NALC Arbitration Advocate

Volume 8 Issue 1 February 2004

A Publication of the Contract Administration Unit and Education Department - National Association of Letter Carriers, AFL-CIO

Last Chance Agreements

Challenging a Removal for Violating a Last Chance Agreement

Sometimes there is only one way to save a letter carrier's job—by agreeing to a last chance agreement or LCA. Experienced union representatives know that a last chance agreement is truly a last resort. In return for avoiding removal, a letter carrier typically must sign an agreement that conditions his or her continued employment on certain specified requirements. The requirements may involve attendance, or receiving treatment for such things as alcohol or drug dependency or even anger management.

The usual last chance agreement provides that if the employee violates these requirements, management may proceed directly to removal. When management later alleges that the carrier violated the LCA and issues a removal, the matter is not finished, however, because NALC has the right to grieve a removal for violation of an LCA.

This article addresses these types of cases—challenges to removal for violation of a last chance agreement. Letter carriers facing this type of removal already have two strikes against them. First, they have effectively admitted the charges against them which led to the LCA, so their records are tainted by serious past elements. (But see the Briggs award discussed below.) Second, the removal is based on a violation of the LCA's terms, rather than more traditional

(Continued on page 2)

30-day Discussion Requirement

Discussing Scheduled Cases 30 Days in Advance

Article 15, Section 4 of the National Agreement deals with arbitration. The following language was added to Article 15.4.A.4 in the 2001 Agreement:

> The designated advocates will discuss the scheduled cases at least thirty (30) days prior to the scheduled hearing date if possible.

The point of this provision is to ensure that union and management advocates take every opportunity to explore settlement short of arbitration. Timing is essential here, because too often cases are pre-arbed "on the courthouse steps"—that is, on the hearing day. This results in the loss of both the hearing day and the arbitrator's fee and expenses.

NALC expects advocates to comply strictly with the 30-day discussion requirement. If union advocates are unable to obtain full the cooperation of USPS advocates with this provision, they should contact the national business agent for advice.. ■

Inside...

Last Chance Agreements . . .

(continued from page 1)

charges of misconduct. So management is likely to argue that the usual just cause standard should not apply, because the employee has agreed to abide by the LCA's more stringent conditions for continued employment. In some cases management even takes the position that a removal for violation of an LCA is not grievable.

No Waiver: The Right to Grieve and the Just Cause Standard

Most arbitrators uphold NALC's position on two fundamental issues concerning LCAs. First, they agree that no matter what a last chance agreement's provisions, a grievant has the right to grieve a removal based on an alleged violation of an LCA. The language in some LCAs purports to deny the letter carrier any access whatsoever access to the grievance procedure. NALC is usually successful in arguing that no agreement can waive or contradict the right to grieve guaranteed by Article 15 of the National Agreement. The opposing view would deny the grievant any redress at all in challenging a removal for violating a last chance agreement.

Similarly, most arbitrators agree that an LCA's provisions cannot waive the requirement that discipline or discharge be judged by the just cause standard. While management may argue that the terms of a last chance agreement render the just cause standard inapplicable, advocates should know that numerous arbitrators have concluded that LCA language cannot override Article 16, Section 1.

Regional Arbitrator Thomas F. Levak provided an in-depth analysis of a claim by USPS that by virtue of language in the LCA, the employee had waived his right to a hearing on the merits. Arbitrator Levak commented:

> In a few cases, unions have challenged the LCA's themselves on the ground that regardless of what they say, a removed Grievant is still entitled to grieve, and is still entitled to full just cause protection under Article 16. Arbitrator Cohen, in at least two cases, has basically ignored the terms of LCA's and has resolved the disputes based upon Article 16 just cause concepts. In Case No. C1C-4A-D 3843, July 19, 1982, he stated:
>
> > It is obvious that the parties have not taken Grievant's last-chance settlement of September 25, 1981 literally. One of the provisions of that agreement is that Grievant would not grieve a subsequent discharge for failure to maintain a perfect attendance record during the 120-day period. She has grieved her discharge, and the Postal Service does not contend that she has no right to file a grievance. Obviously, her agreement not to grieve is unenforceable because the National Agreement gives her the right to grieve.
>
> Similarly, a provision in an agreement setting forth what constitutes just cause for dismissal is also unenforceable, because the final decision as to what constitutes just cause for discharge must be left to an arbitrator. Otherwise, a Grievant's right to arbitrate would be effectively terminated. If the parties could determine what is "just cause", then all an arbitrator could do would be to rubber-stamp the agreement. That is not the intention of the National Agreement. The National Agreement reserves to the arbitration process the eventual resolution of disputes. What constitutes just cause is one such dispute.
>
> C-11113, February 27, 1990.

Most arbitrators agree that no matter what a last chance agreement's provisions, a letter carrier has the right to grieve a removal for violating the agreement.

Ultimately, Arbitrator Levak concluded:

> . . . an LCA that purports to waive the union's and the employee's right to grieve the employee's removal is, to that extent, unenforceable. The parties at the local level cannot write an LCA that totally extinguishes

(Continued on page 3)

Last Chance Agreements . . .

(continued from page 2)

> the right of an employee to grieve the propriety of his removal under Article 16. That Article expressly provides that any removal is grievable. Further, Article 15, Sections 1 and 2 expressly provide that grievances concern employee complaints over the compliance with the National Agreement, one of the terms of which is the just cause provision. The situation is analogous to that of parties to an LMU who write a provision that conflicts with or is inconsistent with the National Agreement. Such a provision may be challenged by the Service at any time during the term of the LMOU.

While some arbitrators disagree with Arbitrator Levak's conclusion, the majority have decided that a removal for violation of an LCA is arbitrable and that the removal must be determined on the merits of the case.

Two further, related points are worth noting. First, the national parties agreed in Step 4 settlement M-01127, involving an employee and his non-union representative, that an LCA containing language barring grievance rights was invalid. The settlement states that:

> ...the Grievant and his/her non-union representative cannot waive the union's right to file a grievance concerning a dispute as to whether the Grievant violated a last chance agreement.

