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U.S. Courts Confirm Joint Statement

Arbitrators Have Power to Demote, Discharge Supervisors

Arbitrators have the power to demote, discipline or discharge postal supervisors who violate the Joint Statement, two U.S. Courts of Appeals have ruled.

In separate cases, two federal appeals courts have enforced arbitration awards ordering sanctions against supervisors who had violated the Joint Statement on Violence and Behavior in the Workplace. One ruling upheld the demotion of a Nashville supervisor and the other affirmed the discharge of a Maryland Postmaster. However, the Merit Systems Protection Board recently reversed the Postmaster's discharge; NALC has appealed the case.

Joint Statement Background

The Joint Statement on Violence is a 1992 agreement created shortly after the Royal Oak, Michigan shootings, in which a discharged letter carrier shot four postal employees to death. The NALC, the Postal Service, and other postal unions and management organizations signed the statement, a mutual commitment to stop the violence.

In 1996 National Arbitrator Carlton J. Snow ruled that the Joint Statement is a binding, contractually enforceable amendment to the National Agreement, and that NALC can use the contractual grievance procedure to enforce the Postal Service's obligations under it (Snow Award,

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Article 7.1.B.1 Violations

Casuals "In Lieu Of" Career Employees

Article 7.1.B, Supplemental Work Force, defines and limits the employment and use of casual employees—the "supplemental workforce." It contains four separate restrictions on the hiring and use of casuals.

This article reviews the Article 7.1.B.1 restriction on employing casuals "in lieu of full or part-time employees" and provides advice to union representatives and arbitration advocates who seek to enforce it.

The Das Award

In the national-level hearing before Arbitrator Das, the three postal unions took the same essential position on Article 7.1.B.1, arguing that the language established a separate and independent management obligation to limit the hiring of casuals—a

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gations under it (Snow Award, C-15697, August 16, 1996). Arbitrator Snow explicitly authorized regional arbitrators to impose remedies against supervisors found to have violated the Joint Statement:

> The grievance procedure 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.

Since Snow issued his landmark award many regional arbitrators have imposed varying sanctions against postal supervisors for Joint Statement violations. The remedies have varied in severity depending on the violations involved, and have included, for example, written apologies, insertion of an arbitration decision in the supervisor's personnel file, retraining, fitness-for-duty examinations, and orders banning supervisors from supervising letter carriers.

For example, in C-21292 (Regional Arbitrator Bernice Fields, November 1, 2000), a supervisor yelled at the a letter carrier at his case, waving his arms, calling him a liar and "unprofessional" and accusing him, unjustifiably, of almost running down a customer. The arbitrator ruled that the supervisor was a chronic abuser who violated the Joint Statement, and that a higher-level manager also violated the Joint Statement by failing to control the supervisor. Arbitrator Fields ordered the manager to apologize and punished the supervisor severely, suspending him from letter carrier supervision duties and ordering him to undergo a psychological fitness-for-duty examination and "anger management training."

In two recent cases arbitrators broke new ground in Joint Statement remedies against supervisors, demoting a supervisor in one instance and firing a Postmaster in the other.

In two recent cases arbitrators went further, demoting a supervisor in one instance and firing a Postmaster in the other.

The Hatten Case

In one of those cases, Regional Arbitrator Raymond Britton ordered the Postal Service to remove a Postmaster, Derek F. Hatten, who had initiated a physical confrontation with a letter carrier. C-21913, April 13, 2001 (the "Hatten case"). Hatten had approached the carrier in his vehicle and opened the door repeatedly while the grievant tried to close it, resulting in a physical contest over the door.

Arbitrator Britton treated the Postmaster's testimony—that he had only been trying to prevent a roll-away accident by reaching to turn the ignition key off—with "incredulity and skepticism" because the vehicle was in park and on level ground. The arbitrator found that Hatten had violated the Joint Statement and, without any discussion of the appropriate remedy, ordered management to remove him from postal employment. (See discussion in the *Arbitration Advocate*, August 2001.)

The Postal Service, faced with the first case of an arbitrator ordering a supervisor fired for a Joint Statement violation, refused to obey the decision. NALC sued to enforce the award in federal court. The U.S. District Court ruled for USPS and vacated the award, finding that the Joint Statement does not allow termination for a single violation.

NALC appealed the case and prevailed in the U.S. Court of Appeals for the Fourth Circuit. The court agreed with NALC's argument that the District Court decision was improper because it relied on a theory that the Postal Service had never raised in arbitration. The court found that USPS had similarly failed to raise earlier, and thus had also waived, its argument that the award was improper because it required the removal of an employee who was not a party to the arbitration proceeding. The court rejected management's claim that the argument could

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not be waived because it was based on due process and the federal civil service law.

The Court of Appeals reversed the District Court and ordered it to enforce the award—which required USPS to fire Hatten. *USPS v. NALC*, No. 02-1159 (4th Cir. Nov. 5, 2002). In a footnote court noted:

> Although the USPS has waived this public policy argument, Hatten could still raise it in a challenge to his dismissal before the Merit Systems Protection Board. . . .

Hatten Appeals Removal to MSPB

The Postal Service then began the process of removing Hatten, providing the Postmaster with the due process guaranteed under federal law (more below). It proposed the removal on February 6, 2003, Hatten made oral and written replies to the proposal letter, and USPS issued a decision letter on March 31, 2003. The deciding official's letter explained that although he had reviewed all of Hatten's submisions, he was required by a federal court order to remove him.

Hatten appealed his removal to the Merit Systems Protection Board. He was able to appeal because certain preference eligible postal employees, including supervisory employees with over one year of continuous service, have "adverse action" rights under the Civil Service Reform Act of 1978 (CSRA, 5 U.S.C. § 7511-13).

The law specifically defines those adverse personnel actions that trigger these rights:

- removal from federal employment,
- suspension for more than 14 days,
- a reduction in grade,
- a reduction in pay, or
- a furlough of 30 days or less.

These personnel actions entitle the affected employee to:

(1) at least 30 days' advance written notice stating the specific reasons for the proposed action;

(2) a reasonable time to answer and provide affidavits or other evidence in support of that answer;

(3) be represented by an attorney;

(4) a written decision and the specific reasons therefor at the earliest practicable date; and

(5) the right to appeal the adverse personnel action to the Merit Systems Protection Board.

USPS Legal Dodge Rejected

For several years the Postal Service has been pursuing a strategy of attempting to undermine the Snow Award and evade its responsibilities to enforce the Joint Statement. As reported extensively in the April, 2002 *Arbitration Advocate*, USPS has argued in numerous arbitration hearings and in federal court that it cannot comply with an arbitration decision that orders one of these types of adverse actions against a supervisor.

