NALC Arbitration Advocate

Volume 2 Issue 1 February 1998

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

New Arguments or Evidence

Arguing For or Against Exclusion

Management: "I object, Mr. Arbitrator. The union is attempting to introduce testimony to support a brand-new argument at this arbitration hearing. This argument has never before been made in the grievance procedure, and introducing it here is a violation of the collective bargaining agreement and an abuse of this process.

"I might add that it is quickly becoming standard operating procedure for NALC advocates to introduce new arguments or facts for the first time at arbitration, in an attempt to ambush employer representatives. The union does this all the time, asking an arbitrator to hear new arguments at the hearing when NALC knows well that this practice is banned by controlling precedent under the National Agreement. These union abuses have grown so widespread that the employer has been forced to respond with a written position paper on this topic, which I offer to you at this time.

"I quote from the third paragraph of the paper:

> *As Arbitrator Benjamin Aaron held in National Arbitration case number NC-E-11359 (Attachment #1, Page 3):*
>
> *It is now well settled that the parties to an arbitration under a National Agreement between the Postal Service and a signatory Union are barred from introducing evidence or arguments not presented at preceding steps of the grievance procedure, and that this principle must be strictly observed (emphasis added).*

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Absenteeism and the FMLA

Just Cause Meets the Law at Arbitration

A case originating in Idaho illustrates how a carrier's rights under the Family and Medical Leave Act (FMLA) may provide powerful help when a management disciplines a carrier for absences caused at least partly by medical problems. The award also shows how the union can make a powerful case by challenging each separate violation of the just cause principle. C-16970, Regional Arbitrator Donald E. Olson, Jr., June 24, 1997.

The grievant in the case was scheduled to report to work on August 17, 1994, but experienced car trouble while out of town late the previous night. She notified the Post Office by phone between 2:00 and 2:30 a.m. on August 17 and returned to work the next day. Her supervisor requested documentation of the automobile repairs. The grievant explained that a friend had fixed the car. The grievant received at that time what she and her branch president believed to be an official discussion regarding the absence from her supervisor.

On October 27, 1994 the Postal Service issued the grievant a seven-day suspension. The first charge

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Inside...

New Arguments . . .

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The ruling of a national arbitrator is absolute under the Postal Service's arbitration system, Mr. Arbitrator. So I ask you to plant a flag in this case, Mr. Arbitrator, to stop the union's abusive attempt to violate the agreement by introducing arguments and evidence for the first time at this hearing. Arbitrator Aaron has spoken, and this union must be forced to play by the rules."

* * * * *

Fallacy in a Can

Management's "position paper" is real. The Postal Service's arbitration bureaucracy has developed a one-page "canned argument" that advocates can offer to try to exclude union evidence or arguments that USPS believes to be "new." (It is reproduced on page 5 below.) This tactic is one of several strategies used recently by management advocates in attempts to alter the balance of persuasion at arbitration.

However, management's position paper on this topic is so flawed as to border on plain dishonesty. The quotation has been cut off at a key point to misrepresent Arbitrator Aaron's actual ruling. The remainder of the quotation gives a true picture of its meaning:

> *... must be strictly observed. The reason for the rule is obvious: neither party should have to deal with evidence or argument presented for the first time in an arbitration hearing, which it has not previously considered and for which it has had no time to prepare rebuttal evidence and argument. The spirit of the rule, however, should not be diminished by excessively technical construction.*

C-04085, January 25, 1984, at pp. 3-4 (emphasis added). So contrary to the Postal Service's "canned" assertions, in fact the Aaron decision stands for the proposition that new arguments and evidence are *not* always barred at arbitration. In the particular circumstances of the case, Aaron rejected NALC's attempt to exclude a USPS defense made for the first time at arbitration, where he found that NALC had been aware of the defense all along.

In fact, Aaron's decision stands for the proposition that new arguments and evidence are *not* always barred at arbitration.

NALC advocates should be prepared to counter management's canned misrepresentation with a full reading of Aaron's ruling. It may be helpful to point out that it is unethical to employ a partial quotation in an attempt to mislead the arbitrator about controlling precedent.

Other USPS Tactics

This particular canned argument is typical of many management advocates' attempts to use sweeping claims to stop particular arguments, or entire cases, from even reaching the point at which an arbitrator can consider and decide the matter. After all, if USPS can exclude union arguments, it need not respond to the merits of those arguments. And if management can come up with a an argument that a case is not arbitrable at all, it may be able to avoid defending its actions altogether. (For an in-depth discussion of management arguments that a dispute is not arbitrable, see "Challenges to Arbitrability: Clearing the Management Roadblocks," in the August, 1997 *Advocate*.)

Some NALC advocates have reported that certain USPS districts, or particular management advocates, tend to employ these types of "exclusionary" tactics in nearly every case. The "canned argument" addressed here may be part of a trend in which management advocates use all kinds of hardball procedural tactics in a desperate attempt to reduce their caseloads.

Whatever arguments management throws out in the rough-and-tumble debates of arbitration hearings, NALC advocates need to be ready with their own counter-arguments. The issues of when arguments must be raised to be preserved for arbitration, and what truly constitutes "new" evidence or arguments at the hearing, are worthy of some in-depth discussion.

The General Rule

As Arbitrator Aaron recognized in the case that management's canned argument misquotes, the general rule is that new arguments and evidence may not be raised for the first time at arbitration. Aaron ruled in a different case that if the parties do not raise arguments or facts at Steps 2, 3 and 4 of the grievance procedure they may not raise such arguments or introduce such facts for the first time at arbitration. C-03319, National Arbitrator Aaron, April 12, 1983. National Arbitrator Mittenthal stated the identical rule with respect to new arguments in C-03206, September 21, 1981. Similarly, National Arbitrator Gamser ruled that where an issue is not raised until

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the filing of a party's brief, the arbitrator will not dispose of the issue. C-03002, November 3, 1976.