Second, advocates should note that NALC representatives can never waive an employee's right to appeal to the EEOC or MSPB. Nor do NALC representatives possess authority to resolve pending EEO or MSPB appeals. Only the employee can waive EEOC or MSPB appeal rights or resolve these types of appeals, because they are grounded in federal laws rather than the National Agreement.

Application of Just Cause in LCA Cases

How should an arbitrator apply the just cause standard in a case involving removal for violation of an LCA? NALC advocates should argue that each removal under an LCA must be examined on its own individual merits, with all extenuating circumstances taken into account.

NALC advocates must prepare to counter management arguments that once the facts of an LCA violation are proven, discharge follows automatically.

However, advocates must be prepared to face management arguments that the only issue before the arbitrator is whether the grievant committed misconduct prohibited by the last chance agreement. Once management proves the misconduct, USPS advocates will argue, discharge must follow ***automatically***. The arbitrator is not empowered, they will contend, to look further into extenuation, mitigation or any defense intended to lessen or rescind the removal. After all, USPS will argue, the grievant and the union have agreed in the LCA that the specified conduct justifies discharge.

NALC advocates should oppose vigorously any argument that discharge must follow automatically once the facts of misconduct are proven. Remember that no LCA can waive the contract's just cause standard. Regional Arbitrator Klein provided support for the union's position as follows:

> An agreement dictating that certain behavior automatically constitutes just cause for removal is likewise unenforceable. The grievance-arbitration procedure allows for other managers or an arbitrator to be involved in the decision-making process as it relates to the determination of just cause. Despite the existence of a last chance agreement, the Grievant is entitled to a review of the facts which occurred subsequent to said agreement for the purpose of determining the existence of just cause and the appropriateness of the penalty.

C-10846, May 6, 1991.

Regional Arbitrator Gerald Cohen, in supporting a grievant's right to arbitration despite signing an LCA waiver, set a standard for determining just cause in cases involving LCAs. In the case the grievant had been absent after signing an LCA that required him to maintain

(Continued on page 4)

Last Chance Agreements . . .

(continued from page 3)

"perfect attendance" for 120 days. Arbitrator Cohen reviewed the circumstances surrounding each absence or tardy, and concluded:

> Were it not for the last-chance settlement involved here, every absence that the Grievant had in the period in question would have been accepted as reasonable, and the Grievant would not have been criticized for them.
>
> Perfection in attendance has always been recognized as a goal to be striven for. But lack of perfection is not recognized as grounds for discharge. It is an impossible expectation that ordinary mortals will attain perfection in anything, and lack of perfection is accepted as part of every-day life. If lack of perfection should reach a certain point, of course, it might be a basis for discipline. But lack of perfection itself is not grounds for discharge.
>
> To impose on the Grievant the requirement of perfection at the risk of discharge is to require her to live up to a standard which is almost impossible to keep, and which neither the National Agreement nor the Handbooks and Manuals require. Therefore, her discharge was not for just cause.

C-00239, July 19, 1982.

Regional Arbitrator Axon also addressed the specific circumstances leading to management's discharge of an employee who had signed an LCA. The carrier, who had signed an LCA with no specified termination date, had gone 14 months without violating any terms of the LCA, which required that he call into his supervisor if he anticipated being unable to finish his route by 5:00 p.m. Management claimed that the grievant's discharge was proper because the grievant had failed to make such a call at the appropriate time. Management also charged that a week later, the grievant had returned to the office with a tray of undelivered mail and had not reported that fact to management. This second alleged act triggered the Grievant's removal.

NALC can challenge a removal for an LCA violation when the LCA demands "perfection" in the employee's performance, when USPS has failed to enforce the LCA previously, or when the alleged misconduct is unrelated to the reasons underlying the LCA.

Arbitrator Axon noted that although the first reason for discharge, failing to call in, would have been sufficient under the terms of the LCA, management did not act at that time to discharge the grievant. Rather, the Postal Service acted only after the second incident, when the grievant returned with a tray of undelivered mail. Arbitrator Axon concluded that management did not consider the first instance to be a removable offense. He further reasoned that management had failed to meet the just cause standard because it relied on the grievant's return of undelivered mail. The union had demonstrated at the hearing that other carriers who returned undelivered mail had not been discharged. Also, the grievant had no history of returning undelivered mail. The problem addressed by the LCA was that the Grievant had failed to notify the supervisor when he was unable to complete delivery by 5:00 p.m. Arbitrator Axon concluded, "In sum, the charges on which the Postal Service relied to remove this Grievant do not rise to the level for which summary discharge is justified." C-11112, August 9, 1991.

This case highlights two potential arguments available to union advocates challenging a discharge for breach of a last chance agreement. First, if management fails to act promptly after the grievant violates an LCA, the union can argue that the Postal Service, by waiving its right to act, has effectively ***changed or nullified*** the terms of the agreement.

Second, management ***changed the subject*** when it fired the letter carrier for an offense unrelated to the charges underlying the last chance agreement. So if, for instance, a letter carrier with a poor attendance record

(Continued on page 5)

Last Chance Agreements . . .

(continued from page 4)

signs a last chance agreement requiring specified standards concerning future attendance, then a subsequent removal for working unauthorized overtime should fall outside the scope of the LCA. A union advocate should argue that in such a removal case the LCA is irrelevant and the carrier's conduct must be judged solely by the just cause standard.

Supporting Cases
Arbitrator Roberts
C-16475, March 1, 1997

Arbitrator Bowers
C-23571, July 27, 2002

When an LCA provides for discipline "up to and including removal," argue that management must demonstrate why removal is more appropriate than lesser discipline.

Many LCAs state that violations of work rules or other specified requirements may lead to discipline "up to and including discharge." This language provides NALC with the argument that even where the grievant has violated the LCA, management has the burden of demonstrating why discharge, rather than lesser discipline, is warranted. Regional Arbitrator Carlton J. Snow addressed this issue as follows:

> Violation of such an agreement may well provide just cause for discharge. But, where, as in this case, the Last Chance agreement stipulated only that failure to abide by provisions of the agreement might result in discipline "up to and including" removal, the Employer also accepted an obligation to establish why the violations, once proven, warranted discharge, rather than some lesser discipline.