Specifically, management has argued that it cannot comply with such an award without violating provisions of the Civil Service Reform Act of 1978 (CSRA), or at least violating the supervisor's rights under that law. USPS also has argued that obeying such an award it would violate a supervisor's Constitutional rights to his or her job.

The federal appeals court refused to allow the Postal Service to escape its obligations to obey the arbitration awards.

NALC has argued in these cases that the Postal Service is bound by Supreme Court decisions and the National Agreement to obey arbitration awards as final and binding. The union has argued further that the Postal Service can obey an award ordering an "adverse action" and still provide the affected supervisor with all of the due process and MSPB appeal rights required by the law.

The Court of Appeals' decision affirmed NALC's position completely and ordered USPS to comply with the arbitration award. The Hatten case resulted in the first U.S. Court of Appeals decision upholding an adverse

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action remedy against a supervisor for violating the Joint Statement on Violence. It was not to be the last, however.

USPS Again Runs from Joint Statement Obligations

When Hatten appealed his removal to the MSPB, NALC realized that the Postal Service might not prosecute the case against Hatten with much enthusiasm. After all, USPS lawyers had argued vehemently against the arbitrator's order in more than one federal court. And management has opposed all of NALC's efforts to impose sanctions against supervisors who violate the Joint Statement's prohibitions on employee harassment and abuse.

NALC submitted a motion to intervene in Hatten's MSPB appeal as an interested party. We argued that the case could not be judged fairly without our full participation as a party to the proceeding. Unfortunately the MSPB Administrative Judge turned down our request. NALC believes this was an error, and has appealed the decision to the full Board.

At Hatten's hearing, NALC's worst fears were realized when ***the Postal Service sat on its hands before the MSPB judge, refusing to put on any case at all to show that Hatten deserved to be fired.*** Instead management just submitted the court order and arbitration decision, saying it had no choice in the matter.

With little or no record of Hatten's misconduct before him, the judge issued an MSPB Initial Decision reversing the removal and ordering Hatten reinstated with full backpay. Docket No. DC-0752-03-0516-I-1 (MSPB Initial Decision, September 12, 2003). This travesty of justice resulted directly from the Postal Service's continuing refusal to live up to its solemn obligations under the Joint Statement—to give dignity and respect to employees, and to remove from its ranks those who refuse to do so.

If NALC's intervention motion is granted on appeal, the union intends to ask for a new hearing. NALC will then present the evidence showing that Hatten engaged in a violent physical altercation with the letter carrier, and argue that his removal was justified.

The Boyd Case

While the Hatten case was proceeding through the legal system, NALC and the Postal Service were battling in different federal courts over another key Joint Statement case. In that case (the "Boyd case") Arbitrator Leonard C. Bajork ruled that a supervisor, Herbert Boyd, who had threatened a letter carrier must be demoted to the position he held prior to the incident and that he could not be promoted for five years from the date of the award, or be granted any raises except for across-the-board raises. C-20643, April 17, 2000. Bajork noted the specific Joint Statement language committing the Postal Service to avoid rewarding or promoting those who violate its provisions:

> . . . Those who do not treat others with dignity and respect will not be rewarded or promoted. Those whose unacceptable behavior continues will be removed from their positions.

The Postal Service refused to implement the Bajork award by demoting Boyd, so NALC sued in federal court to enforce the decision. NALC prevailed in U.S. District Court, and management appealed.

USPS Arguments on Appeal

The Postal Service's appeal made a series of arguments based on federal law. USPS advocates had been making the same arguments previously in arbitration hearings, and in April, 2002 NALC published an entire issue of the *Advocate* advising NALC advocates how to counter this USPS offensive. In essence, USPS argued that the award's remedy of demotion would force it to violate Boyd's rights under federal law.

Here is how the U.S. Court of Appeals summarized the Postal Service's arguments:

> The Postal Service argues that it cannot comply with the arbitration award without violating provisions of the Civil Service Reform Act of 1978 (CSRA). *5 U.S.C. § 7511-13.* Under the Postal Reorganization Act, certain preference eligible postal employees, including supervisory employees with over one year of continuous service, are covered by the CSRA's provision for administrative and judicial review of adverse person-

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nel actions. *39 U.S.C. § 1005(a)(4).* Adverse personnel actions are defined as removal from federal employment, suspension for more than 14 days, a reduction in grade, a reduction in pay, and a furlough of 30 days or less. *5 U.S.C. § 7512.* The procedural protections are set forth in 5 U.S.C. § 7513(b), which states that an employee against whom an action is proposed is entitled to: (1) at least 30 days' advance written notice stating the specific reasons for the proposed action; (2) a reasonable time to answer and provide affidavits or other evidence in support of that answer; (3) to be represented by an attorney; and (4) "a written decision and the specific reasons therefor at the earliest practicable date." *Id. at § 7513(b)(4).* The agency may provide a hearing in lieu of or in addition to the opportunity to answer. *Id. at § 7513(c).* Finally, the statute provides that an employee is also entitled to appeal the action to the Merit Systems Protection Board (MSPB) under 5 U.S.C. § 7701. *Id. at 7513(d).*

The Court of Appeals further noted that the Postal Service had abandoned its earlier claim that obeying the award would violate Boyd's Constitutional rights.

Sixth Circuit Enforces Joint Statement

The Sixth Circuit Court of Appeals soundly rejected the Postal Service's arguments and ruled for NALC, ordering USPS to obey the arbitrator's decision and demote Boyd. *USPS v. NALC*, No. 02-5050 (6th Cir. June 5, 2003). The court found that Boyd would receive full procedural protections when the Postal Service initiated adverse action against him, and that Boyd would have the right to appeal that action to the MSPB, whose decision would take precedence.

The Sixth Circuit's decision destroyed the Postal Service's legal strategy. The law of the land now requires USPS to enforce awards that sanction supervisors for violating the Joint Statement on Violence.

The court concluded:

> Thus, we find that implementation of the arbitration award would not force the Postal Service to violate the CSRA and therefore is not contrary to public policy.

Sixth Circuit Decision Crushes USPS Strategy

The Sixth Circuit's ruling destroyed the Postal Service's strategy of using legal excuses to escape its solemn obligations under the Joint Statement. Now USPS has been told forcefully, by two U.S. Courts of Appeal, that it must obey the Snow award and enforce arbitrators' remedies against supervisors who have violated the statement.

