NALC Arbitration Advocate

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Windows of Operation

The Evolving Arguments

Operational Windows, aka Windows of Operations (WOOs) have been a much discussed topic over the past two decades. A WOO is a unilaterally implemented Postal Service goal which requires letter carriers to return to the delivery unit following the delivery of mail by a certain time in the afternoon.

The usual Postal Service explanation to support the necessity to implement the WOO is that collection mail must be returned to the delivery unit so that it can be transported and processed in a timely fashion. WOO becomes an issue for letter carriers when non-overtime desired list (non-ODL) letter carriers are mandated to work overtime (OT) in order for management to meet their WOO goal rather than maximizing letter carriers on the overtime desired list (ODL).

Let's take a look at the history of arbitral decisions on WOOs and then examine some current cases to see how the union's arguments have matured on this issue.

Since we began tracking arbitrations heard on this issue, there have been 342 WOO cases, 102 of which were sustained by an arbitrator in the union's favor, 29 of which resulted in modified decisions (neither side prevailed on every issue), and 211 of which the grievances were denied.

Although we have lost far more cases on this issue then we have won, arbitration is not merely an exercise in winning or losing, but is an extremely important vehicle in providing lessons on how to handle and how not to handle future cases.

Declining Number of Cases

In 2007, the NALC handled 72 WOO cases in regional arbitration. Of those 72 cases, 34 were sustained, three were modified and 35 were denied. In other words, we were totally unsuccessful in slightly over 50% of the cases presented to regional arbitrators.

Compare that record to 2008, when we regionally arbitrated a total of 16 cases, 8 of which were sustained, 3 of which were modified and 5 of which were denied.

Those recent numbers show an improvement over previous years. Last year's totals also indicate that far fewer cases on this issue were arbitrated.

The issue has not gone away, but more cases are being settled short of arbitration. Advocates on both sides have learned from previous arbitrations and augmented their views on this issue to coincide with many of the analyses provided by some arbitrators' decisions.

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Inside...

Windows of Operations . . .

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Several recent arbitration awards have continued to strengthen one of our arguments that management's reliance on operational windows is a ruse that is used to avoid the payment of penalty OT.

The first example is a case, No. E01N-4E-C 06175483 (C-28001), out of Springfield, MO, which was heard in front of Arbitrator David A. Dilts. In May of 2006, letter carriers in Springfield had a starting time between 7:30 am and 8:00 am, and an end tour time between 4:00 pm and 4:30 pm. In addition management established a WOO, a goal of which was to get all carriers off the street by 5:00 pm. This caused non-ODL letter carriers to work overtime simultaneously with ODL carriers, despite the fact that the ODL carriers were not worked to their Article 8.5.g. maximum limits.

Factual Data Presented Late by Management

Arbitrator Dilts, in concluding to sustain the union's case, looked at a number of factors. Important was management's claim that they had factual data that supported the 5:00 pm window based on operational needs at the plant, and that the WOO met customers' needs. The Postal Service, however, never attempted, until the day of the hearing, to place information and documentation into the record to arguably support those alleged operational needs that were critical to implementing the WOO.

Arbitrator Dilts refused to allow the data into the record, commenting:

> *The Union objected to the Service's attempt to proffer more detail concerning these surveys and additional detail concerning processing operations, etc., than what was before the Step B Team. The Union's objection is sustained. If these data were of such significance that the Arbitrator should consider them, those data should have been entered into the grievance process so that the parties themselves could resolve this matter without resort to a third party. Further, for the Union to be ambushed in this fashion at hearing, is clearly proscribed by the parties at the National Level.*

Arbitrator Dilts:
Without a clear showing of operational necessity for simultaneous scheduling of non-ODL and ODL carriers, management treads on thin ice.

Central to this arbitrator's refusal to consider those additional management arguments was the fact that the NALC had requested such information from the Postal Service earlier in the grievance procedure and the Postal Service had not provided it. Had the Postal Service provided the information, the burden of proof would have shifted to the union to dilute or destroy the factual basis of the information itself and/or minimize its significance to the case.