Arbitrator Snow concluded:

> The Last Chance agreement in this case merely stated that failure to abide by the agreement "may" result in discipline and that the discipline "may include removal." Because the consequences in this case are severe and the violations relatively minor, it is essential to pay close attention to the process by which management made the decision to remove the Grievant in order to test whether just cause existed at the time the supervisor reached his decision.
>
> A single incident of oversleeping simply was insufficient to warrant a removal in this case where the Last Chance agreement did not state that all violations will result in removal and where the violation was not directly related to the conduct which precipitated the Last Chance agreement.

C-10214, August 17, 1990.

Arbitrator Snow drew two distinct conclusions. First, when an LCA provides for discipline "up to and including removal," the union may argue that discipline other than discharge may be appropriate. Second, a single incident or technical violation may not be sufficient to warrant summary discharge.

Supporting Cases
Arbitrator Render
C-14949, November 21, 1995

Arbitrator Lange
C-10000, March 20, 1990

Arbitrator Cohen
C-00239, July 19, 1982

Arbitrator Britton
C-11086, July 26, 1991

Arbitrator Bennett
C-09680, January 29, 1990

Arbitrator Klein
C-10846, May 6, 1991

Arbitrator Render
C-10482, November 29, 1980

Arbitrator Fraser
C-24190, April 14, 2003

Duration of an LCA

The union should never agree to a last chance agreement without a clearly specified termination date. It is NALC's strong recommendation that an LCA's termination date be set no more than two years from the date the removal was issued. This is partly because a national arbitrator has ruled that LCAs are not "records of disciplinary action" covered by the provisions of Article 16, Section 10 of the National Agreement. Thus they are not by covered by the prohibition on consideration of records of discipli-

(Continued on page 6)

Last Chance Agreements . . .

(continued from page 5)

nary action where the employee has had no discipline for two years. National Arbitrator Steven Briggs wrote:

> Last chance agreements do not constitute an employer disciplinary action against employees for their misconduct; rather, they represent an employer-sanctioned reprieve from an earlier discharge.

C-22941, January 15, 2002.

However, Arbitrator Briggs found that specific language in the LCA that referred to particular, past disciplinary actions did in fact constitute a "record of a disciplinary action." He concluded that since the discipline cited in the LCA was over two years old,

> It is an obvious and inappropriate reference to the Grievant's past disciplinary record. Accordingly, . . . [it] may not be considered in any subsequent proceedings . . .

Arbitrator Briggs ruled that where the LCA to be introduced at arbitration mentioned discipline issued more than two years before the removal action for violation of the LCA, the proper action is for the parties to "redact," or black out, from the LCA all mention of the stale discipline. Specifically, Arbitrator Briggs stated:

> The Union contends that the Settlement Agreement cannot constitute a waiver of any protections under Article 16.10. The Arbitrator agrees. Allowing it to do so would deprive the Union and its constituents of rights that were bargained in good faith. That is why it is appropriate to redact from the Settlement Agreement ... records of past disciplinary action against the Grievant. Making reference to them once the requisite two-year period had passed would violate Article 16.10 ... a negotiated provision the Settlement Agreement cannot amend.

Last chance agreements lacking an expiration date are not favored by arbitrators in general. NALC recommends limiting an LCA's terms to no more than 2 years after the removal's issuance.

Advocates should be prepared to use the national Briggs Award in any case involving an LCA which refers to discipline issued more than two years before the issuance of the removal for violating the LCA. NALC advocates should also note that any removal for violating an LCA which is based even partly on stale discipline—whether or not that discipline is mentioned in the LCA's provisions—is barred by Article 16, Section 10.

Regional Arbitrator Gary Axon also dealt with an LCA which had no time limit. Arbitrator Axon wrote:

> The Arbitrator notes the last chance agreement Grievant signed has no firm date by which it would terminate. Last chance agreements without a termination date are not favored. Arbitrators generally hold that a last chance agreement must be limited to a reasonable period of time.

C-11112, August 9, 1991.

While Arbitrator Axon's decision does not prevent management from using an LCA with no expiration date, it places management on notice that LCAs with no expiration date are not favored. NALC advocates should argue that arbitrators should give little weight to such documents.

Specific, Reasonable Performance Requirements

If an LCA is to be effective, it must meet certain standards. Most important, it must clearly specify what is expected of the employee. Arbitrators have overturned discharges for violation of an LCA where the last chance agreement itself was improperly constructed or administered.

A regional arbitration award from Carlton J. Snow sets forth clear guidelines for LCAs. In that case management claimed the grievant was discharged because of her irregular attendance, unscheduled absences and incomplete tours. The arbitrator found the grievant's record, reproduced in the award, to be "intolerable." However, Arbitrator Snow overturned the discharge and returned the grievant to work because he determined that management had

(Continued on page 7)

Last Chance Agreements . . .

(continued from page 6)

acted inconsistently and conveyed an ambiguous message to the Grievant. The record showed that the Grievant had apparently agreed to two LCAs, one written and one oral. Testimony at the hearing about the nature of these LCA's revealed conflicting beliefs about what the LCAs meant and how they were to be applied. In his award, Arbitrator Snow wrote:

> Last-chance reinstatements can provide management with an effective tool for attempting to salvage a recalcitrant employee. It is a useful device in a variety of situations, and the flexibility inherent in "last chance" agreements allows management to draft an agreement that responds to the specific problems faced by the parties in a particular case. By conditioning reinstatement on attaining satisfactory goals, the Employer has an opportunity to monitor an employee's progress with precision, and it is reasonable for management to conclude that, if an employee will not respond when a Damocles sword hangs above his or her head, the individual will not respond in more normal circumstances. Hence, removal probably would be justified.
>
> If, however, a "last chance" agreement is to be used, it must be used properly. It must be closely monitored. By not enforcing a "last chance" agreement, management lulls an employee into a false sense of security. If management does not follow through with its stated intent, an employee is led to believe that he or she only thought a sword hung above the individual's head but that management really intends to continue its lenient policies. Then, the individual relies on the expectation of leniency, and considerable ambiguity is injected into attempts by management later to rely on the "last chance" agreement after an intervening period of leniency when none was supposed to exist.

Advocates must insist that an LCA's terms are clear and understood by the employee, and that its requirements are specific, limited, and reasonably related to the conduct that led to the agreement.