One reason for the rule banning the late introduction of new evidence or argument, as Aaron explained, is the avoidance of "unfair surprise." The other reason concerns the rationale and structure of the grievance procedure. The NALC-USPS grievance procedure is designed to ensure full disclosure between the parties, at each Step of the procedure, of all issues and facts necessary to resolve the dispute. The notion is that early, full disclosure will assist the parties in resolving disputes at the earliest possible Step. If either party were free to introduce brand new arguments or areas of factual inquiry at very late stages, the goals of full disclosure and early settlement would be undermined. Shop stewards and supervisors might well decide to withhold until later, rather than discuss immediately, their most persuasive facts and arguments.

Management sometimes argues that every word of testimony must be documented in the grievance file.

Limits on the General Rule

The well-settled general rule has some limits, however. First, there is Arbitrator Aaron's admonition: "The spirit of the rule, however, should not be diminished by excessively technical construction." In other words, there may be situations (like the one before him in that case) in which a strict application of the rule may be inappropriate—for example, where the element of "unfair surprise" is missing.

Another limit on the rule is that it cannot be applied literally or mechanically. Management has been known to object to union testimony on the basis that the facts the witness is offering have not been noted specifically in the grievance file already. However, in many situations this objection is nonsensical because there is no requirement that every single fact, down to the smallest detail, offered at arbitration already be documented in the grievance file. One of the purposes of a hearing is to explore and find the facts—something that scholars call the "truth-seeking" function of arbitration. The rule barring "new facts" does not permit management to put the entire factual inquiry of an arbitration hearing under a microscope, and insist that each word spoken by a witness be identical to a written statement submitted previously.

Arbitrators should also understand that the arbitration process, unlike an expensive civil lawsuit, does not afford unlimited opportunities to question each witness at length and under oath in depositions prior to the actual hearing. So one way or another some matters of fact, as well as the full-blown details of an argument, will never be fully delivered until the hearing.

Arbitrators will use their experience and judgment in deciding whether a particular line of questioning or other factual inquiry is "new," or is related closely enough to matters already in the case and thus admissible at the hearing. It is up to advocates to persuade arbitrators that the facts and arguments they offer are not new, but rather part and parcel of matters already in the record.

As an example, say the union offers the grievant's testimony that she had never been warned to stop the behavior for which she was disciplined, or advised that continuing could lead to discipline. Management objects, claiming that the union has not previously made this specific factual allegation and thus cannot offer it for the first time in arbitration. The union might respond:

"The grievance alleged at every Step that the discipline was not for just cause. One fundamental component of the just cause principle is that management must give employees fair warning about the rules and about the consequences of violating them. This is well-settled, and both parties are well aware of the various tests that make up the just cause standard. So management can hardly claim 'unfair surprise' in this situation, and the particular facts of management's errors are absolutely essential to the union's case in arbitration. They should not be excluded."

Advocates should be ready to argue that whatever management objects to as "new" is actually not new at all—that it is so closely related to matters covered at earlier Steps that management has no basis for a claim of "unfair surprise."

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Note on Case Citations

Please note that the C-number cases cited in this publication are available to interested advocates. All cases are available from the office of the National Business Agent and all but the newest cases are available on the NALC Arbitration CD-ROMS.

NALC advocates also can argue that although absolute exclusion may be used often in courts of law, it is seldom appropriate in arbitration, which seeks to provide a fair hearing through an informal search for the truth. Highly technical rules of evidence, an NALC advocate can argue, would undermine the fairness and truth-seeking function of the arbitral process.

Finally, advocates facing claims that union arguments or evidence are "new" may suggest that the arbitrator, as an alternative to exclusion, instead delay the hearing long enough to permit management to prepare a response. Experienced advocates report that most arbitrators facing a claim of "surprise" from either party tend to delay the hearing rather than exclude the argument or evidence completely.

The Best Defense

Union advocates can also use the "new argument or evidence" rule offensively, to bar management from raising new matters for the first time at arbitration. Say, for instance, that in an overtime grievance management has insisted at each Step that Article 8, Section 5.C.2.D. permits the employer to force *any* carrier to work overtime on his or her own route. Management insists on this argument and none other until arbitration. Yet at the hearing management's first witness begins to testify about "operational windows," which have never been mentioned at earlier Steps.

NALC should object to the introduction of any facts or arguments concerning operational windows. At this point management has never before raised such a defense and may not make this argument for the first time in arbitration. Management's pursuit of the "operational window" issue constitutes an unfair surprise, placing the union at a disadvantage in arbitration and undermining the mandatory disclosure provisions of the grievance procedure. (Although this union argument is sound, advocates should expect that many arbitrators will delay the hearing to give the union time to prepare a response, rather than exclude management's new argument and evidence.)

Arbitrability Exception

Arbitrability arguments constitute an established exception to the general rule prohibiting parties from raising arguments for the first time at arbitration. The reason is that arbitrability arguments have nothing to do with the merits of a dispute—rather, they go to the fundamental question of whether the arbitrator has authority to hear and decide the dispute at all. (See "Challenges to Arbitrability: Clearing the Management Roadblocks," in the August, 1997 *Advocate*.)