Arbitrator Dilts also found that management failed to adhere to the Mittenthal Award, H4C-NA-C 30, an APWU National Arbitration Award on simultaneous scheduling. Management was unable to show that they had a practice of simultaneously scheduling ODL and non-ODL carriers due to the critical necessity of getting the mail to the plant for processing by a specific time, which otherwise could not be accomplished.

A significant cause of this case's result comes from management's ***lack of evidence in the case file to support the alleged operational necessity*** of simultaneous scheduling of letter carriers, when coupled with the Union's prior request for such information. As Arbitrator Dilts puts it:

> *Without a clear showing of operational necessity for simultaneous scheduling of non-ODL and ODL carriers management treads on thin ice. The assertion of an operational necessity is not proof of an operational necessity - therefore this Arbitrator is persuaded that the absence of the operational data in this record must be*

construed against management.

Arbitrator Dilts included in his remedy, "***Management is to cease and desist the aggrieved simultaneous scheduling of overtime.***"

Management Tries to Avoid the Merits of the Case

In a decision out of Iselin, NJ, Arbitrator Lawrence Roberts was faced, not only with an operational window, but also with a management claim the case was not arbitral because a similar case had been denied in the same office in arbitration. In Case No. A01N-4A-C 07295591 (C-27702), management argued *Res Judicata/Collateral Estoppel.*, based on the fact that Arbitrator Bruce Fraser in another decision in Iselin, Case No. A01N-4A-C 07295576 (C-27649), ruled in favor of the USPS.

In determining that the Iselin case was arbitrable, the Arbitrator stated:

The issues seemed to be framed in unison and each involve the same Article and Section of the Parties Agreement. The only real difference appears to be the respective dates and the individual Letter Carriers involved.

And based on all of the above, at first blush, I would tend to agree with the procedural argument advanced by the Service. The doctrines of either Collateral Estoppel or Res Judicata certainly appear applicable in this case.

But after reviewing each one of the grievances more carefully, and comparing to this rather recent Award, one very distinct point, made by Arbitrator Fraser, clearly isolates each of the cases and, accordingly, dispels the Employer's procedural argument.

In his summarization, Arbitrator Fraser found, in pertinent part that, "The Union failed to show that carriers on the ODL were available and could have delivered this mail within the established WOO."

This statement is significant in determining the procedural argument made by the Employer in the instant case. The difference controlling the procedural argument is the fact the Union, in that case, failed to show the Carriers were available and could have delivered the mail, on that particular day.

Always keep in mind, the establishment of a WOO can be either legitimate or not.

In my view, this is one very distinct fact that separates these two cases. Arbitrator Fraser clearly pointed out the Union failed to prove certain availability and that mail could have been delivered within the prescribed time frame. And this is the one variable, that dispels any Res Judicata or Collateral Estoppel argument. That grievance, as well as the instant case, all involve only one day. And in my considered opinion, the facts and circumstances, in either of these cases, could vary on a day to day basis.

The union was able to show that there were OTDL carriers who were available and who could have performed the work of the mandated non-OTDL carriers and the arbitrator accordingly sustained the grievance in the Union's favor. Of interest in this case, is the fact that the union did not protest management's establishment of a WOO. Always keep in mind, the establishment of a WOO can be either legitimate or not. More on that later.

Trying to Win without Arguing Merits

Management's arguments in the Roberts arbitration are typical of an attempt to win the day without having to argue the merits of the case. The significant finding by Arbitrator Roberts in this case underlines an important consideration in determining whether or not the concept of *Res Judicata/Collateral Estoppel* is applicable when comparing a past award with a present case: while the basic arguments may be the same, the fact

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Joint Statement on Violence Revisited

The Evidence Makes the Case

The Joint Statement on Violence (JSV) as it applies to postal managers is as meaningful today as it was when it was first signed (see MRS #M-01242, #M-01243, and #C-15697). This issue remains important and should be enforced through the grievance-arbitration procedure. In fact, it is one of the more important tools we have in reigning in overzealous and abusive managers.

To that end, let's take a look at two current cases that show how, when a grievance is properly documented and argued, an important statement is made that unacceptable behavior by a postal manager will not be tolerated.

