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OWCP—Removal for Misrepresentation

Defenses—Misrepresentation of Physical Condition

In 2002, the Postal Service announced a Transformation Plan dedicated to improving the agency's financial state by attacking costs on all fronts. One of the Service's targets for cost reduction was workers' compensation.

The withdrawal of limited duty through the National Reassessment Program, formerly known as "outplacement," is one of the methods that the Service began to use to reduce the costs of injured employees. Another method was the use of videotaped surveillance on employees who file Workers' Compensation claims.

The video surveillance program has resulted in a dramatic increase in the number of removals issued to employees for alleged misrepresentation of their physical condition—a nearly ten-fold increase from prior years.

Elements of the Case File

Certain elements are common to every grievance concerning a removal for misrepresentation. In every case, the grievant will be an employee with a diagnosed physical condition. Along with that will be his or her physical restrictions normally outlined on a Form CA-17. The charge in the removal typically involves an activity (or activities) that the employee engaged in while on disability from work. Finally, there will be management's evidence that purports to show the employee misrepresented his or her physical condition in order get time off work while receiving Workers' Compensation payments.

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Blowing Hot and Cold on Limited Duty

USPS's Simultaneous, Contradictory Arguments

Your child says, "I'm full," as he glowers at you over his plate with nothing left on it but a serving of broccoli. You excuse him from the table without forcing him to eat it. But as he leaves the table, he sees you bring out dessert—a perfectly baked cherry pie and a tub of vanilla ice cream. With a big grin he asks for a piece, but you remind him that he said he was full. He replies, "No, I'm not!"

Arguing that one thing is true one minute and that the exact opposite is true the next minute is

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Although the cases share these elements, they require different arguments in arbitration due to varying factual circumstances. Some employees have major physical restrictions, while others not. Some employees are videotaped for a single day, others for many months. Despite this, advocates can learn from examining some of the arguments that advocates have successfully used to restore injured employees to their positions with the Postal Service.

Failure to Provide Requested Information

Article 15.2 of the JCAM requires the parties to fully disclose all arguments and facts at the grievance levels prior to arbitration. The JCAM states on page 15-5:

> *The Postal Service is also required to furnish to the union, if requested, any documents or statements of witnesses as provided for in Article 17.3 and Article 31.3.*

Article 31, Union-Management Cooperation, provides that the "Postal Service will make available to the union all relevant information necessary" for the processing of a grievance. When a case file indicates that management has failed to provide requested information to the union, an advocate should be prepared to argue this violation of due process rights.

In an August 29, 2005 decision, Arbitrator Helburn excluded a surveillance videotape from evidence after management refused to provide it in response to union requests. In an award reinstating the grievant with full back pay, the arbitrator addressed the videotape evidence as follows:

> *The videotape needs little discussion. While it was shown at the investigative interview, the union was not given a copy then and later requests for a copy went unfulfilled. The National Agreement clearly requires both parties to make existing available evidence and argument during the grievance procedure and to jointly assemble the grievance file. When legitimate union requests for information have not been fulfilled and when the requested information is not in the joint file, the Postal Service should have no realistic hope of having the evidence admitted at arbitration. It does not matter whether the evidence was not forthcoming because of bad faith or simply administrative oversight. Either way, the National Agreement tells the arbitrator not to admit the disputed evidence if an objection is raised.*

C-26138, August 29, 2005.

When the union requests information and management fails to provide it, that information should be excluded from evidence in arbitration.

Videotapes are not the only information that management sometimes fails or refuses to supply. In C-24273 (May 10, 2003), Arbitrator Keith Poole issued a ruling regarding the Postal Service's refusal to supply copies of a postal inspector's notes to the union, despite the steward's request for them by certified mail. The Service ultimately provided the notes, but not until the second day of the arbitration hearing.

> *The Service argues that it did ultimately provide the information in question and therefore, any violation was cured. For the reasons which follow, this argument is not persuasive. . . By waiting until the second day of the hearing to provide the requested information, the Service prevented the union from making effective use of this information in the grievance procedure or at the hearing. . .Since the notes were central to the union's efforts to defend [the grievant] against this charge and since the failure to provide the notes was a clear violation of Articles 17 and 31, I conclude that the only appropriate and meaningful remedy is to dismiss Charge 4 in its entirety. Any lesser*

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remedy would allow the Service to rely on Charge 4 and would have the effect of rewarding the Service for its failure to provide the necessary and relevant information which was central to a charge in a termination case.

In C-23831, the union had submitted requests for videotapes and the postal inspector's handwritten notes—requests that were both ignored. In his October 25, 2002 decision, Arbitrator Claude Ames rescinded the removal by ruling:

The issue of most concern to the Arbitrator in this case is the conduct by the Employer of failure to produce evidence. . .The union was not provided factual information upon which to investigate the case, in a sufficiently timely manner so as to exercise its appropriate representational role. That conduct was improper, prejudicial to grievant's due process rights, and suggestive of evidentiary weaknesses in the case presented by the employer.

The Meaning of Disability

People often think in terms of a physical handicap when they think of the word "disability." However, the law defines "disability" differently in 20 CFR 10.5, where it states, "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."

So in workers' compensation, "disability" means an injured employee's reduced ability to earn wages—and not his or her ability to engage in off-work activities. This is significant because an outside observer, including an arbitrator, might make the assumption that "total disability" means an inability to do anything—whether at work or off work, when in fact, it means something else altogether in terms of OWCP.

"Disability" in workers' compensation means a reduced ability to earn wages due to an on-the-job injury.

The purpose of the CA-17 is to identify an employee's ability to perform specific tasks while at work. The form itself is called the "Duty Status Report." The physician who fills out the form reads the "usual work requirements" on the left side (Side A) of the form, as filled out by the supervisor. The physician then fills in the right side of the form for each specific physical requirement, where the form asks: Is "employee able to perform regular work described on Side A?"

In C-25843, Arbitrator Herbert Marx observed the distinction between restrictions in the workplace vs. non-workplace in his March 24, 2005 decision:

In the literal sense, a "totally disabled" person is one who is incapable of virtually any activity, or certainly any work-related activity. The phrase, however, has a quite different specific meaning when utilized in relation to injury diagnosis, injury reporting, or compensation liability. The Arbitrator believes it entirely reasonable that the Postal Service is aware of these quite separate meanings.

As cited by the union, this is definitively resolved in [20 CFR 10.400] . . .and states as follows: "b) Temporary total disability is defined as the inability to return to the position held at the time of injury or earn equivalent wages, or to perform other gainful employment, due to the work-related injury. . ."