However, the fact that arbitrability may be *raised* for the first time at arbitration does not necessarily mean that the argument will be *successful*. A good example of this concerns management claims that a grievance is not arbitrable because it was untimely filed or appealed. Advocates know that Article 15, Section 3.B provides that an untimely grievance is waived and thus not arbitrable. Yet the same section of the contract states that management can lose its right to make an untimeliness argument:

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

In practice, this language means that:

- If management asserts that a grievance is untimely filed at Step 1, it must raise the issue in the written Step 2 decision (because Step 2 is "later" than Step 1) or the objection is waived. It is not sufficient to assert during the Step 1 meeting that a grievance is untimely.
- If management asserts that a grievance is untimely at Step 2 or a later step, it must raise the objection in the written decision at the step at which the time limits were not met. For example, if management claims that the union's appeal to Step 3 was untimely, it must so state in its Step 3 decision or the argument is waived.

Moreover, the union can demolish a management untimeliness argument where USPS has raised untimeliness in its Step 2 decision but thereafter has failed to preserve the argument by restating it in the Step 3 decision. C-09093, National Arbitrator Aaron, July 7, 1982. For a regional case following this rule see C-08352, Regional Arbitrator Williams, September 23, 1988.

In addition, regional arbitrators have found that the employer waived timeliness arguments when: (a) management orally claimed untimeliness at the Step 2 meeting but did not raise the issue in its written Step 2 decision, C-01300, Regional Arbitrator Levak, September 9, 1982; and (b) when management raised timeliness in its Step 2 decision but failed to raise it orally at the Step 2 meeting, C-03031, Regional Arbitrator Dworkin, February 24, 1983. □

Fallacious "Canned" Argument from Management

NALC Advocates should be on the lookout for this phony argument "canned" for management advocates to fill in the blanks and submit. The quotation from National Arbitrator Aaron is incomplete; two sentences later this caveat changes its meaning completely: "... The spirit of the rule, however, should not be diminished by excessively technical construction." C-04085, January 25, 1984.

In the Matter of Arbitration
between

UNITED STATES POSTAL SERVICE

and

GRIEVANT:_____
CASE#:_____
LOCAL#:_____
BEFORE: Arbitrator_____

DATE OF HEARING:_____
LOCATION:_____
ISSUE:_____
_____
OFFICE:_____

OBJECTION TO NEW ARGUMENT

The Service strongly OBJECTS to the attempt by the Union to circumvent Article 15 of the CBA by attempting to put forth a new argument at hearing. For the union to offer a new argument at this, the final stage of the grievance/arbitration procedure, is untenable.

It is a matter of record in this appeal that at no step in the grievance procedure did the Union make the argument (or submit documentary evidence in support of the argument) that it now attempts to make in front of the Arbitrator. (See Joint Exhibit #2).

As Arbitrator Benjamin Aaron held in National Arbitration case number NC-E-11359 (Attachment #1, Page 3):

> It is now well settled that the parties to an arbitration under a National Agreement between the Postal Service and a signatory Union are barred from introducing evidence or arguments not presented at preceding steps of the grievance procedure, and that this principle must be strictly observed (emphasis added).

The Postal Service asserts that to allow the Union to enter these arguments into the record of this case at this, the last step of the grievance/arbitration procedure, would be improper as well as contrary to the most fundamental, longest recognized elements of arbitration and collective bargaining. *Further, the Postal Service respectfully requests the Arbitrator's intervention in halting the disconcerting regularity of attempts such as this to abuse the process. It has become the rule, rather than the exception, that the Union takes liberties regarding its obligations of full disclosure, effectively "ambushing" management's advocates at hearing and fully expecting arbitrator after arbitrator to allow this blatant circumvention of the Collective Bargaining Agreement. These repeated attempts to enter new arguments into the hearing process have resulted in the Postal Service synopsizing its well-founded objection to this practice in order to formulate this position paper for utilization by its advocates.*

Absenteeism & FMLA . . .

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was that she was AWOL on August 17. A second charge alleged excessive unscheduled absences for an extended time period, including absences covered by sick leave on March 30, May 12-13, June 22 and four days in July. Management also cited a previous Letter of Warning for irregular attendance in December, 1993 and a two-day suspension for irregular attendance on in February, 1994.

The grievance went to a first arbitration in June, 1995 at which NALC raised the issue that management may have violated the Family and Medical Leave Act as well as the contract. The arbitrator decided, with the parties' agreement, to remand the case back to Step 3 so that the parties could "fully develop and further address the issues in dispute." The issues, including the FMLA question, were discussed in an August, 1995 Step 3 meeting and management once again denied the grievance. The second Step 3 decision noted the union's FMLA argument by asserting that the FMLA was not arbitrable, and that even if it were found arbitrable "the union has failed to demonstrate sufficient number of the dates of unscheduled absences should be excused under FMLA."

At a second arbitration hearing management defended the suspension as appropriate, progressive discipline. The management advocate also attacked the union's FMLA claims, claiming that they constituted a new argument raised for the first time at the arbitration hearing—an "ambush at arbitration." The Postal Service further argued that even if the FMLA contentions could be considered, the grievant had never given USPS sufficiently detailed notice that her medical condition met the FMLA definition of a "serious health condition." Management cited a stand-up given to employees about their FMLA rights and the FMLA postings on bulletin boards.

NALC argued that management had committed multiple violations of the just cause principle: (1) management had failed to prove the grievant was AWOL on August 17; (2) management had failed to investigate thoroughly the circumstances of the grievant's absences from work before issuing the discipline; (3) given the official discussion concerning the August 17 absence, the suspension constituted "double jeopardy"—a second punishment for the same incident; (4) the discipline was untimely because it was issued on October 7, well after the August 17 incident; (5) the grievant was treated disparately, receiving discipline for less sick usage than other employees who had not been disciplined.