The JSV is one of our more important tools in reigning in overzealous and abusive managers.

Advocates must understand that JSV cases against managers require well-developed documentation that establishes unacceptable behavior on the part of management representatives. Since January 2008 the NALC has arbitrated 11 JSV cases against the Postal Service. Of those cases, three were sustained, one was modified, and the remainder were denied in arbitration.

If you are assigned a JSV case and you question either the validity of the claim against management, or the documentation to prove said claim, you should immediately consult your National Business Agent.

Arbitrator Ames

One case was decided on December 9, 2008 by Arbitrator Claude Dawson Ames. Case No. F06N-4F-C 08237439 (C-27954) out of Oakland, California involved a supervisor whose actions on several dates in February 2008 led the local branch to file a class action grievance. The facts provided to Arbitrator Ames indicated that Supervisor W loudly yelled, "That muthaf*#%er called in sick again." Supervisor W denied, during the grievance investigation, that he made such a comment. That same day, a limited duty carrier was told by W to case a second route. W loudly stated that if the carrier refused to follow instructions, he would be thrown out of the building.

Another letter carrier, when asking for a form, was told by W to get back to her case and take her jacket off. When the carrier told Supervisor W she was on break he told her to "Go sit down." In addition, the letter carrier who overheard some of Supervisor W's outbursts and who testified at the arbitration hearing, had been issued a 14-day suspension for making an alleged racial slur towards the supervisor the day prior to the other incidents.

In concluding that Supervisor W violated the JSV, Arbitrator Ames stated:

> *After careful review and examination of the evidence record, arguments of the parties and review of prior arbitral decisions (National and Regional) as presented, the Arbitrator finds for the Union. The Union has come forth with a preponderance of evidence to sustain its grievance and a finding that [Supervisor W] did violate the National Agreement and the Joint Statement of Violence and Behavior in the Workplace by his treatment of Carriers at the Oakland Eastmont Station from February 11 through February 14, 2008. The evidence is unrebutted that, on the dates in question [Supervisor W] did engage in unacceptable, intolerable conduct constituting harassment, intimidation, verbal threats and abuse, bullying against Carriers while on the work room floor.*

Management's case was arguably weakened by the fact hat

Supervisor W did not testify at the hearing. The Postal Service presumably recognized that placing Supervisor W on the witness stand could have weakened their case even further. Arbitrator Ames found that the charges against Supervisor W were unrebutted.

While most advocates cannot expect to have a manager fail to testify at the grievance hearing that charges him/her to be in violation of the JSV, advocates must understand that when the manager charged with a violation of the JSV does testify, the evidence against him/her, the credibility of that manager, the credibility of the witnesses, and our advocate's cross-examination will all be critical in convincing the arbitrator to find in the union's favor.

Of great importance in this case was the previous history of Supervisor W's behavior. The supervisor's past record, along with supporting evidence, must be developed in the grievance file. The Arbitrator, in coming to the conclusion that a violation of the JSV occurred, stated:

> *Notwithstanding the Agency's position that evidence does not support the allegations or rise to the level of a JSOV violation, the Arbitrator does not concur. The overall record presented before the Arbitrator, including a history of cease and desist orders involving Supervisor W at stations throughout the Bay-View Postal District in Oakland, Richmond and Piedmont Stations, indicate a pattern and practice of disrespect, intimidation and harassment by this postal supervisor.*

As a result of Arbitrator Ames' findings, he determined that the following remedy was appropriate:

> *...the Arbitrator finds that the appropriate remedy in this matter is to instruct and Order the Postal Service to bar Supervisor W from any future supervision of members of the Letter Carrier Craft in the Pacific Area Region.*

Arbitrator Zuckerman

The second case that deserves discussion is out of Manchester, New Hampshire and involves a supervisor who, during a standup talk, threatened to break the legs of a former carrier in his unit if he ever came back. In Case No. B01N-4B-C 08041671 (C-27976) Arbitrator Marilyn H. Zuckerman was faced with two issues. First, was the case arbitrable? Second, since management took action against the supervisor for his actions, did the grievance's requested remedy constitute double jeopardy against the supervisor's interests?

