preference eligible grievant has appealed the same management action through the grievance procedure and to the Merit Systems Protection Board, and where the MSPB appeal remains pending or has been settled or otherwise resolved on the merits, at the time the union appeals the grievance to arbitration. An advocate handling this issue must read carefully Article 16, Section 9, M-00830, a 1988 Memorandum of Understanding spelling out the purpose and intent of Article 16.9, and arbitration decisions on the subject.

Note, however, that a grievance is arbitrable even though the grievant has asserted the same claim in an Equal Employment Opportunity (EEO) complaint (see, e.g., C-10972, Regional Arbitrator Caraway, August 8, 1991). Nor is a grievance rendered non-arbitrable when a preference eligible grievant has appealed the same matter through the EEOC and then to the MSPB under the "mixed case" federal regulations (see C-16650, National Arbitrator Snow, January 1, 1997).

Some of the more common additional substantive arbitrability issues are discussed below.

"Wrong forum" issues. Sometimes arbitrators have ruled that they have no authority to hear and decide a grievance because the type of claim must be handled in a different forum. For instance, regional arbitrators have recognized that they do not have the power to accept or reject OWCP claims, which are properly handled by the Department of Labor (e.g., C-01396, Regional Arbitrator Caraway, August 23, 1982).

However, a host of other OWCP and limited duty issues are governed by regulations published in the ELM and are substantively arbitrable. Arbitrators have the authority to examine the merits of disputes over limited duty assignments (see M-01264, Step 4 Settlement), interference with a letter carrier's choice of physician, interference with the filing of a claim, etc. On a different topic, Regional Arbitrator Caraway has ruled that an arbitrator lacks authority over a claim under the Freedom of Information Act (C-01377, September 9, 1982).

However, National Arbitrator Bernstein ruled in 1987 that Article 5 of the National Agreement serves to incorporate all of the Postal Service's "obligations under law" into the Agreement, so as to give the Service's legal obligations the status of contractual obligations as well. In particular, the case held that Article 5's reference to the National

Labor Relations Act served to make the Service's obligations under the NLRA enforceable through the grievance procedure.

"Status of grievant" issues. In 1990 the parties executed a National Memorandum of Understanding ensuring that grievances would continue to be processed, and arbitrations would go forward, concerning cases in which the grievant had been separated from the Postal Service after the grievance was filed. 1994 National Agreement, p. 192.

A related issue involves postal workers in other crafts, including former letter carriers who have transferred to

other crafts. Such workers are covered by different collective bargaining agreements and their grievances are substantively not arbitrable under the NALC-USPS contract. See C-06949, National Arbitrator Bernstein, April 8, 1987, C-01148; Regional Arbitrator Foster, June 11, 1982. However, a national Memorandum of Understanding establishes that a letter carrier who accepts a limited duty assignment to another craft "under protest" may grieve the assignment under the NALC-USPS contract. M-01120, January 29, 1993.

Violations of the Joint Statement on Violence. Management

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National Arbitrator Bernstein ruled that the all of the Postal Service's "obligations under law" are incorporated into the National Agreement, and thus enforceable in the grievance-arbitration procedure.

may claim that a grievance is substantively not arbitrable because it alleges a violation of an agreement which is not enforceable through the grievance procedure. National Arbitrator Snow rejected such a management argument in C-15697 (August 16, 1996), by ruling that the Joint Statement on Violence and Behavior in the Workplace was enforceable through the grievance-arbitration procedure. (See the lead story in the *NALC Advocate*, May 1997, for an in-depth discussion of that case).

Reports have surfaced recently of management advocates attacking the arbitrability of NALC grievances requesting that supervisors be transferred, disciplined or removed for violating the Joint Statement. NALC advocates should be prepared to quote the national Snow award, which specifically affirms regional arbitrators' authority to formulate appropriate remedies in Joint Statement cases:

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.