The union advocate also argued that management had violated Articles 3, 5 and 19 as well as the FMLA by disciplining the grievant for absences caused by a chronic, serious health condition which included two on-the-job ankle injuries and a limited duty assignment offered and accepted in late February, 1994 and later rescinded in April, 1994. Finally, NALC argued that management had acted contrary to its own leave regulations—ELM Sections 515 concerning the FMLA and 513 requiring the notation of AWOL on Form 3971. NALC asked that the discipline be rescinded and that the grievant be made whole, be treated properly as a limited duty employee and be afforded a position she could accomplish within her medical restrictions.

Arbitrator Olson ruled for NALC, reversing the discipline. His decision first disposed of management's claim that NALC had raised the FMLA issue for the first time at arbitration. Noting that the parties had discussed the FMLA matter after the remand to Step 3 and that management had rejected the union's FMLA contentions in its Step 3 decision, the arbitrator concluded that management's claim of unfair surprise "cannot be countenanced." [Note: Management is encouraging its advocates to argue that a union's "new arguments" at arbitration constitute "an ambush." See the article and "canned" management argument on pages 1-5 above. —Ed.]

The arbitrator then ruled, referring to Articles 3 and 5, that NALC can "avail itself of the grievance procedure for alleged violations of applicable law," including the FMLA. However, he said that "albeit the FMLA is arbitrable," the FMLA did not need to be considered in resolving the grievance before him.

Arbitrator Olson then proceeded to detail management's violations of just cause. Concerning the charge of AWOL on August 17, he found the grievant's explanation of her absence reasonable, as well as the union's testimony that the absence was resolved through an official discussion. He also declared the suspension untimely, explaining, "As a rule, it is an essential aspect of industrial due process that discipline be administered promptly after the commission of the offense which prompted the discipline."

The arbitrator tied NALC's FMLA contentions to the issue of management's failure to investigate the reasons for the grievant's absences over the preceding several months. In light of the grievant's

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prior injuries, limited duty assignment, and 4-day sick leave absence in July—for which management had the right to request medical justification—the arbitrator found the employer "was aware of the Grievant's serious medical condition, and her work limitations."

In language that may be helpful to union representatives in future grievances, Olson pointed out that management has certain legal obligations to an employee who may have a "serious health condition" as defined by the Family and Medical Leave Act:

> *Equally important, this Arbitrator notes the Employer's own reference material dealing with the FMLA, charges supervisors with the responsibility for designating whether or not an absence is FMLA qualified and to give notice of the designation to employees, if such employees have a serious health condition such as the Grievant had. There is no doubt in the opinion of this Arbitrator that management knew of the Grievant's serious health condition, however, blatantly disregarded their responsibility to notify the Grievant of her FMLA rights for qualified FMLA absences. Additionally, there was no evidence in the record that the Employer after being made aware of the Grievant's medical condition, required her to provide current certification from a health care provider that the FMLA definition was met. These requirements are mandated by the Employer's own regulations. ...*

(The "Employer's own regulations" cited by Arbitrator Olson include M-01271, "Family and Medical Leave Act (FMLA) Reference Material for U.S. Postal Service," March, 1995.* This internal USPS Human Resources material outlines the affirmative obligations placed on supervisors by the FMLA.)

Arbitrator Olson found additional due process violations concerning the completeness of management's investigation and consideration prior to issuing the suspension. Management had violated Article 16.8's review and concur requirement because the Postmaster testified that he had no idea why the grievant was absent on August 17. And there had been no investigative interview with the grievant prior to the October suspension notice.

Finally, the arbitrator ruled that in light of sick leave usage comparisons, management had disparately treated the grievant. The grievant had used 88 hours of sick leave during the period in question, while other employees who had used more—480 hours, 320 hours and 160 hours—received no discipline.

Arbitrator Olson's reasoning is particularly helpful to NALC representatives seeking to reverse discipline that is based at least partly on leave covered by the Family and Medical Leave Act. The FMLA flatly prohibits an employer from disciplining an employee for leave which is covered by the law. The FMLA regulations further obligate a management which has reasonable notice of an employee's medical or other FMLA-related problems to investigate and determine whether leave may be covered by the FMLA, and to inform employees when coverage is established. So an advocate may use management's legal obligations under the FMLA as powerful tools to challenge many instances of discipline for absenteeism.

For more information see sidebar, "Enforcing the FMLA: Grieving Violations of the Law," on this page. □

Enforcing the FMLA

Grieving Violations of the Law

In a recent settlement of a Step 4 grievance, the Postal Service agreed with NALC as follows:

> *In a disciplinary hearing involving just cause, the union may argue as an affirmative defense that management's actions were inconsistent with the Family and Medical Leave Act.*

M-01270, October 16, 1997.* This agreement establishes a nationwide rule that all of the FMLA's requirements may be raised as a defense in a disciplinary case. Prior to this settlement the Postal Service had taken the position that the union could raise only those FMLA defenses which arose from the limited USPS FMLA provisions found in Section 515 of the Employee and Labor Relations Manual (ELM). Now management has agreed to what Arbitrator Olson sensibly held a few months prior to the settlement—that in raising an FMLA-

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*These materials recently were added to the NALC Materials Reference System. They are available in the offices of the National Business Agents but do not yet appear on the M.R.S. CD-ROM.

Grieving the FMLA law . . .

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based affirmative defense in a discipline case, NALC may enforce any and all of the Postal Service's obligations under the FMLA.