Addressing the substantive arbitrability claim, the Postal Service advocate argued that any remedy beyond a simple cease and desist order robs the supervisor of his due process rights. In concluding that the case was arbitrable, Arbitrator Zuckerman states:

> *The Arbitrator does not read the National Snow Award [NALC Arbitration System C#015697] as narrowly as does the Service. In that case, the Union argued that the standards set forth in the Joint Statement allowed an Arbitrator to deny a supervisor managerial authority over letter carriers. Arbitrator Snow found that the Joint Statement was a binding contract between the Service and the Union and that the Union could use the negotiated grievance procedure to resolve differences between the parties under the Joint Statement.*

That decision, while not unique, is yet another in the line of solid decisions that supports the NALC's position that these cases are clearly arbitrable. In addition, the union was well prepared for the arbitrability question and supplied the arbitrator with the Fourth Circuit Federal Court's reversal of a lower court decision. The Fourth Circuit, in an unpublished November 5, 2002 decision (MRS #M-01518), ruled that Arbitrator Britton (see Arbitration #C-21913) was within his rights to require the USPS to remove a postmaster for an altercation with a letter carrier.

Double Jeopardy?

Turning to the issue of double jeopardy, the Postal Service claimed that since they had the supervisor apologize to the employees and they issued the su-

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The Value of Precedent in Arbitration

Precedent: To go before. An act or instance used as an example in dealing with subsequent similar cases. A judicial decision used as a standard in subsequent similar cases. Custom or convention.

Most, if not all of an arbitrator's knowledge and understanding of a case is based upon the evidence and arguments presented at the hearing. You are telling the story to the arbitrator and giving reasons why they should agree with you, why the contract should be interpreted your way, and why your theory of the case is supported by the facts, the evidence, and the testimony.

Clearly, the story is dictated by the case file—who, what, when, where and how—and as with most everything in arbitration, preparation is key to a successful presentation of the case.

The parties at the national level have agreed a case before an arbitrator should be limited to the arguments made, and evidence presented, in the prior steps of the grievance process. While the introduction of new arguments and evidence at the hearing is frowned upon—if not explicitly prohibited—an advocate does have powerful resources at the ready to bolster the case which are typically not part of the case file: prior arbitrational precedent. Arbitrational precedent is the weight arbitrators give prior arbitration decisions in cases similar to one you are presenting.

Authoritative vs. Persuasive Precedent

Arbitrational precedent can be divided into two categories, authoritative and persuasive. Authoritative precedents are those cases which arbitrators must follow; persuasive precedents are those which arbitrators have no obligation to follow, but may consider and give such weight as their intrinsic merit demands. The parties have agreed that the only authoritative precedent recognized comes from national level arbitration cases and headquarters level joint pre-arbitration settlements or grievance decisions. Of the nearly 30,000 arbitration cases in our system, less than 500 were heard at the national level—so while the reserve of authoritative precedent on which you may draw is strong, it is also very small. This leaves you with a large reserve of persuasive arbitrational precedent to use in support of your position at hearing.

Most of us have heard our brothers and sisters refer to a regional arbitration case they have read and believe, mistakenly, that the matter that they are working on should be disposed of by that case —*Res Judicata!*—but that is not necessarily so. While the regional case may be on point, it is not authoritative, unless it sets forth precedent for the same office as the present dispute is from. It may be persuasive, but an advocate must still point the way for the arbitrator to see the connection. Incidentally, it is no secret that for almost every regional case you can find which sustains a particular position, a little effort will find one which denies the same position. So don't put all your eggs in one basket based on one regional arbitration case. It is at this point we return to preparation.

First and foremost is preparing for the merits of the case. Thoroughly understanding the various arguments [ours and the other side's], the valid and invalid contractual points made by both sides, the weight of every piece of evidence, and then preparing the witnesses are your first responsibilities. That is as it should be! That said, following your preparation of the case file, your next preparation should be to search for any arbitration decisions on similar cases. Finding favorable rulings which closely parallel your case is the goal.