Arbitrator Snow returned the employee to duty with full back pay. He did, however, require the Grievant to sign a twelve month last chance agreement and require her to be informed of the ramifications of a failure to live up to the stated requirements. C-09746, June 28, 1989.

Arbitrator Snow's award lends support for NALC arguments that before an LCA may be used against an employee, the agreement must be constructed and administered properly. The terms of the agreement must be clear and unmistakable. The agreement needs to incorporate specific performance requirements. There must be objective proof that the terms have been communicated by management to the employee. Moreover, it is the duty of management, not the union, to explain these terms to the employee.

Supporting Case
Arbitrator Baroni
C-20299, January 3, 2000

LCAs Cannot be Arbitrary, Capricious or Unreasonable

As noted above, sometimes NALC advocates have overturned removals for LCA violations by arguing that the LCA's requirements were not reasonably related to the misconduct charged in the removal. In some cases an LCA's language purports to cover every possible type of employee misconduct. NALC should challenge as unenforceable this kind of overreaching LCA, arguing that overly broad and undefined performance requirements are arbitrary, capricious or unreasonable.

Regional Arbitrator Mark Lurie grappled with an LCA containing language providing that any violation of work performance requirements would result in immediate removal. The grievant signed the LCA to avoid a removal for unsatisfactory attendance. Arbitrator Lurie stated in his award:

(Continued on page 8)

Arguing for Remedies in Contract Cases

Remedies Are Not Automatic—They Must Be Argued

All too often an NALC advocate succeeds in convincing an arbitrator that management violated the contract, yet fails to obtain a substantial remedy. This can happen because union advocates forget that remedies are not automatic once a violation is established.

Rather, in contract cases the union carries the burden of demonstrating that the remedy requested is appropriate and necessary. This article offers strategies for arguing remedies and obtaining them from arbitrators.

Since over 500 arbitrators have handled NALC cases at one time or another, there are exceptions to any generalization about arbitrators. Nevertheless, the key to formulating remedy arguments is to understand how arbitrators perceive their role.

Most rights arbitrators view their function—as they should—as enforcing the terms of the National Agreement, a contract between the parties. They generally do not believe it is their function to police the relationship between the parties. Consequently, they view the proper function of remedies as "making the grievant whole," that is, restoring any rights or entitlements that were lost because of a contract violation.

For example, if a casual is worked instead of a part-time flexible in violation of Article 7.1.B.2, most arbitrators would accept that the appropriate remedy is to pay the part-time flexible for the hours he or she would have worked but for the violation. However, in many contract grievances the remedy issue is not so simple. For example, if a full-time letter carrier is denied a

(Continued on page 9)

Last Chance Agreements . . .

(continued from page 7)

The terms of a last chance agreement cannot be arbitrary, capricious or unreasonable. Rather, given the penalty for failure, a last chance agreement must clearly set forth the performance requirements that the employee must meet; that is, the specific standards the violation of which will trigger removal. Where a last chance agreement is clear and unequivocal on [its] face, it will be enforced as written. However, the performance standards must be knowable, reasonable and attainable.

Arbitrator Lurie concluded:

> While it is reasonable, in a last chance agreement, to hold the employee to a higher standard than her peers in the area in which her performance deficiency has engendered the agreement, it is commercially unreasonable to hold the employee to that same high standard for every aspect her performance, and to make infractions which are unrelated to the fundamental cause and remedial purpose of the last chance agreement (and which would otherwise be treated as minor discipline) a tripwire for discharge. In the instant case, the catch-all phrase, expansive in its coverage, so lacking in standards of performance, and so devoid of distinction as to degree of severity of the infraction, as to have been substantively arbitrary and capricious.

C-22344, July 15, 2001.

NALC should challenge any last chance agreement that holds an employee to an unknowable, unattainable or unreasonable standard of conduct. Such agreements may be attacked as requiring "perfection" or threatening discharge for minor infractions of any type, even if unrelated to the basis for the LCA.

As a final note, NALC advocates should know that in most cases arbitrators uphold removals for violation of last chance agreements. However, when an LCA is improper or when the removal otherwise violates just cause, it is our job to argue vigorously for the grievant's reinstatement with full back pay. ■

Arguing for Remedies . . .

(continued from page 8)

special route inspection that should have been given under the provisions of M-39 Section 271.g, almost all arbitrators will order that a special inspection be conducted forthwith. Where arbitrators differ is over whether any further remedy is due. After all, some have reasoned, the grievant was paid for any overtime hours that were worked as a result the route being overburdened and there is nothing in the contract that requires anything more. In such cases, it is the NALC advocate's responsibility to convince the arbitrator that an additional monetary remedy is required.

The Arbitrator's Remedial Authority

There is a legal maxim, "Without remedies there are no rights." National Arbitrator Mittenthal elegantly restated this in C-03234: "The grievance procedure is a system not only for adjudicating rights but for redressing wrongs." Nevertheless, some arbitrators are persuaded by Postal Service arguments that since Article 15.4.A.6 provides that "all decisions of arbitrators shall be limited to the terms and provisions of this Agreement," they must look to the contract for the authority to formulate a remedy for any specific violation. Needless to say, there are no contractually specified remedies for most violations.

Unless careful review of an arbitrator's prior decisions makes absolutely clear that the arbitrator fully understands his/her authority to fashion remedies, it is suggested that NALC advocate use the more extended discussion of the remedial authority of arbitrators in C-06238 as the foundation of any remedy argument. Citing the applicable U.S. Supreme Court decision, Arbitrator Mittenthal wrote in that June 9, 1986 award as follows:

> One of the inherent powers of an arbitrator is to construct a remedy for a breach of a collective bargaining agreement. The U.S. Supreme Court recognized this reality in the Enterprise Wheel case:
>
> > "...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 a 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 & Car Corp.*, 80 S. Ct. 1358, 1361 (1960).
>
> As National Arbitrator Garnser observed,
>
> > "... to provide for an appropriate remedy for breaches of the terms of an agreement, even where no specific provision defining the nature of such remedy is to be found in the agreement, certainly is found within the inherent powers of the arbitrator."

This excerpt from National Arbitrator Garnser's award continues as follows:

> ... No lengthy citations or discussion of the nature of the dispute resolution process which these parties have mutually agreed to is necessary to support such a conclusion.

