Remedies

All too often, the NALC succeeds in convincing an arbitrator that management violated the contract, yet fails to obtain a substantial remedy. This can happen because union representatives forget that remedies are not automatic once a violation is established. Rather, the union carries the burden of demonstrating that the remedy requested is appropriate and necessary. A carefully considered and written remedy request should be an integral part of every grievance. Although the vast majority of grievances are resolved at the earlier steps of the grievance procedure, remedy requests should always be written as if the grievance were going to arbitration.

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

This is simply wrong. As National Arbitrator Mittenthal wrote in C-06238, citing the applicable U.S. Supreme Court decision:

> One of the inherent powers of an arbitrator is to construct a remedy for a breach of a collective bargaining agreement. The U.S. Supreme Court recognized this reality in the Enterprise Wheel case:
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> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency."

Similarly, National Arbitrator Gamser observed in C-03200:

> To provide for an appropriate remedy for breaches of the terms of an agreement, even where no specific provision defining the nature of such remedy is to be found in the agreement, certainly is found within the inherent powers of the arbitrator.

The basic purpose of a remedy is to "make the grievant whole." The best way to do this depends on the exact nature of the violation and the specific facts in the case, so you will not necessarily find boilerplate remedies for every conceivable violation. However, the NALC has provided its grievance handlers with a wide variety of research resources such as the *NALC Activist* and the Contract Talk column.

Often the most valuable resource is the NALC Arbitration Program. It allows searches by every conceivable subject and type of contract violation. Try to find sustained cases with a similar fact pattern and study the arbitrators' reasoning and the remedies they gave. Remember that, although arbitrators differ in background, training and attitudes, most of them are either lawyers or have learned to think as lawyers do. This means that they seek to be guided by precedent. They are more likely to grant the union's remedy if it can be shown that other arbitrators have granted similar remedy requests in similar circumstances. By showing arbitrators that there is precedent for a requested remedy, union advocates can increase an arbitrator's comfort and confidence levels. This underscores the need to conduct careful research to find support for remedy requests.

Finally, in contract cases always consider requesting "cease and desist" language in addition to the "make whole" portion of the remedy. This will provide the basis for stronger remedies in case of any future violations. This is, of course, precisely why the Postal Service often resists the inclusion of cease-and-desist language in settlements. For example, most postal representatives know that the *JCAM*'s discussion of Article 41.2.B.4 states the following:

> In circumstances where violation is egregious or deliberate or after local management has received previous instructional resolutions on the same issue and it appears that a "cease and desist" remedy is not sufficient to insure future contract compliance, the parties may wish to consider a further, appropriate compensatory remedy to the injured party to emphasize the commitment of the parties to contract compliance.

Remember that even if the cease-and-desist is non-citable and non-precedent-setting, NALC can still use it to show that management has failed to live up to its promise to cease and desist. The parties agreed in national-level settlement M-01384 that "a non-citable, non-precedent settlement may be cited in arbitration to enforce its own terms." ✉