Arbitrator's Track Record

You should also take a look at the arbitrational history of the arbitrator before whom you are scheduled to appear. Has the arbitrator ruled on the same issue before, or a similar case? If the answer is "yes," this will be a real help in preparing your case. What argument or positions did the arbitrator accept and which were dismissed? Pay particular attention to the weight the arbitrator gave each argument and how the arbitrator arrived at his/her deter-

mination to accept or refute each of those contentions. Be cognizant of arguments on either side that did not appear in the arbitrator's prior award, but do exist in the case you are preparing. Ask yourself how the addition of those arguments may have made a difference in the arbitrator's decision, good or bad.

Did the arbitrator appear to be swayed by arbitrational precedent in reaching a decision? If an arbitrator specifically references other arbitrators' findings as a guide used in crafting his/her own decision, take note. This is likely an indicator of how important your citation of precedent will factor in the arbitrator's view of your presentation. Did the arbitrator confuse what should have been a persuasive case with an authoritative case? If so, you are going to have to plan on educating the arbitrator on Article 15 language and citable national level arbitration awards that explain that the parties have negotiated the difference, from the standpoint of precedential value, between the status of a regular panel arbitration award and a national award.

After looking at the decision history of the arbitrator, begin looking at all arbitrators' decisions in similar cases. Tailor your search using the subject code in the NALC Arbitration Search tool. For instance, if you have a case which alleges supervisors are doing bargaining unit work, select that subject code and read those cases. At the present time there are 90 decisions in the NALC search dealing with supervisors doing bargaining work. Always pay particular attention to the *KEY* cases in a given subject code search. Look for clues about how arbitrators rule.

If you are presenting a contract case, does the arbitrator scheduled to hear your case lean one way or the other? Do his/her decisions tend to strictly adhere to the contract language? Or give significant weight to circumstances and intent? If it's a discipline case, what quantum of proof does he/she usually require? Does the arbitrator take the same position as articulated by Arbitrator DiLauro when quoting Arbitrator Dougherty's oft quoted finding regarding the *Just Cause Test*?

…if there is a negative response to one or more of the… [just cause]*...questions, just cause may not exist.* (C-14036, pg. 12)

Granted, you can't count on history to predict the future, but you can get an idea about the arbitrator's thinking process. What arguments were dismissed? What were the arguments that won the day? What was the basis of the final decision? And don't forget to look at cases which were denied. Often looking at denied cases proves more useful than studying winning cases. Decisions which refute either side's position can show specific flaws in case preparation or presentation by the side that lost. For example, such decisions may shed light on the arguments management used successfully in shifting the burden of proof onto the union and so may help avoid that trap in the case at hand.

The study and selection of supporting arbitrational precedent is time consuming, but the time spent can be the difference between winning and losing. Allow enough time to prepare, but don't waste time on reinventing the wheel. In order to save time over the long run, contact your National Business Agent's office for helpful direction on how to find cases that you should consider in preparing for your case.

> ***Key Cases:*** *Arbitration decisions in the NALC Arbitration System so indentified by the CAU to denote cases of particular significance within the selected subject code. These cases should always be consulted first when preparing for a hearing.*

Introducing Precedent

What is the best way to introduce arbitrational precedent at a hearing? There is no right answer because everyone's style is different. What works for one person may not work for another. Clearly, the presentation of precedent differs somewhat between oral closings and a brief, but the principle is the same—tell the arbitrator the story of your case, cite the appropriate contract language, explain by national arbitration

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Value of Precedent . . .

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cites and provide the national arbitration awards for those cites, provide the precedential arbitration cases that are applicable to your case, and give the arbitrator the reasons why the precedential arbitration cites should irrefutably be applied to a specific argument in your case or be dispositive of the case entirely.

Methods for presenting your arbitrational citations seem to fall into two main camps. The first is presentation *en bloc*; the second is a case by case submission. Presentation *en bloc* provides the arbitrator with your selected precedent as a single submission packet. Often, the *en bloc* submission contains a cover page listing each case individually with one or two line quotations from the case or a very brief synopsis of the case's significance or similarity to the case at hand. This method can be used when presenting well known and oft-used arbitration citations and when you are sure the arbitrator is familiar with the citations and their relevancy to the type of case under consideration or their relevancy to a certain aspect of the case in hand.