FMLA as Affirmative Defense

An "affirmative defense" made in a discipline case says, in effect, "Even if management has proven all the facts and basic elements of just cause in this case, the union has an entirely separate defense which, if the union meets its burden of proving it by a preponderance of the evidence, invalidates the discipline." Management retains the burden of proving all of the elements of just cause, but when the union raises an affirmative defense it takes on the burden of proving that defense alone.

"Disparate treatment" is a good example of an affirmative defense. In making a disparate treatment defense a union representative contends, "Even if management has otherwise established that it had just cause for the discipline in question, this discipline must be reversed solely because other employees have committed the same or similar offenses and have not received any discipline or the same level of discipline." As to the sole issue of whether the grievant was disparately treated the union shoulders the burden of proof. That is, when the union raises a disparate treatment defense it must stand ready to present persuasive facts to support the argument. The union cannot, simply by raising the defense and nothing more, force management to prove that the grievant was not disparately treated.

When the union does raise an FMLA affirmative defense in, say, a case of discipline for absenteeism, it must stand ready to prove two things. First, the union must show that the employee's time off was, in facts, covered by the FMLA. In a typical case of the employee's own "serious health condition," this will require medical evidence that the employee's condition met the FMLA definition, and that the absences were due to the covered condition.

Second, in order to immunize a grievant's absences from discipline the union should show that management had reasonable notice that the employee might have had an FMLA-covered condition. Once the union shows that management had such notice, management's affirmative obligations under the FMLA are triggered—the obligation to give the carrier USPS publication 71, "Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act," which outlines FMLA rights, and the obligation to investigate further whether the employee's leave was covered by the FMLA. (See M-01271 for more information.) If management failed to fulfill these obligations it cannot discipline the employee for the FMLA-covered absences.

A further twist may occur where management has failed to give employees sufficient information concerning their FMLA rights. For instance, if management fails to post prominently in the grievant's workplace WH Publication 1420, the U.S. Department of Labor's official FMLA poster (also known as USPS Poster 43), then NALC can argue that management is responsible for any failure of the grievant to give notice that leave might have been covered by the FMLA.

Other FMLA Enforcement

Advocates should be aware that the Step 4 settlement does not restrict the enforcement of management's FMLA requirements to discipline cases and affirmative defenses. For instance, NALC can certainly grieve when management denies leave which is guaranteed by the FMLA, and take the case to arbitration if necessary. To argue this matter advocates may find helpful a ruling by National Arbitrator Bernstein in C-06858 (March 11, 1987), that the language of Article 5 enables NALC to enforce laws within the grievance-arbitration procedure:

> *The only purpose the Article can serve is to incorporate all the Service's "obligations under law" into the Agreement, so as to give the Service's legal obligations the additional status of contractual obligations as well. This incorporation has significance primarily in terms of enforcement mechanism—it enables the signatory unions to utilize the contractual vehicle of arbitration to enforce all of the Service's legal obligations. …*

NALC has FMLA resources in the office of each National Business Agent, including the NALC Guide to the Family and Medical Leave Act, the full set of federal regulations spelling out the law's requirements, Title 29 of the Code of Federal Regulations, Part 825 (29 C.F.R. Part 825)—as well as ELM Section 515 and the internal USPS Human Resources references materials on FMLA, M-01271. In addition, the U.S. Department of Labor's World Wide Web site contains the law, the regulations and additional information about the FMLA at the URL below.

http://www.dol.gov/dol/esa/fmla.htm □

Administrative Leave for "Acts of God"

When Carriers Shouldn't Fool with Mother Nature

On December 12, 1995 a storm swept through the Northwest, causing wind gusts of over 61 miles per hour in Portland. Thousands of people in the area lost power and telephone service and the governor declared a state of emergency.

The Tigard Station post office lost power and telephone service. The window remained open until 5:00 p.m. that day and many carriers worked their full tour. However, several carriers tried to call the station because they feared for their safety due to trees falling, fly-away mailboxes, severe winds and the state of emergency announcement. The carriers delivered the mail in spite of the storm and only some 500 pieces of mail were curtailed of 30,000 total.

The workroom floor at Tigard Station was mostly dark with only a few lanterns and flashlights for illumination. Many of the carriers, who returned to the office between 1:30 and 3:00 p.m., could not work at their cases. Supervisors told some carriers to go home and told others to take annual leave or leave without pay. One carrier was given a choice—work or go home. No work could be done so he went home.

NALC grieved when management did not pay the full-time carriers their full eight-hour guarantees for December 12. The union also alleged that management should have granted the carriers, including part-time flexibles, paid administrative leave due to an "Act of God," as provided by Section 519 of the *Employee and Labor Relations Manual* (ELM). Management contended that the carriers were given an option to leave or to stay and work, and that no carriers were directed to leave the work place. The case was heard by Arbitrator Nancy Hutt.

Arbitrator Hutt ruled for NALC, finding that all the requirements of ELM Section 519.211 were met. C-17710, January 7, 1998. The language provides:

> *519.211. "Acts of God" involve community disasters such as fire, flood, or storms. The disaster situation must be general rather than personal in scope or impact. It must prevent groups of employees from working or reporting to work.*

The arbitrator found that the storm was a community disaster because it had affected the community at large and led the governor to declare a state of emergency. It was general, she found, because it caused power and phone outages in many areas including Tigard Station. And the loss of power and lack of back-up lighting prevented a group of employees from continuing their work in the post office.

Arbitrator Hutt further found that some carriers were ordered to leave, and that although others had been given a choice,

> *"... the decision to leave was reasonable, justifiable, and somewhat involuntary. ... It is not difficult to conclude a group of employees were impacted by the storm and prevented from working."*

Under these circumstances, Arbitrator Hutt ruled, management's denial of administrative leave violated the National Agreement. She ordered the Postal Service to pay administrative leave to all the carriers who were directed to leave prior to the end of their tours and to those carriers who could not work or were not provided work due to the power outage and storm.