The Postal Service did not attempt to appeal to the Supreme Court either of these two rulings from the U.S. Courts of Appeal. The two decisions are, therefore, the law of the land. The Postal Service can no longer maintain that an award ordering an "adverse action" against supervisor violates the Civil Service Reform Act, because the federal courts have told USPS authoritatively and repeatedly that its position was wrong.

What is more, any arbitration award that has ruled contrary to these Court of Appeals decisions has been ***rendered irrelevant***. While management may continue to cite and submit such arbitration decisions, an NALC advocate should counter by presenting the court decisions and explaining that any such award has ***zero value as precedent***. (Both decisions are available for download on NALC's website, www.nalc.org, under Contract Administration, Joint Statement on Violence.)

Even more important, both the Joint Statement and the Snow Award remain standing. These two remarkable documents live on to guarantee the most basic human right of dignity on the job for postal employees. ■

Article 7.1.B.1 Violations . . .

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limitation in addition to the national 3½ percent casual cap of 7.1.B.3. The Postal Service opposed, arguing that Section 7.1.B.1:

> ... relates solely to the number of casual employees that may be hired and to the limited duration of their employment. Thus, a violation of the National Agreement with respect to the "employing in lieu" of provision can occur only when either the allowable percentage or the limited duration is exceeded.

In short, USPS argued that Section 7.1.B.1 imposed no restriction on management other than those already imposed by Sections 7.1.B.2, B.3, and B.4. In the unions' view, acceptance of management's interpretation would have rendered Article 7.1.B.1 meaningless.

Arbitrator Das reviewed thoroughly the history of Article 7.1.B.1 and its interpretation over the three decades of postal collective bargaining. The provision was the subject of previous national awards written by such leading arbitrators as Howard Gamser and Richard Mittenthal. It was also the subject of a memorandum issued by postal headquarters management and a number of national settlements and regional awards.

One key decision was C-13393, a January 29, 1994 national award from Arbitrator Richard Mittenthal. Mittenthal addressed the question of whether management should pay a monetary remedy at the national level for acknowledged violations of the then-5 percent national casual hiring cap of Article 7.1.B.3. Significantly, Mittenthal separated the 7.1.B.3. national cap conceptually from the "essentially local" nature of 7.1.B.1 violations:

> This [management] argument is not persuasive. The section 1.B.1 restriction can be invoked when Management hires casual employees "in lieu of..." career employees. That is a matter to be determined by conditions existing at a particular time at a particular postal facility. A violation of 7.B.1 can occur at the local level even in an accounting period in which the national casual ceiling of 5 percent has been honored. For the casual ceiling is a Postal Service obligation beyond the essentially local obligation found in 1B1. ...

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Article 7.1.B.1 Bargaining Unit Protection

Article 7.1.B provides the following:

B. Supplemental Workforce

7.1.B.1. The supplemental work force shall be comprised of casual employees. **Casual employees are those who may be utilized as a limited term supplemental work force, but may not be employed in lieu of full or part-time employees.**

7.1.B.2. During the course of a service week, the Employer will make every effort to insure that qualified and available part-time flexible employees are utilized at the straight time rate prior to assigning such work to casuals.

7.1.B.3. The number of casuals who may be employed in any period, other than December, shall not exceed 3½% of the total number of employees covered by this Agreement.

7.1.B.4. Casuals are limited to two (2) ninety (90) day terms of casual employment in a calendar year. In addition to such employment, casuals may be reemployed during the Christmas period for not more than twenty-one (21) days.

The highlighted sentence in Article 7.1.B.1 has been present in the national collective bargaining agreements of NALC, the APWU and the Mail Handlers (NPMHU) since postal collective bargaining began in 1971. The language's meaning had been the subject of numerous disputes which had escaped definitive resolution until the 2001 award from National Arbitrator Shyam Das. The award sustained the positions of NALC, APWU and NPMHU that Article 7.1.B.1 provides substantive protections against the hiring of casual employees as substitutes for full-or part-time career employees. Arbitrator Das's August 29, 2001 award, C-22465, is available on NALC's website ww.nalc.org under Contract Administration/ Arbitration.

Article 7.1.B.1 Violations . . .

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The unions also submitted a nationwide instruction issued by headquarters postal manager William Downes in 1986, known as the "Downes Memorandum" (M-01451) and the 1986 Step 4 settlement of an APWU grievance (M-01354). The unions argued that the Downes Memorandum was not only issued by the highest levels of the Postal Service, but also was used to settle a series of Step 4 Mail Handlers grievances over several years.

Arbitrator Das ruled forcefully that Article 7.1.B.1 establishes a separate and independent violation.

Arbitrator Das ruled forcefully for the unions in an award that tread a firm path through the 30 years of precedent and the parties' conflicting arguments. Das began his discussion by referring to the second sentence of Article 7.1.B.1. and declaring, "These few words have bedeviled the parties off and on for the past thirty years."

Das found that Article 7.1.B.1 clearly establishes an independent violation which is entirely separate from the national hiring cap:

> Adoption of the Postal Service's position . . . would read out of the National Agreement a separate restriction on casuals, which, as Arbitrator Mittenthal points out, imposes an essentially local obligation, separate and apart from the National casual ceiling in Article 7.1.B.3. sition, to take an extreme example, the Postal Service could staff an entire facility with a succession of casual employees on an indefinite basis, provided it did not exceed the National casual ceiling, which hardly seems consistent with the language in Article 7.1.B.1. . . .

Arbitrator Das wrote an award that resolved the questions before him powerfully and definitively in the unions' favor. The award makes crystalclear the meaning of Article 7.1.B.1. It establishes the independent force of the "in lieu of" restriction on casuals, explicitly defines "employed" as "hired" and "in lieu of" as "in-stead of, in place of, or in substitution of," and adopts language from the Downes Memorandum as a jointly reached understanding of the operation of Article 7.1.B.1:

> **Award**
>
> Article 7.1.B.1 of the APWU National Agreement (and the corresponding provision in the NALC and NPMHU National Agreements) establishes a separate restriction on the employment of casual employees, in addition to the other restrictions set forth in other paragraphs of Article 7.1.B.
>
> The Postal Service may only employ (hire) casual employees to be utilized as a limited term supplemental work force and not in lieu of (instead of, in place of, or in substitution of)
>
> The following formulation in the May 29, 1986 Downes Memorandum sets forth a jointly endorsed understanding as to the circumstances under which it is appropriate to employ (hire) casual employees to be utilized as a limited term supplemental work force consistent with Article 7.1.B.1:
>
> Generally, casuals are utilized in circumstances such as heavy workload or leave periods; to accommodate any temporary or intermittent service conditions; or in other circumstances where supplemental workforce needs occur. Where the identified need and workload is for other than supplemental employment, the use of career employees is appropriate.