It is obviously in the sense—and this sense only—that the physician and, later, the surgeon stated that [the grievant] was "totally disabled." They are expressing the medical judgment that the injured employee should not be working. . .What the phrase is <u>not</u> intended to mean is that the employee is unable to continue some or most ordinary activities. . ." (Emphasis in original)

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In late 2003, a letter carrier injured his back while lifting mail. The Postal Service issued him a removal after videotaping him running various errands including visits to his physician's office and picking up prescription medicine. Arbitrator Jacqueline Imhoff issued a September 2, 2003 decision in C-24605:

> *The fact that during the period after November 15, the grievant was seen going for a doctor's appointment. . . picking up the prescription and x-rays and performing another errand does not mean that he was able to return to work. [The doctor] examined the grievant on November 12 and found that he still was unable to perform the duties of his job description as listed on the CA-17. That did not mean that the doctor's diagnosis was that the grievant was physically incapable of performing those activities, as the Postal Service suggested. It meant only that [the doctor] did not want him performing them at work.*

Medical restrictions on particular activities apply to the work environment—which may involve repetition and strenuous exertion—but they do not necessarily apply when an employee is away from work.

Arbitrator Imhoff pointed to the physical restrictions on the CA-17 and applied them only to the duties required while working on the job. Imhoff did not apply those same restrictions to the grievant while at home or running errands.

> *The grievant was physically able to stand, sit, walk and twist his neck, but the doctor believed that doing so with the frequency required on the job could possibly do him harm.*

Arbitrator Vicki Peterson Cohen took a similar position in C-25941 (April 28, 2005). The Postal Service in that case issued a removal after discovering that the grievant had played slot machines at casinos while off work on doctor's orders. On the CA-17 the grievant's physician had listed zero as the number of hours he could perform letter carrier duties.

> *Although the grievant's doctor found that he was unable to perform any letter carrier duties, he never medically restricted his personal activities. . .*
>
> *Performing the duties of a letter carrier for 8 hours per day is a physically demanding task. The letter carrier is on his/her feet the majority of the day while constantly lifting or carrying mail. The grievant was not observed performing laborious tasks at his home or elsewhere. In fact, the grievant was only minimally observed driving and only once observed pacing while talking on his cell phone. Neither of such activities is equivalent to performing the duties of a letter carrier, or light duty, for 8 hours. Nor are visits to the casinos to play slot machines conclusive evidence that the grievant could perform light duty work. Because the grievant's doctor did not restrict his outside activities, he obviously felt free to continue visiting the casinos while recuperating from the accident.*

Lack of Evidence

In the same case, Arbitrator Cohen rejected the Postal Service's argument that the grievant must have misrepresented his physical restrictions to his physician. The Service provided no evidence to support that charge—just its assumption based on the videotape of the grievant engaged in off-work activities. To management, a videotape equals automatic evidence of misrepresentation. Arbitrator Cohen disagreed:

> *Although the employer implied that the grievant must have misled his doctor about his medical condition, the record is void of any evidence,*

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other than pure speculation, that he did so.

Arbitrator Claude Ames also rejected a management attempt to prove misrepresentation solely through a videotape, in C-23831 (October 5, 2002). Arbitrator Ames's decision made it clear that a videotape was insufficient to support such a charge.

There was no direct evidence that grievant told [the doctor] that he was unable to walk, sit, stand, drive, bend, twist, etc., for more than the work limits prescribed. . . [Evidence must exist in order to prove a contested issue. Here, without the testimony of [the doctor] as to what grievant actually said, the occurrence of his alleged misrepresentation has far less support by competent evidence. The circumstances and content of grievant's contacts with [the doctor] are necessary to identify the alleged misrepresent-tations with specificity. Concerning the claim that grievant misrepresented the severity of his injury, the only one who could support and corroborate that argument was [the doctor], and there was no testimony from him in this matter or any matter.

Videotape evidence alone cannot prove an employee has misrepresented a condition to a doctor.

Managers made assumptions in another case, C-24027, as well. The employee suffered a dog bite and was taken off work by the attending physician. The doctor's notation on a CA-16 that the grievant was "totally disabled" was the Postal Service's only evidence that the grievant had misrepresented her condition to him. Arbitrator Lurie's February 8, 2003 decision discounted this evidence as insufficient to prove misrepresentation had taken place.

The Service's evidence that the grievant overstated her injuries to [the physician]. . .consisted of [his] statement on the CA-16 that the grievant was totally disabled. This is not direct evidence but rather a logical inference. Direct evidence would have been [the physician's] statement to a postal inspector that the grievant had, in fact, overstated her injury. . .The grievant's activities exceeded her prescribed limitations and risked exacerbation of her purported condition. However, it is one thing to find that the grievant acted in derogation of her medical restrictions, and it is another thing to find that her doing so proved that the restrictions were obtained through deceit in the first instance. As the Arbitrator has already stated, the Service had the opportunity to investigate and prove deceit; it instead relied on inference.

Lack of Intent

Advocates should be ready to argue that the grievant's actions, even if proven, were not the result of any intent to commit fraud or misrepresent. The national parties address the issue of intent in the JCAM, under Article 16.1:

Examples of Behavior. Article 16.1 states several examples of misconduct which may constitute just cause for discipline. Some managers have mistakenly believed that because these behaviors are specifically listed in the contract, any discipline of employees for such behaviors is "automatically" for just cause. The parties agree these behaviors are intended as examples only. Management must still meet the requisite burden of proof, e.g. prove that the behavior took place, that ***it was intentional,*** *that the degree of discipline imposed was corrective rather than punitive, and so forth.* (Emphasis added.)

Arbitrator Joseph Brock cited this paragraph in his November 2, 2004 award (C-25557). Brock reinstated an employee with full back pay in part because of management's failure to

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prove the grievant intended to deceive.

> *Concerning the question of intent; Intention as defined in Oxford American Dictionary is defined as: "a thing intended, an aim or purpose; the act of intending". . .*
>
> ** * **
>
> *As per common law of labor arbitration, an act of dishonesty is deemed a dischargeable offense only where an employee commits an intentional act aimed at gaining a benefit to which he would otherwise be unentitled. Intentional, again, is the key.*

To prove falsification, management must show an employee knowingly made a statement with the intention of deceiving.

In another case Arbitrator Keith Poole pointed out that employees are not always familiar with OWCP forms. They may make mistakes that are not automatic evidence of intent to misrepresent. C-24273, May 10, 2003.