A Closer Look at "Acts of God"

With the winter of '98 upon us, a major Northeast ice storm just past and El Niño looming, it is a good time to review the meaning of "Acts of God."

Most arbitrators agree that all three, separate criteria of ELM Section 519.211 must be met before a request before administrative leave is upheld (see, e.g., C-04883, Regional Arbitrator Harry Grossman, April 23, 1985; C-00074, Regional Arbitrator Gerald Cohen, January 18, 1980; C-00235, Regional Arbitrator Gerald Cohen, July 26, 1982).

1. The "Act of God" must involve a community disaster. Acts of God usually involve violent storms, especially snow storms. Generally, arbitrators rule that a storm must be more than merely above average in intensity—it must create "disaster conditions" to justify administrative leave. Some arbitrators have defined an "Act of God" justifying administrative leave as:

> *A natural occurrence of extraordinary and unprecedented impact whose magnitude and destructiveness could not have*

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been anticipated or provided against by the exercise of ordinary foresight.

E.g., C-04205, Regional Arbitrator George Bowles, March 23, 1984.

"... bad conditions, poor weather, difficult conditions and the like, are insufficient to constitute a disaster," regional Arbitrator Gerald Cohen ruled in C-09208 (December 21, 1981). In C-03491 Regional Arbitrator George Roumell, Jr. denied administrative leave because a storm did not block main roads and many businesses operated normally (July 13, 1983). Other factors arbitrators typically consider include whether a state of emergency has been called, evidence of massive road closings, and whether state police or local authorities had advised people to stay home. See C-04964, Regional Arbitrator William Rentfro, March 8, 1985; C-04205, *ibid*.; C-05432, Regional Arbitrator John Mikrut, Jr., January 2, 1986. In C-00411 the arbitrator granted administrative leave after a three-day snowstorm in which the National Guard was called out to rescue people stranded in cars and other stranded travelers were forced to sleep in schools. Regional Arbitrator Gerald Cohen, October 7, 1980.

Most arbitrators agree a disaster may be "general in scope and impact" even though the Post Office has continued to operate.

2. The disaster must be "general in scope and impact." Whether a disaster is "general rather than personal in scope and impact" usually depends on the amount and pattern of absenteeism among employees scheduled to work. Where a storm prevented employees from a large area from reporting to work, arbitrators usually uphold administrative leave. E.g., C-09024, Regional Arbitrator Bernard Dobranski, December 29, 1982. Maps may be helpful to demonstrate where employees live and whether the storm prevented employees generally, or only from specific areas, from reporting to work. Where some employees in an area have been able to report but others have not, arbitrators often find that the disaster was personal rather than general in scope. C-03489, Regional Arbitrator Robert McAllister, July 7, 1983; C-04964, *ibid.*

Most arbitrators agree that the Post Office need not have suspended operations for a disaster to have been "general" scope and impact. E.g., C-00402, Regional Arbitrator Gerald Cohen, November 7, 1980; C-00713, Regional Arbitrator Bernard Dobranski, October 9, 1981. But occasionally an arbitrator will deny administrative leave because the Post Office continued to operate and mail was not curtailed. E.g., C-01176, Regional Arbitrator J. Fred Holly, June 21, 1982.

3. "Groups of employees" must be prevented from working or reporting to work. Some arbitrators refuse to grant administrative leave for an Act of God unless, as a rule of thumb, half or more of the employees at the particular station were unable to report to work. C-04205, *ibid*; C-03964, Regional Arbitrator John Caraway, December 2, 1983. Other arbitrators reject the 50 percent rule. Some require that the group be "substantial." E.g., C-01357, Regional Arbitrator Elliot Goldstein, August 2, 1982. In C-00447 the arbitrator rejected even a "significant number" test, reasoning, "The manual only requires that groups of employees must be prevented from working." Regional Arbitrator Robert Stutz, November 9, 1983. He granted administrative leave to the 14 percent of employees who were unable to report due to a snowstorm.

The Postal Service's method of grouping employees can affect the percentages dramatically. In C-00448 management grouped employees over a 24-hour period to demonstrate that more than 50 percent had reported to work. However, the arbitrator rejected this approach and grouped employees by tour of duty instead, because weather conditions had changed over the 24-hour period. Regional Arbitrator Herbert L. Marx, August 26, 1983.

Postmaster's Discretion

ELM Section 519.213 spells out two additional hurdles for carriers seeking administrative leave for an Act of God—the issue of managerial discretion and the requirement that carriers exercise "reasonable diligence" in attempting to report to duty.

519.213. Postmasters and other appropriate postal officials determine whether absences from duty allegedly due to "Acts of God" were, in fact, due to such cause or whether the employee or employees in

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question could, with reasonable diligence, have reported to duty.

Postmasters have discretionary authority under the ELM to grant administrative leave. As a general rule arbitrators hesitate to substitute their own judgment where the contract gives such discretion to management. The exception is where the Postmaster's judgment was "arbitrary or capricious," a phrase that is often taken to mean "contrary to reason" or "illogical." The arbitrator in C-03205 explained,

> *"The only time an arbitrator might consider overturning the Postmaster's decision in such cases would be a situation where the requirements spelled out in the manual were met, and the Postmaster's decision appeared to be arbitrary or capricious."*

Regional Arbitrator Elvis Stephens, September 25, 1981. Although this statement expresses the standard of review which arbitrators often apply to managerial exercises of discretion, in practice the standard is open to a wide range of interpretation. In some decisions (such as the recent one from Arbitrator Hutt) arbitrators overturn management's refusal to grant administrative leave for an "Act of God" simply on a showing that the ELM criteria were met. A few, such as Arbitrator Stephens, may hold that even where the criteria are met, the decision whether to grant the leave remains in management's hands. Arbitrators do seem to agree, at least, that the Postmaster's discretionary authority is not absolute—it must be guided by the ELM and may reviewed by an arbitrator. See C-00359, Regional Arbitrator Gerald Cohen, January 12, 1981.