Retroactive Remedies Available

Arbitrator Das refused the Postal Service's request that he designate his interpretation of Article 7.1.B.1 to be prospective only. The Postal Service had argued that if Das should rule against the employer, he should not permit damages in cases filed previously and held for resolution in the national case.

As a result of this holding, NALC may seek monetary remedies in cases held for the Das national decision which involved violations that predated the award. Of course, NALC also may file new grievances based on the Das decision.

No Formula for Violations

Arbitrator Das declined to

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Article 7.1.B.1 Violations . . .

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set forth guidelines for determining when, under a particular set of circumstances, the hiring of casuals would violate Article 7.1.B.1:

> As Arbitrator Mittenthal noted, a claim that casuals have been "employed in lieu of" career employees is "a matter to be determined by conditions existing at a particular time at a particular postal facility." To paraphrase Gamser, the question is whether they were employed or hired for the purpose of being utilized as a limited term supplemental work force or instead of, in place of, or in substitution of career employees.

Advice on Grieving Violations of Article 7.1.B.1

Because Arbitrator Das did not provide guidelines, NALC representatives cannot consult a simple formula to determine precisely when a violation of Article 7.1.B.1 has occurred. However, NALC contract enforcers may find the following guidelines useful in evaluating a potential violation of Article 7.1.B.1.

Choose Cases Carefully

After National Arbitrator Das issued his landmark award, one would have expected NALC's arbitration record in Article 7.1.B.1 cases to improve. In fact, it worsened.

It is important to remember that Article 7.1.B.1 cases are contractual rather than disciplinary in nature, so *the union bears the burden of proof.* Article 7.1.B does give management the right to hire and use casuals in appropriate circumstances. Many, if not most, casuals are employed and scheduled in a manner consistent with the provisions of Article 7.1.B.

So if, upon careful review of all the facts and arguments in a case, union officers or arbitration advocates doubt that the union will be able to meet its burden of proof, then they have a responsibility to discuss the case with the national business agent. NALC's long term interests are harmed whenever weak grievances are denied by regional arbitrators.

After NALC's victory in the Das case, one would have expected NALC's record in Article 7.1.B.1 cases to improve. In fact, it worsened.

Basic Information

To properly investigate Article 7.1.B.1 grievances, the union must obtain from management the documentation showing, typically, the following:

- When casuals were hired
- What hours the casuals worked
- How many hours the casuals worked during different periods
- The availability of other letter carriers to perform the work (including career carhours—straight time and overtime)

This will require information requests—in writing—for such items as: Form 50 for each casual hired, time records including the Employee Activity Reports (EAR), and PS Forms 3997, Unit Dai-ly Record (showing daily work in the unit). The various documents and data will have to be organized to form a clear picture of casual hiring and employment over the period in question, which may be a year or more.

Union representatives also should question supervisors about casual hiring. "Why were these casuals hired? What was the reason for hiring them in this station?" Stewards may receive clear answers that establish a clear violation, or vague answers, or a great deal of hemming and hawing. In any event, it is a good idea to ask first and write down the precise responses given.

Countering management's justifications. Local managers may state justifications for the hiring of casuals—reasons that might possibly pass muster under the Das award, such as a temporary and unexpected spike in mail volume, high leave usage during the summer months, or the sudden and temporary loss

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been called up from the Military Reserves.

Whatever justifications management offers, it is the union's job to evaluate the reasons and decide whether or not to accept them. If the union decides to reject management's justification it must collect additional data to counter management's claims. For instance, if management lost two carriers to the military reserves but hired four casuals who worked full-time for the next six months, NALC must collect information pointing out the discrepancy.

Strongest case—year-round employment. The language of the Das award makes clear that casuals should be hired to take care of temporary problems. So NALC's strongest case under Article 7.1.B.1 occurs when management has hired casuals in a station on a year-round or long term basis. If a single station has been staffed continuously with casuals, management will have a hard time explaining how the casual employment was "temporary" or "supplemental." Regional Arbitrator Zigman wrote the following in sustaining NALC's position on this issue:

> There is a presumption, albeit rebuttable, that in situations involving continuous employment of casuals, over a significant period of time, that the casuals are being employed "in lieu" of career employees. In other words, while employment and/or the utilization of casuals over an extended period of time may not constitute a violation of Article 7.1.B.1, it is for the Service to rebut evidence which has established a *prima facie* basis to infer that a violation has occurred. In other words, once the union has established a *prima facie* case, the burden switches on the Service to rebut that presumption.

C-23028, January 29, 2002 p. 12.

Similarly, Regional Arbitrator Levak wrote as follows:

> The controlling principle…is as follows: When the use of casuals goes beyond the means of dealing with unforeseeable short-term circumstances, and such employees are utilized full-time over protracted periods of time, the so-called supplemental work force is not supplemental. "In such a factual situation, casuals do not supplement, rather they supplant."

C-18905, Sept. 17, 1998 p. 11.

Regional Arbitrator Nancy Hutt wrote:

> The constant employment and utilization of casuals over a four year period cannot be considered the use of a "limited term supplemental work force." In the case at hand, once the use of long-term casuals ceased, twenty (20) PTF's were promoted to regular status and seventeen (17) PTF's were hired at the Canoga Park Post Office. This uncontested factual circumstance certainly leads one to believe the casuals were employed in lieu of full or part-time employees.

C-19923, September 5, 1999.

Union representatives should question supervisors pointedly about casual hiring. "Why were these casuals hired? What was the reason for hiring them in this station?" The answers provided could help an advocate in a later arbitration hearing.

Hiring authority denied. In a surprising number of cases local managers assert that casuals were hired because they could not get permission from higher-ups to hire career employees. Of course, competent Postal Service arbitration advocates will instruct managers not to offer this fact at an arbitration hearing unless asked. This makes it particularly important that, early in the grievance procedure, NALC grievance handlers ask probing questions of managers concerning their justifications for hiring casuals. Quite often they will respond in a manner that helps the union's case. All management responses should be carefully and meticulously documented.

Regional Arbitrator MacLean addressed the issue of lack of hiring authority as follows:

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> In the instant case, the Service offered three explanations for its use of two to four casuals for an uninterrupted sixteen month period:...(3) the postmaster had trouble getting approvals for the new clerk positions. The last argument must be summarily rejected. The fact that a regional office might not give approval to postmaster's request to hire additional clerks cannot logically be relied upon as grounds for hiring casuals. This would allow regional managers to circumvent the requirements of 7.1.B by simply denying the requests for additional clerk positions. **Bureaucratic stumbling blocks cannot be valid grounds for not complying with the contract.** (Emphasis added)

C-19760, April 19, 1999.