Also see the article on page 1 of this issue, "Joint Statement Case Update."

Prior to Arbitrator Snow's Joint Statement award, which gave arbitrators authority to order sanctions

against supervisors, several arbitrators had ruled that grievances seeking the reprimand or discipline or transfer of supervisors were not arbitrable (e.g., C-09418, Regional Arbitrator Skelton, October 6, 1989). However, other arbitrators had ruled that such requests for unavailable remedies did not render grievances non-arbitrable (C-00111, Regional Arbitrator Caraway, March 9, 1982; C-08838, Regional Arbitrator Sobel, May 15, 1989).

The management "lawyer-speak" phrases "res judicata" or "collateral estoppel" are used to argue that a case or issue has already been adjudicated.

Cases or issues already decided.

There are many different "flavors" of claims that a grievance, or the claim made in a grievance, has already been decided.

Sometimes management advocates use

the Latin term "*res judicata*," which means that the matter has been adjudicated already. Others may use the term *collateral estoppel* to mean essentially the same thing. For example, in one case two identical grievances were filed two days apart, protesting the same action and asking for the same remedy. The arbitrator said the matter was *res judicata* because the first grievance had already been arbitrated and the grievance had been denied.

Sometimes management will argue that other, similar cases have been resolved against the union, rendering the current grievance non-arbitrable. For instance, in a contract case a USPS advocate may argue that NALC recently arbitrated, and lost, an identical case in the same USPS Area or District.

The union advocate must be ready to argue that the two cases are *distinguishable* in some fashion—that the grievant, the factual circumstances, the violation charged or the remedy sought is different. In addition, arbitrators are not bound by what other regional arbitrators have decided; other regional cases may be *persuasive precedent* but only national cases are *binding precedent*. However, if a case is not distinguishable from earlier precedent then the advocate should discuss with the NBA whether it should be pursued in arbitration.

A related management argument sometimes encountered is that the union previously withdrew a grievance on the same issue. A USPS advocate making this argument is claiming that by failing to appeal a denial, the union has acquiesced in management's position on the issue. However, good arbitrators will reject such arguments because a union may decline to pursue a case for a host of different reasons—because the facts of the particular case were not strong, because other cases were more pressing at the time, etc.—that do not signify any agreement with management's position.

A more down-to-earth argument is that the case before the arbitrator was settled by the parties at an earlier step of the grievance procedure. This is one argument against the arbitrability of a grievance which either party might make. In such a case the arbitrability portion of the case focuses on the existence and contents of the disputed settlement.

Another management tactic is to argue that a case is not arbitrable because a national-level settlement or arbitration decision has settled the matter and the union's position is therefore wrong. This argument

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is simply misplaced because the application of contractual rules to new cases is precisely the job of arbitrators. Even if one party may be "wrong" in a case, that does not render the grievance non-arbitrable. See, e.g., C-01664, Regional Arbitrator Dworkin, January 2, 1982.

Yet another variation of the "already settled or decided" argument is a claim that a case is "moot" (pronounced "moot" rather than "mute"). Management may argue that a case is moot and not arbitrable because the only remedy requested has been granted already (e.g., C-01694, Regional Arbitrator Holly, August 28, 1981 (grievance ruled moot), C-10827, Regional Arbitrator Goldstein, September 28, 1990 (ruled arbitrable), or has become unattainable because of the passage of time (e.g., C-01648, Regional Arbitrator Bowles, June 3, 1981 (ruled arbitrable)).

Last-chance agreements.

Union representatives sometimes make "last-chance" agreements to settle grievances involving removals. Sometimes last-chance agreements have contained provisions stating that upon any further

infraction, the grievant may be removed and shall not have access to the grievance procedure. (Note: It is NALC's strong recommendation that such language *not* be placed in any last-chance settlement. An advocate who discovers such language in a last-chance settlement should contact the NBA to ensure that the union representative who drafted the settlement is instructed not to include such language in future settlements.)