The case by case submission method is quite affective in guiding the arbitrator through your theory of the case as it relates to precedent. For instance, if management has used hearsay evidence in its case you would point out what Arbitrator Snow said about the value of hearsay (C-04710) as you recount the hearsay evidence in management's testimony. Likewise, if you are defending against a charge of failure to follow instructions and the grievant has testified to doing everything he/she understood to comply, you would submit precedent concerning what an arbitrator considers to be the Postal Service's burden to prevail as you recount the testimony offered by both management and the witness (C-23987).

As you recount the testimony and evidence of the hearing you bring direct attention to the precedent as it supports the union position and/or detracts from management's. A synopsis cover page with the cited arbitrator, the case number, location and brief summary is often provided at the end of closing in this method as well. Typically, the submission of precedent in a brief uses the case by case method, weaving the citation through the brief to point out similarities between the two.

> *Hearsay evidence routinely is admitted "for what it is worth." Customarily, arbitrators will decide a case based on the reliability of the evidence in light of all the surrounding circumstances. Hearsay evidence usually is not considered to be sound evidence.*
> *Snow (C-04710)*

Regardless of which method you use the goal is the same—tell the story and give reasons why the arbitrator should agree with you and your theory of the case. And while you are telling the story, make it easy for the arbitrator to follow. When the arbitrator reviews your precedent citations after the hearing, make it simple. Direct his/her in the review—but how? Make sure you have clear copies printed on a good quality paper; this will make for a more pleasing read for the arbitrator. Highlight the discussion portion of the citation you intent the arbitrator to concentrate upon. Take the time to use a straight edge and always highlight under the font, not over it, if you are highlighting manually. Using the highlight function of your computer to prepare your citations is a time saver and looks neat and uniform. Incidentally, it is always a good idea to tab the pages you want the arbitrator to read—remember, you are trying to make it as easy as possible for the arbitrator to find the point and follow your theory.

You are telling a story. You may be defending against discipline or prosecuting a contract violation but the goal is the same. The goal is to persuade the arbitrator that your version of the case is the right version and the grievance should be sustained in the union's favor. The parties at the national level have agreed the case file should contain all the evidence needed for proper adjudication at the arbitration step, but the offering of precedent is allowed. Few arbitrators will disregard out of hand how their peers have ruled in similar cases. The value of precedent in arbitration cannot be overlooked or dismissed. Precedent—*used as an example in dealing with subsequent similar cases*—is an invaluable tool at your disposal.

Can Appearances Be Deceiving?

How many of you remember Gomer Pyle, that backward hill-folk mechanic turned USMC Private. Gomer had a blank look, a nasal twang that would set your teeth on edge and a goofy gait? Who would have guessed that when that golly-gee-whiz private opened his mouth to sing the beautiful baritone of Jim Nabor's would come out? Of course appearances can be deceiving!

Appearances and the way you carry yourself are big factors in how others perceive us. They are no less important in an arbitration hearing. Arbitrators can be significantly swayed, favorably or unfavorably, by the way you or a witness appears or acts. This may seem like a very surface matter—arbitration should be about clearly, skillfully and truthfully presenting the facts of the case—but they signal impressions that can influence an arbitrator's perception of the evidence. As the old saying goes, *you only have one chance for a first impression*.

Clothes and Grooming

Don't be alarmed, no one expects you to come to hearing looking like you stepped off the cover of *GQ* or *Cosmo; the* focus is on looking appropriate for hearing. You will not find written rules in Elkouri and Elkouri dictating what you must wear to a hearing. That said, it's extremely important for advocates to be appropriately dressed, well-groomed, and clean. NALC policy typically indicates advocates will wear business attire, and you should consult your business agent if you are in doubt.