Similarly, Arbitrator Linda Byars wrote:

> (T)he fact that the Cleveland Post Office was within the "allotted" career employees and could not get authorization for more persuades the Arbitrator that the casual employees were "employed in lieu of full or part-time employees." Therefore, the Postal Service violated Article 7.1.B.1 of the National Agreement.

C-23435, May 20, 2002.

Other circumstances. It is impossible to give specific advice on the huge variety of circumstances that may surround the hiring and use of casuals in the carrier craft. The best advice is to reason from the language of the contract and the national Das award which defines casual employees as a "limited term supplemental work force" and goes on to explain:

> Generally, casuals are utilized in circumstances such as heavy workload or leave periods; to accommodate any temporary or intermittent service conditions; or in other circumstances where supplemental workforce needs occur.

Management cannot justify hiring casuals by claiming that higher management refused to authorize sufficient career positions. All levels of management need to follow the contract.

To build a 7.1.B.1 case, consider whether the casual employment you are challenging appears justified by this language, or banned by it. For instance, ask whether casuals perform work that other employees could be performing instead. If so, then look for justifications that management might raise in its defense. Has there been a temporary period of heavy leave or workload, or some other temporary or intermittent condition that otherwise required casual work hours to get the job done? Or coud career employees have done the work?

Often management will try to cite annual leaves, sick leave, other routine absences, and common variations in mail volume as a justification for hiring casuals. Such events are normal and expected and do not in themals. Many arbitrators have rejected such factors as insufficient, by themselves, to justify the hiring of casuals.

For example, Regional Arbitrator Drucker wrote:

> The USPS would argue that...they have different peaks, and each peak justifies use of casuals throughout the year . . . (S)uch peaks, however, are predictable. They are part of the normal ebb and flow of mail volume . . . . Vacations, sick leave, other routine absences, and common variations in mail volume are expected and may be anticipated well in advance.

C-24656, March 20, 1997.

Similarly, Regional Arbitrator Miller wrote:

> . . . it appears that the need for casuals by the Postal Service was a direct result of employee shortages that had occurred by employees quitting, retiring, and doing work in another location. These situations do not, in my considered opinion, constitute circumstances such as heavy workload or to accommodate any temporary or intermittent service conditions as is provided in the Downes Memorandum.

C-24655, July 19, 2002, p. 16.

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Regional Arbitrator Evans wrote:

> It may well be that Postmaster Edwards could not hire career employees during the relevant period because upper management would not permit it, as suggested by the Union. In such a circumstance, though, local management proceeds at its peril when it uses casual employees for long periods of largely uninterrupted time, up to 40 hours per week or beyond, without some readily identifiable and legitimate operational necessity it can point to...(H)ad Edgewater employed the casuals on a limited term basis to assist for a couple of hours in the morning with the heavy lifting duties, I may well have reached a different result. But when casuals are routinely and continuously employed for 30 to 40 hours per week performing duties on a set schedule over an extended period of time, as here, the conclusion will inevitably be, as it is here, that the casual employees have been "employed in lieu of full or part-time employees," in violation of Article 7, Section 1.B.1. The deployment of casuals at Edgewater was contrary to te Downes memorandum.

C-24654, Dec. 21, 2001, p. 5.

Remedies in 7.1.B.1 Cases

As Arbitrator Das noted in his award, "the Union has the burden of proving a violation of Article 7.1.B.1." This is generally true in contract cases, with respect to both contractual rights and the remedy. However, an Article 7.1.B.1 violation raises an unusual question of remedy, for the violation harms the entire bargaining unit even if harm to specific employees may be difficult to prove or calculate.

Although Arbitrator Das did not address remedy in his award, another national arbitrator has spoken forcefully on the issue of remedy in a case involving violations of Article 7.1.B's limitations on casual employment. National Arbitrator Mittenthal addressed violations of the national percentage cap on casual employment (Article 7.1.B.3) in C-13393, a 1994 national award cited above. Mittenthal's discussion of remedy is particularly instructive for those facing remedial questions in 7.1.B.1 cases.

Most important, Mittenthal specifically rejected a Postal Service argument that no monetary remedy was due in the case because it was not possible to identify which employees were harmed by the violation or to measure the exact amount of the harm caused by the casual employment violations. Mittenthal acknowledged that very specific harm to particular employees could not be proved:

> . . . Hence, there is no way to identify which bargaining unit employees were harmed by excessive casual usage. Moreover, there are evidently no pay or work records that would prove particular employees were available and willing to work at times when excess casuals were employed. Thus the possibility of naming those who were injured by the casual violations is slim indeed.

But Mittenthal did not let the Postal Service off the hook simply because specific harm could not be proven:

> None of this, however, warrants denying the Unions a remedy in this case. The Postal Service was guilty of a continuing violation . . . Some form of money remedy is plainly justified.

The arbitrator decided to remand the remedy issue to the parties for resolution, making what he called a "final observation:"

> It may not be easy to construct a money remedy or to identify the injured employees. But the parties have been confronted in the past by remedy problems every bit as complicated as this one and they have been able through hard work and imagination to find a mutually acceptable solution. . . .

Following the Mittenthal award the national parties did meet and hammer out a remedy agreement (M-01257). The agreement, recognizing that harm to specific employees might be impossible to prove, awarded a flat monetary amount ($15.10 per accounting period) to each bargaining-unit letter carrier in those installations in which the national casual cap was exceeded. In this fashion the parties provided a remedy to the entire complement of affected bargaining-unit employees. The parties noted that the remedy was solved by:

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Article 7.1.B.1 Violations . . .

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> . . . devis[ing] a methodology which is both administratively feasible and best approximates the impact that excessive casual usage may have had on different groups of employees. . . .

In constructing a grievance challenging USPS violations of Article 7.1.B.1, the union should provide whatever evidence of specific harm that may be available. However, the union should cite Mittenthal for the proposition that a monetary remedy is due for violations of contractual limitations on casual employment, even where specific harm to specific individuals may be difficult or impossible to show. Violations of the limits on casuals cause harm to the bargaining unit as a whole, even where specific proof of harm is not available.