> *To prove falsification, one must prove a party knowingly made a statement with the intention of deceiving. Falsification can be proven either by an admission or it can be inferred from the evidence. . .OWCP is a specialized area, and this was the first time [the grievant] filled out a CA-7 form. . .I conclude the Service has not met its burden of proving [the grievant] made a false statement because the Service has not shown the statement was made with the intention of deceiving.*

Doctor's Orders

An argument can also be made that an injured worker was merely following his or her doctor's orders. It is the physician who fills out the restrictions on the CA-17, not the employee. It is the physician who determines whether an employee is able to work or not and, if so, with what restrictions. Some arbitrators have ruled that an employee cannot be held accountable for physical restrictions that were determined by the attending physician. Here are three examples, with brief quotations:

C-25843, Arbitrator Herbert Marx, March 24, 2005:

> *In sum, when an employee is found physically unfit for duty by a physician, and the Postal Service believes otherwise, the Postal Service's argument is with the physician, not with the grievant.*

C-25941, Arbitrator Vicki-Cohen:

> *The important fact in this case is that the grievant was not released by his doctor to return to work in any capacity until November 29, 2004. . . .The grievant was following the instructions of his treating doctor when he did not return to work.*

C-24605, Arbitrator Imhoff:

> *He followed his physician's prescribed course of treatment and returned to work when his physician was assured that he could do so without subjecting himself to further injury.*

Conclusion

The awards cited in this article were all from 2002 or later, which is indicative of the sudden increase in removal cases stemming from videotaped surveillance of injured workers.

Advocates should ensure they make the proper due process arguments when appropriate, including failure to provide requested information to the union. The union advocate should be sure to argue that management must meet its burden of proof by supplying substantial evidence that misrepresentation took place, as opposed to just an assumption that it did based on a videotape. Part of that burden of proof also includes proving intent to misrepresent as opposed to simply following the doctor's orders. ■

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an obvious attempt to have it both ways. It comes down to "tailoring the truth" to whatever is most beneficial at the moment.

That's what some local managers have begun doing recently when they started withdrawing limited duty from employees with compensable injuries. Management took the limited duty away despite the fact that some of these employees have been performing this same work for many, many years.

The Postal Service is legally and contractually obligated to make "every effort" to provide limited duty to employees who have suffered on-the-job injuries. The JCAM identifies the legal authority for that obligation.

JCAM Article 21.4—Injury Compensation

Employees covered by this Agreement shall be covered by Subchapter I of Chapter 81 of Title 5, and any amendments thereto, relating to compensation for work injuries. The Employer will promulgate appropriate regulations which comply with applicable regulations of the Office of Workers' Compensation Programs and any amendments thereto.

Chapter 81 of Title 5 (§ 8151) confers upon the Office of Personnel Management (OPM) the authority to establish regulations regarding restoration to duty following an on-the-job injury. The regulations that OPM established are found in 5 CFR 353.

5 CFR 353.301(d)

*Agencies must make **every effort** to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty.* (Emphasis added.)

To facilitate compliance with the federal law, the Postal Service provides two manuals or handbooks, which contain language that affirms the Service's legal obligations as outlined in 5 CFR 353.301(d). The two provisions are found in the ELM and the EL-505:

ELM Section 546.142(a) Obligation

*a. Current Employees. When an employee has partially overcome a compensable disability, the Postal Service must make **every effort** toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance.* (Emphasis added.)

EL-505 Section 7.1

*The USPS has legal responsibilities to employees with job-related disabilities under OPM regulations. Specifically, with respect to employees who partially recover from a compensable injury, the USPS must make **every effort** to assign the employee to limited duty consistent with the employee's medically defined work limitation tolerance.* (Emphasis added.)

Consistent in all the language found in the law, the ELM, and the EL-505 is the "every effort" that the Postal Service must make to assign limited duty to compensably injured employees. However, despite its clear legal and contractual obligations, in some locations management has begun withdrawing limited duty work from employees. Supervisors have begun asserting, for the first time, that there are boundaries to the Service's legal obligation of providing limited duty. According to management, this new boundary to its obligation is that there must be an ***operational necessity*** for any limited duty it offers.

That's the equivalent of the Postal Service saying, "I'm not full! Hand me cherry pie!"

Meanwhile, in its dealings with the American Postal Workers' Union, the Postal Service at the national level argues the exact opposite. While trying to fend off the APWU in two national level arbitrations, the Service argued that operational needs have nothing at all to do with limited duty job offers it makes. Operational needs have no consideration whatsoever, the Service asserts.

How do arbitrators characterize an attempt to argue two contradictory things simultaneously? "Blowing hot and cold" is

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how arbitrators frequently refer to it—rejecting management's feigned arguments.

A classic example of management "blowing hot and cold" can be found in a 1997 award from Arbitrator Carlton Snow (C-17270, September 8, 1997). As background, we must first examine a prior arbitration heard by Arbitrator Richard Mittenthal (C-15091, February 8, 1996). The events of the Mittenthal case started earlier, in 1995, when NALC and the Postal Service had a dispute about the number of hours a Transitional Employee (TE) could work. The Postal Service, whose interest at that time was in working TEs on overtime, successfully argued that there was no "ceiling on the number of hours they may work in a delivery unit."

After winning that case, the Postal Service changed its tune in front of Arbitrator Snow. In C-17270, the Service had a new interest in which it wanted to exclude TEs from the definition of "auxiliary assistance." This would enable the Service to mandate non-ODL carriers on overtime as opposed to having the TEs perform the overtime work.

On page 15 of C-17270, Arbitrator Snow ruled:

> *In the earlier case, the Employer argued that:*
>
> *"Management, which had not given all overtime to Transitional Employees, believed that Transitional Employees are employees under the National Agreement and were eligible for overtime assignments."*
>
> *It was Lord Kenyon who observed that "a man should not be permitted to blow hot and cold with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest."*

Another example of the Postal Service making simultaneous and contradictory arguments is a discipline case before Arbitrator Clarence Deitsch (C-18924, November 23, 1998). In that case, the Postal Service issued a removal to an employee who had injured his ankle at work. The removal simultaneously charged the employee with (1) fracturing his left foot while violating safety rules, and (2) fraudulently filing an OWCP claim. So had the employee been injured, or not?