C-03200, April 3, 1979.

Additional Compensatory Remedies Are Not "Punitive"

Most arbitrators, including many of our best neutrals, view their roles as limited to deciding and remedying the cases before them. They generally do not see their function as policing the future relationship of the parties. So it is almost always a mistake to ask an arbitrator to grant a "punitive remedy" or to "punish" management for violating the contract. Many arbitrators view these concepts as more suited to tort or criminal proceedings in a court of law than to labor arbitration.

This does not mean the union should restrict its remedy requests to the make-whole minimum—payment for demonstrated lost pay or benefits. NALC has been very successful in obtaining remedies in arbitration that more fully compensate

(Continued on page 10)

Arguing for Remedies . . .

(continued from page 9)

grievants and the union for contract violations. However, this does mean that NALC arbitration advocates need to provide arbitrators with carefully thought-out arguments in support of remedy requests.

Arguing for Additional Compensatory Remedies

The union makes the strongest case for additional compensatory remedies by demonstrating that the violations were deliberate, repeated or egregious. Both the JCAM and national level arbitration awards provide support for additional compensatory remedies in such situations.

The JCAM recognizes the general principle that compensatory remedies beyond mere payment for lost hours and benefits are available in appropriate circumstances.

The JCAM's discussion of remedies for violating the opting provisions of Article 41.2.B (JCAM page 41-14) is particularly helpful because, as arbitrators should be reminded, it expresses the joint, agreed-upon position of both NALC and the Postal Service. The JCAM states:

> Where the record is clear that a PTF was the senior available employee exercising a preference on a qualifying vacancy, but was denied the opt in violation of Article 41.2.B.4, an appropriate remedy would be a "make whole" remedy in which the employee would be compensated for the difference between the number of hours actually worked and the number of hours he/she would have worked had the opt been properly awarded.
>
> In those circumstances in which a PTF worked 40 hours per week during the opting period (or 48 hours in the case of a six day opt), an instructional "cease and desist" resolution would be appropriate. This would also be an appropriate remedy in those circumstances in which a reserve letter carrier or an unassigned letter carrier was denied an opt in violation of Article 41.2.B.3.
>
> In circumstances where *the violation is egregious or deliberate or after local management has received previous instructional resolutions on the same issue* and it appears that a "cease and desist" remedy is not sufficient to insure future contract compliance, the parties may wish to consider *a further, appropriate compensatory remedy to the injured party to emphasize the commitment of the parties to contract compliance.* In these circumstances, care should be exercised to insure that the remedy is corrective and not punitive, providing a full explanation of the basis of the remedy. (Emphasis added.)

In other words, the JCAM specifically suggests and authorizes "compensatory" remedies beyond mere payment for lost hours and benefits in appropriate circumstances. It should be emphasized that this is a general principle that can, and should, be applied to other kinds of contract violations.

Similarly, National Arbitrator Howard Gamser discussed remedies for failure to distribute overtime equitably among full-time letter carriers on the overtime list. He held that in ordinary cases the appropriate make-whole remedy was simply to provide an equalizing make-up opportunity in the next immediate quarter. However, he went on to say that the Postal Service must pay employees deprived of "equitable opportunities" for the overtime hours they did not work if management's failure to comply with its contractual obligations under Article 8.5.C.2 shows

> ... a willful disregard or defiance of the contractual provision, a deliberate attempt to grant disparate or favorite treatment to an employee or group of employees, or caused a situation in which the equalizing opportunity could not be afforded within the next quarter.

C-03200, April 3, 1979.

Persuasive precedent. Arbitrators differ in background, training and attitudes. As a generalization, however, most of them are either lawyers or have learned to think as lawyers do. This means arbitrators seek to be guided by precedent. They are

(Continued on page 11)

Arguing for Remedies . . .

(continued from page 10)

more likely to grant the union's remedy if it can be shown that other arbitrators have granted similar remedy requests in similar circumstances. By showing arbitrators that there is precedent for a requested remedy, union advocates can increase an arbitrator's comfort and confidence levels. This underscores the need to conduct careful research to find support for remedy requests.

Research Strategies

NALC has a wide range of resources available for advocates researching remedy issues. The most important of these are the following:

The NALC Materials Reference System (MRS) contains summaries—and in some cases the full text—of many important national-level materials including settlements of Step 4 grievances, other national-level settlements and memorandums, USPS policy statements and so forth. The MRS also contains cross-references to significant national and regional arbitration awards. It contains specific discussions and extensive arbitration citations concerning many recurring issues such as Special Route Examinations and Opting. Also be sure to check the "Arbitration" section which covers many remedy issues. The MRS is available on the NALC website, www.nalc.org.

The NALC *Arbitration Advocate* has published many articles concerning specific contract violations and highlighting significant arbitration awards addressing remedy issues. Each edition of the *Arbitration Advocate* has a cumulative index so that articles can be located easily. If needed, back issues of the *Advocate* relating to a specific topic can be obtained through the offices of NALC's national business agents.

CAU Publications. The Contract Administration Unit periodically publishes papers on a wide variety of contract related issues. For example, the recent CAU publication concerning the "in lieu of" provisions of Article 7.1.B.1 contains an extensive discussion of remedy issues in such cases and cites many useful national and regional arbitration awards. Many of these publications are available on the NALC website.

To develop your arguments for remedies, use the MRS, the Arbitration Search Program and other NALC publications to get a fix on the issues and on your arbitrator.

The NALC Arbitration Search Program has robust search capabilities and copies of almost 25,000 national and regional arbitration awards. It is also the best place to get actual copies of any arbitration awards discussed in the publications above. Because it contains so much material, it is often not the place to begin research. In most cases the publications discussed above should be reviewed first. However, it is an indispensable tool for all arbitration advocates. In preparing to argue for remedies in contract cases, advocates should look for two types of material.

1. Supporting cases. To find cases supporting remedy requests, simply search under the applicable subject. In situations where the program finds a large number of cases, it is often useful to narrow the search to "key cases." In selecting cases for submission to the arbitrator, remember that quality is more important than quantity. Try to find cases that most closely match the facts and arguments in the case you are researching. Remember also that cases where the arbitrator explains the reasons for granting a remedy can be especially persuasive.