When there is such a last-chance settlement, a subsequent removal sometimes occurs. The union grieves it and management argues that the grievance is not arbitrable due to the terms of the agreement.

Arbitrators routinely reject such management arguments and rule the cases arbitrable. Arbitrators appear to agree unanimously that they have the power to review the facts of such cases, to determine whether or not the grievant actually violated the terms of the last-chance agreement. Otherwise, as Regional Arbitrator Render noted in one case, the Postal Service would be permitted "to discharge the

grievant for absolutely no reason whatsoever." C-14949, November 21, 1995. See also, e.g., C-11086, Regional Arbitrator Britton, July 26, 1991.

In addition, some arbitrators have reasoned that the National Agreement's grievance procedure or "just cause" for discipline provision are fundamental contractual rights which cannot be waived by the local parties who made the last-chance settlement. See, e.g., C-10846, Regional Arbitrator Klein, May 6, 1991; C-11113, Regional Arbitrator Levak, February 27, 1990.

Be Prepared

Management attacks on arbitrability seem to be increasing, as USPS advocates search for new strategies to defend their growing backlog of indefensible cases. NALC arbitration advocates should ask colleagues about particular management advocates and discuss management tactics regularly with the national business agent and other union advocates. The best way to stay on top of management attacks on arbitrability is to anticipate the types of arguments that may arise and prepare a basic set of counter-arguments.

Keep in mind that the union has some advantage in arguing arbitrability issues, because most arbitrators employ a "presumption favoring arbitrability." Even when an arbitrator does not explicitly embrace the presumption, he or she may well believe that the dispensing of arbitrable justice is good for workers, for management and for the labor-management relationship. From the union point of view, arbitration gives employees and NALC our "day in court," and we will fight hard to keep the courthouse door open. □

USPS Asks Money Damages Wants \$5,000 to Punish Union

A management advocate in the Pacific Area has been asking for \$5,000 damage awards against NALC in recent arbitration cases, arguing that the union's grievance was "trivial" or that such damages would force the union to become "more responsible." These desperate attempts to intimidate the union with the threat of punitive damages awards have been met with flat-out rejection from arbitrators. C-16849, Regional Arbitrator Abernathy, May

27, 1997; C-16729, Regional Arbitrator Rehmus, May 9, 1997.

NALC advocates should know that there is no basis whatsoever in the labor-management arbitration arena for an award of punitive damages against a union. Our initial research has not uncovered a single case involving such an award. So advocates should be prepared to call this management tactic what it is—a red herring. □

Monetary Remedies without Proof of Loss

Dollars to Deter Management Defiance of Contract

In two recent cases NALC advocates have obtained monetary remedies for contract violations without having to prove that management's actions led to any direct losses by letter carriers. In both cases, the arbitrators awarded monetary remedies to penalize management for violations and to deter future violations.

Information Request

Regional Arbitrator Donald Olson, Jr., recently ordered a monetary penalty against a management that repeatedly had ignored union information requests. C-16246, September 24, 1996. The case arose when an NALC steward in San Francisco requested information from a supervisor concerning a carrier's return to duty following an extended leave of absence—information which the supervisor could have obtained in a few minutes from other management sources. The supervisor ignored the request. NALC filed a grievance alleging the employer had violated articles 15, 17 and 31 by failing to honor the information request. At the Step 2 meeting management provided the information sought, but refused to pay the monetary remedy requested by the grievance.

NALC showed at the arbitration hearing that the same supervisor had ignored two other union information requests during the previous several months, leading to separate grievances which were settled in the union's favor. Both settlements contained language obli-

gating the supervisor to honor future union information requests. The second one also referenced a management labor relations instruction stating that front line supervisors are responsible for responding to information requested in accordance with Article 17, Section 3.