The arbitrator wrote (p. 15):

> *As regards the grievant's removal, the Service has raised two conflicting charges, namely, severe rules infractions resulting in injury and filing a fraudulent OWCP claim. The Service cannot simultaneously present two contradictory arguments—cannot "blow hot and cold" on the same issue as circumstances dictate.*

Arbitrator Deitsch continued on page 18:

> *As regards just cause for removal, the principle of collateral estoppel precludes the Postal Service from arguing contradictory positions as suits its purpose. . . The Service is estopped from claiming one thing and then turning around and claiming the exact opposite. . .The Service cannot have it both ways.*

Let's examine now how the Service is presently "blowing hot and cold" with regard to limited duty. There is substantial documentary evidence that this is so. The evidence is related to a grievance that the APWU filed—a National Arbitration before Arbitrator Shyam Das (C-23742, October 31, 2002).

Before considering the award itself, it is important to understand the background of the case. The Postal Service provided a letter carrier with a Modified General Clerk position following her partial recovery from an on-the-job injury. The APWU filed a grievance maintaining that the position should not have been designated as limited duty. The APWU argued that instead, the position should have been posted for bid by members of the clerk craft.

The Postal Service argued repeatedly that it had no obligation to post the position because the duties were not operationally necessary. The Service argued that the position was uniquely created and would be

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abolished in the event the injured employee ever vacated it. Fortunately for NALC advocates, the Postal Service put these arguments in writing (in a brief sent to the arbitrator). The brief is therefore ripe for inclusion in future grievances regarding denied limited duty. (See page 11 for information on how to get copies of these documents.)

USPS Brief—Excerpts

Reproduced below are excerpts from the Postal Service's written brief in the Das case (Case No. E90C-4E-C 9507 6238). Please note that references to "Article 37 duty assignments" are operationally-necessary duty assignments within the clerk craft. In other words, these are normal clerk jobs. Here are the arguments straight from the Postal Service itself:

"Article 37 duty assignments are created by management due to operational needs. Rehabilitation assignments are created as a result of legal, contractual and regulatory requirements. But for the obligation to the injured employee, the rehabilitation assignment would not exist and would not be created under Article 37. Therefore, rehabilitation assignments are not Article 37 duty assignments." (page 8)

"The rehabilitation assignments at issue are by definition uniquely created for employees who were injured on the job and continue to have work restrictions. A uniquely created rehabilitation assignment is therefore not an Article 37 duty assignment. It only exists as a result of the need to reassign an injured employee." (page 2)

"If there was a bona fide operational need for the craft duty assignment it would have been created long before the rehabilitation assignment was created." (page 14)

"However, nothing in the Agreement impedes management's exclusive right to assign employees to work when and where they are needed and create Article 37 duty assignments to maintain efficiency of the operations. This is in sharp contrast to rehabilitation assignments created under Article 21, Section 4." (page 4)

Fortunately, USPS has recorded its actual position on limited duty positions in writing, and submitted it to national arbitration.

"In the instant case. . .the rehabilitation assignment was created as a result of the injury compensation contractual requirements. The rehabilitation assignment did not exist before the employee was injured on duty and would not have been created by management because no need for the Article 37 duty assignment existed." (page 6)

"Article 37 Duty Assignments and Article 21 Rehabilitation Assignments are Separate and Distinct. . . Such Article 37 duty assignments are driven solely by management's operational needs. This is not true for rehabilitation assignments. Rehabilitation assignments are created as a result of legal, contractual and regulatory mandates." (page 7)

"If it is a uniquely created rehabilitation assignment, it is by definition not an Article 37 duty assignment. The rehabilitation assignment would not exist but for the obligation to reassign the injured employee. Management never created a duty assignment pursuant to Article 37. Management reassigned an injured employee pursuant to Article 21.4 and ELM Section 546 as part of the established injury compensation program. Had there been no injured employee the rehabilitation assignment would not exist. The decision to create a new Article 37 duty assignment is determined by management based on operational needs,

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not the needs of injured employees. This distinction is critical." (Page 5)

"But for the employee's on the job injury, the uniquely created rehabilitation assignment would not exist and would not be posted for bid as a duty assigment." (page 2)

"The bottom line here is that because the legal, contractual and regulatory mandates drive the decision to create a rehabilitation assignment, it is not an Article 37 duty assignment. The injury compensation regulations require that 'every effort' be made to reemploy the injured employee. The every effort mandate has been expressly codified in ELM Section 546 and detailed in ELM Section 546.141(a). Therefore, rehabilitation assignments made under this provision are not Article 37 duty assignments but rather are created and governed by totally separate and distinct dynamics and forces." (page 8)

"Because management has no need for the assignment other than to reemploy the injured employee, if any other employee were the successful bidder the assignment would be abolished at management's discretion pursuant to Article 37.1.F." (page 11)

"As the rehabilitation assignment was tailored to the needs of the injured employee it would serve no purpose to allow a healthy employee to work such an assignment." (page 14)

The national award from Das is also a rich source of evidence regarding the employer's arguments, which the arbitrator described at length:

"This issue, the Postal Service stresses, is predicated on the existence of a uniquely created rehabilitation assignment for an employee with work restrictions due to an on-the-job injury. The Postal Service contends that an assignment of this sort is not an Article 37 duty assignment. It only exists as a result of the need to reassign the injured employee. It is created under Article 21.4 and ELM Section 546. When the injured employee vacates the assignment, it will no longer exist". (page 12)

"Creation of duty assignments is based on management's operational needs. The present assignment, in contrast, was only created because of the Postal Service's legal, contractual and regulatory obligation to reassign or reemploy an employee who is injured on the job. This assignment did not exist before the employee was injured and otherwise would not have been created by management." (page 13)

"Moreover, in that case, the assignment would not exist, but for the obligation to reemploy the injured employee, it would not have been created." (page 14)

Das' award, issued in 2002, ruled against the APWU and provided that the Postal Service was not required to post the uniquely created positions for bid. In 2006, the APWU presented another grievance in national arbitration—again before Arbitrator Das.

APWU's issue in the 2006 arbitration was not over a requirement to post unique positions, but rather its objection to even including language referring to unique positions in the ELM 546.2. The Postal Service argued in favor of ELM language referring to unique positions created solely to provide limited duty in its 2006 brief (Q90C-4Q-C 9503 3931):

"The proposed changes to ELM Section 546.2 are entirely consistent with the Postal Service's legal obligation under federal law at Title 5, U.S.C Section 8151, OPM regulations found at Title 5, CFR Section 353.301(d), contractual commitments contained in Article 21.4, preexisting published regulations on reassignment of current employees found at ELM Section 546.141 and numerous national arbitration awards." (page 11)

The Postal Service brief mentioned the earlier Das case and

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then went on to repeat the same arguments in 2006 that it made in 2002:

> *Essentially, the holding in that case was that uniquely created rehabilitation positions were not duty assignments because they would not exist but for the need to make reassignments for injured workers. It was held that there was no operational need for such jobs.* (page 9)

The Postal Service has been consistent in its briefs and in its arbitrations with the APWU. It has made it clear that its position is that (1) it has legal, regulatory, and contractual obligations to make every effort to provide limited duty, and (2) such limited duty is not based upon operational necessity.