It is equally important for witnesses to be appropriately dressed, well-groomed, and bathed prior to entering the hearing room. This does not mean a witness needs to wear his best suit or her best dress or to be "fancy" in any way. Actually, dressing in a flashy or overly formal way is likely to send the wrong message. A witness' clothing should always be neat and clean, and, most importantly should be appropriate for the witness. Wearing clothing the witness is not accustomed to wearing—like a suit or tie—may prove to be a distraction to both the witness and the arbitrator. Carrier witnesses may wear their uniform if there is a logical reason for it—for example, if they are on the clock during the hearing. For a discipline hearing it is best the grievant appear out of uniform. The important thing is that the witness appears neat and clean and businesslike.

Grooming and appearance are equally important. Hair should be neat, clean and orderly, and not dyed a weirdly distracting color. Men should be clean shaven unless they normally wear a beard or moustache, in which case it should be neatly trimmed. Women should avoid excessive makeup and flashy jewelry. When in doubt, witnesses should be conservatively groomed.

Decorum and Demeanor

Witnesses should conduct themselves in as professional a manner as possible at all times in the hearing room and areas where they may be seen by the arbitrator. A witness should avoid loud talk, foul or crude language or an overly casual posture or stance (e.g. slouching, putting feet on chairs or tables), arguing with others and inappropriate gestures or expressions (e.g. frowning or shaking one's head or rolling eyes while an opposing witness is testifying). A good rule of thumb is for a witness to maintain a quiet, alert, and stoic expression and to speak only when asked a question. All things being equal in a hearing, arbitrators are more likely to rule in favor of the side which presents a courteous, well mannered witness than one whose witnesses act inappropriately.

The way a witness appears during questioning impacts the way the testimony is perceived. A witness should look the advocate or arbitrator in the eye when answering. A witness who makes good strong eye contact and answers without long pauses or hesitation is much more likely to be believed than a

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circumstances in each case may be of such significant difference that it would cause an arbitrator to hear the case before him/her based on the merits.

After the Arbitrator found that the case was arbitrable, the union went forward on the merits of the instant case and two other cases that were joined with the original one. In Case Nos. A01N-4A-C 07295591, 92 & 93 (C-27779) the union was able to attack management's alleged Article 8 violations by establishing that mail was available to be cased by letter carriers at 5:00 AM and management was aware at such a time to have been able to preschedule OTDL carriers to work before their normal starting time. In addition, the union showed a constant pattern of letter carriers working past management's 5:00 pm WOO. That evidence, at the least, impressed the arbitrator with the observation that either the WOO wasn't as much of an operational necessity as the Postal Service claimed or management was not as concerned as it argued with the WOO being surpassed on a recurring basis.

One of the more interesting findings by Arbitrator Roberts was based on the testimony of the Postmaster who claimed legitimate reasons for working letter carriers beyond the WOO. Arbitrator Roberts states:

> *In my considered opinion, the Service is well within their contractual right to claim a legitimate exception. In doing so, the Service must also be held to show, that, even if the Window of Operation was not being met, other actions were being taken to correct any deficiencies. And that was not done in this case.*

In finding a violation of Article 8 in the above case, Arbitrator Roberts remedied the case as follows:

> *Overtime worked by the non-ODL carriers be paid at the appropriate rate to ODL carriers that were available to work. A like amount of compensatory time will be awarded to the non-ODL carriers and they also will be granted* ***administrative leave equal to the time worked.***

Often the key to a WOO case is the Postal Service argument that the window is set because of the operational necessity to have all collection mail back off the street by a certain time to ensure that it gets dispatched to the plant so that it can be processed in a timely manner. In any WOO grievance where the union is protesting the validity of the WOO, of critical importance for the union is to establish in the grievance the distance between the delivery unit and the plant, the travel time for that distance [considering also any other stops that the vehicle carrying the collection mail must make between the delivery unit in question and the plant], the truck schedule for the dispatch to the plant from the delivery unit, and the internal window for the plant, i.e., by what time does the plant need the collection mail to begin processing it.