The union advocate argued that a monetary remedy was essential in this case, for to do less would make a mockery of the National Agreement's requirements, make the grievance procedure useless and erode any faith or confidence of the workforce in the system. NALC demanded a remedy to both protect the grievant's contract rights and penalize the employer's arbitrary and capricious behavior.

Management raised a new argument at the hearing—that the grievance was procedurally defective because the information request was made to the wrong supervisor. It further argued that no loss had been suffered as a result of the delay in furnishing the information, and that the union's remedy request was therefore inappropriate.

Arbitrator Olson rejected management's procedural argument, citing Article 15 provisions requiring management to disclose detailed reasons for denying a grievance at step 2 or 3, and the decision of National Arbitrator Aaron

prohibiting the raising of new evidence or arguments at arbitration (C-03319, April 12, 1983).

The arbitrator found that the contractual violation was clear from

the facts, which indicated that the supervisor had been admonished repeatedly to provide information to the union, yet management had waited three months to provide information it

could have obtained with a simple phone call.

In addressing the remedy question, the arbitrator quoted from one of the Supreme Court's 1960 *Steelworkers Trilogy* cases, which recognized the arbitrator's broad remedial powers:

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

The Supreme Court established in 1960 that arbitrators require flexibility, especially "when it comes to formulating remedies."

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Arbitrator Olson ruled that a monetary remedy was appropriate because the employer's violation had delayed the payment of compensation to a carrier by at least twelve weeks, and because the supervisor had flagrantly and repeatedly flouted his contractual obligation to provide requested information. He ordered the payment of \$25 to the grievant for each week of the delay, for two purposes: to make the grievant whole, and to provide management with a "deterrent" to future violations.

60-Day Post-DPS Route Review

A recent case from NALC's Memphis region further underscores an arbitrator's authority to remedy contract violations by fashioning monetary remedies "as a deterrent to future incidents". C-16688, Regional Arbitrator Leonard Bajork, April 28, 1997. The grievance concerned management's failure to conduct the 60 day post-DPS implementation reviews to ensure that the routes were as near to 8 hours daily as possible as required by the September 17, 1992 Memorandum discussed in *Building Our Future by Working Together*. The memorandum states:

Within 60 days of implementing the planned adjustments for future automated events, the parties will revisit those adjustments to ensure that routes are as near to 8 hours daily, as possible. Both the planned adjustments and subsequent minor adjustments that may be necessary to ensure compliance will be based on the most recent route inspection data for the route. However, if the future event occurs [i.e. DPS adjustments are

made] after the 18-month time limit expires, a new mail count, route inspection and evaluation must occur, unless the local parties agree otherwise.

Among management's defenses at the arbitration hearing was the claim that the reviews were unnecessary because the union had failed to demonstrate that any of the routes were actually overburdened. The union was able to overcome management's arguments by skillfully educating the arbitrator about the complexities of DPS implementation and management's obligations under the terms of the applicable memorandum.

The arbitrator sustained the grievance, held that the 60 day review requirement is absolute and rejected management's arguments as follows:

Throughout the hearing, the Employer maintained that the Union failed to show that the GMF's routes were overburdened as basis for its position that the Union failed to meet its burden of proof as the moving party. The Employer's position misses the point. It is not a matter of proving the routes were overburdened. Rather, it is a matter of the parties complying with the M-39's applicable sections on DPS implementation and then, and only then, to ensure a bilateral approach to further adjusting routes if and when warranted.

Because management had a positive obligation to conduct the review, the union did not have to prove that the routes were actually overburdened.

The arbitrator ordered the Postal Service to conduct the required reviews immediately. Although the union had not proven that any specific carriers were required to work overtime solely as a result of the violation, he further ordered USPS to remedy the past violation by paying each letter carrier who had worked overtime up to \$500 as a deterrent to future violations.