Now, however, when some local managers are dealing with injured letter carriers and the NALC, they make no mention of the employer's true position regarding limited duty obligations as stated above. Now that some supervisors want to take away limited duty work, they pretend that the Postal Service's position on its limited duty obligations is entirely different. Local management pretends that the "every effort" obligations only apply to the extent that such work is operationally necessary.

Management's documents and correspondence to injured workers say this with various words or phrases. But the meaning is the same no matter how it is phrased:

> *"Your current modified position assignment. . . no longer meets operational needs."*
>
> *"Limited and light duty assignments are reviewed for operational necessity."*
>
> *"The search for limited duty is limited to "necessary, funded work."*

There are no exceptions to the "every effort" obligation.

For nearly thirty years, the Service's treatment of limited duty has been consistent with the arguments it makes in hearings with the APWU. That is, its words in the Das hearings and written briefs matched the actions the Service has always taken toward providing limited duty. The sudden change in course that some local managers have now taken to redefine "every effort" makes it clear that they are simply feigning a new position in order to achieve a wholesale withdrawal of limited duty within that locale.

Management can only hope to get away with this limited duty withdrawal by pretending that "every effort" means something other than "every effort." The problem for the Service is that nowhere in the law, regulations, or contract are the words "every effort" qualified in any way. The national parties never made any exceptions or qualifications whatsoever.

The ELM 546.142 language states, "The Postal Service must make every effort toward assigning the employee to limited duty." That language ***does not*** provide exceptions such as, "unless there is no operational necessity for such work" or "unless no necessary, funded work exists."

The unconditional "every effort" language of ELM 546.142 has been a part of the Service's contractual obligations ever since it was first negotiated in 1979. In its thirty years of actions and in its arguments before Arbitrator Das, USPS has consistently recognized that there are no restrictions on its "every effort" obligations—although local managers may now be trying to pretend otherwise.

Both of the Postal Service's written briefs, along with the Das award, are available from the National Business Agent offices. Request them by asking for "the Das Award, C-23742, plus the two briefs." (The award alone is also available on NALC's Arbitration DVDs.)

Advocates should be prepared to counter local management's attempt to "blow hot and cold" on the issue of limited duty. The Postal Service cannot now, after thirty years, redefine its "every effort" obligations when there is no law, regulation, or contractual language to support such a new definition. ■

Arbitration Vocabulary Quiz

Advocates use many words and concepts unique to the arbitration process. Some advocates—especially managers—use fancy language, including Latin terms and other legalese, to confuse and bewilder their opponents. Although NALC believes that plain English is best, union advocates still need to know the specialized terms and concepts that may be used in arbitration hearings.

Test your knowledge of arbitration terms by taking this quiz. Circle the letter of the correct answer (s) to each question. When you are finished, grade your quiz by consulting the answers on page 14.

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1. Adverse inference

(a) Management's negative inferences from the facts presented at the hearing.

(b) An arbitrator's negative conclusion about missing evidence.

2. Affirmative defense

(a) An aggressive defense in a disciplinary case.

(b) A claim that management is the true cause of a grieved incident.

3. Appropriate weight

(a) "The arbitrator will render the award after an appropriate weight."

(b) "I'll give this evidence appropriate weight."

(c) "I wish I could achieve an appropriate weight."

4. Rebuttal

(a) Another word for re-direct examination; also known as rehabilitation.

(b) A second chance to present evidence, to clarify or contest issues raised in the opponent's case-in-chief.

(c) Reverse liposuction.

5. Bench decision

(a) A decision rendered at the hearing.

(b) A decision rendered in the park.

6. Bifurcate

(a) Split the union's arguments between substantive and procedural.

(b) Split a hearing between arbitrability and other arguments.

(c) Separate from one's lunch following a particularly stressful hearing.

7. Competent-incompetent

(a) "Madame Arbitrator, this witness is incompetent because he has been fired as a postal supervisor."

(b) "Madame Arbitrator, the witness is incompetent because he was not in the room when the incident occurred."

(c) "Madame Arbitrator, the union is glad that my opponent is incompetent."

8. Demeanor

(a) "I object, Mr. Arbitrator! That issue is simply demeanor and not important here."

(b) "Mr. Arbitrator, the witness's demeanor showed that he was shading the truth."

(c) "Demeanor advocates tend to win more cases."

9. *De minimus*

(a) "Mr. Arbitrator, at *de minimus* I need to call seven witnesses."

(b) "Mr. Arbitrator, you should ignore management's second charge; it is simply *de minimus.*

10. *Dicta*

(a) "Arbitrator Snow's comments in the 1995 award are mere *dicta* and not controlling."

(b) "Mr. Arbitrator, negotiations within the grievance procedure are *dicta* and not admissible in arbitration."

Vocabulary Quiz . . .

(continued from page 12)

11. *Ex parte* communications

(a) Private communications between advocate and grievant about the merits of the case.

(b) Private communications between a party and arbitrator about the merits of the case.

12. Hostile or adverse witness

(a) Management witness with a nasty attitude.

(b) Must answer leading questions.

13. Impeachment

(a) Removal of an arbitrator from a case for unethical conduct.

(b) Undermining the credibility or value of testimony.

(c) Monica, you almost caused it.

14. Instant case

(a) Case heard with little advocate preparation.

(b) This case, as opposed to another case.

15. Intervene

(a) Interfere with the opposing advocate's case preparation.

(b) Become a party to a case begun by others.

16. "Lay in the weeds"

(a) Be sneaky; plan an ambush.

(b) Sleep on one's rights and thereby lose them.

17. *Res judicata*

(a) Already decided; similar to collateral estoppel.

(b) Ripe for judgment; the record has been closed.

18. Stipulation

(a) Bowing before the arbitrator at the close of the case.

(b) Agreement that certain facts or issues are not in dispute.

19. Tripartite arbitration

(a) Division of the hearing into three parts, each addressing one main issue.

(b) Three-party arbitration, usually involving jurisdictional issues.

20. Ultimate issue

(a) Witness testimony should address this directly.

(b) No witness should address this directly.

(c) Only the arbitrator may address this.

(d) The advocates may address this in their arguments.

21. Waive

(a) To give something up—usually a right.

(b) To withdraw a grievance after the hearing has begun.

(c) To raise and lower the arms in sequence with other hearing participants.