Regional arbitrators have used this reasoning to find that monetary remedies are warranted to remedy Article 7.1.B.1 violations. Regional Arbitrator Zigman wrote following:

> The Arbitrator finds merit in the Union complaint that without a monetary award the Postal Service essentially gleans a financial benefit no matter the outcome of the decision and therefore, may continue to violate the contract since it is economically advantageous to do so. The Arbitrator finds career employees were harmed and that a cease and desist order alone would not "provide a meaningful remedy."
>
> ***
>
> Award. The parties shall calculate the difference in wages paid to casual carriers and to the PTF's employed in the Arcata Post Office, for the hours worked by casuals in the carrier craft, during the period April 19, 1995 to June 1995 and March 1996 to August 31, 1998. The compensation should include the amount which would have been paid on benefits, but not to account for overtime.

C-02308, March 16, 1977. Similarly, Arbitrator Nancy Hutt wrote:

> However, as the Union maintains, the circumstances do not alter the conclusion that by violating the National Agreement the Postal Service reaped a monetary benefit while the bargaining unit was harmed. Under such circumstances, a remedy is warranted to compensate the bargaining unit for its loss in the amount saved by the Postal Service when it violated Article 7.1.B.1.
>
> ***
>
> Award. The hours worked by the inappropriate use of casuals from April 13, 1996, to April 1999 shall be calculated. The parties are directed to meet and confer promptly from the date of this Opinion and Award to resolve the amount of money due. In the event the Parties are unable to resolve the amount of money owed and to whom, they shall so notify the arbitrator within ninety (90) days of receipt of this Award.

C-19923, Sept. 5, 1999.

Supporting Cases

In addition to national level arbitrator Das' award C-22465, the following arbitration awards upholding NALC's position are particularly useful. They can be found on the NALC Arbitration CDs.

C-22465 National Arbitrator Das
C-13393 National Arbitrator Mittenthal
C-16905 Arbitrator Levak
C-19760 Arbitrator MacLean
C-19923 Arbitrator Hutt
C-20309 Arbitrator Eaton
C-20323 Arbitrator Eaton
C-20324 Arbitrator Foster
C-20325 Arbitrator Mariatt
C-23028 Arbitrator Zigman
C-23031 Arbitrator Olson
C-23435 Arbitrator Byars
C-24543 Arbitrator Freitas
C-24654 Arbitrator Evans
C-24655 Arbitrator Miller
C-24656 Arbitrator Drucker
C-24665 Arbitrator Jacobs

Additional supporting cases can be found by searching under the subject "Casuals: Hired in Lieu of Carrier Employees, Article 7.1.B.1" in the NALC Arbitration Program.

As always, when in doubt or in need of further assistance, NALC representatives should seek advice from branch officers and the NALC national business agent's office. ■

Advice for Advocates in Joint Statement Cases

Where We've Been . . . and What's Next

It has been more than 11 years since the NALC, the Postal Service and other postal organizations agreed to the Joint Statement on Violence and Behavior in the Workplace. The Joint Statement, a landmark commitment to banish employee harassment and abuse from the Postal Service, unfortunately has been the subject of many arbitration and court battles between NALC and management.

An 11-Year Battle for the Joint Statement

Through years of litigation, NALC has succeeded in strengthening the Joint Statement and defending it against an evolving series of strategic defenses and legal attacks from postal management. The first major hurdle for NALC was the Service's belief that the Joint Statement was merely an unenforceable statement of principle or "commitment."

In 1996 National Arbitrator Carlton Snow ruled that the Joint Statement was a binding amendment to the National Agreement, that NALC could enforce the Joint Statement through Article 15, and that regional arbitrators could impose remedies against postal supervisors—remedies which remained undefined in Snow's award.

With that award as a foundation, NALC advocates began building a body of arbitration precedent that gradually expanded the range of remedies available against supervisors who violated the Joint Statement's requirements.

Early on, management advocates argued that no remedies could be ordered against supervisors, even in response to severe and repeated Joint Statement violations. Over time, however, more and more arbitrators came to understand that the Snow Award specifically granted them authority to impose varying types of sanctions against supervisory employees: apologies, retraining, and even prohibitions from supervising letter carriers.

Although some arbitrators remained reluctant to sanction a supervisor, the body of precedent for doing so continued to grow. NALC advocates learned to bring the Snow Award and a collection of regional arbitration awards with them to present a case requesting a remedy for Joint Statement violations.

Management has never accepted the consequences of its loss in the Snow case. Under pressure from supervisory organizations, management advocates have tried arguing that arbitrators could not order remedies that amounted to "adverse actions" under the Civil Service law. When arbitrators in the Boyd and Hatten cases did exactly that by ordering Boyd demoted and Hatten removed, USPS took its objections to federal court.

The Battle is Over—The Joint Statement Won

With NALC's twin victories in the Fourth and Sixth Circuit Courts of Appeal, these legal arguments have been put to rest. The Sixth Circuit's decision, in particular, clearly proclaimed that arbitrators have the authority to order remedies—including "adverse actions"—against managers who violate the Joint Statement.

Now NALC advocates must carry with them the arbitration awards and Court of Appeals decisions in the Boyd and Hatten cases. These cases, along with the Snow Award, should answer and defeat unequivocally all management attempts to restrict arbitrators' remedial authority over supervisors who violate the Joint Statement. For copies of all three documents see NALC's website, www.nalc.org, under Contract Administration, Joint Statement on Violence.

Following their previous pattern of refusing to give up a lost cause, management advocates may continue to challenge arbitral authority in Joint Statement cases. They may argue that, for example: (1) the Snow Award

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Advice in Joint Statement Cases . . .

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did not empower arbitrators to punish supervisors; (2) a union's request for a remedy against a supervisor is not arbitrable; or (3) an arbitrator may not order USPS to issue an "adverse action" against a supervisor without violating the Civil Service Reform Act or the supervisor's Constitutional rights. An NALC advocate's answer is now clear:

> *"Mr./Madame Arbitrator, the Postal Service has been told that its arguments are simply wrong, by not one, but two separate decisions of the United States Courts of Appeals. These Fourth and Sixth Circuit decisions are final and they are the law of the land. And any previous regional awards upholding management's positions have no value as precedent."*

The two court decisions should put an end to any serious debate on such issues, but just in case, NALC advocates should also keep handy the January, 2002 *Arbitration Advocate*. The entire issue was dedicated to answering, point-by-point, management's various arguments for avoiding its responsibility under the Joint Statement on Violence.