A Postmaster's denial of administrative leave was ruled arbitrary in C-00680, where a employees arriving late to work during a severe snowstorm were granted the leave but those who failed to report were denied it. The Postmaster testified that he had followed this practice so that employees would have more incentive to make an effort to get to work in the future. The arbitrator held that this was no valid reason for denying the leave. Regional Arbitrator Nicholas Zumas, May 16, 1983.

Managerial discretion is seen diffferently by different arbitrators.

"Reasonable Diligence"

Some arbitrators will use evidence of the general disaster conditions to make a finding that employees exercised reasonable diligence. For example, in Regional Arbitrator Gerald Cohen reasoned, "Reasonable diligence must be determined on an overall basis of general conditions." He found that given the unusual strength of the storm in question and news media advice to stay off the streets, " ... anyone on the street under those conditions would be more foolhardy than reasonable." C-00402, *ibid*.

However, some arbitrators will require specific proof that employees exercised reasonable diligence and still were unable to report to work. In C-00581, the arbitrator granted administrative leave only to the two grievants who testified at the hearing although the storm halted community activity and severely affected the Postal Service. He denied leave to employees who failed to produce affidavits or other evidence of reasonable diligence. Regional Arbitrator Nicholas Zumas, October 25, 1982. In C-03433 the arbitrator denied the grievance where USPS did not suspend operations and the union presented no evidence of employees' diligence. Regional Arbitrator Vernon Jansen, April 14, 1982. In C-00411, *ibid*., Arbitrator Cohen explained that a carrier must show that alternate means of getting to work were unavailable or that the effort would have been futile:

> *Proof of such effort will involve the various means available to the employee to get to work and the feasibility of those means. Such means can be a personal automobile, or various specialized automotive vehicles such as 4-wheel drive vehicles, snowmobiles, trucks and the like. Were cabs and/or car pools available? Could the employee have walked to work?*

See also C-09024, *ibid*.

Finally, it should be noted that in the Portland case described at the start of this article, those carriers who were not ordered to leave the Post Office nonetheless departed because no work could be done. In other cases, arbitrators have denied administrative leave to employees who were given the choice of performing work that *was* available, or taking leave and going home. □

Parking Past Practice is Prologue

Arbitrator Reinstates Paid Parking Program

After 20 years of providing Spokane, Washington letter carriers with free parking at commercial lots, local management terminated the program in 1994, claiming it was under no contractual obligation to continue. NALC grieved, arguing that the parking benefit was a binding past practice. Regional Arbitrator Donald E. Olson, Jr. agreed, ordering the free parking program reinstated and the payment of $50 per month in damages to affected carriers. C-17475, October 18, 1997.

Starting in the mid-1970's, local management had issued parking passes to carriers at Spokane's Riverside Station each month, which they used at nearby commercial parking lots. During 1981 local negotiations the parties had agreed upon language stating, "Parking spaces will be allotted to employees within limitations of availability and budget." The language had been carried forward in each successive Local Memorandum of Understanding.

Sometime before September, 1994 the Postal Service established a new Spokane District with headquarters located near the Riverside Station. Some district headquarters employees did not receive free parking, and the Postal Service decided it was not "fair" to continue to provide the Riverside Station carriers with free parking. Management terminated the carriers' parking pass program in September, 1994.

At arbitration NALC alleged violations of Articles 5, 19 and 20 of the National Agreement, Section 20 of the LMOU and of the established past practice concerning parking at the Riverside Station. NALC argued that Article 20, Section 1 mandates that the existing parking program remain in effect for the term of the National Agreement. As to the LMOU NALC argued that the local memorandum language was vague and that the actual 20-year practice defined the LMOU's intent. The union advocate further argued that a more than 20-year practice rose to the level of a binding past practice, and that management violated Article 5 as well as Section 8(d) of the National Labor Relations Act by acting unilaterally to terminate the parking program.

The Postal Service argued that it had not violated the National Agreement or the LMOU because it had provided Riverside Station carriers with parking solely based on availability and budget, as required by the LMOU, rather than as a contractual "right." It also argued that although Article 30 provided an avenue for NALC to establish a "right" to parking, the union had failed to negotiate locally "[t]he assignment of employee parking spaces" as set forth by Item 19 of Article 30. NALC objected to the latter argument because management raised it for the first time in the arbitration hearing.

Arbitrator Olson ruled for NALC on all counts. Citing the "full disclosure" provisions in Article 15 and National Arbitrator Mittenthal's decision banning new arguments in arbitration (C-03206, September 21, 1981) he refused to consider the Postal Service's Article 30 argument because the matter had not been raised at any time during the processing of the grievance:

> *Without doubt, Article 15 of the National Agreement requires both parties to fully disclose all of the facts and arguments they rely upon, prior to arbitration. ...*

(For a detailed discussion of the rule prohibiting the introduction of new evidence or arguments at arbitration, see the lead story on page 1.)

The arbitrator also ruled that the employer's program of paid carrier parking at Riverside Station had become a contractually binding past practice. Noting that Article 20 required the "existing parking program" to remain in effect, he found that the paid parking program constituted the "existing parking program."