Both of these cases illustrate that arbitrators take seriously management's obligations to obey the parties' collective agreement, and that monetary remedies are obtainable—with skilled advocacy—even in cases where let-

ter carriers have suffered no direct, demonstrable loss of pay or benefits. Unfortunately, for too long some arbitrators have accepted management arguments that without proof of direct loss, many contractual violations were "harmless error" that could be remedied through a "cease-and-desist" order alone.

Although it should not be necessary to wait for the kind of flagrant violations in these cases, it often does take a strong set of facts to persuade an arbitrator that a monetary penalty is warranted without proof of loss. A skilled advocate can sharpen the issue for the arbitrator by arguing that anything less than a monetary remedy would undermine the integrity of the parties' agreement. □

Introducing Documents

Hearing Skills: Getting Documents Into the Record

Has this ever happened to you?

"I object, Mr. Arbitrator! The union witness is testifying about the contents of a document that is not yet in evidence! I have just been handed this document and I have no idea what it is. The union has failed to lay any foundation whatever for the document. May I *voire dire* the witness at this time?"

The arbitrator sustains the objection and allows the management advocate to start asking the witness questions about the document. You try to object, saying you're not finished with your witness, but the arbitrator ignores your protests.

What happened? What is the management advocate talking about—what lawyer mumbo-jumbo is he spouting now? Why did the arbitrator let him interrupt you right in the middle of your direct examination?

The answer is that you did not *lay a proper foundation* for the document, a necessary step to *authenticating* it. The best way to explain those concepts is to review the fundamentals of how documents may be introduced at an arbitration hearing.

Arbitration advocates routinely introduce documents into evidence as part of their cases. There are standard techniques for doing this, which all advocates must learn to use.

Must Be "In the Record"

An arbitrator will consider a document in his or her decision only if the document has been placed "in evidence" or "in the record." This means you may not simply give any piece of paper to an arbitrator and ask her to consider it. Instead, you have to *get* the document into the record somehow. This is part of your hearing strategy, just as you must decide how to get necessary testimony into the record.

Two Ways to Get It In

There are two ways to get a document into the arbitration hearing record: (1) by *stipulation* or agreement of the parties; or (2) by *authentication* during the hearing.

1. Stipulation. Management and the union often stipulate (agree) to enter certain documents in the record. When the parties stipulate to the admission of documents, they agree there is no dispute about their authenticity. For instance, by stipulating to the admission of the National Agreement, the parties agree that the document submitted actually is the parties' labor agreement.

What it does not mean. Although union and management advocates may agree that a document is what it purports to be—and thus stipulate to its introduction—this does *not* necessarily commit the union to agreeing to the document's

accuracy or *applicability*. For example, the union may stipulate that a submitted Form 1838 is the form that was created during the grievant's route inspection and adjustment, yet it may also intend to prove that the form contains several inaccurate entries. Similarly, the union may stipulate to admit ELM Section 434.6, which governs out-of-schedule pay, without agreeing that management should have applied those provisions in the case at hand. In such cases the union advocate may stipulate to the document's admission to the record, but should tell the arbitrator when stipulations are made that the union reserves the right to challenge the document's accuracy or applicability in the case.

How it is done. Generally the advocates agree on stipulations before the hearing begins. Then, during the preliminary discussion among advocates and arbitrator just before the hearing opens, the advocates present to the arbitrator the exhibits to whose admission they have stipulated.

Typically the parties stipulate to the admission of:

- (a) The *National Agreement*, which is typically Joint Exhibit No. 1; and
- (b) The *documents making up the grievance record* (Step 2 Appeal, Step 2 decision, Step 3 Appeal, etc.). Usually the parties call these collected papers the "grievance package" and they stipulate to admit the whole package as Joint Exhibit No. 2. Some arbitrators or advocates may give each separate document in the package its own Exhibit number.

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(c) Relevant USPS handbook and manual provisions, such as the M-39 and the *Employee and Labor Relations Manual* (ELM).

In addition, advocates often stipulate to admit USPS forms and other routinely-used postal documents into the record.