Advocates should also be wary of management attempts to bifurcate the hearing in a Joint Statement case involving supervisory misconduct. In some recent cases management has proposed that the first day of hearing be restricted to the issue of whether the arbitrator had authority to issue discipline against a supervisor. NALC advocates should never agree to such a bifurcation. Rather, an advocate should argue that given the two federal court decisions upholding the demotion and discharge of supervisors, it would be a waste of the parties' time to hear frivolous management challenges to the arbitrability of supervisory discipline.

Advocates need to take a "precedent kit" to any Joint Statement-related arbitration hearing. The arbitration awards and Court of Appeals decisions in Hatten and Boyd, and the national Snow Award, are just the beginning.

Remember that Article 15, Section 4.A.6 gives arbitrators broad authority to formulate remedies that fit the situation. Even when an arbitrator disagrees with the specific remedy you have requested—say, you have asked for an "adverse action" against a supervisor but the arbitrator believes that is too harsh—you should inform the arbitrator that he or she retains the flexibility right to formulate whatever remedy that he or she believes is appropriate.

Choose Your Cases Carefully

Case selection is always important and in Joint Statement cases it is paramount. As in any contract case, NALC shoulders the burden of proof when it seeks to show that a supervisor has violated the Joint Statement. Especially in cases where the union is asking the arbitrator to order strong sanctions against a manager, arbitrators may require the union to put on powerful evidence of both the violation and the effect on the employee.

Keep in mind the old saying, "Bad cases make bad law." If we want to continue using the Joint Statement to improve carriers' working lives, then we must not sap its strength by taking weak or meritless cases to arbitration.

We have already arbitrated too many bad cases, accord to statistics from NALC's arbitration system. During the period from January 2001 through February 2003, ***64 percent of NALC's Joint Statement cases against managers have been denied in regional arbitration.*** NALC's grievances have been ***sustained or modified in just*** 35% of the cases. Clearly, we need to work harder at proper case selection.

In arguing for remedies, NALC advocates need to remember that "the punishment should fit the crime." Just as a letter carrier can be removed only for either progressive disci-

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Advice in Joint Statement Cases . . .

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pline or a single, serious violation, one cannot expect an arbitrator to order serious penalties against a supervisor for a single, minor violation. A request for an "adverse action" remedy may engender particular resistance from a management advocate concerned about triggering a supervisor's potential MSPB appeal. Such remedies include a removal, a suspension for more than 14 days, a reduction in grade or pay, or a furlough of 30 days or less. 5 U.S.C. 7511-13.

What should an advocate look for when he or she is assigned a Joint Statement case? First and foremost, determine whether the facts support the union's allegation. If the facts involve, for example, a letter carrier's claim that a manager made threatening remarks, a number of factors must be considered. How credible are both the manager and the letter carrier? If both the manager and letter carrier's versions are credible explanations, arbitrators will generally credit management's version of the facts. With that in mind, the union may need more evidence to tip the scales in its favor—for example, evidence that the manager has followed a long-term pattern of abusive behavior, or evidence bolstering the carrier's credibility.

Some Joint Statement cases involve allegations that a letter carrier or a manager threatened the other. Regional Arbitrator Joseph F. Gentile provided a five-part test to help determining whether a threat was made:

(1) the listener's reactions;
(2) the listener's apprehension of harm;
(3) the speaker's intent;
(4) any conditional nature of the statements; and
(5) the attendant circumstances.

C-18878, (November 8, 1998).

Whether the alleged threat came from the carrier or the supervisor, this test is a good starting point for determining the strength of the case. Use the reasonable person test to weigh your case according to the "threat test." That is, ask yourself, "Would a reasonable person have acted that way?"

It is often said that "bad cases make bad law." NALC needs to choose its cases against managers carefully to avoid diluting the Joint Statement's power and relevance.

As an illustration, take the case of an employee who was confronted by his supervisor at his case and who claimed that the supervisor "constructively kidnapped him" by not allowed him to leave his case. In addition, the letter carrier claimed that the supervisor touched him with her fingers. The testimony in the case revealed that the supervisor simply told the letter carrier that she had no help and that he should only case enough mail to complete his assignment in eight hours. The letter carrier became upset and attempted to leave the case to see his shop steward. When the supervisor told him no, he attempted to leave the case and was stopped by the supervisor. The supervisor testified in the arbitration that she put her hand up to prevent being run into by the employee. Regional Arbitrator Nicholas Duda, Jr., denied the union's grievance, explaining:

> Grievant claims he experienced nervousness, palpitations and shaking during his conversation with Supervisor Soliz, on June 2, 2000. We were persuaded by his testimony that he did experience those symptoms, but the fact that he had such symptoms does not satisfy the Union's burden of showing that Supervisor Soliz violated the Joint Statement on Violence and Behavior in the Workplace. Quite the contrary, the evidence shows that Soliz made reasonable orders in a respectful way. In fact, Grievant's behavior was threatening to her and without any justification or excuse.

C-23676, August 29, 2002. The facts in this case are not unusual. Although the Grievant was very upset, the supervisor did not act in an improper or threatening way. A review of all facts and potential testimony may have led to a conclusion that this case should have been pre-arbed.

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Advice in Joint Statement Cases . . .

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Advocates should review Joint Statement cases well in advance of the hearing date. This should include speaking with the employee claiming a violation of the Joint Statement as well as all witnesses. The grievance file should contain an interview of the manager to get his or her side of the story. Do not automatically discount the manager's view of what happened, because an arbitrator will not. If, after discussing the case with the Grievant, you feel that your witness lacks credibility or the case lacks sufficient strength, discuss the matter with the National Business Agent. After that discussion it may be agreed to either pre-arb or withdraw the case. Remember, withdrawal of a case without prejudice does not hurt us, but a bad decision may.

Allegations Against Carriers—Just Cause Standard Applies

Letter carriers also may be accused of Joint Statement violations. Typically management issues discipline to a letter carrier, and management claims that in addition to the alleged misconduct, the carrier has violated the Joint Statement.

In most cases the Joint Statement allegation is simply an additional charge that adds little of consequence to management's case. However, some managers have argued that "automatic" discipline or removal must follow when the facts establish that a letter carrier engaged in misconduct which violated the Joint Statement.

In one extreme case managers went so far as to claim a grievance was not arbitrable because the employee had admitted being involved in a physical altercation with another employee, albeit with mitigating circumstances. The union advocate moved the case to Step 4 (now the Interpretive Step), and the national parties agreed that the case was arbitrable and that the hearing would proceed on the merits. M-01332, June 25, 1998. Advocates should cite this case if management ever challenges a case's arbitrability on similar grounds.

A few managers have argued that if the facts show a carrier violated the Joint Statement, the discipline or removal must be upheld as imposed. This is flatly wrong. Management must show just cause.