Olson reviewed the basic elements of a binding past practice and found all of them present in the facts before him:

> *On the whole, in order for a practice to rise to the level of a binding "past practice", it must be clear, consistently followed, followed over a reasonably long period of time, and to have been mutually accepted by the parties. ... The practice in this case was clear. There can be no question that since the mid-70s the Employer provided paid parking for letter carriers at the Riverside Station. This*

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benefit has been consistent and without objection. Moreover, the obvious mutuality and long standing practice of the Employer providing paid parking is convincing evidence the parties intended to deal with this benefit at the local level.

The award further noted the rule that a past practice cannot be binding if it conflicts with the language of the parties' written collective bargaining agreement. Arbitrator Olson found the practice was not at odds with the parties' agreements because it constituted the "existing parking practice" as set forth by Article 20, Section 1, and was included by implication in the LMOU's Article 20 language.

Arbitrator Olson also ruled that management's termination of the parking program violated Article 5's prohibition on unilateral action, which states:

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

The arbitrator further held that the management's unilateral action had violated Section 8(d) of the National Labor Relations Act. Section 8(d) of the NLRA prohibits unilateral changes in wage, hours or conditions of employment, including changes in such terms of employment which are covered by an existing collective bargaining agreement. Since a binding past practice has the same binding force as a written provision of a collective bargaining agreement, a unilateral change in a past practice violates NLRA Section 8(d) as well as Article 5's contractual prohibition on unilateral action. [Note: It is relatively unusual for an arbitrator to find a violation of law when the same result could be reached through a ruling solely on the contractual issue. Arbitrator Olson found that management had violated the law as well as the contract. —Ed.]

Arbitrator Olson ordered USPS to reinstate the paid parking program for carriers at Riverside Station, and to pay the affected carriers $50 for each month they were denied the benefit.

NALC covered all of the bases in presenting this case to Arbitrator Olson. The union explained to the arbitrator how the parking program met all the elements of a past practice, that the program was consistent with the LMOU, that management was obligated to continue the "existing parking program" under Article 20 of the National Agreement, that management had violated both the contractual and legal prohibitions on unilateral changes in working conditions, and that management's raising of an Article 30 argument for the first time at arbitration violated binding national arbitration precedent. The case illustrates the persuasive power of a very thorough, well-constructed set of arguments in arbitration. □

Dollars for TE Violations

Failure to Give Union Information

Arbitrator Louise Wolitz recently awarded overtime pay to Venice, Florida carriers who lost overtime hours after management failed to give NALC information justifying the use transitional employees beyond November 20, 1994. C-17192, July 5, 1997.

Under the Mittenthal transitional employee award and subsequent NALC-USPS agreements, USPS is required to provide NALC with information justifying the hiring of transitional employees. This includes a DPS impact analysis—determined by applying the Hempstead formula to current route data—which produces an estimate of the hours expected to be lost due to DPS implementation. USPS also must give NALC its calculations of the expected attrition rate and the "transition period." After this analysis is completed and delivered to NALC, management may hire transitional employees only after certain "triggering events" occur.

In addition, USPS was required to terminate all transitional employees by November 20, 1994 except those whom management had justified under these requirements. The Venice post office continued to employ five carrier TE's beyond the November 20, 1994 deadline although it had not provided NALC with the required information. NALC grieved the violation.

At the arbitration hearing NALC built its case thoroughly, providing and explaining all of the relevant contractual documents including various Memorandums of Understanding concerning TE hiring and utilization rules, the booklet *Building Our Future By Working Together* and the Revised

Chapter 6 of that publication concerning TE's. The advocate pointed out the strong language requiring local management to give NALC "all relevant information on which the DPS impact analyses are based, and to give the union reasonable time to review the calculations and discuss them with local managers." The union also offered the award of Regional Arbitrator Devon Vrana in C-16500 (March 10, 1997)—an award highlighted in the May, 1997 *Advocate*—in which a series of similar management failures to comply with TE-related information requirements led to a $25,000 award in Amarillo, Texas.

Management's defense in the Venice case was essentially one of "harmless error." The Postmaster told the arbitrator he had made an informal impact analysis but did not give it to the union because it was not the official analysis from the District. The District's analysis was delivered several months after the November 20 deadline. The Postal Service argued that the Postmaster's numbers turned out to be accurate and that the justification for the TE's was proper, even though it was delivered a bit late.

Arbitrator Wolitz ruled for NALC, finding that the contractual information sharing requirements were mandatory. USPS was obligated to provide the information even if the union did not ask for it or file grievances demanding it. The parties' agreements also required the local parties to cooperate and share information, so the obligation was on local management to provide the information. The arbitrator also rejected management's argument of "harmless error":

> *Management argues that no harm was done. The arbitrator disagrees. First, harm was done to the union's contractual rights under the Memorandum of Understanding by management disregarding its responsibilities. Unfortunately, it is difficult to fashion a remedy for this type of violation. Secondly, harm was done to any regular carrier who would have worked the hours worked by the TE's. Certainly any carrier on the Overtime Desired List who was not working the maximum number of hours was harmed by not receiving those hours. ...*

Arbitrator Wolitz ordered management to pay every carrier on the Overtime Desired List who was not working the maximum number of overtime hours during the period in question for those hours at the overtime or penalty overtime rate, whichever was applicable.

Like the Amarillo, Texas award that preceded it, the Venice award illustrates the power of a contractual case constructed step-by-step, walking the arbitrator through the relevant documents and explaining the meaning of each one. Although contract language can be difficult, a careful advocate can educate the arbitrator about the contract's requirements and obtain an award enforcing them. □

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