Stipulation is the easiest way to get documents into the record, and is often the best way when there is no dispute about their authenticity. Advocates should use stipulation regularly because it is quick and efficient—it prevents unnecessary and time-consuming haggling at the hearing.

Explain all documents. Even where there is no dispute over the admissibility of a document, advocates must take pains to *explain fully* what the document is and what significance it should have for the arbitrator. Remember, everything the arbitrator receives should be explained; never assume the arbitrator understands something just because you do. This is an essential part of *educating the arbitrator* about your case.

2. Authentication. Authentication is the other way to get a document admitted into the record. It is necessary where the parties have *not* stipulated to a document's admission. To *authenticate* a document is to *show it is valid* so the arbitrator will admit it to the hearing record.

Authentication is necessary because a document is different from a witness's live testimony. A document usually reports that certain facts are true or actually happened. So does a witness, but although a

witness can be cross-examined to test his or her truthfulness, a document cannot. So a document is usually authenticated *through a witness* who can testify about it. This is also called "laying a foundation" for the document. (Technically, it is hearsay where a document is submit-

ted to the arbitrator to prove the truth of what the document reports. For instance, where management offers a supervisor's written witness statement to prove the grievant extended her lunch hour, that is hearsay.)

USPS documents. When a document was produced "in the regular course of business"—for instance, a time card record—there is a presumption that the document is authentic and this is an exception to the hearsay rule. The document will be admitted to the record without extensive "foundation" testimony. Many standard USPS documents are routinely admitted without objection under the "produced in the regular course of business" exception to the hearsay rule.

However, an advocate may still prove that such a document is wrong, by presenting evidence that contradicts what the document pur-

ports to show. For example, in one case an NALC advocate introduced copies of actual time cards to show that entries on the Form 1838 and 1840 were incorrect and that an improper route adjustment was the result.

How to lay a foundation for a document. An advocate typically authenticates a document by calling a witness who can answer such questions as:

- Where he or she obtained the document (where it came from);
- How the document was created (and where appropriate, what source documents were used to create it);
- Whether the document was produced in the regular course of business (either USPS business or NALC business);
- What facts the document shows; and
- Whether the document accurately reports the facts (if the witness knows this).

After the witness has established the document's authenticity through answers to such questions, the advocate requests that the document be placed in the record:

"Madame Arbitrator, the Union offers this document for admission to the record as Union Exhibit 5."

Two Steps

The following two-step procedure is used to get documents into the hearing record—unless the arbitrator indicates that a less formal approach is acceptable:

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Explain all documents even if you stipulate to their admission to the record. Never assume the arbitrator understands everything. This is part of educating the arbitrator.

1. Marking for identification.

First, the advocate should write a Union Exhibit number on a document just to identify it, before it is offered for admission to the record. Marking for identification is for the parties' convenience only. A document marked for identification but not admitted to the record technically is *not evidence* and will not be considered by the arbitrator.

Assume, for example, that you wish to introduce certain compilations of route mail volume and street time data through a witness, the branch president. When you are ready to have the witness authenticate and explain the documents, you would give copies to the witness, the arbitrator and the USPS advocate and say:

"Mr. Arbitrator, at this time I have marked for identification three documents as Union 4, 5 and 6."

There should not be any objections to simply marking a document for identification, because the document has not yet been offered for admission to the hearing record.

However, the other advocate may ask for a recess to study the documents prior to the testimony. As union advocate you should always ask for sufficient time to study any documents the Postal Service introduces in this way. You have a right to examine documents so that you may respond appropriately with questions or objections to their admission into evidence. Arbitrators recognize this and rou-

tinely grant advocates time to study new documents.

2. Admission to the record. After the documents are marked for identification, the advocate proceeds to authenticate and explain them through the witness. When this ground has been covered sufficiently, the advocate offers them for admission to the record.

Objections

Two objections are commonly made to challenge the admission of documents to the record—*lack of foundation* and *hearsay*.