2. The arbitrator's record. Always search for cases by the arbitrator who will hear the case you are preparing. Of course you may be especially lucky—or unlucky—and find that the arbitrator has already decided a similar case. In most cases, however, the purpose of researching an arbitrator's record is to understand the specific arbitrator's attitude and approach to remedy issues in order to help shape and refine your arguments. ■

The Reluctant Arbitrator:

Enforces Joint Statement, Balks at Disciplining Supervisor

Arbitrators are not alike. Every advocate learns this early in his or her career. Arbitrators come from different places, they have divergent educational backgrounds and professional experiences, and they have widely—some would say wildly—varying personalities.

Arbitrators are also divided by the philosophical approaches they bring to their profession. Some are tough on employees who break the rules, and some are tough on an employer's contract violations. Some view procedural protections as fundamental to fairness, while others are quick to find "harmless error."

Some arbitrators also have well-defined philosophical lines they will not cross. Unfortunately, this has been the case with some arbitrators when it comes to sanctioning supervisors who violate the Joint Statement on Violence.

No matter how egregious a supervisor's behavior toward employees, some arbitrators hesitate to do what the Snow Award explicitly told them they could: Reassign, demote, discipline or discharge a supervisor. In their view such remedies would upend the classical labor relations structure, in which management alone has the power to control the conditions of employment for its own people.

A recent arbitration decision provides a good example of how an arbitrator's philosophical approach can determine the outcome in a Joint Statement case. C-24886, December 17, 2003, Regional Arbitrator Jonathan I. Klein.

In the case NALC's advocate presented a devastating factual record against a customer service supervisor ("Supervisor A"). Supervisor A was reassigned to the Aspen Hill, Maryland Post Office following complaints of sexual harassment lodged against him by several female postal employees. His harassing behavior continued at Aspen Hill, and a letter carrier ("Ms. J") wrote a letter to the Postal Service detailing the supervisor's offenses and requesting action. The Postmaster met with Supervisor A and about that time the supervisor was reassigned to the Silver Spring, Maryland delivery annex.

Unfortunately, some arbitrators still don't "get it" when it comes to exercising their authority to discipline supervisors for violating the Joint Statement.

NALC filed a grievance on Ms. J's behalf alleging that the supervisor's behavior had violated Article 2 and the Joint Statement on Violence. NALC asked as a remedy, "[Supervisor A] to be removed from the Postal Service because of past history at annex, & Tacoma Park."

At the arbitration hearing, held August 19 and September 9, 2003, NALC put on a damning course of testimony from numerous carriers who had been harassed by Supervisor A or who had witnessed the harassment. In her detailed testimony the grievant told the arbitrator that, for example, Supervisor A: made comments every time she bent over to pick up mail; remarked to her that "women should stand behind men"; said he would "f— all the women in Aspen Hill that he could"; directed other lewd remarks at her; wanted to do sexual things with her and made her life miserable when she refused. She also testified that two windows on her automobile were broken while it was parked on USPS property, and that she had received many "hang-up telephone calls" since Supervisor A had harassed her.

Another female letter carrier ("Ms. S") also testified, detailing Supervisor A's sexually harassing behavior at another station.

(Continued on page 13)

The Reluctant Arbitrator . . .

(continued from page 12)

He told her "how good their sex would be" and made remarks about her anatomy and underwear, which prompted Ms. S to file two sexual harassment complaints against him. Supervisor A also sexually harassed other female employees. Ms. S obtained a restraining order against Supervisor A and missed two months of work due to the stress related to his sexual harassment. She also testified that on September 3, a day between the two hearing days, Supervisor A had driven past her in the postal parking lot and said, "Bitch, I'm gonna get you." Ms. S testified that she "was in fear and would shake all the time" because of Supervisor A's harassment.

A third female letter carrier ("Ms. P") further supported the case against Supervisor A. She said he made comments about her body, threatened to discipline her unless she went to bed with him and retaliated against her when she refused to go on a date with him. Ms. P testified that because Supervisor A threatened her concerning her attendance record, she was pressured into having sex with him.

A fourth carrier ("Ms. L") testified that Supervisor A would "gawk" at the grievant, "hover" over her on her route and laugh and joke about the grievant's breasts and buttocks every time she bent over to pick up mail.

Management offered little evidence to counter the union cases except for the testimony of Supervisor A. The supervisor denied everything—that he had ever harassed the grievant or any other employees or made sexual remarks to them. He said he had very little contact with employees while he was a manager. He admitted, however, that a number of sexual harassment complaints had been lodged against him.

Incredibly, management argued that the language in the Snow Award authorizing arbitrators to remove supervisors from their administrative positions was "simply *dicta*"—meaningless extra words rather than part of the ruling.

The Arguments

The union advocate fully covered the ground in its arguments before Arbitrator Klein. NALC argued that contrary to USPS contentions, under the Snow Award the case was substantively arbitrable and the arbitrator had full authority to grant its remedy request and was not limited to "cease and desist." NALC cited awards in which arbitrators had imposed remedies against supervisors, and submitted court decisions supporting the union position.

The Postal Service argued that the arbitrator should not have permitted testimony about incidents involving employees other than the grievant. Management argued that the arbitrator should hold the union to a "clear and convincing" standard of proof in the case, and contended that the union had not met its burden. USPS argued further argued that the arbitrator could not grant the remedy sought by the union. It contended that the language in the Snow Award authorizing arbitrators to remove supervisors from administrative duties was "simply *dicta*"—meaningless extra words rather than part of the ruling. USPS also argued that the remedy requested would violate Supervisor A's rights under the Constitution and the Civil Service Reform Act.

The Decision

Arbitrator Klein refused to grant the union's request and order Supervisor A removed from the Postal Service. However, his conclusions of fact and the remedy he ordered effectively accomplished the same thing.

The arbitrator's "Opinion and Analysis" began by concluding that,

> ... the Union has presented clear and convincing evidence which establishes that [Supervisor A] engaged in conduct that violated both the Postal Service's sexual harassment policy and the Joint Statement

(Continued on page 14)

The Reluctant Arbitrator . . .

(continued from page 13)

> on Violence and Behavior in the Workplace.