22. *Voire Dire*

(a) "I want to see the witness say it" — an objection to hearsay testimony.

(b) A method for questioning the competence of the other side's evidence.

(c) An advocate's motion to recess the hearing for a trip to "les toilettes."

23. Sequestration

(a) Sequestered witnesses may not speak or see one another outside the hearing room.

(b) Sequestered witnesses must await their time to testify while outside the hearing room.

24. *Prima facie* case

(a) Incontrovertible proof that the Grievant is guilty as charged.

(b) Proof offered by a party sufficient that a reasonable arbitrator could find in that party's favor.

(c) The burden of proof in jurisdictional cases.

25. Arbitrability - Procedural (P) or Substantive (S) (circle a letter)

P S "The arbitrator has no power to hear this case because it was untimely appealed."

P S "The case is not arbitrable because management failed to review and concur or conduct any investigation at all before issuing discipline."

P S "The case is not arbitrable because it alleges only a violation of the law."

Answers—Arbitration Vocabulary Quiz

1. Adverse inference

(b) An arbitrator's negative conclusion about missing evidence.

An advocate may ask the arbitrator to draw an adverse inference about missing facts, for instance, when a key witness has not been produced by the other side. Arbitrators also may draw such inferences on their own. For example, some arbitrators refuse to reinstate a discharged employee who fails to testify at the arbitration hearing. They apparently draw an inference that a grievant who will not defend himself or herself is probably guilty as charged.

2. Affirmative defense

(b) A claim that management is the true cause of a grieved incident.

Sometimes the union asserts a defense in a discipline case that shifts the burden of proof to itself. For instance, NALC might argue that a carrier did not strike a supervisor as charged, but even if he did, it was because he was provoked. As to the provocation defense NALC has the burden of proof, even though management generally has the burden of proof in a discipline case. Another affirmative defense is disparate treatment. One cannot simply claim disparate treatment and then force management to prove the claim wrong—rather, the union must produce facts to prove the treatment was disparate.

3. Appropriate weight

(b) "I'll give this evidence appropriate weight."

In arbitration hearings, unlike legal trials, arguments to restrict the admission of evidence are rarely successful. Rather, the arbitrator tends to admit almost everything offered by both sides. The theory is that the arbitration hearing is mostly a fact-finding inquiry, and that the arbitrator later will give different kinds of evidence—direct testimony, hearsay, documents, etc.—an "appropriate weight." It is a union advocate's job to argue, when necessary, that if unreliable evidence is to be accepted from management then it should be accorded little or no weight at all in the arbitrator's consideration of the case.

4. Rebuttal

(b) A second chance to present evidence, to clarify or contest issues raised in the opponent's case-in-chief.

It is common for an advocate to rest the case in chief "subject to rebuttal." This means that if management raises an unexpected issue which the union did not address, or if unexpected new facts are introduced which the union wishes to clarify or contest, the union should have a right to present rebuttal evidence. Caution: Many arbitrators follow the legal rule that any rebuttal evidence must respond directly to something raised in the opponent's case. Rebuttal evidence must be tightly focused; arbitrators will not permit any party to re-try the case through rebuttal, or to introduce evidence that a party simply forgot about during presentation of the case-in-chief.

5. Bench decision

(a) A decision rendered at the hearing.

A bench decision is one rendered by the arbitrator orally at the hearing, rather than in a written decision. The term comes from the courtroom: "Please approach the bench." After the hearing, the arbitrator issues a written decision to record the result.

6. Bifurcate

(b) Separate the arbitrability arguments from other arguments at a hearing.

Management often asks the arbitrator to bifurcate the hearing—divide it in two—when it raises an issue of arbitrability. In a bifurcated case a first hearing deals only with the issue of arbitrability, and the arbitrator renders a decision on that issue alone. Then, if the arbitrator has ruled the dispute arbitrable, a second hearing addresses the merits of the grievance.

When faced with a request to bifurcate, an arbitrator has three main options:

1. Grant the request, hold a separate hearing on arbitrability, and then go home to write a decision on that issue alone. If the

Answers—Vocabulary Quiz . . .

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case is found arbitrable, another time is scheduled for a hearing on the merits before the same arbitrator. NALC strongly opposes this option because it wastes union resources and delays justice for the grievant.

2. Bifurcate the hearing but hear both parts of it on the same day. The arbitrator may choose to hear opening statements, receive testimony and other evidence, and hear closing arguments on just the arbitrability issue. Then, either:

A. The arbitrator issues a bench decision on arbitrability, and proceeds to hear the merits if the case is found arbitrable; or

B. The arbitrator also proceeds to hear the merits of the case. He or she reserves judgment and decides both matters in the written award. (Sometimes the arbitrability and merits "hearings" are not kept separate.)

7. Competent-incompetent

(b) "Madame Arbitrator, the witness is incompetent because he was not in the room when the incident occurred."

An incompetent witness is one who is not capable of providing reliable evidence on the topic in question. For instance, if a witness did not observe an incident, he or she is incompetent to provide eyewitness testimony about it. (Competence also comes up in criminal trials when judges must decide whether a defendant is mentally competent to stand trial—that is, capable of understanding the charges and assisting in a defense.)

8. Demeanor

(b) "Mr. Arbitrator, the witness's demeanor showed that he was shading the truth."

"Demeanor" is a person's outward manner—that collection of personal characteristics, facial expressions, mannerisms, etc. that we show, and that others use to judge us. Arbitrators evaluate witness demeanor to help decide issues of credibility.

9. De minimus

(b) "Mr. Arbitrator, you should ignore management's second charge; it is simply de minimus.

De minimus is Latin, meaning "so small as to be insignificant." For instance, management might argue that its contract violation was *de minimus* and thus not sufficient to justify a monetary remedy.

10. Dicta

(a) "Arbitrator Snow's comments in the 1995 award are mere *dicta* and not controlling."

Dicta is Latin, in arbitration meaning "mere words." Often an advocate cites language from a previous decision to support an argument. The other side sometime responds by arguing that the cited language is not the controlling rationale of the decision, nor even a necessary part of the decision, but rather nothing but *dicta*—mere extra words of no importance.

11. *Ex parte* communications

(b) Private communications between a party and arbitrator about the merits of the case.

Ex parte is Latin meaning "by or for one side only." The *ex parte* communication rule is that no party—not the grievant, a union official, nor a management official—is permitted to communicate with an arbitrator about the merits of a live case outside the hearing forum. The rule prevents impropriety and its appearance in the arbitration process, by ensuring that decisions are based on the evidence offered at hearing, rather than on secret or off-the-record information. It also ensures that each party has the opportunity to hear and respond to the presentation of the adversary.