In a few cases management has argued that if an arbitrator concludes that the employee's conduct violated the Joint Statement, then the disciplinary action must stand. This is flatly wrong, for the Joint Statement did not override or alter in any way the just cause requirement of Article 16.1. The just cause standard does not permit any kind of "automatic discipline" for particular offenses, and Joint Statement violations are no exception to the rule.

So management must show just cause for discipline based on allegations that a letter carrier's conduct violated the Joint Statement, just as discipline for any other type of misconduct. And the usual defenses to such discipline remain available to advocates: Management must conduct a thorough investigation; it must review and concur; the discipline must be timely; it must be corrective rather than punitive; the severity must be reasonably related to the nature of the misconduct and the employee's past record; there must not be disparate treatment; and so forth. See the discussion of just cause in Article 16.1 of the JCAM.

So in arbitration, the union's position is that an arbitrator must hear evidence about and consider all aspects of just cause and its various tests in making his or her decision. Further, advocates should insist that the arbitrator continues to have the authority to fashion a remedy appropriate to the circumstances of the particular case. ■

Tips on Writing Settlement Language

Make it Clear . . . and Make it Stick

The settlement language you write is critical when you resolve a case short of arbitration, usually through a pre-arbitration settlement. The key to any effective settlement language is specificity. Say what you want to say in precise, clear and simple language that is difficult to misinterpret.

If you are the author of settlement language that is unclear or ambiguous, in a later dispute your opinion of the actual meaning may be ignored in favor of management's interpretation. Arbitrators usually follow a rule of contract interpretation that where language has more than one reasonable interpretation, the view of the party who did *not* write the language should be favored.

Plain Meaning and Extrinsic Evidence

Arbitrator Carlton J. Snow wrote extensively about contract interpretation in the book, *The Common Law of the Workplace* (Theodore J. St. Antoine, ed., BNA Books 1998). Arbitrator Snow discusses the role of ambiguity as follows:

> Some arbitrators follow the "Elkouri" rule that, if words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and clear meaning will ordinarily be applied by arbitrators.

Under this "plain meaning" rule, if you write language that on its face is clear, it will be difficult for either party to claim later that the language should be given some more obscure meaning.

Difficulties emerge when the parties wind up disputing the meaning of contract language which has not been written clearly. Arbitrator Snow also addresses this situation:

> When language of an agreement is ambiguous, arbitrators admit extrinsic evidence to help clarify contractual intent. Such information may include the parties' bargaining history, past practice, industry standards, and a course of dealing unique to these parties. Arbitrators use such extrinsic evidence to clarify or explain a latent or hidden contractual ambiguity with regard to syntax, grammatical structure, or omissions. Some arbitrators use extrinsic material to test whether apparently unambiguous language is susceptible to multiple interpretations.

Extrinsic evidence is that which is not contained in the body of the agreement or settlement. It may include testimony by the settling parties about conversations they had leading up to the settlement, initial drafts of the settlement, and so forth. Obviously, it is better to write clear settlement language than to spend resources later trying to prove what you meant to say. If you have any questions about the meaning of drafted language—regardless of which side drafted it—clarify the language before agreeing to the settlement.

Precedential Value of Settlements

When NALC and the Postal Service settle a case in pre-arbitration discussions, the parties are free to make the settlement non-citeable and non-precedent setting if they so agree. Management often seeks this kind of language, and at times it may be in NALC's best interests to settle a case in this way.

As an example, a letter carrier may have engaged in inappropriate behavior that results in a removal. Management may want to instruct the carrier in a settlement that his or her conduct was improper. You, on the other hand, may have concerns about the ramifications of setting this down in writing. If you agree, consider putting in language that makes the settlement non-precedential and non-citeable for any purpose.

In other cases you may believe that the only proper settlement must include citeable language. In that case don't sign the settlement until the offensive language is removed. Management has no right to insist on

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Settlement Language . . .

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non-citable, non-precedential language; this is a matter it must negotiate with the union.

Even where the parties agree that a settlement is non-citeable and non-precedential, NALC may grieve to enforce the settlement's terms if management does not follow through. The parties agreed in Step 4 decision M-01384 that "a non-citeable, non-precedent settlement may be cited in arbitration to enforce its own terms."

Contractual Rules: Settlements as Precedent

The National Agreement contains specific rules on the precedential force of settlements made at different Steps of the grievance procedure.

Informal A. Article 15, Section 2, Informal Step A (b) provides that no resolution reached at Informal A may "be precedent for any purpose." That means that even if a steward and a supervisor decide to settle an issue at Informal A as precedent, they are barred from such an agreement. (Of course, as explained above, the settlement may be cited to enforce its own terms.)

Formal A. Article 15, Section 2, Formal Step A (e) provides that any settlement shall not be precedent unless both parties agree. That agreement should always be in writing, and any such precedent-setting agreement shall be for the installation only. If the parties later dispute whether or not the settlement is precedent, if the agreement is not in writing you are unlikely to convince an arbitrator that the parties intended to make the settlement precedential.

Step B. Article 15, Section 2, Step B provides that Step B decisions are precedent-setting in the installation involved unless the parties agree otherwise.

Even where the parties agree that a settlement is non-citeable and non-precedential, NALC may grieve to enforce the settlement's terms if management does not follow through.

Withdrawal "without prejudice." Anytime you withdraw a case from arbitration, the withdrawal letter should contain a line indicating that the withdrawal is "without prejudice to the union's position in this or any other case." Withdrawal "without prejudice" is a method for preserving the union's position for a later challenge. Absent such language management might claim in a subsequent case on a similar issue that the union's earlier withdrawal of a case involving the similar issue indicates that the union has waived it position.

Case and desist language. Although NALC often seeks remedies beyond a "cease and desist" order, sometimes the NALC may want to insert such language in a settlement. Cease and desist language means that management admits to a violation of the contract, the union agrees that no other remedy is needed at the time, but if violations continue then stronger remedies may be required.

Occasionally, your case will be weak and the best decision you can anticipate is a "cease and desist." Remember that even if the cease and desist is non-citeable and non-precedent setting, NALC can still use it to show that management has failed to live up to its promise to cease and desist. In other cases, the parties will agree to a cease and desist where the violation was the result of a legitimate, good-faith misunderstanding. Another situation is where a practice long accepted by both parties has been found to violate of the contract. In these types of cases, a cease and desist is often an appropriate way for the parties to agree to change the practice without placing blame. ■

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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 at http://www.nalc.org.

NALC Arbitration Advocate