Arbitrator Klein then proceeded to rule for NALC on every factual dispute before him, finding that: Supervisor A had made the alleged remarks to the grievant and they were sexual and harassing in nature; he made frequent sexually harassing remarks to the grievant and to other employees at his station; he violated the grievant's personal space on another occasion; he "directed deliberate, unsolicited remarks with sexual connotations toward the grievant"; the grievant "clearly communicated ... that such remarks were unwelcome"; the testimony of the other women who claimed Supervisor A had harassed them was "heartfelt and truthful"; and that Supervisor A's testimony was "unbelievable due to the lack of credibility which he displayed throughout the arbitration hearing."

The arbitrator also held the Postal Service accountable for the supervisor's behavior:

> ... the Postal Service was on notice that [Supervisor A] had been accused of engaging in improper and sexually harassing behavior prior to the time that he was reassigned to the grievant's post office in Aspen Hill—it appears he was transferred throughout the local postal facilities due to ongoing complaints about his conduct.

Remedy—A Philosophical Block

Arbitrator Klein refused to grant the union's requested remedy despite his overwhelming findings of fact and conclusions on the violation, and despite the union advocate's thoroughly developed arguments. Here is where the arbitrator's philosophical bent reared its head, without any stated foundation or apparent basis in the National Agreement, the Joint Statement or the Snow Award:

> However, the arbitrator determines he is without authority to grant the remedy . . . and order the discharge of [Supervisor A] for the reason that [Supervisor A] is not a bargaining unit employee covered by the terms and conditions of the National Agreement. Neither the Joint Statement nor the Snow award modifies the Postal Service's inherent managerial right to discipline management personnel or delegates that right to arbitrators.

Arbitrator Klein was flat wrong when he concluded: "Neither the Joint Statement nor the Snow award modifies the Postal Service's inherent managerial right to discipline management personnel or delegates that right to arbitrators." The exact opposite is true, and NALC intends to insist that arbitrators obey the contract by exercising their full authority in Joint Statement cases.

This ruling contradicts the Snow Award, dismisses the persuasive precedent set by numerous other regional awards, and ignores federal court decisions upholding arbitral remedies against postal supervisors. Yet advocates should expect to encounter arbitrators wearing similar philosophical blinders in some of their Joint Statement cases.

Many arbitrators have experience in the wider world of labor relations beyond the shores of the Postal Service, where few union representatives would ever ask an arbitrator to discipline a supervisor. A large proportion of arbitrators are lawyers, who are taught that laws tend to separate union from management and that only the employer can hire, fire, promote or discipline a manager.

The Joint Statement is very unusual and the Snow Award, which authorizes arbitrators to issue all types of remedies against supervisors, may be unique in American labor relations. So some arbitrators have taken a "show me" attitude when NALC has tried to obtain discipline against supervisors. Of those arbitrators, some have

(Continued on page 15)

The Reluctant Arbitrator . . .

(continued from page 14)

been persuaded over time and have ordered such remedies in appropriate circumstances. Others have refused, based on their continuing belief that union and management authority are "inherently" distinct.

Although Arbitrator Klein refused to fire the sexually harassing supervisor, his findings of fact made clear the supervisor's long history of harassing behavior.

Given that two United States Courts of Appeal have now accepted arbitral decisions demoting one supervisor and firing another, these attitudes will have to change. (See the November 2003 *Arbitration Advocate* and the Contract Administration section of NALC's website, www.nalc.org.) Nonetheless, advocates must be prepared to encounter the kind of philosophical reluctance expressed by Arbitrator Klein. Good advocates research their arbitrators in advance to unearth these kinds of issues.

Other Remedies Are Available

While some arbitrators simply will not discipline or remove a supervisor, alternative remedies may offer effective relief and still be achievable even before such arbitrators as Jonathan Klein. This very decision offers an excellent example.

Although Arbitrator Klein would not order USPS to discipline Supervisor A, he was willing to grant a remedy prohibiting Supervisor A from working at the same facility as the grievant. The arbitrator concluded that such a remedy "does not constitute discipline" and thus, was "well within his authority" given the Joint Statement's declaration that "[t]hose whose unacceptable behavior continues will be removed from their positions."

Arbitrator Klein's award was notable because it provided that if the Postal Service violated his award by assigning the supervisor to the grievant's facility at any time in the future, the grievant effectively would receive administrative leave:

> . . Effective immediately, the Postal Service is prohibited from assigning [Supervisor A] to perform ay duties at the same postal facility as the grievant for so long as he shall remain employed by the Postal Service. The grievant shall be permitted to call off work with full pay and benefits in the event that [Supervisor A] is assigned to the same postal facility as the grievant in violation of this Award. Any period(s) of absence directly caused by such a voluntary call off shall not be charged against the grievant, nor used in any disciplinary action against the grievant. . . .

Effect of Factual Conclusions

Although Arbitrator Klein refused to order USPS to fire Supervisor A, his findings of fact may have accomplished a comparable result. Klein concluded that the union had proven its factual case by clear and convincing evidence, that Supervisor A's contrary testimony lacked credibility, and that the Postal Service had known of Supervisor A's sexual harassment history when it moved him to the grievant's workplace.

These factual conclusions alone placed the Postal Service in the position of defending the indefensible—that it had knowingly continued to employ a supervisor exhibiting a pattern of EEO violations. The grievant had filed an EEO complaint against Supervisor A and several other complaints were potentially in the offing. Monetary remedies may be sought in sexual harassment complaints. So if USPS kept the supervisor employed following the Klein award it could be generating more and more complaints and financial liabilities.

Arbitrator Klein's award spoke directly to this situation. Immediately following his conclusion that disciplining supervisors was an inherently and exclusively managerial right, he wrote,

> This does not, however, relieve management of its duty to act

(Continued on page 16)

The Reluctant Arbitrator . . .

(continued from page 14)

> where appropriate. . . . This arbitrator concurs with the reasoning of arbitrator Bowers on this point[1] [citing C-23937, Regional Arbitrator Mollie Bowers, January 6, 2003].

---

1. The following statement by arbitrator Bowers as to management's significant burden to respond timely and responsibly to findings by arbitrators that a member of management has engaged in egregious behavior warrants repeating here:

> Ignoring these responsibilities can easily lead to potentially catastrophic liability claims against the Service, arbitral awards restoring leave and granting medical benefits to adversely affected employees, and perpetuation of the costly struggle to establish whether authority extends to discipline/discharge of Management personnel.