NALC and the Postal Service have agreed to a National Memorandum of Understanding banning *ex parte* communications with the arbitrator. See the JCAM, Article 15.4.A.3.

12. Hostile or adverse witness

(b) Must answer leading questions.

An adverse or hostile witness is one offered by the other side. An advocate has the right to use leading questions in cross-examining adverse witnesses.

Occasionally a witness will show reluctance or hostility in testifying in direct examination. In this case the advocate may ask the arbitrator to treat the witness as hostile, or adverse. If

Answers—Vocabulary Quiz . . .

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permission is granted, the advocate may use leading questions, as if the witness belonged to the other side.

13. Impeachment

(b) Undermining the credibility or value of testimony.

To impeach a witness or the witness's testimony is to show that the witness lacks credibility or that, for other reasons, the testimony has little value to the arbitrator. Testimony is most often impeached by offering evidence—other testimony, for example—that shows the first testimony was wrong. A classic impeachment technique is to show that the witness made a prior inconsistent with the present testimony.

14. Instant case

(b) This case, as opposed to another case.

15. Intervene

(b) Become a party to a case begun by others.

Generally, intervention occurs in jurisdictional cases involving two unions contesting the assignment of jobs or work. When one union successfully intervenes in the other's arbitration proceeding, the intervenor becomes a full party with the right to offer and examine witnesses and other evidence, to argue, etc. The intervenor also agrees to be bound by the ruling.

16. "Lay in the weeds"

(a) Be sneaky; plan an ambush.

17. *Res judicata*

(a) Already decided; similar to collateral estoppel.

"Res judicata" is Latin meaning, "The thing has already been adjudicated." Sometimes management uses this term to argue that a binding national precedent requires a certain result in a case. "This has already been decided," the management advocate argues, "so you cannot decide a different way in this case." Or management may argue that the union has already litigated the current issue in a previous case, so because of the doctrine of *res judicata,* that issue is not arbitrable in the current case. This is a classic "no second bite of the apple" argument.

A related term, often confused with *res judicata*, is "collateral estoppel." One party may argue collateral estoppel when some other forum has already determined a fact or issue and that the opponent is thus estopped (legalese for "stopped") from trying to argue for a different result.

A third Latin term, *stare decisis,* is often confused with *res judicata* or with collateral estoppel. *Stare decisis* actually refers to the generally policy of courts to avoid overturning an established precedent—even if the current court may not agree with that precedent—to maintain stability and predictability in the legal system. This concept could apply at the Interpretive Step of the grievance procedure, where a national-level arbitrator might apply *stare decisis* to avoid disturbing long-establish national arbitration precedent.

18. Stipulation

(b) Agreement that certain facts or issues are not in dispute.

The parties have the option of stipulating to any facts or issues they wish. Usually the parties stipulate to certain matters to avoid wasting hearing time on issues that are not worth disputing. In some cases the parties stipulate to most or all of the facts, because only a contractual issue, or the remedy, remains in dispute.

Sometimes one party plans to present a parade of witnesses to establish facts unfavorable to the other side. The second party, feeling the discomfort of damaging testimony after a few witnesses, may decide to stipulate to facts to prevent the arbitrator from hearing more of the same.

19. Tripartite arbitration

(b) Three-party arbitration, usually involving jurisdictional issues.

20. Ultimate issue

(b) No witness should address this directly.

(c) The advocates may address this in their arguments.

Both **b** and **c** are correct. The "ultimate issue" in an arbitration case is whether management violated the contract or whether the discipline was for just cause. This is a matter for the arbitrator to decide and for the advocates to argue about. Witnesses offer facts, not argument. So they

Answers—Vocabulary Quiz . . .

(continued from page 16)

should not testify about whether the discipline was for just cause, or whether management violated the contract.

21. Waive

(a) To give something up—usually a right.

22. Voire Dire

(b) A method for questioning the competence of the other side's evidence.

Voire dire is Latin meaning "to speak the truth." An advocate may ask the arbitrator for permission to *voire dire* the other side's witness, to test the competency of the witness or the competency of other evidence being introduced through the witness.

For example, say the employer calls a manager to testify about the grievant's work habits, but the manager has not supervised the grievant for many years. Instead of waiting for cross-examination, the union advocate could interrupt as soon as the witness is sworn and ask to *voire dire* him or her.

The advocate would pose questions to show the witness could not offer any useful evidence about the grievant's recent job performance. The *voire dire* would be an attack on the witness's competence to testify on the subject. If completely successful, the attack could lead to a ruling from the arbitrator to exclude the testimony. Tactically, this interrupts the opposing advocate's presentation and damages his or her case in an unexpected way.

23. Sequestration

(b) Sequestered witnesses must await their time to testify while outside the hearing room.

24. *Prima facie* case

(b) Proof offered by a party sufficient that a reasonable arbitrator could find in that party's favor.

One party always has the overall burden of proof in a case—also known as the "burden of persuasion." That party has to produce a certain level of proof at the outset of a case. This is known as making out a *prima facie* case. If that party's evidence is so weak that it fails to do so, then it stands to lose the case even without a defense from the other side.

For example, if management presents a very weak case-in-chief on a discipline grievance, the NALC advocate can argue once management rests that USPS has failed to present a *prima facie* case, and ask the arbitrator for an immediate bench decision in the union's favor.

25. Arbitrability - Procedural (P) or Substantive (S) (circle a letter)

P "The arbitrator has no power to hear this case because it was untimely appealed."

X *Second example is neither—a procedural challenge to discipline, **not** an arbitrability issue.*

S "The case is not arbitrable because it alleges only a violation of the law."

First, when a party challenges the arbitrability of a dispute, it is saying to the arbitrator, "You have no power to hear this dispute; you cannot decide it." This is different from a procedural challenge to discipline, which claims that the arbitrator should reverse discipline because management handled it improperly. That case ***is*** arbitrable and we do want the arbitrator to rule on it.

Second, there are two types of arbitrability arguments. Management argues ***procedural*** arbitrability by saying, for instance, that a grievance was untimely filed or appealed. In other words, the arbitrator cannot hear the case because it was not handled properly within the grievance procedure and the union's right to a hearing on the matter has been waived.

Substantive arbitrability concerns the subject of the grievance. For example, Article 12, Section 1.A states, "The employee shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto." Almost all arbitrators read this section as a substantive bar to the arbitrability of a grievance of a fired probationary employee. In other words, under the contract the subject matter of this grievance is outside the arbitrator's authority to decide.