Lack of foundation. An objection of "lack of foundation" usually means, "The document should not be admitted to the record because it

has not been sufficiently authenticated or explained." Usually this objection is proper when one side has moved to admit a document without any explanation of what it is, where it came from, who created it or what it supposedly

shows.

When you face such an objection, be prepared either to: (1) offer additional information about the document, usually through your witness; or (2) argue that you have already provided sufficient information about the document for its admission to the record.

Hearsay. A hearsay objection to a document may be raised where the truth of what the document reports is an issue. Such an objection may be raised where, for example: (1) the Postal Service moves to ad-

mit a Postal Inspector's investigative memorandum, but the inspector is not present to testify and be cross-examined about the facts reported in the memorandum; or (2) the union offers a written statement of a witness, but the witness is not available to testify and be cross-examined about the facts reported in the statement.

Keep in mind that arbitrators commonly admit evidence—testimony and documents—that is technically objectionable, saying, "I'll admit it and give it appropriate weight." If the material is offered against you and it is damaging, it may be helpful to object strenuously to make the point that the evidence should be considered worthless even though it is allowed into the record.

Voire Dire

This French phrase, usually pronounced "vwahr deer," is used to describe the process of testing the authenticity of a document offered into evidence, by questioning a witness about it. One side may *voire dire* the opposing side's witness concerning a document offered into evidence, interrupting the other side's direct examination of its own witness.

Say, for example, management offers a multi-page document into evidence consisting of a summary of the grievant's mail volumes and delivery times each day over several weeks, including line and bar charts illustrating the data. The USPS advocate marks the document for identification as USPS 5, gives copies to you, the arbitrator and the supervisor-witness, and then asks the supervisor if she prepared the document. The supervisor says "Yes" and the management

A "lack of foundation" objection is a claim that the document has not been sufficiently authenticated or explained.

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advocate moves to place the document into evidence.

You object to the document's admission claiming "lack of foundation," and ask the arbitrator if you may *voire dire* the witness concerning the document. The arbitrator permits you to do so. You may then ask the witness questions about the document intended to establish its authenticity—or lack of authenticity. These are the same types of questions you would use to authenticate any document through a witness, for example:

"Supervisor, I refer you to the document marked for identification as USPS 5. Can you tell me what this document is?"

"Who created this document?"

"Please explain each column and row of numbers on the chart."

"What is the source of the data reported in this document? Can you provide it to this hearing today, for verification?"

The *voire dire* generally ends when you or the arbitrator are satisfied that the document may be

admitted to evidence, or when you reach a point where you wish to state an objection to its admission based on what you have learned.

In this example, if the data were taken from standard USPS forms or computer reports, you may wish to demand that USPS produce the original source documents so the summary document may be verified for accuracy.

Use Documents to Persuade

Planning for the introduction of documents is a key part of hearing strategy. NALC advocates should use documents in a step-by-step fashion, introducing each document to support a point made during testimony. This is often done in contract cases, with an experienced and articulate NALC witness such as a branch president "walking" the arbitrator through the union's case. Advocates should prepare their witnesses to explain each document in down-to-earth English rather than "postal-speak," so that arbitrators can follow the action.

Sometimes an advocate has an especially important or "smoking gun" document that should be introduced with maximum dramatic effect. If the document undermines a supervisor's testimony, the union advocate should consider introducing it *through the management witness* during cross-examination. This may call for strong cross-examination skills to keep the witness under control and the testimony on course.

Returning to the situation at the start of this article, how should an NALC advocate handle a "lack of foundation" objection combined with a request to *voire dire* the witness? The best way is to offer to fix any problem immediately: The union advocate might respond:

"Mr. Arbitrator, if you desire a more complete foundation for this document I can establish it right now with just a couple of questions. I would appreciate an opportunity to do so without interruption from management."

This should work in most cases, maintaining the union advocate's control over the case. □

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