This information should be discovered by the shop steward during his/her investigation of the grievance. All of this is critical information for in the grievance file and for an advocate to have prior to going forward in arbitration in cases where the union is challenging the validity of the WOO and its alleged operational necessity. For example, if the plant is ten miles from the delivery unit, the plant needs the collection mail at the plant by 9:30 pm to be begin processing, and the WOO is 5:30 pm, the operational necessity to establish the WOO becomes a facade, leaving the Postal Service with no legitimate argument to explain the residual Article 8 violations.

Where such information is not in the grievance file, the challenge to provide it for the first time in arbitration is daunting. That can probably only be done if a manager testifies about the operational necessity of the WOO and the union can provide the missing information to destroy the credibility of the management witness. Technically, however, such evidence could only be used by the arbitrator to destroy the credibility of the management witness, but not to shoulder the union's burden to establish that the service lacks any operational necessity to establish a WOO. That information should be attained (with supporting evidence) and be incorporated in the grievance file early on.

Joint Statement on Violence . . .

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pervisor a letter of warning, any additional action would constitute double jeopardy. Arbitrator Zuckerman found that the supervisor violated the JSV and must be sent to anger management training and removed from supervision in his current station. Arbitrator Zuckerman states:

> *This remedy does not create double jeopardy for Supervisor G because this is not a criminal case where the concept of double jeopardy is applied. This remedy is based on the present grievance filed by the Union alleging that the Postal Service violated the Joint Statement and the National Agreement by the actions of Supervisor G.*
>
> *The removal of G from supervising letter carriers in the South Station facility also is not discipline in the sense that a seven or fourteen day suspension or a removal would be discipline. The removal of Supervisor G from supervising letter carriers at the South Station facility is distinct from the Letter of Warning that he received.*

As you can tell from the two cases presented here, strong evidence supporting the NALC's allegation that supervisors had indeed crossed that line and violated the JSV occurred in both cases. When the evidence is lacking and we take the case to arbitration, we not only lose the instant case, but bolster management's argument that the union is using the JSV to punish managers for doing their job. When faced with difficult cases, contact your National Business Agent and get advice before going forward.

Remember, credible witness statements regarding a manager's actions, language, and demeanor, now and in the past, coupled with past grievance settlements and arbitration decisions that pertain to the same manager's past actions, along with the same manager's disciplinary records for previous similar infractions, tell a story that should always be used in the grievance-arbitration procedure to enforce letter carriers' rights to be treated with dignity and respect and to insure a job free of abuse from management. ■

Can Appearances Be Deceiving?

(Continued from page 9)

witness who looks down or away, and stammers and flounders for an answer. Witnesses should wait for a question to be completed before answering and should remain silent whenever an objection is lodged by an advocate. This courtesy provides more credibility than a witness who interrupts and insists on speaking. The witness who sits erect in the witness stand, and avoids hostility toward the opposing advocate will be more effective than one who does the opposite. Lastly, the witness who is polite (without being sticky sweet) and serious (without being somber) will make a stronger impression than one who is overly casual or not courteous. A witness should only answer the question being asked, not what he/she presumes it really means or what it should mean. A witness should not provide an answer that goes beyond the question, but trust his/her advocate to ask a necessary follow-up if it is needed.

Preparation

Advocates must spend time in preparation to coach witnesses how to dress and act during the hearing. Conservative dress which is neat and clean will always be more appropriate than flashy clothing which appears disheveled and unkempt. If the hearing and arbitrator aren't worth putting your best foot forward, don't expect the arbitrator to make the extra effort either. Explain that the process, while adversarial, isn't uncivil or a forum to air personal grudges—the arbitrator is there to make a well reasoned and neutral decision based on what they hear and see at the hearing. Give the arbitrator every reason to find in the union's favor by taking the process seriously even down to dress and behavior.

Appearances can be deceiving. Don't allow your appearance, or that of your witness, to distract the arbitrator from hearing the facts of the case. Don't ask witnesses to follow these rules. A good advocate demands that they do, pointing to the negative possibilities if they don't. It's all part of the process, so use it to your advantage. ■

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 the website under Contract Admin>MRS. All materials are also available from the offices of the National Business Agents.

NALC Arbitration Advocate