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New Awards Support NALC Overtime Claims

Decisions Reject USPS Understaffing and "Operational Windows"

Three new regional decisions have reversed management policies that undermined the contract's overtime rules. In a path-breaking award, Arbitrator Donald Olson, Jr. ruled that a management failure to staff a facility with sufficient letter carriers violated the USPS Handbook EL-312, which he found enforceable through Article 19 because the staffing provisions directly impact letter carriers. C-26693, September 23, 2006.

In two other new awards, regional arbitrators rejected management arguments that a "window of operations" justified its overtime violations. C-26646, Regional Arbitrator Dennis Campagna, September 12, 2006; C-26662, Arbitrator Joshua Javits, August 20, 2006.

The three awards turned on different facts and arguments. But all successfully challenged management policies that forced letter carriers to work excessive overtime, against their will and in violation of the National Agreement.

The Issue—Staffing

The first case originated in Lancaster, California, where chronic under-staffing had caused "virtually all letter carriers . . . regardless of their desire to work overtime or not, to be mandated to work overtime daily for the greater part of 2005" (award at p. 8). OTDL carriers were often required to work beyond 12 hours in a day and 60 hours in a week. Non-OTDL carriers were repeatedly forced to work overtime on and off their assignments and on non-scheduled days. In addition, annual leave was often canceled in violation of the LMOU and carriers were often forced to work on holidays.

NALC filed a class action grievance in December 2005 directly challenging understaffing, the heart of the problem. The union alleged that by inadequately staffing the Lancaster facility, the Postal Service had violated several provisions of the National Agreement. The union cited Article 19, portions of the M-39 and the ELM relating to the 8-hour workday, and the Memorandum of Understanding on Article 8, which states the parties' intention to "limit overtime, to avoid excessive mandatory overtime, and to protect the interests of employees who do not wish to work overtime." JCAM, page 8-26.

The grievance struck at understaffing, the heart of the problem.

NALC also argued that management had violated provisions of management's Handbook EL-312 which made installations responsible for forecasting personnel needs, "to assure that there are qualified persons available for appointment." Section 211.1. The EL-312 also states that "forecasting . . . recruitment requirements is one of management's most important responsibilities." Section 232.2.

The union argued that these staffing requirements are contractually binding through Article 19 because they have a direct impact on letter carriers' wages, hours and working conditions.

Management argued that the grievance was not substantively arbitrable because the EL-312 did not directly relate to wages, hours or working conditions as specified in Article 19. It also argued that Article 3 gives the employer the right to manage its personnel.

Arbitrator Olson found the case arbitrable and sustained the grievance on the merits, finding that, "management at the Lancaster Post Office inadequately staffed that facility in violation of the National Agreement, as well as pertinent postal regulations." He reasoned that management's obligation under the EL-312 to provide adequate staffing had a direct and measurable impact on letter carriers, and thus was enforceable through Article 19.

Although the arbitrator ruled it beyond his authority to order management to hire the 18 letter carriers requested by NALC, he did order a far-reaching remedy requiring management to correct understaffing:

New Awards . . .

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> *[T]his arbitrator . . . will direct the Employer . . . to conduct a thorough review and study to evaluate the staffing and complement requirements for letter carriers at the [facility] . . . Once this evaluation has been concluded the Employer is directed to share the results of this staffing review and study evaluation with the Union. In the event specific remedial measures are found to be necessary, the Employer shall immediately implement same to assure [the facility] is fully staffed in the carrier craft. Furthermore, the arbitrator will retain jurisdiction in this matter pending submission of the evaluation and proposed corrective measures . . .*

"Operational Windows" Shattered

Two regional arbitrators have rejected USPS "operational window" defenses to violations of Article 8.5.G.

In C-26646, management in Buffalo, New York forced the grievant, a non-OTDL carrier, to work on her day off, rather than assigning the work to carriers on the overtime list. The union grieved, alleging a violation of 8.5.G, which provides in part:

> *Full-time employees not on the "Overtime Desired" list may be required to work overtime only if all available employees on the "Overtime Desired" list have worked up to twelve (12) hours in a day or sixty (60) hours in a service week.*

In its defense, management claimed the overtime needed to be completed before 5:00 p.m. under its "window of operations."

NALC attacked the employer's "operational window" defense, using arguments outlined in the CAU White Paper, "Overtime, Staffing and Simultaneous Scheduling," May 2006 (M-01458, available on the CAU web pages at www.nalc.org).

Arbitrator Compagna agreed with NALC. He ruled that the operational window did not justify a violation of Article 8.5.G, partly because the 5:00 window was a goal rather than a prohibition on carrier work beyond that time. He held management responsible to staff facilities sufficiently to avoid 8.5.G violations:

> *Moreover, where, as here, the Service chose to establish its Operational Window of 5:00 p.m., it was their obligation to provide the necessary resources to implement its Window, and their failure to do so resulted in a violation of Article 8.5(G).*

Award at 14. Arbitrator Campagna awarded the grievant an additional 50 percent of straight-time pay and an hour of administrative leave for each hour of forced overtime.

In another "window of operations" case, Arbitrator Joshua Javits ruled that management had violated Article 8.5.G by forcing a non-OTDL carrier to perform work that should have been assigned to OTDL carriers (C-26662).

NALC showed that letter carriers on the overtime list were available to perform the work in question. Management countered that those carriers were not "available" to work beyond its 5:00 "window of operations."

Management defended the window by arguing that: Article 3, Management Rights, authorizes the employer the right to create such a window; management created the window to provide efficient service to its customers; the employer is required to comply with Article 8.5.G only when carriers can complete the available overtime within the window of operation; and carriers could not be scheduled to start work earlier due to a lack of mail.

Arbitrator Javits rejected these USPS arguments and ruled for NALC, finding that OTDL carriers were available to perform the work before the 5:00 p.m. deadline. Noting that even management had not treated the deadline as absolute—carriers had worked beyond 5:00—he ruled that OTDL carriers were also available to work beyond that time. He further found that management had known of the staffing shortage at the facility and had failed to correct it. He ordered USPS to cease and desist, pay OTDL carriers and grant the non-OTDL carrier administrative leave equal to the hours of forced overtime. ■

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Cumulative Index

Note on Citations

C-number arbitration cases are available on the NALC Arbitration DVDs. New national awards are available at http://www.nalc.org, under Departments>Contract Admin>Arbitration. M-number Materials Reference System materials are available on the NALC Contract CD and on website under Contract Admin>MRS. All materials are also available from the offices of the National Business Agents.

NALC Arbitration Advocate