Epilogue: Supervisor A has resigned from the Postal Service.

Advice for Advocates

NALC advocates should keep arguing the union position, which many arbitrators and two U.S. Courts of Appeal have upheld—that arbitrators do indeed have the power to demote, discipline or discharge a supervisor who violates the Joint Statement. This is the law of the land and union advocates must insist that arbitrators exercise the full range of their authority to formulate remedies in Joint Statement cases. Some arbitrators may continue to resist based on their personal, private notions of "inherent management prerogatives." However, NALC must let such arbitrators know that they are "creatures of the contract" and are responsible for enforcing its dictates, rather than dispensing their own brand of industrial justice.

In the meantime, advocates must be realistic when facing an arbitrator who may be unwilling to discipline a supervisor. Be prepared in such cases to offer a series of alternative remedies. Point out that many other reasonably effective choices are available, such as prohibitions from supervising letter carriers or the grievant, demotion, retraining, letters to be placed in the supervisor's personnel file, written apologies and more. The growing body of arbitral precedent on the Joint Statement contains a wealth of creative remedial options. Encourage arbitrators to consider them all. ■

To support your arguments that arbitrators enjoy broad remedial authority, see the article on remedies on page 8.

The Advocate's Library

Some Recommended Books About Arbitration

Arbitration advocates are life-long learners who do not hesitate to pick up a book to learn more about a topic.

NALC has assembled this short list of books about arbitration based on the recommendations of many NALC advocates.

Just Cause: The Seven Tests

Adolph M. Koven and Susan N. Smith, Donald F. Farwell, 2nd ed. (BNA Books 1997).

This book approaches the just cause concept as seen through the "seven tests" formulated by Arbitrator Carroll R. Daugherty.

From the preface:

The book has three main purposes, as follows:

- to provide a general treatment, for managers, union representatives, and practitioners and students of labor relations, of the concept of just cause and the seven tests;
- to offer guidance for determining what (if any) disciplinary action is warranted in particular cases of employee misconduct;
- to provide a reference for those who want to know what the authorities in the field have had to say.

Winning Arbitration Advocacy

Marvin F. Hill, Jr., Anthony V. Sinicropi and Amy L. Evenson, et al (BNA Books 1997).

Professors Hill and Sinicropi are legendary for their excellent, practitioner-oriented books about labor arbitration.

From the Foreword:

While there are numerous texts that address what arbitrators do, few focus on the advocates who practice before arbitrators and "how to do it." [This book] will address numerous prehearing, hearing and posthearing issues. For example, . . . [w]hy sequester witnesses? What should be in an opening statement? ... Can an advocate make a witness testify? What about hearsay evidence? ... Are briefs necessary? If so, what should be in a brief? ... Are their common mistakes that advocates routinely make? ...

Remedies in Arbitration

Marvin F. Hill, Jr. and Anthony V. Sinicropi, 2nd ed. (BNA Books 1991).

From the Foreword to the Second Edition:

... we have organized the second edition into three major divisions:

I. Sources of Remedial Authority (which includes chapters on the collective bargaining agreement, the submission, and external law ...)

II. Remedies in Discharge and Disciplinary Cases (discussing reinstatement; back pay; procedural issues; reduction of discipline; ...)

III. Remedies in Nondisciplinary cases ...

How Arbitration Works

Frank Elkouri, Edna Asper Elkouri, Marlin M. Volz (Ed.), Edward P. Goggin (Ed.), 5th ed. (BNA Books 1997).

For decades *Elkouri & Elkouri* has been called the "Bible" of arbitration. The book is gargantuan in scope and based on so much research that the footnotes dwarf the text. This is the place to start when searching for basic information on almost any arbitration topic. Here are the topics listed in the Summary Table of Contents:

1. Arbitration and Its Setting
2. Legal Status of Arbitration
3. Scope of Labor Arbitration
4. The Arbitration Tribunal
5. Grievances—Prelude to Arbitration
6. Determining Arbitrability

The Advocate's Library . . .

(continued from page 17)

7. Arbitration Procedures and Techniques
8. Evidence
9. Standards for Interpreting Contract Language
10. Use of Substantive Rules of Law
11. Precedent Value of Awards
12. Custom and Past Practice
13. Management Rights
14. Seniority
15. Discharge and Discipline
16. Safety and Health
17. Employee Rights and Benefits
18. Standards in Arbitration of Interest Disputes
19. Arbitration's Place As an Industrial and Public-Employment Institution

How to Prepare and Present a Labor Arbitration Case: Strategy and Tactics for Advocates

Charles S. Loughran (BNA Books 1996).

This insightful guide for the practitioner offers a step-by-step approach, with chapters such as: Assembling the Evidence; Selecting and Preparing Witnesses; Opening Statements; Presenting the Case in Chief; Rules of Evidence; Making and Defending Against Objections; Conducting Cross-Examination. Previous articles in the NALC *Arbitration Advocate* have drawn ideas from this well-written, thoughtful book.

Discipline and Discharge in Arbitration

Norman Brand, Ed. et al (BNA Books 1998).

This book is published by the Labor and Employment Law Section of the American Bar Association, as one of series of books concerning arbitration. This volume, written for advocates, focuses on issues in disciplinary cases using a case or "story" method to present an analytical approach to the various topics.

The Common Law of the Workplace: The Views of Arbitrators

Theodore J. St. Antoine (Editor), et al. (BNA Books 1998)

This book consists of articles written by distinguished arbitrators, many of whom serve on NALC panels. It is excellent reading for advocates who desire a deeper understanding of the arbitration process. ■

NALC Arbitration Advocate Cumulative Index

Note on Citations

Please note that the C-number arbitration cases and M-number Materials Reference System materials cited in this publication are available to interested advocates. All materials are available from the office of the National Business Agent. All but the newest arbitration cases are available on the NALC Arbitration CD-ROMs. All M-number materials are available online under Contract Administration at www.nalc.org.

NALC Arbitration Advocate

NALC Arbitration Advocate

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO
100 Indiana Avenue, NW - Washington, DC 20001-2144